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The Federal Common Law of Nations

Bradford R. Clark

George Washington University Law School, bclark@law.gwu.edu

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ARTICLE

THE FEDERAL COMMON LAW OF NATIONS

*Anthony J. Bellia Jr.**

*Bradford R. Clark***

Courts and scholars have vigorously debated the proper role of customary international law in American courts: To what extent should it be considered federal common law, state law, or general law? The debate has reached something of an impasse, in part because various positions rely on, but also are in tension with, historical practice and constitutional structure. This Article describes the role that the law of nations actually has played throughout American history. In keeping with the original constitutional design, federal courts for much of that history enforced certain rules respecting other nations' "perfect rights" (or close analogues) under the law of nations as an incident of political branch recognition of foreign nations, and in order to restrain the judiciary and the states from giving other nations just cause for war against the United States. Rather than viewing enforcement of the law of nations as an Article III power to fashion federal common law, federal courts have instead applied rules derived from the law of nations as a way to implement the political branches' Article I and Article II powers to recognize foreign nations, conduct foreign relations, and decide momentous questions of war and peace. This allocation of powers approach best explains the most important federal cases involving the law of nations across American history. This Article does not attempt to settle all questions of how customary international law interacts with the federal system. It does aspire, however, to recover largely forgotten historical and structural context crucial to any proper resolution of such questions.

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* Professor of Law and Notre Dame Presidential Fellow, Notre Dame Law School.

** William Cranch Research Professor of Law, George Washington University Law School. We thank Amy Barrett, Tricia Bellia, Curt Bradley, Rachel Brewster, Paolo Carozza, Doug Cassel, Michael Collins, Lori Damrosch, Rick Garnett, Jack Goldsmith, Kent Greenawalt, Philip Hamburger, Vicki Jackson, Bill Kelley, Thomas Lee, John Manning, Maeva Marcus, Jon Molot, Henry Monaghan, David Moore, Trevor Morrison, Sean Murphy, John Nagle, Mary Ellen O'Connell, Mike Ramsey, Jonathan Siegel, Ralph Steinhardt, Ed Swaine, Amanda Tyler, Carlos Vázquez, Julian Velasco, and Art Wilmarth for extremely helpful suggestions; the Columbia and George Washington Law School faculties for insightful comments at workshops; Notre Dame research librarian Patti Ogen for expert assistance; Jonathan Bond, Sean Dudley, and Krista Yee for excellent research assistance; and Benjamin Beaton for careful editing.

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INTRODUCTION

There is an ongoing debate among courts and scholars regarding the proper role of customary international law in American courts.¹ Two

1. Customary international law generally refers to law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987). Today, "customary international law" is generally used in lieu of the customary "law of nations." See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (equating "customary international law" with "the law of nations"). In this Article, we generally use the phrase, "the law of nations" to refer to the customary law of nations as opposed to treaties.

diametrically opposed approaches have emerged. The “modern” position asserts that federal and state courts should recognize and enforce customary international law as supreme federal law whether or not the political branches have incorporated it through constitutional lawmaking processes.² Proponents of this position maintain that courts should recognize customary international law as a form of federal common law and treat it as both preemptive of state law and sufficient to establish federal “arising under” jurisdiction.³ The “revisionist” position, by contrast, asserts that customary international law is federal law only to the extent that the political branches have properly incorporated it; otherwise, it may operate as state law if a state has incorporated it.⁴

2. See Lea Brilmayer, Federalism, State Authority, and the Preemptive Power of International Law, 1994 Sup. Ct. Rev. 295, 295; Ryan Goodman & Derek P. Jinks, *Filartiga's* Firm Footing: International Human Rights and Federal Common Law, 66 Fordham L. Rev. 463, 472 (1997); Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1825 (1998); Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371, 371–72 (1997); Beth Stephens, The Law of Our Land: Customary International Law as Federal Law After *Erie*, 66 Fordham L. Rev. 393, 393–94 (1997). For a more cautious endorsement of judicial power “to make federal common law interstitially in the area of foreign affairs to serve important federal interests,” see Daniel J. Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int'l L. 513, 536 (2002).

3. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980) (stating that “[t]he law of nations forms an integral part of the common law, and . . . became a part of the common law of the United States upon the adoption of the Constitution” and that “[f]ederal jurisdiction over cases involving international law is clear”). Proponents of the modern position argue that customary international law qualifies as “Law[] of the United States” for purposes of the Supremacy and Arising Under Clauses. See Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1559–60 (1984).

4. 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, 870 (1997); see also Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 670–73 (1986) (“[C]ustomary international law has not traditionally been applied by American courts, nor should it be.”). A few scholars reject both the modern and revisionist positions in favor of a third approach: Courts should treat customary international law as neither federal nor state law, but rather as a source of nonbinding transnational law. See Michael D. Ramsey, The Constitution’s Text in Foreign Affairs 342–61 (2007) (recognizing that the law of nations is enforceable in federal courts as a rule of decision if it “does not displace otherwise-constitutional state or federal law”); Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int'l L. 365, 369–70 (2002) (arguing customary international law is neither state nor federal law, but “general” law that “would remain available for both state and federal courts to apply in appropriate cases as determined by traditional principles of the conflict of laws”); see also Arthur M. Weisburd, The Executive Branch and International Law, 41 Vand. L. Rev. 1205, 1251 (1988) (contending American courts cannot force the President to comply with international law); Arthur M. Weisburd, State Courts, Federal Courts, and International Cases, 20 Yale J. Int'l L. 1, 48–49 (1995) (analogizing customary international law to “the law of a foreign country,” only applicable in “American courts in appropriate cases”).

No consensus has emerged from this impressive body of scholarship,⁵ and the Supreme Court has not recently addressed the issue.⁶ Adherents of the modern and revisionist positions dispute what historical practice evinces and what the constitutional structure requires regarding the role of customary international law in the federal system. Critics of the modern position maintain that it “is in tension with basic notions of American representative democracy” because “[w]hen a federal court applies [customary international law] as federal common law, it is not applying law generated by U.S. lawmaking processes.”⁷ These critics contend that the modern position disregards the historical reality that before the Supreme Court decided *Erie Railroad Co. v. Tompkins* in 1938,⁸ customary international law was not regarded as federal law, but as a species of non-preemptive “general law.”⁹ *Erie*, they say, banished general law from federal courts and established that state law applies “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress.”¹⁰

In response, critics of the revisionist position argue that it fails to account for the Constitution’s assignment of foreign relations authority to the federal government rather than the states. In their view, the revisionist position contravenes the Constitution’s basic allocation of foreign affairs power by allowing states to determine the force and effect of customary international law.¹¹ In addition, they contend that the revisionist position disregards a long line of statements, stretching back to the founding, by federal judges and public officials that the customary law of nations¹²—today known as “customary international law”¹³—is “part of the law of the land.”¹⁴ The critics argue that these public actors necessarily understood the law of nations to be preemptive of state law (and perhaps even federal statutes) as well as sufficient to generate Article III aris-

5. For an insightful evaluation of the modern and revisionist positions, see Young, *supra* note 4, at 372–463.

6. Although the Court recently interpreted the Alien Tort Statute to incorporate some principles of the law of nations, see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), it has not more broadly addressed the status of customary international law in U.S. courts absent federal statutory incorporation since its decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). These decisions are discussed *infra* Part IV.

7. Bradley & Goldsmith, *supra* note 4, at 857.

8. 304 U.S. 64 (1938).

9. See Young, *supra* note 4, at 393 (explaining that “virtually all participants in the customary law debate agree” that customary international law had the status of general law before *Erie*).

10. *Erie*, 304 U.S. at 78.

11. See, e.g., Koh, *supra* note 2, at 1850–52 (arguing that modern position preserves national authority over foreign affairs).

12. See *infra* Part I.A.2 (describing various branches of the law of nations).

13. See *supra* note 1 (defining customary international law and noting that it has replaced the older phrase “the law of nations”).

14. See, e.g., Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. Davis J. Int’l L. & Pol’y 205 *passim* (2008).

ing under jurisdiction.¹⁵ In light of the vast gap between these competing claims and critiques, the debate over the role of customary international law in the American federal system has reached something of a stalemate.

In this Article, we argue that the law of nations has interacted with the American federal system in a way that neither the modern nor the revisionist position fairly captures. The Supreme Court has treated certain aspects of the law of nations as a set of background rules to guide its implementation of the Constitution's allocation of powers. Specifically, the Court has respected foreign sovereigns' "perfect rights" (and close analogues) as a means of ensuring that any decision to commit the nation to war would rest exclusively with the political branches, and not with the judiciary or the states. Indeed, when application of other aspects of the law of nations would risk embroiling the nation in war, the Court has declined to apply them in order to preserve political branch authority. The current debate over the status of customary international law has paid insufficient attention to the relationship between the law of nations and the Constitution's allocation of powers. To be sure, scholars on either side look to the founding and early judicial precedent to evaluate whether, as a matter of original understanding, courts have authority to take the lead over the political branches in adopting customary international law as the supreme law of the United States.¹⁶ But their historical accounts are either incomplete or anachronistic, often recasting history in a post-*Erie* mold. After the founding, public officials and judges initially debated a question similar to the one that dominates customary international law debates today: whether federal courts have Article III power to adopt the law of nations as part of a preemptive, jurisdiction-triggering federal common law. They ultimately moved beyond this question, concluding that the constitutional structure precludes the existence of a federal municipal common law. Instead, they recognized the perfect rights of sovereigns as essential background for understanding the Constitution's allocation of powers.

This Article recovers this lost context and, in the process, identifies a third way to conceptualize how important aspects of the law of nations have interacted with the federal system. Our account recaptures the

15. See, e.g., Jordan J. Paust, Customary International Law and Human Rights Treaties *Are* Law of the United States, 20 Mich. J. Int'l L. 301, 301 (1998) ("The Founders clearly expected that customary law of nations was binding, was supreme law . . . and would be applicable in United States federal courts."); Stephens, *supra* note 2, at 416–17 & nn.113 & 118 (citing eighteenth and nineteenth century Attorney General opinions and nineteenth century cases).

16. Compare, e.g., Jordan J. Paust, International Law as Law of the United States 7–8 (2003) (arguing that early practice demonstrates understanding that courts may enforce customary international law as preemptive federal law), and Koh, *supra* note 2, at 1825 (same), with Bradley & Goldsmith, *supra* note 4, at 822–26 (arguing that early practice demonstrates understanding that courts did not enforce customary international law as preemptive federal law).

Founders' understanding of core aspects of the law of nations and best describes the Supreme Court's reliance on such law in key cases throughout American history. This allocation of powers approach helps alleviate the apparent tension between federal control over foreign affairs (stressed by proponents of the modern position) and the Constitution's federal lawmaking procedures (emphasized by proponents of the revisionist position).

In the late eighteenth century, a foundational principle of the law of nations was that each nation should reciprocally respect certain perfect rights of every other nation to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty.¹⁷ The perfect rights of sovereigns were so fundamental that interference with them provided just cause for war.¹⁸ Thus, respect for these rights was essential to maintaining international peace. This idea was ubiquitous in English and American legal thought at the time of the founding.

The Founders understood the need to respect perfect rights of sovereigns in order to avoid embroiling the fledgling United States in foreign conflict. This background provides essential context for understanding the Constitution's allocation of powers to the federal political branches to recognize foreign nations and make war and peace.¹⁹ The Founders also authorized federal court jurisdiction over several categories of cases implicating the law of nations.²⁰ By simultaneously allocating authority to the federal political branches over foreign relations and jurisdiction to the federal judiciary over cases likely to implicate the law of nations, the Founders established complementary, not conflicting, powers.

From ratification through the War of 1812, the Supreme Court employed the law of nations to respect perfect rights and, in the process, upheld constitutional prerogatives of the federal political branches in foreign relations. Over time, judges increasingly grounded their decisions in the Constitution's allocation of foreign relations powers to the political branches. In the twentieth century, the Court continued to respect what were historically considered perfect rights, but recognized that the Constitution's allocation of foreign relations powers also required the judiciary to apply at least some principles of modern customary international law as well.

It is not our purpose to settle all questions regarding the role of customary international law in the federal system. Rather, we seek to identify the role that certain aspects of the law of nations actually have played throughout American history in light of the constitutional structure. In context, historical practice does not evince a principle that all of the law of nations necessarily functioned as preemptive federal law. Much of

17. Emmerich de Vattel, *The Law of Nations* *145, *302; see *infra* Part I.A.2.

18. Vattel, *supra* note 17, at *lxii–lxiii.

19. See *infra* Part II.A.

20. See *infra* Part II.B.

what was regarded as part of the law of nations—the law merchant, for example—was never understood to operate as preemptive federal law, by incorporation or otherwise. But neither does historical practice evince a principle that rules derived from the law of nations could *never* trigger federal preemption. Instead, history and structure demonstrate that courts have applied certain principles derived from the law of nations as a means of upholding the Constitution’s allocation of foreign affairs powers to Congress and the President—in particular, the powers to recognize foreign nations and decide questions of war and peace.

This Article proceeds as follows. Part I begins by discussing the relationship between municipal law (the law of a particular sovereign) and the law of nations in late eighteenth century England. To understand the role that the law of nations played in the original constitutional design, it is crucial to understand its role in the English legal system—a role that was familiar to the Founders and that established the background against which the Constitution was established. In some respects, of course, the Constitution rejected practices of English governance. But in other respects, the Constitution can only be understood by reference to relevant English traditions that supply crucial historical context.

Part I explains—and in certain respects recovers—three important points about English practice that illuminate early American constitutional understandings and disagreements about the role of the law of nations. First, English courts generally applied the law of nations as part of the law of the land because they adopted it as part of the common law. Some members of the founding generation believed that the law of nations applied in American courts on the assumption that the United States as a whole had somehow received the common law from England. The Supreme Court’s rejection of this assumption led it to tie the application of certain principles of the law of nations to the Constitution’s allocation of powers. Second, when English judges and other writers described the law of nations as part of the law of the land, they did not mean that it was supreme relative to other parts of the law of the land. Accordingly, when members of the founding generation referred to the law of nations as part of “the law of the land,” they did not mean that the law of nations was necessarily part of the *supreme* law of the land within the meaning of the Supremacy Clause. Third, English writers understood that judicial enforcement of perfect rights of sovereigns under the law of nations was necessary to uphold the prerogatives of the Crown in foreign relations, including the authority to send and receive ambassadors and to make war and peace. The Founders allocated these prerogatives to Congress and the President and assumed that federal courts would likewise enforce perfect rights as a means of upholding this allocation of powers.

In light of this historical context, Part II explains the role that the Founders envisioned for the law of nations in the original constitutional design. Like English courts, state courts incorporated the law of nations into state law before ratification. But their violations of the law of nations

were well known, as were the challenges that those violations posed for U.S. foreign relations. The Constitution was framed in part to better consolidate national political control over foreign relations. In Articles I and II, the Founders allocated foreign relations powers to Congress and the President, including powers to recognize foreign nations and make war. Prominent members of the founding generation understood that federal political power over war and peace would be effective only if states did not embroil the United States in war by violating these principles of the law of nations. Thus, judicial enforcement of the law of nations was necessary to sustain the foreign relations powers allocated to the federal government. To serve that end, Article III authorized federal jurisdiction over categories of cases—such as those involving admiralty and ambassadors—in which the law of nations would often supply rules of decision. In addition, the Arising Under Clause provided a judicial mechanism to ensure the effective enforcement of enacted federal municipal law, including treaties and statutes exercising foreign relations powers. Taken together, Article III jurisdiction was designed to facilitate judicial adherence to the law of nations, uphold the constitutional prerogatives of the political branches, and guard against state actions that would give other nations just cause for war against the United States.

Part III describes how early executive and judicial officials understood the Constitution to require application of certain default rules derived from the perfect rights of sovereigns. It was clear at the founding that federal court jurisdiction over cases implicating this part of the law of nations would further federal authority over foreign relations. It would take a couple of decades, however, for the Court to clearly articulate that the Constitution's allocation of powers was the basis of its obligation to enforce, as the law of the land, an important subset of principles derived from the law of nations. The Justices realized that not only states but also federal courts could undermine the Constitution's allocation of foreign relations powers if either disregarded core principles of the law of nations. Given the Constitution's allocation of foreign affairs and war powers, the Court recognized that the political branches, rather than the judiciary, should decide whether to risk provoking conflict with foreign nations by interfering with traditional sovereign rights. For various reasons, the question whether states remained free to pursue their own path in such cases did not come before the Court in the nation's early years. But to the extent that the Court understood Articles I and II to require courts to apply certain rules derived from the law of nations, it applied a constitutional rule of decision that would ultimately override contrary state law under the Supremacy Clause.

Part IV explains how several well-known federal cases have continued to apply principles derived from the law of nations to uphold the Constitution's allocation of powers. Scholars often cite *Banco Nacional de*

Cuba v. Sabbatino,²¹ for example, for the proposition that federal courts should apply modern principles of customary international law as federal law.²² The decision is best read, however, to reflect adherence to the same allocation of powers principles recognized by the Marshall Court, under which the Court upheld the perfect rights of sovereigns as a means of preserving federal political branch authority over foreign relations. The *Sabbatino* Court applied the act of state doctrine—a traditional rule respecting a foreign nation’s perfect right to territorial sovereignty—rather than a modern rule that would have compromised foreign territorial sovereignty. In so doing, the Court carried on a centuries-old tradition of upholding perfect rights in cases implicating the law of nations. It is tempting simply to characterize the Court’s practice as applying “federal common law”—judicially crafted “rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands.”²³ This characterization, however, is both anachronistic and too simplistic. Rather than devising its own rules of decision out of whole cloth in cases like *Sabbatino*, the Court has applied constitutionally derived rules of decision that preserve federal political branch control over the conduct of foreign affairs. Taken in historical context, the best reading of Supreme Court precedent dating from the founding to the present is that the law of nations does not apply as preemptive federal law by virtue of any general Article III power to fashion federal common law, but only when necessary to preserve and implement distinct Article I and Article II powers to recognize foreign nations, conduct foreign relations, and decide momentous questions of war and peace.

I. THE LAW OF NATIONS AND THE ENGLISH SYSTEM

To understand the role of the law of nations in the original constitutional design, it is first necessary to appreciate its role in the late eighteenth century English legal system. Many of those who framed the Constitution, participated in its ratification, and expounded its meaning were lawyers trained in English traditions. It is not possible to understand certain provisions of the Constitution without reference to how those who established it understood law to operate.²⁴ That said, the Constitution did not simply enshrine the English system of government. In many respects it broke from English practice, most notably by estab-

21. 376 U.S. 398 (1964).

22. See, e.g., Goodman & Jinks, *supra* note 2, at 490–97 (interpreting “*Sabbatino* and its progeny [as] strong evidence that CIL should be federal common law in many, if not all, cases involving acts of foreign governments”); Koh, *supra* note 2, at 1835 (arguing “that even after *Erie* and *Sabbatino*, federal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law”).

23. See Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 685 (5th ed. 2003).

24. See *infra* notes 304–306 and accompanying text.

lishing distinctive separation of powers and federalism principles. Accordingly, the relevance of English legal traditions to American constitutional interpretation is context specific.²⁵ To determine its relevance, one must examine both English practice and the American constitutional structure.

This Part explains English legal traditions that, in turn, help explain the role of the law of nations in the American constitutional system. Contemporary debates over customary international law and the federal system have overlooked key aspects of the English tradition. Before we can understand the proper role of the law of nations in the U.S. constitutional framework, we must recover the English background against which the Constitution was adopted.

Three points are crucial. First, the law of nations applied as a rule of decision in English courts because Parliament and courts incorporated it into the municipal law of England. English courts and treatise writers described the law of nations, so incorporated, as part of the law of the land. This context illuminates why, following ratification, certain members of the founding generation assumed that federal courts had the same power as English courts to adopt the law of nations as part of a municipal common law of the United States. In response, other members of the founding generation argued that the American constitutional structure precluded federal courts from recognizing a federal municipal common law into which courts could incorporate the law of nations. Ultimately, the Supreme Court, for structural reasons, would reject the existence of a municipal common law of the United States.

Second, when English courts described the law of nations as part of the law of the land, they did not mean that it was necessarily the supreme law of the land. Proponents of the modern position make much of statements by members of the founding generation, borrowed from English law, that the law of nations was part of the law of the land. They read such statements to mean that all of the law of nations was understood to be the supreme law of the land under the Supremacy Clause. By supreme law, proponents mean a law that displaces conflicting law—typically state law, but potentially even an act of Congress.

This is not, however, a necessary implication of such statements. In England, much of the law of nations as adopted by the common law did not operate as supreme relative to other sources of municipal law. The common law itself was subject to reasonable local deviations and usages. Accordingly, the law merchant, as adopted, was subject to such devia-

25. See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 *Iowa L. Rev.* 777, 850–51 (2004) [hereinafter *Bellia, Cause of Action*] (explaining that the federal constitutional structure can be determinative of whether federal courts hold a power that English courts held); John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 26 n.111, 28 n.119 (2001) (describing contexts in which the Supreme Court has considered English context determinative or not determinative of constitutional meaning).

tions. The law maritime operated independently of, not preemptively over, the common law. And, in all events, the common law was subject to Parliamentary override. Thus, to describe the law of nations as part of the law of the land was not to describe its relationship to other parts of the law of the land. The same would obtain in the United States: To say that the law of nations was part of the law of the land was not necessarily to imply that it was supreme over other parts of the law of the land, either local law (state law) or national law (acts of Congress).

A final important point about English practice is that judicial application of certain aspects of the law of nations operated to sustain national political authority in foreign relations. As the law of nations was understood in the late eighteenth century, each nation had certain perfect rights relative to other sovereigns—rights concerning ambassadors, territorial sovereignty, and use of the high seas. Violation of a nation’s perfect right gave that nation just cause to wage war. This feature of the law of nations was axiomatic. By recognizing rights of ambassadors and upholding rights of nations against private acts of hostility, courts maintained the authority of the Crown to recognize foreign nations and decide questions of war and peace. This English practice provides crucial background for understanding why U.S. courts enforced certain aspects of the law of nations—namely the perfect rights of sovereigns—in a seemingly preemptive way.

Section A of this Part defines municipal law and the law of nations as English writers understood them. Section B describes how these sources of law operated in English courts. It demonstrates why English statements that the law of nations was part of the law of the land do not control the distinct question of what subsets of American law count as the supreme law of the land under the Supremacy Clause. It also explains, however, an aspect of the law of nations—the perfect rights of sovereigns—that operated in England to uphold Crown prerogatives in foreign relations. This context illuminates how the Supreme Court of the United States would come to draw upon the perfect rights of nations as a means of upholding the constitutional allocation of foreign relations authority to the federal political branches.

A. *Defining Municipal Law and the Law of Nations*

1. *Municipal Law.* — William Blackstone defined “municipal” law in his well-known *Commentaries on the Laws of England* as “the rule by which particular districts, communities, or nations are governed.”²⁶ In “common speech,” the expression “municipal law . . . applied to any one state or nation, which is governed by the same laws and customs.”²⁷ Significantly, municipal law was synonymous with the “law of the land”;

26. 1 William Blackstone, *Commentaries* *44.

27. *Id.*

Blackstone used the two phrases interchangeably.²⁸ Either denoted a rule “prescribed by the supreme power in a state.”²⁹

English writers identified two forms of municipal law: written and unwritten.³⁰ The unwritten law was common law—the customary law of the land. “General customs,” Blackstone explained, are “the universal rule of the whole kingdom, and form the common law, in its . . . usual signification,” governing such matters as trusts and estates, property, contracts, rules of construction, civil injuries, and crime.³¹ The common law also governed the jurisdiction and modes of proceeding of English courts³²—both common law courts, which decided cases according to the law of the land,³³ and courts that applied other sources of law, such as the courts of admiralty and maritime jurisdiction,³⁴ the ecclesiastical

28. See, e.g., *id.* at *54, *69, *75, *83 (using “law of the land” to refer to municipal laws of England).

29. *Id.* at *44, *45.

30. See *id.* at *63 (“The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.”).

31. *Id.* at *67–68.

32. See, e.g., *R v. Almon*, (1765) 97 Eng. Rep. 94, 103 (K.B.) (Wilmot, J.) (“[C]onstant immemorial usage, sanctified and recognised by the Courts of Westminster Hall, and in many instances by the Legislature [make it now] as much a part of the law of the land, as any other course of practice which custom has introduced and established”); *Fogge v. Gale*, (1747) 95 Eng. Rep. 551, 551 (K.B.) (“[W]e cannot depart from the practice, which is the law of the Court, and, as such, is the law of the land”); *Welles v. Trahern*, (1740) 125 Eng. Rep. 1147, 1150 (C.P.) (“[W]e are of opinion that such a jurisdiction being contrary to the law of the land cannot be granted without an Act of Parliament, even by the King himself” (citation omitted)); *Trantor v. Duggan*, (1697) 88 Eng. Rep. 1219, 1219 (K.B.) (“[B]y the law of the land, no man ought to be *subpoenaed* to answer an *English bill* in those Courts, unless he live and be personally served there, that is within the jurisdiction thereof.”); 1 Matthew Bacon, *A New Abridgment of the Law* *180 (Dublin, Luke White, 6th ed. 1793) (explaining that an attachment proceeding “is certainly now established as Part of the Law of the Land”); 4 *id.* at *173 (explaining that “the true reason” that ecclesiastical courts have jurisdiction of certain crimes but not others “is, because the Law of the Land hath indulged them with the Conuzance of some Crimes, and not of others”); 3 Blackstone, *supra* note 26, at *422 (“We afterwards proceeded to consider the nature and distribution of wrongs and injuries affecting every species of personal and real rights, with the respective remedies by suit, which the law of the land has afforded for every possible injury.”); 4 *id.* at *288 (“[T]he method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity, and by long and immemorial usage is now become the law of the land.”).

33. See 3 Blackstone, *supra* note 26, at *30–61 (describing common law jurisdiction of the courts of Westminster and inferior courts).

34. See, e.g., *Spanish Ambassadors v. Buntish*, (1615) 80 Eng. Rep. 1156, 1157 (Adm.) (“[I]f the matter, or contract, was done beyond sea, this by the law of the land is to be tried here”); 2 Edward Coke, *The Second Part of the Institutes of the Laws of England* *51 (explaining that “*lex terrae*” does not extend to certain legal events “done upon the high sea,” but that “*lawes of the realme*” authorize other proceedings to deal with such events).

courts,³⁵ and the universities.³⁶ The duty to determine the content of the law of the land rested with the judges of the several courts of Westminster.³⁷ They professed to determine this law from prior judicial records³⁸ or, where no judicial decision established the point, from established custom.³⁹ Judges and other legal writers routinely referred to this common law as “the law of the land.”⁴⁰

35. See, e.g., *Brownsword v. Edwards*, (1751) 28 Eng. Rep. 157, 158 (Ch.) (“[B]y the law of the land the ecclesiastical court cannot proceed to judge of the marriage and to pronounce sentence of nullity after death of one of the married parties”); *Hill v. Turner*, (1737) 26 Eng. Rep. 326, 326 (Ch.) (“[T]here is no colour to say the ecclesiastical court want jurisdiction, for the authority they exercise in matrimonial cases is the general law of the land”); *R v. Bettesworth*, (1730) 93 Eng. Rep. 896, 897 (K.B.) (“[T]he Ecclesiastical Court shall never be suffered to set up their practice against the law of the land”).

36. See, e.g., *Parkinson’s Case*, (1689) 90 Eng. Rep. 977, 978 (K.B.) (distinguishing between the private laws of the college, administered by the “visitor” and not appealable to the courts of law, and “the law of the land,” the violation of which “this Court [of law] will take notice thereof, notwithstanding the visitor” through *mandamus*).

37. See 1 Blackstone, *supra* note 26, at *69 (“[H]ow are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice.”).

38. See, e.g., *R v. Despard*, (1798) 101 Eng. Rep. 1226, 1230 (K.B.) (opinion of Kenyon, C.J.) (“[T]he records of the Court furnish me with the law of the land.”). See generally 1 Blackstone, *supra* note 26, at *69 (“And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law.”).

39. See, e.g., *Despard*, 101 Eng. Rep. at 1230 (opinion of Kenyon, C.J.) (“To one argument used by the defendant’s counsel I cannot assent, namely, that no point is to be considered as law, unless it has been made and judicially decided: if that were true, farewell to the common law of the land.”); *id.* at 1231 (opinion of Ashhurst, J.) (“It is rather an extraordinary position . . . that nothing is to be considered as law but what has been solemnly decided; for a point may be so clear that it was never doubted, and yet if this position were well founded, it would not be law.”); *Paget v. Gee*, (1753) 27 Eng. Rep. 133, 134 (Ch.) (“Where this court finds out the law of the land in any instances, they will follow and extend it to other cases that are analogous.”).

40. See, e.g., *Massey v. Rice*, (1775) 98 Eng. Rep. 1122, 1124 (K.B.) (Mansfield, J.) (“By the settled law of the land, men by deeds may fetter their estates: but tenant in tail when of age may unfetter them, observing a certain form.”); *Mitchel v. Neale*, (1755) 28 Eng. Rep. 433, 433 (Ch.) (“This general custom of copyhold may be called the law of the land”); *Kruger v. Wilcox*, (1755) 27 Eng. Rep. 168, 168 (Ch.) (“Such is the law of the land as to retainers in other cases.”); *Herne and Herne*, (1741) 27 Eng. Rep. 707, 708 (Ch.) (explaining that “the general Law of the Land” governed certain matters of maintenance); *Welles v. Trahern*, (1740) 125 Eng. Rep. 1147, 1150 (C.P.) (“Besides, it is certain that the university do not judge according to the common law but according to the civil law; so that if this consuance be allowed men’s properties are to be tried without a jury and by a different law from the law of the land.”); *Pratt and Pratt*, (1731) 94 Eng. Rep. 758, 760 (K.B.) (explaining that “heir at law” as used in statute, “is generally understood, [as] the heir by the general law of the land”); *Jordan v. Foley*, (1725) 25 Eng. Rep. 199, 199 (Ch.) (“[T]he husband is only chargeable for what is sued for and recovered in the life of the wife; this is the clear law of the land, and unalterable but by Act of Parliament”); *R v. Thorp*, (1697) 90 Eng. Rep. 824, 824 (K.B.) (“And now it was objected in arrest of judgment, that the matter for which the defendants were convicted was not a crime within the law of the land”); *Kemp v. Andrews*, (1690) 90 Eng. Rep. 704, 704 (K.B.) (“The

Particular local customs existed alongside the general customary law of the land. Courts did not regard the general customary law of the land as necessarily preemptive of conflicting local customs. To the contrary, courts enforced local customs that derogated from the common law of the land. In 1741, for example, the Court of Chancery explained that “by the general Law of the Land, a Father is a Judge of the Merit of his Children, and has a Right to dispose of his Property at his Death in such Manner as he shall think fit. But by the Custom of *London* . . . [he] has not this Power”⁴¹ Examples of local customs that governed as rules of decision in derogation of the general customary law abound.⁴² Judges explained that whether a proven local custom contrary to the general law of the land would govern as the rule of decision depended on whether the local custom was “reasonable.”⁴³ It is important to appreciate this fact

defendant pleaded . . . that by the law of the land there is no survivorship between joint merchants”); *Mathews v. Whetton*, (1629) 79 Eng. Rep. 804, 804 (K.B.) (argument of counsel) (“[B]y the law of the land every copyholder may make a lease for a year without forfeiture”); *Moore v. Foster*, (1605) 80 Eng. Rep. 43, 44 (K.B.) (“[B]y the common law of the land, the misusage and mis-carrying of a commissioner of the business is not punishable”). Courts also described the prerogative of the Crown as incorporated into the law of the land. See, e.g., *Sandys v. Spivey*, (1744) 94 Eng. Rep. 968, 968 (K.B.) (“The prerogative of the Crown is incorporated with the law of the land. . . . The King, by his prerogative, hath a right to sue in what Court he pleases, and to imprison his debtor in the goal [sic] for the county or liberty where he is arrested.”).

41. *Herne*, 27 Eng. Rep. at 708.

42. See, e.g., *Steel v. Houghton*, (1788) 126 Eng. Rep. 32, 33–34 (C.P.) (“[S]uch a general right . . . must be by the common law of the land; and though . . . in certain places there may be particular regulations of its exercise by custom, that will not derogate from the general right . . . which will . . . prevail, unless a custom is shewn to the contrary.”); *R v. Inhabitants of Minchin-Hampton*, (1762) 97 Eng. Rep. 847, 848 (K.B.) (“Beech is certainly not timber by the general law of the land: yet it may be timber by the particular custom of the place”); *Robinson v. Bland*, (1760) 96 Eng. Rep. 129, 131 (K.B.) (argument of counsel, Blackstone) (“Courts have admitted local customs and particular usages to prevail in derogation of the common law.”); *Mitchel*, 28 Eng. Rep. at 433 (“This general custom of copyhold may be called the law of the land; yet in several instances that general law is broke in upon. (Note: Every custom which departs from the common law must be construed strictly and ought not to be enlarged beyond the usage.)” (citation omitted)); *Fenn v. Mariott*, (1743) 125 Eng. Rep. 1252, 1252 (C.P.) (“But we thought the present case not at all parallel to that; because that depends on the general law of the land in respect to customary estates, but this on the particular custom of the manor.”); cf. *R v. Inhabitants of Sheffield*, (1787) 100 Eng. Rep. 58, 61 (K.B.) (“[B]y the general law of the land the parish [is] bound to repair all highways lying within it, unless by prescription they can throw the onus on particular persons . . . when that is the case, it is [an] exception to the general rule.”); *Birch v. Blagrove*, (1755) 27 Eng. Rep. 176, 176 (Ch.) (“[W]hether it be in fraud of the local law of *London*, or general law of the land, is the same thing.”); 1 Blackstone, *supra* note 26, at *75 (“[These customs] are all contrary to the general law of the land, and are good only by special custom, though those of *London* are also confirmed by act of parliament.”).

43. For instance, Lord Mansfield stated that “[t]he only question” regarding whether a local custom governed as a rule of decision was “whether this be a reasonable custom or not.” *Butter v. Heathby*, (1766) 97 Eng. Rep. 1154, 1156 (K.B.). In 1743, the Court of Common Pleas determined that a particular custom of a manor was “good”: “It was insisted that such custom was unreasonable, and that in the present case it was unjust”

about the common law in considering the role of the law of nations in the English system. When courts adopted the law merchant (a branch of the law of nations) as part of the common law, the law merchant was subject to local deviations as part of the common law.

In addition to customary municipal law, general and local, there was written municipal law. The “*legis scriptae*, the written laws of the kingdom,” as Blackstone described them, were “statutes, acts, or edicts, made by the king’s majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled.”⁴⁴ English courts referred to the written laws of the kingdom, as they did to the common law, as the “law of the land.”⁴⁵ Where an act of Parliament was not clearly in derogation of the general common law, courts would interpret the act to comport with the common law.⁴⁶ On the other hand, parliamentary supremacy—ultimately recognized by Blackstone and others—required courts to apply acts of Parliament in preference to the common law in cases of irreconcilable conflict.⁴⁷ Moreover, courts of Westminster required that acts of Parliament receive uniform constructions across localities. As Justice Nash Grose explained in 1787, a statute, as a “universal law,” may not “receive different constructions in different towns. It is the general law of the land that this kind of property should be rated; and we cannot explain the law differently by the usage of this or that particular place.”⁴⁸ Relative to the common law and local deviations from it, acts of Parliament were supreme.

2. *The Law of Nations*. — Unlike municipal law, the law of nations was not understood to be the law of a single nation. According to Blackstone, the law of nations “cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues and agreements between these several communities.”⁴⁹ To appreciate how the Founders understood the law of nations, it is important to examine the writings of Emmerich de Vattel. Vattel’s treatise, *The Law*

But to this we answered that we thought it neither unreasonable nor unjust.” *Fenn*, 125 Eng. Rep. at 1252; see also *Mitchel*, 28 Eng. Rep. at 434 (“In several manors there are unreasonable customs, though not so unreasonable as that the law will set them aside.”). If a local custom was to govern in derogation of the common law, courts, according to some decisions, should construe the custom “strictly” and not “enlarge” it “beyond the usage.” See *id.* at 433 (“Every custom which departs from the common law must be construed strictly . . . and ought not to be enlarged beyond the usage.”).

44. 1 Blackstone, *supra* note 26, at *85.

45. For example, in *Biggs v. Lawrence*, Justice Francis Buller disallowed recovery on a contract made “directly against the statute laws of this country,” a contract that offended “against the law of the land.” (1789) 100 Eng. Rep. 673, 675 (K.B.).

46. See 1 Blackstone, *supra* note 26, at *89 (describing this principle).

47. See *id.* (“Where the common law and a statute differ, the common law gives place to the statute.”).

48. *R v. Hogg*, (1787) 99 Eng. Rep. 1341, 1345 (K.B.).

49. 1 Blackstone, *supra* note 26, at *43. For a discussion of Blackstone’s treatment of the law of nations, see Mark W. Janis, *The American Tradition of International Law: Great Expectations 1789–1914*, at 2–11 (2004).

of Nations, was well known in England and America at the time of the founding.⁵⁰ In 1775, Benjamin Franklin wrote to thank Charles Dumas, American agent in the Hague, for “the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations.” A copy, Franklin explained, “has been continually in the hands of the members of our [Continental] Congress.”⁵¹ It has been argued that a copy that Dumas, through Franklin, gave to the Philadelphia public library “undoubtedly was used by members of the Second Continental Congress . . . ; by the leading men who directed the policy of the United Colonies until the end of the war; and, later, by the man who sat in the Convention of 1787 and drew up the Constitution of the United States.”⁵²

Vattel described the law of nations in terms of the “necessary” and the “voluntary.” A necessary principle of the law of nations was “a sacred law which nations and sovereigns are bound to respect and follow in all their actions”; a voluntary principle was “a rule which the general welfare and safety oblige them to admit in their transactions with each other.”⁵³ For Vattel, “the very object of the society of nations” was to promote “the peaceable enjoyment of that liberty which [each nation] inherits from nature.”⁵⁴ To further this goal, “nature has established a perfect equality of rights between independent nations.”⁵⁵

This equality and independence obliged nations to respect certain perfect rights that each held against the others. A perfect right, as de-

50. See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 35 (1952) (explaining that this treatise and writings of Grotius, Pufendorf, and Burlamaqui “were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century”); see also Janis, *supra* note 49, at 57 (“Those meeting at Philadelphia to draft the document were not deficient in formal training in the law of nations.”); David Gray Adler, *The President’s Recognition Power, in The Constitution and the Conduct of American Foreign Policy* 133, 137 (David Gray Adler & Larry N. George eds., 1996) (“During the Founding period and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law.”); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. Int’l L. & Pol. 1, 67 (1999) (explaining that in American judicial decisions, “in all, in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel”).

51. Letter from Benjamin Franklin to Charles Dumas (Dec. 19, 1775), *in* 2 *The Revolutionary Diplomatic Correspondence of the United States* 64, 64 (Francis Wharton ed., 1889).

52. Abraham C. Weinfeld, Comment, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. Chi. L. Rev. 453, 459 (1936) (quoting Albert de Lapradelle, Introduction to 3 Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, at xxx n.I (Charles G. Fenwick trans., 1916). In 1978, the Supreme Court wrote that Vattel was the “international jurist most widely cited in the first 50 years after the Revolution.” *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 462 n.12 (1978).

53. Vattel, *supra* note 17, at *xv.

54. *Id.* at *lxi–lxii (emphasis omitted).

55. *Id.* at *149; see also *id.* at *lxiii (describing equality of nations).

fined by general principles of law, was a right that the holder could carry into execution without legal restraint, including by force. An imperfect (or inchoate) right, on the other hand, was accompanied by legal restrictions that its holder had to respect.⁵⁶ According to Vattel, “[t]he perfect right is that which is accompanied by the right of compelling those who refuse to fulfil the correspondent obligation; the imperfect right is unaccompanied by that right of compulsion.”⁵⁷ Therefore, when one sovereign nation violated the perfect rights of another, the aggrieved nation had just cause for waging war to compel the corresponding duty.⁵⁸ This idea of perfect rights was well recognized in England and deeply rooted in writings on the law of nations by such well-known writers as Pufendorf and Burlamaqui.⁵⁹ English admiralty courts, which frequently applied the law of nations in their prize jurisdiction, invoked the concept on numerous occasions.⁶⁰

56. See Hugo Grotius, *The Rights of War and Peace* 282 n.2 (J. Barbeyrac trans., London, W. Innys et al. 1738) (1625) (explaining that “a Man may be forced to do what he is obliged to” under a perfect right); 2 Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* 58 (William Abbott Oldfather trans., Clarendon Press 1931) (1672) (explaining that one who has a “perfect” right may “compel” the corresponding obligation “either by directing action against him before a judge, or, where there is no place for that, by force”); 1 T. Rutherford, *Institutes of Natural Law, Being the Substance of a Course of Lectures on Grotius De Jure Belli et Pacis* 28–29 (Cambridge, J. Archdeacon 2d ed. 1779) (“Where no law restrains a man from carrying his right into execution, the right is of the perfect sort. But where the law does in any respect restrain him from carrying it into execution, it is of the imperfect sort.”).

57. Vattel, *supra* note 17, at *lxii–lxiii.

58. *Id.* at *lxiv.

59. See, e.g., 1 Jean Jacques Burlamaqui, *The Principles of Natural and Politic Law* 173 (Nugent trans., Cambridge, University Press 4th ed. 1792) (1747 & 1751) (“Offensive wars are those, which are made to constrain others to give us our due, in virtue of a perfect right we have to exact it of them”); 1 Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* 127 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688) (“Now an unjust act, which is done from choice, and infringes upon the perfect right of another is commonly designated by the one word, injury.”); 8 *id.* at 1294 (describing as “causes of just wars”: “to assert our claim to whatever others may owe us by a perfect right” and “to obtain reparation for losses which we have suffered by injuries”); see also G.F. de Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* 273 (William Cobbett trans., Philadelphia, Thomas Bradford 1795) (“Nothing short of the violation of a perfect right . . . can justify the undertaking of war [But] every such violation . . . justifies the injured party in resorting to arms.”); 2 Alberico Gentili, *De Jure Belli Libri Tres* 106 (John C. Rolfe trans., Clarendon Press 1933) (1612) (“[B]ecause [the Sanguntines] had aided and received the enemies of Hannibal, he had a perfect right to make war upon them.”); 2 Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* 43–108 (Joseph H. Drake trans., Clarendon Press 1934) (1764) (explaining that nations have “imperfect rights” to external commerce, and describing how by agreement nations can obtain “perfect rights” to commerce).

60. See, e.g., *The President*, (1804) 165 Eng. Rep. 775, 776 (Adm.) (stating that American Government has “perfect right” to “confer the privileges of American navigation on vessels occupied by their Consuls in foreign states”); *The Der Mohr*, (1802) 165 Eng. Rep. 624, 625 (Adm.) (stating that neutral vessel “had a perfect right to carry” cargo, “provided it was not attended with any circumstances of ill faith, or unneutral conduct”); *The Rebecca*, (1799) 165 Eng. Rep. 253, 253 n.b (Adm.) (noting court in “*The Wilhelmina*,”

The London *Telegraph* invoked the phrase in 1797 to describe the origins and principles of the war then proceeding between England and France. It explained that “[a]s a perfect equality prevails in the society and intercourse of nations, . . . every Government has a perfect right to be admitted to that open, avowed, authorised, honourable negotiation, which in the practice of nations is employed for the pacific adjustment of their contested claims.”⁶¹ Because this is a perfect right, “it follows, as a necessary consequence, that they who refuse such authorised negotiation are RESPONSIBLE for a war which that refusal makes on their part UNJUST.”⁶²

Vattel did not catalogue an exhaustive list of the perfect rights that sovereign nations enjoyed based on their equality and independence. Throughout his work, he simply noted where he believed that a right he was describing was perfect under the law of nations. This included “the right to security”—“that is, to preserve herself from all injuries” other nations might attempt to inflict.⁶³ He also identified, as perfect, the right to govern, excluding from any state “the smallest right to interfere in the government of another.”⁶⁴ “Of all the rights that can belong to a nation,” Vattel stated, “sovereignty is, doubtless, the most precious, and that which other nations ought the most scrupulously to respect, if they would not do her an injury.”⁶⁵ Accordingly, it did not “belong to any foreign power to take cognizance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”⁶⁶ Vattel also emphasized the connection between sovereignty and territory: “The sovereignty united to the domain establishes the jurisdiction of the nation in her territories.”⁶⁷ “We should not only refrain,” he continued, “from usurping the territory of others; we should also respect, and abstain from every act contrary to the rights of the sovereign: for, a foreign nation can claim no right in it.”⁶⁸ Each nation also had an equal right to use the open sea, the violation of which warranted the use of force.⁶⁹

Additionally, Vattel described the rights to establish embassies and to send and receive public ministers as essential to effectuating all other

Carlson, 23d July 1799,” determined “[t]he Dane has a perfect right, in time of profound peace, to trade between Holland and France . . . and there is no ground upon which any of its advantages can be withheld from him in time of war”); *The Maria*, (1799) 165 Eng. Rep. 199, 206 (Adm.) (explaining that the only circumstance in which lawful use of force can lawfully be resisted is in a “state of war and conflict between two countries, where one party has a perfect right to attack by force, . . . the other has an equally perfect right to repel by force”).

61. *Origin and Principles of the War*, *Telegraph* (London), Jan. 17, 1797, at 3.

62. *Id.*

63. Vattel, *supra* note 17, at *154.

64. *Id.* at *155.

65. *Id.*

66. *Id.*

67. *Id.* at *166.

68. *Id.* at *169.

69. *Id.* at *126.

rights. “Nations,” he explained, “should treat and hold intercourse together in order to promote their interests,—to avoid injuring each other,—and to adjust and terminate their disputes.”⁷⁰ Public ministers were “necessary instruments in the management of those affairs which sovereigns have to transact with each other, and the channels of that correspondence which they have a right to carry on.”⁷¹ Vattel described the right to send public ministers—and thus the rights, privileges, and immunities of public ministers—as inviolable because “[t]he respect which is due to sovereigns should redound to their representatives, and especially their ambassadors, as representing their master’s person in the first degree.”⁷²

Finally, Vattel described the obligations that nations assumed in treaties to give treaty partners corresponding perfect rights: “As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is therefore a violation of the perfect right of the party with whom we have contracted.”⁷³

All of these rights that Vattel described under the rubric “law of nations” related to reciprocity between and among nations. Some English writers and judges used the phrase “the law of nations” to denote not only such rules of state-state relations, but also certain transnational rules of private conduct, including the law merchant and the private law maritime.⁷⁴ These various branches of the law of nations did not describe strict mutually exclusive categories; nonetheless, the categories were, and remain, helpful.⁷⁵

70. *Id.* at *452.

71. *Id.* at *453.

72. *Id.* at *464.

73. *Id.* at *196.

74. For descriptions of these branches, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1280–81 (1996) [hereinafter Clark, *Federal Common Law*] (identifying three branches that comprise the law of nations: “the law merchant, the law maritime, and the law governing the rights and duties of sovereign states” (citations omitted)); Dickinson, *supra* note 50, at 26–29 (identifying law merchant, law maritime, and “law of states”); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 821–22 (1989) [hereinafter Jay, *Early American Law*] (describing law merchant, law maritime, conflict of laws principles, and “law governing the relations between states” as comprising the law of nations); see also Randall Bridwell & Ralph U. Whitten, *The Constitution and the Common Law* 51 (1977) (describing admiralty, commercial law, and conflict of laws as comprising the law of nations); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517 (1984) [hereinafter Fletcher, *General Common Law*] (describing law merchant and law maritime).

75. As Blackstone described it:

[I]n mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but

B. *Municipal Law and the Law of Nations as Rules of Decision*

The relationship between the law of nations and municipal law as rules of decision in late eighteenth century English courts was complex. Notable English judges and treatise writers introduced the idea that the law of nations was part of the laws of England in the eighteenth century. In 1764, Lord Mansfield explained that “Lord Talbot declared a clear opinion [in 1736]— ‘That the law of nations, in its full extent, was part of the law of England.’”⁷⁶ Blackstone too described the law of nations as part of the law of the land. For him, adoption of the law of nations by the common law was necessary to render its judicial application politically legitimate:

[S]ince in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of [its] jurisdiction) is here adopted in [its] full extent by the common law, and is held to be a part of the law of the land.⁷⁷

According to Blackstone, this adoption enabled England to “be a part of the civilized world.”⁷⁸

To deem the law of nations part of the law of the land was not to define its relationship to other parts of the law of the land. One must differentiate the various branches of the law of nations, as English writers described them, to appreciate this multifaceted relationship. The late eighteenth century English lawyer would not have understood the law merchant or law maritime to provide rules of decision that could conflict with English national or local municipal law, let alone preempt it. Moreover, judges construed municipal law to avoid conflict with the law of state-state relations. Rather than undermine municipal prerogatives, Blackstone explained, core principles of the law of state-state relations served to sustain them, particularly in foreign relations.

1. *The Law Merchant’s Adaptability*. — The law merchant, a branch of the law of nations, was inherently subject to local deviations and thus not preemptive of other parts of English municipal law. English courts and

this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

4 Blackstone, *supra* note 26, at *67.

76. *Triquet v. Bath*, (1764) 97 Eng. Rep. 936, 938 (K.B.) (quoting *Buvot v. Barbut*, (1736) 25 Eng. Rep. 777, 778 (Ch.) (“That the law of nations (which in its fullest extent was and formed part of the law of *England*) . . .”).

77. 4 Blackstone, *supra* note 26, at *67. For a discussion of how the law of nations applied in eighteenth century English courts only to the extent that English law adopted it, see Philip Hamburger, *Law and Judicial Duty* 62, 349–50 & n.43 (2008).

78. 4 Blackstone, *supra* note 26, at *67. David Armitage has argued that in light of when *Triquet* and *Buvot* were reported in relevant part, Blackstone’s *Commentaries* represent the first appearance in print of the doctrine that the law of nations is part of English law. David Armitage, *Parliament and International Law in the Eighteenth Century, in Parliaments, Nations and Identities in Britain and Ireland, 1660–1850*, at 169, 174 (Julian Hoppit ed., 2003).

writers commonly described the law merchant as “part of the law of England, which decides the causes of merchants by the general rules which obtain in commercial countries.”⁷⁹ Such references did not indicate that the law merchant was superior to or preemptive of contrary laws of the land. Rather, if an act of Parliament conflicted with the common law, which included the law merchant, the act of Parliament controlled.⁸⁰ Moreover, just as courts applied local customs that derogated from the common law in certain circumstances,⁸¹ they also applied local usages that supplanted or supplemented the law merchant.⁸²

In light of English practice, certain judges in America would apply the law merchant only where it did not conflict with the positive municipal law.⁸³ In the first two decades following ratification, American courts

79. 1 Blackstone, *supra* note 26, at *273. One effect of courts’ deeming the law merchant part of the common law or the law of England was that they could take judicial notice of it, just as they took judicial notice of the common law. See *Edie v. E. India Co.*, (1761) 97 Eng. Rep. 797, 802 (K.B.) (opinion of Foster, J.) (“This custom of merchants is the general law of the kingdom, part of the common law; and therefore ought not to have been left to the jury, after it has been already settled by judicial determinations.”); *id.* at 803 (“The custom of merchants is part of the law of England; and Courts of Law must take notice of it, as such.”); *Meggadow v. Holt*, (1692) 88 Eng. Rep. 1134, 1134 (K.B.) (“[T]he law of merchants is *jus gentium*, and part of the common law; and therefore we ought to take notice of it, when set forth in pleading.”); *Hodges v. Steward*, (1691) 91 Eng. Rep. 117, 117 (K.B.) (“[T]he Court is to take notice of the law of merchants as part of the law of England . . .”).

80. See 1 Blackstone, *supra* note 26, at *89 (“Where the common law and a statute differ, the common law gives place to the statute . . .”); see also *id.* at *75 n.8 (“Merchants ought to take their law from the courts, and not the courts from merchants: and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress.”).

81. See *supra* notes 41–43 and accompanying text.

82. See generally Timothy Cunningham, *The Law of Bills of Exchange, Promissory Notes, Bank-Notes, and Insurances 77–100* (1760) (listing examples of special or local customs that operated in conjunction with, or contrary to, principles of the law merchant). For example, local customs governed usances. See, e.g., *Buckley v. Cambell*, (1706) 88 Eng. Rep. 917, 917 (Q.B.) (Holt, C.J.) (explaining, regarding time of usances, that “he would take notice of the custom of merchants here, but not that at Amsterdam or Venice, &c.,” for “[i]n such case, you must set forth the custom in your declaration”); *Meggadow*, 88 Eng. Rep. at 1135 (“It is not necessary to shew the custom of merchants, but it is necessary to shew how the usance shall be intended, because it varies as places do.”). Local custom also governed, in certain instances, whether infants could bind themselves by accepting bills of exchange. See, e.g., *Williams v. Harrison*, (1697) 91 Eng. Rep. 774, 774 (K.B.) (recognizing local custom in London that infant may bind himself as apprentice by accepting bill of exchange, notwithstanding that the “custom of merchants [which holds otherwise] is part of the law of the land”).

83. See, e.g., *Odlin v. Ins. Co. of Pa.*, 18 F. Cas. 583, 584 (C.C.D. Pa. 1808) (No. 10,433) (Washington, J.) (“These regulations [the custom of merchants] are read in the British and American courts, and have frequently furnished rules of decision, where the positive law of the country, or former decisions upon the point, had not prescribed a different one.”); *Walden v. LeRoy*, 2 Cai. 263, 265 (N.Y. Sup. Ct. 1805) (Kent, C.J.) (“The *Law Merchant* is, however, the general law of commercial nations; and, where our own positive institutions and decisions are silent, it is to be expounded by having recourse to the usages of other nations.”).

recognized that local usages could govern as rules of decision notwithstanding a conflict with the general law merchant, and that the general law merchant itself varied from nation to nation.⁸⁴ The Supreme Court based its 1842 decision in *Swift v. Tyson* upon the same premise.⁸⁵ In short, as American jurists appreciated, English judges and writers did not understand the law merchant—though part of the law of the land—generally to preempt contrary national law or local usage.

2. *The Law Maritime's Sphere of Operation.* — Moreover, English law incorporated certain parts of the law of nations—namely the law maritime—to operate independently of, not preemptively over, municipal law. The common law defined the jurisdiction of admiralty courts in England,⁸⁶ and “the lawes of the realme” allowed them to apply the law maritime to disputes within their jurisdiction.⁸⁷ As a result of a long-standing rivalry between common law and admiralty courts in England, English courts understood the “law of the sea” (the law maritime) to govern a sphere separate from that governed by the “law of the land” (municipal law).⁸⁸ The law of nations governed maritime actions and other actions arising upon the sea that municipal law did not govern. In addition, the courts of admiralty had jurisdiction only over cases that the law

84. See, e.g., *Fenwick v. Sears's Adm'rs*, 5 U.S. (1 Cranch) 259, 270 (1803) (“[T]he custom of merchants in the United States differs in some respects from the custom of merchants in England.”); *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 368 (1797) (Elsworth, C.J.) (“I say the custom of merchants in this country; for the custom of merchants somewhat varies in different countries, in order to accommodate itself to particular courses of business, or other local circumstances.”); *Thurston v. Koch*, 4 U.S. (4 Dall.) 348, 351, 23 F. Cas. 1183, 1184 (C.C.D. Pa. 1800) (No. 14,016) (Paterson, J.) (“It is, however, evident, that the law merchant varies in different nations, and even in the same nation at different times. The course of trade, local circumstances, commercial interests, and national policy, induce to some variation of the rule.”); *Snyder v. Findley*, 1 N.J.L. 78, 79 (1791) (“[A]s to negligence, the custom of merchants settles it in Great Britain; there is, however, no such custom here.”); *Fleming v. M'Clure*, 3 S.C.L. (1 Brev.) 428, 432 (S.C. Const. Ct. 1804) (“The law merchant, as it obtains in England, is, generally speaking, the law of this country. Some exceptions have been made, and some more may be made, which convenience and necessity have directed, and may hereafter suggest.”).

85. 41 U.S. (16 Pet.) 1 (1842). In *Swift*, the Court expressly acknowledged the nonpreemptive nature of the general commercial law. The Court justified its famous rejection of a New York judicial determination of a question of general commercial law on the ground “that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law.” *Id.* at 18. Had a New York (“local”) statute or usage deviated from the law merchant, that statute or usage would have controlled, and the Court would have deferred to New York courts’ understanding of it. Cf. Clark, *Federal Common Law*, *supra* note 74, at 1276–92 (arguing that *Swift* was defensible at time it was decided).

86. See *supra* notes 32–34 and accompanying text.

87. 2 Coke, *supra* note 34, at *51.

88. See generally David W. Robertson, *Admiralty and Federalism: History and Analysis of Problems of Federal-State Relations in the Maritime Law of the United States* 35–64 (1970) (describing rivalry).

maritime governed.⁸⁹ The “tidewater doctrine”—that admiralty jurisdiction extended no further inland than tidal waters—reflected and demarcated the respective jurisdictions of common law and admiralty courts in England.⁹⁰ If a court of admiralty attempted to exercise jurisdiction over a case that municipal law governed, the courts of Westminster (courts that administered the municipal law of the land) would issue a writ of prohibition removing the case to the common law courts.⁹¹ Just as courts of admiralty lacked jurisdiction over cases that municipal law governed, the common law courts lacked jurisdiction over cases that maritime law governed.⁹² Accordingly, an appeal from a court of admiralty would run not to the courts of Westminster but to judge delegates who were ap-

89. Coke explained that:

By the lawes of this realm the court of the admirall hath no conusance, power, or jurisdiction of any manner of contract, plea, or querele within any county of the realm, either upon the land or the water: but every such contract, plea, or querele, and all other thing rising within any county of the realm, either upon the land or the water, and also wreck of the sea ought to be tried, determined, discussed, and remedied by the lawes of the land, and not before, or by the admirall nor his lieutenant in any manner.

4 Coke, *supra* note 34, at *134; see also 1 Bacon, *supra* note 32, at *623 (explaining general rule “[t]hat the Admiral’s Jurisdiction is confined to Matters arising on the High Seas only, and that he cannot take Conuzance of Contracts, &c. made or done in any River, Haven or Creek within any County; and that all Matters arising within these are triable by the Common Law”); 1 Sir John Comyns, *A Digest of the Laws of England* 275 (London, Strahan & Woodfall 1780) (“[T]he Court of Admiralty has no Jurisdiction in any Cause which arises upon Land, or within any County.”); 2 *A General Treatise of Naval Trade and Commerce* 422 (London, E. and R. Nutt & Gosling 1739) (“All Maritime Causes, or Causes arising wholly upon the Sea, out of the Jurisdiction of any Country, this Court [of Admiralty] hath Power to determine; but a Judgment of a Thing done upon Land, is void . . .”).

90. Cf. *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825) (following English practice of limiting admiralty jurisdiction over maritime contracts to “cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide”), overruled in part by *The Genesee Chief*, 53 U.S. (12 How.) 443 (1851); Clark, *Federal Common Law*, *supra* note 74, at 1341–42 (describing tidewater doctrine and its initial acceptance and ultimate rejection by Supreme Court).

91. See, e.g., *Spanish Ambassadour v. Buntish*, (1615) 80 Eng. Rep. 1156, 1157 (Adm.) (explaining that there was “just cause for a prohibition” because admiral exceeded his jurisdiction over matters arising on the high seas); see also 1 Bacon, *supra* note 32, at *558 (explaining that admiralty and ecclesiastical courts are also “not Courts of Record, but derive their Authority from the Crown, and are subject to the Controul of the King’s Temporal Courts, when they exceed their Jurisdiction”); 1 Comyns, *supra* note 89, at 276 (“So, upon Motion, after a Suggestion, that the Suit in the Admiralty is for a Matter out of their Jurisdiction, and after *Oyer* of the Libel, and Day given to the Party, a Prohibition goes.”).

92. See 3 Blackstone, *supra* note 26, at *68–69 (“The maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of reach of the common law, are only the court of admiralty, and [its] courts of appeal.”); Thomas Parker, *The Laws of Shipping and Insurance* 268 (London, Strahan & Woodfall 1775) (same).

pointed by commission out of Chancery.⁹³ Thus, the law maritime operated not in preference to municipal law, but in its own separate sphere.

3. *The Law of State-State Relations.* — The question whether the law of state-state relations could preempt English municipal law did not squarely arise in late eighteenth century English legal writings. In large measure, courts administered the two bodies of law independently of each other. The law of prize—a branch of admiralty that directly implicated sovereign relations—provided a rule of decision in courts of admiralty, which lacked jurisdiction to apply municipal law governing actions arising upon land.⁹⁴ Since an admiralty court lacked jurisdiction over questions of municipal law,⁹⁵ it also lacked any opportunity to resolve conflicts that might exist between the law of nations and municipal law.⁹⁶

Moreover, even when courts had authority to administer rules from both sources of law, they strained to find constructions of municipal law that did not derogate from the law of nations.⁹⁷ The law of state-state relations could furnish a rule of decision in the courts of Westminster, and thus conflict with municipal law was at least conceivable there. For example, the law of nations provided public ministers with certain privileges and immunities in English courts. Lord Mansfield suggested in 1764 that an act of Parliament could not change these privileges. In

93. 3 Blackstone, *supra* note 26, at *69 (“From the sentences of the admiralty judge an appeal always lay, in ordinary course, to the king in chancery But . . . upon appeal made to the chancery, the sentence definitive of the delegates appointed by the commission shall be final.”); 4 Coke, *supra* note 34, at *135 (“And if an erroneous sentence be given in that court, no writ of error, but an appeale before certain delegates do lye, as it appeareth by the statute of 8 Eliz. *reginae*, cap. 5. which proveth that it is no court of record.”); 1 Comyns, *supra* note 89, at 279 (“If there be an Appeal from a Sentence in the Court of Admiralty, it may be to the King in *Chancery*, who thereupon makes a Commission to Delegates.”).

94. As Blackstone described it:

[I]n case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it.

3 Blackstone, *supra* note 26, at *69; see also Parker, *supra* note 92, at 269 (“[T]his being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it.”).

95. See *supra* Part I.B.2 (describing this limitation).

96. See, e.g., *The Recovery*, (1807) 165 Eng. Rep. 955, 958 (Adm.) (asserting that “this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain,” and it thus administers “the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence” (emphasis omitted)).

97. Since the law of nations was part of the common law, this practice comported with English courts’ practice of construing municipal acts to not derogate from the common law. See *supra* note 46 and accompanying text.

Heathfield v. Chilton, he remarked that the statute in question “did not intend to alter, *nor can alter* the law of nations” insofar as the law of nations recognizes privileges in foreign ministers.⁹⁸ In evaluating this statement, it is important to distinguish the *content* of the law of nations (which reflects the practice of many nations) from the *obligation* of a municipal court to follow the law of nations if an enactment of its sovereign provides otherwise. In *Chilton*, Mansfield observed that an act of Parliament cannot alter the law of nations itself. This is, of course, true in the sense that the law of nations was not made by any single nation, but constituted the practice of many nations. Mansfield did not purport to address, however, what rule of decision a court should apply if faced with an irreconcilable conflict between the law of nations and an act of Parliament; in this case, he construed the act of Parliament to comport with the law of nations.⁹⁹

Other judges also assumed that Parliament sought to act in concert with the law of nations, and refused to speculate about potential conflicts. In 1811, in *The Fox*, Sir William Scott addressed the following question: “What would be the duty of the Court under Orders in Council that were repugnant to the law of nations?”¹⁰⁰ He began by observing “that this Court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government.”¹⁰¹ “At the same time,” he continued, “it is strictly true, that by the constitution of this country, the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this Court.”¹⁰² A judicial practice operated to avoid conflict between “[t]hese two propositions, that the Court is bound to administer the law of nations, and that it is bound to enforce the King’s Orders in Council”: specifically, that “these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law.”¹⁰³

Scott would not indulge the hypothetical question of what rule of decision a court should apply if the written law of England plainly did not conform to the law of nations in a given case. “[T]his Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot without extreme indecency, presume that

98. (1767) 98 Eng. Rep. 50, 50 (K.B.) (emphasis added).

99. *Id.* at 51. Outside his judicial role, Mansfield appears to have addressed the question in some measure. Responding to an opinion by Mayor James Duane of New York that cited Mansfield for the proposition that the common law adopted the law of nations, Mansfield reportedly stated that “the law of nations could never be pleaded against a law of the land.” Hamburger, *supra* note 77, at 351–52.

100. (1811) 165 Eng. Rep. 1121, 1121 (Adm.).

101. *Id.*

102. *Id.*

103. *Id.*

any such emergency will happen.”¹⁰⁴ Indeed, he answered this question as he expected a common law court would respond if asked to enforce an act of Parliament that contradicted “principles of natural reason and justice.”¹⁰⁵ This “is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition that any such will arise.”¹⁰⁶ Even though English judges and writers described the law of nations as a part of the law of the land, this description did not necessarily imply that it displaced other parts of the law of the land.

C. *The Law of Nations and Crown Prerogatives in Foreign Relations*

Rather than operating to displace other parts of the law of land, core principles of the law of nations operated to uphold certain municipal prerogatives. Specifically, Blackstone described judicial enforcement of principles of the law of state-state relations as facilitating “prerogatives of the Crown” in foreign relations.¹⁰⁷ In his *Commentaries*, Blackstone explained why judicial enforcement of certain principles of the law of nations was necessary to sustain those prerogatives. He noted the general criminal prohibition in English law against violating the law of nations to make his point. Specifically, Blackstone noted that the municipal laws of England subjected to punishment “any subject committing acts of hostility upon any nation in league with the king” and characterized such conduct as “a very great offence against the law of nations.”¹⁰⁸ English law provided this criminal penalty, Blackstone explained, to sustain the Crown’s prerogatives in foreign relations against acts that would undermine them.¹⁰⁹

Blackstone enumerated several particular prerogatives of the Crown in foreign affairs; for almost all of them, he explained how judicial enforcement of specific law of nations principles sustained them. First, “[t]he king . . . has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.”¹¹⁰ In describing this power, Blackstone explained that “[t]he rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions.”¹¹¹ Blackstone recognized that “writers on the law of nations” disputed the extent of certain ambassadorial rights, such as immunity from prosecution, but noted that English law afforded them broad protection.¹¹² To sustain the authority

104. *Id.* at 1122.

105. *Id.* at 1121.

106. *Id.* at 1122.

107. 1 Blackstone, *supra* note 26, at *252.

108. *Id.* at *252–53.

109. *Id.*

110. *Id.* at *253.

111. *Id.*

112. *Id.*

of the Crown to determine foreign relations, “the security of ambassadors is of more importance than the punishment of a particular crime.”¹¹³

Next, Blackstone stated that “[i]t is . . . the king’s prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power.”¹¹⁴ Furthermore, “[u]pon the same principle the king has also the sole prerogative of making war and peace.”¹¹⁵ Under the law of nations, Blackstone explained, “the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power”¹¹⁶ “It would indeed be extremely improper,” Blackstone reasoned, “that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.”¹¹⁷ If England were to give another nation cause for war by waging hostilities against that nation, it would be the decision of the Crown as sole holder of the prerogative to make war. For the same reason, the prerogative to issue letters of marque and reprisal, as well as to grant safe conducts, rested with the Crown.¹¹⁸

Most important for present purposes, the principles of the law of nations that Blackstone identified as necessary to maintain “the principal prerogatives of the king respecting this nation’s intercourse with foreign nations”¹¹⁹ reflected the ubiquitous perfect rights of sovereigns.¹²⁰ Blackstone recognized that private hostilities against a nation, or a violation of certain rights of its representatives, could inappropriately lead a nation into a state of war.¹²¹ To sustain the Crown’s control over foreign relations, English law enforced principles of the law of nations prohibiting private hostilities and respecting the rights of ambassadors, including through its criminal law.¹²² Enforcement of the law of nations in this context did not preempt English law or otherwise limit municipal authority; to the contrary, it operated to preserve it.

* * *

From this analysis, three points emerge that illuminate early understandings and disputes regarding law of nations in the American system. First, English courts assumed a common law power to adopt the law of

113. *Id.* at *254.

114. *Id.* at *257.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at *258–60.

119. *Id.* at *261.

120. See *supra* Part I.A.2 (explaining concept of perfect rights of nations and how their violation was understood to provide just cause for war).

121. 1 Blackstone, *supra* note 26, at *258 (recognizing that an individual, by waging hostilities, could generate a state of war with another nation).

122. *Id.* at *252–54.

nations as part of English municipal law. Whether federal courts had the same power would be a subject of fierce debate in the first decades following ratification. Second, when English courts described the law of nations as part of the law of the land, they did not necessarily imply that it took priority over other parts of the law of the land, including not only acts of Parliament but also (in some instances) local custom. Accordingly, American judges and writers who borrowed this phrase were speaking of a concept that bears no relationship to the distinctly American concept of supreme law of the land—a novel construct adopted by the Supremacy Clause to resolve the inevitable conflicts that would arise in a federal republic with dual sovereignty. Third, one aspect of the law of nations—the perfect rights of sovereigns—served the special function of implementing and preserving certain prerogatives of the Crown in foreign relations. The Marshall Court would infer from the Constitution’s allocation of similar foreign relations prerogatives to the political branches that American courts should likewise respect the perfect rights of sovereigns as a means of upholding that allocation.

II. THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION

The Constitution assigned to the federal government certain foreign relations powers that were familiar prerogatives of the English Crown, including recognition of foreign nations and control over war and peace. It also authorized federal court jurisdiction to hear and decide cases likely to involve the law of nations. Federal court jurisdiction over cases implicating the perfect rights of sovereigns would prevent state courts from disregarding them, and thereby undermining U.S. foreign policy. Thus, the concept of perfect rights provides important context for understanding the Constitution’s allocation of foreign affairs powers. As the following sections explain, a key reason the Constitution authorized this jurisdiction was to preserve the power of the federal *political branches* to recognize foreign states, comply with the law of nations, and conduct foreign relations.

It would be a couple of decades after ratification before the Supreme Court would clearly articulate the constitutional basis of its authority to enforce certain principles derived from the law of nations as the law of the land. At the time of the founding, however, it was clear that federal jurisdiction over cases implicating the law of nations would further federal political branch authority over foreign relations vis-à-vis the states. Section A describes the states’ post-independence incorporation of the English common law, and how their violations of the law of nations contributed to the need for the Federal Convention. Section B explains the Constitution’s allocation of foreign affairs authority to the federal political branches and its denial of corresponding powers to the states. Finally, section C examines the Founders’ assumption that aspects of the law of nations would operate in American courts, and their use of federal juris-

diction to uphold the foreign affairs prerogatives of the political branches.

A. *The Law of Nations and Pre-constitutional State Practice*

After declaring independence, states adopted the common law of England and, by incorporation, the law of nations. “[E]ven of the original thirteen colonies immediately adopted ‘receiving statutes’ expressly incorporating the common law as state law.”¹²³ The twelfth state, New Jersey, received the common law by including a similar provision in its Constitution of 1776.¹²⁴ Connecticut did not adopt a written constitution until 1818, but its judiciary incorporated the common law into its unwritten constitution “so far as it corresponds with our circumstances and situation.”¹²⁵ Accordingly, prior to ratification of the Constitution, state courts applied the various branches of the law of nations as part of their common law.

For example, in a famous Pennsylvania case predating the Constitution, the defendant (Longchamps) was indicted at common law for assaulting and threatening the Consul General of France (Marbois) “in violation of the law of nations, against the peace and dignity of the United States and the Commonwealth of Pennsylvania.”¹²⁶ Chief Justice M’Kean described the case as one “of first impression in the United States” that “must be determined on the principles of the law of nations, which form a part of the municipal law of Pennsylvania.”¹²⁷ The jury convicted the defendant and the Chief Justice reiterated that the law of nations, “in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers.”¹²⁸ The sentence—“a little more than two years imprisonment” and a fine¹²⁹—was chosen not only to punish the offender, but also “to deter others from the commission of the like crime, preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world.”¹³⁰

123. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 1027 n.307 (2002).

124. Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791, 799 (1951).

125. 1 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 1 (Windham, John Byrne Pub. 1795); see also *id.* (“A common law peculiar to ourselves, resulting from our local circumstances, has been established by the decision of our courts; but has never been committed to writing.”).

126. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111 (Pa. O. & T. 1784) (emphases omitted).

127. *Id.* at 114.

128. *Id.* at 116 (emphases omitted). For a discussion situating *Respublica* in the early debate over complete judicial, as opposed to selective legislative, incorporation of offenses against the law of nations, see Hamburger, *supra* note 77, at 350 n.43.

129. *Respublica*, 1 U.S. (1 Dall.) at 118.

130. *Id.* at 117.

Though states incorporated the law of nations, their violations of it—especially respecting the Treaty of Paris of 1783—were notorious. One of the primary reasons that the Framers drafted a new constitution was the growing sense that the existing confederation was inadequate to enable the United States to ensure compliance with its obligations under treaties and the law of nations.¹³¹ The Founders perceived this situation to be fraught with danger. The first defect Edmund Randolph pointed out when he opened the Federal Convention was the confederation's inability to prevent other countries from waging war against the United States as a consequence of state violations of the law of nations.¹³² Similarly, in urging ratification, John Jay stressed that “[i]t is of high importance to the peace of America that she observe the laws of nations,” and that “this will be more perfectly and punctually done by one national Government, than it could be . . . by thirteen separate States.”¹³³

Historically, the most established principles of the law of nations—the perfect rights of sovereigns—respected nations' territorial sovereignty, equal rights on the high seas, treaty rights, and representative agents operating in other nations. Nations considered the violation of these principles hostile actions justifying war. Prominent members of the founding generation presumed general knowledge of the idea of perfect rights under the law of nations. For instance, notable early commentators on American law, such as James Wilson and James Kent, wrote as if their readers were familiar with the concept of perfect rights. In his *Lectures on Law*, James Wilson observed that nations should abide by treaties they make, for “by not preserving them, they subject themselves to all the consequences of violating the perfect right of those, to whom they were made.”¹³⁴ The consequences, of course, were forcible retaliation by the treaty partner. In his *Commentaries on American Law*, James Kent discussed the importance that one nation “not violate the perfect rights of other nations,” and referenced the substance of certain perfect rights—such as a nation's “perfect right to judge for itself whether the language or conduct of a foreign minister be admissible,” and a neutral's “perfect right to avail himself of the vessel of his friend, to transport his property.”¹³⁵ Other writers and officials similarly referenced the concept of perfect rights, both as a general principle of law and in the context of the

131. See Janis, *supra* note 49, at 56 (“[I]t was the inability of the United States under the Articles of Confederation to live up to its obligations as a sovereign state under international law which proved to be one of the principal causes of the downfall of that early form of US government.”).

132. 1 The Records of the Federal Convention of 1787, at 24–25 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand's Records].

133. The Federalist No. 3, at 14–15 (John Jay) (Jacob Cooke ed., 1961).

134. 1 James Wilson, *The Works of the Honourable James Wilson, L.L.D.* 176 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804).

135. 1 James Kent, *Commentaries on American Law* 25, 38, 119 (1826).

law of nations.¹³⁶ Early American jurists, including John Marshall, took for granted the existence of perfect rights.¹³⁷ Supreme Court Justices relied upon such rights, explicitly and implicitly, in several prominent early cases implicating the law of nations, as Part III will explain. Thus, those who drafted and ratified the Constitution were undoubtedly familiar with the concept of perfect rights under the law of nations and the serious consequences that flowed from their violation.

B. *The Foreign Relations Powers of the Federal Political Branches*

The Constitution is structured to enable the federal government to conduct foreign relations and ensure compliance with the law of nations, particularly the perfect rights of sovereigns. Article II provides that “[t]he executive Power shall be vested in a President of the United States of America;”¹³⁸ that “[t]he President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;”¹³⁹ that “[h]e shall have Power, by and with the Advice and Consent of the Senate, to make Treaties;”¹⁴⁰ that “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls;”¹⁴¹ and that “he shall receive Ambassadors and other public Ministers.”¹⁴² The power to send and receive ambassadors enabled the new federal government, on behalf of the United States,

136. See, e.g., William Barton, *A Dissertation on the Freedom of Navigation and Maritime Commerce* 53–54 (1802) (explaining that when a right is perfect, “no law restrains me, or no person has any right to hinder me from recovering it” (quoting 1 Rutherford, *supra* note 56, at 29)); *id.* at 280–81 (explaining how Pufendorf and Grotius considered violation of a perfect right to be just cause for war); William John Duane, *The Law of Nations, Investigated in a Popular Manner, Addressed to the Farmers of the United States* 28 (Philadelphia, William Duane 1809) (explaining how neutrals, by treaty, conceded certain of their perfect rights to belligerents); *An Essay on the Rights and Duties of Nations, Relative to Fugitives from Justice* 10–13 (Boston, David Carlisle 1807) (“Much confusion in our reasoning will be avoided by attending to the distinction which divides perfect from imperfect rights . . .”); Letter from John Jay to William Wilberforce (Apr. 14, 1806), in 2 *The Life of John Jay* 307 (William Jay ed., New York, J. & J. Harper 1833) (“It appears to me, that every *independent* state has, as such, a perfect right at all times, whether at war or at peace, to make grants to and treaties with any other independent state.”).

137. See, e.g., *The Nereide*, 13 U.S. (9 Cranch) 388, 426 (1815) (Marshall, C.J.) (“A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel.”); *Hannay v. Eve*, 7 U.S. (3 Cranch) 242, 247 (1806) (Marshall, C.J.) (describing Congress as “having a perfect right, in a state of open war, to tempt the navigators of enemy-vessels to bring them into the American ports”).

138. U.S. Const. art. II, § 1, cl. 1.

139. *Id.* art. II, § 2, cl. 1.

140. *Id.* art. II, § 2, cl. 2.

141. *Id.*

142. *Id.* art. II, § 3.

to recognize foreign nations as equal and independent sovereigns possessing certain perfect rights.¹⁴³

In addition, Article I gives Congress power to “regulate Commerce with foreign Nations;”¹⁴⁴ “establish an uniform Rule of Naturalization;”¹⁴⁵ regulate the value “of foreign Coin;”¹⁴⁶ “constitute Tribunals inferior to the supreme Court”¹⁴⁷ (and thereby provide foreign states and citizens with an alternative to adjudication in state court); “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;”¹⁴⁸ “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;”¹⁴⁹ “raise and support Armies;”¹⁵⁰ “provide and maintain a Navy;”¹⁵¹ “provide for calling forth the Militia to . . . repel Invasions;”¹⁵² “provide for organizing, arming, and disciplining, the Militia;”¹⁵³ and “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁵⁴

At the same time, Article I specifically restricts the states’ ability to conduct their own foreign relations, ensuring they do not exercise powers assigned to the federal government.¹⁵⁵ Section 10 provides in abso-

143. Although today we often equate recognition of foreign states with the President’s power to *receive* ambassadors, the Founders arguably understood the act of *sending* ambassadors as an equal, if not more important, step in the process. See Adler, *supra* note 50, at 137, 146–49. The constitutional design supports this conclusion because it gives the President unilateral power to receive ambassadors, U.S. Const. art. II, § 3, but requires Senate approval to send ambassadors, *id.* art. II, § 2, cl. 2. In addition to sending and receiving ambassadors, the President and the Senate arguably trigger recognition of a foreign state or government by making a treaty, and Congress arguably triggers recognition by appropriating money to pay the expenses and salary of an ambassador to a country seeking recognition. See Julius Goebel, Jr., *The Recognition Policy of the United States* 131–33 (1915) (recounting debate over recognition of South American governments and whether to send ministers to the new nations). Once the United States recognized a foreign nation—by whatever means—the United States would risk giving that nation just cause for war if it failed, as a whole, to respect the perfect rights of that nation.

144. U.S. Const. art. I, § 8, cl. 3.

145. *Id.* art. I, § 8, cl. 4.

146. *Id.* art. I, § 8, cl. 5.

147. *Id.* art. I, § 8, cl. 9.

148. *Id.* art. I, § 8, cl. 10. For an insightful analysis of this power, see J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 *Tex. L. Rev.* 843, 852 (2007) (arguing clause authorizes regulation of individuals whose conduct violates international law, and authorizes punishment of foreign and domestic states for violations of international law).

149. U.S. Const. art. I, § 8, cl. 11.

150. *Id.* art. I, § 8, cl. 12.

151. *Id.* art. I, § 8, cl. 13.

152. *Id.* art. I, § 8, cl. 15.

153. *Id.* art. I, § 8, cl. 16.

154. *Id.* art. I, § 8, cl. 18.

155. See generally Clark, *Federal Common Law*, *supra* note 74, at 1295–99.

lute terms that “No State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal.”¹⁵⁶ It also states that:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.¹⁵⁷

Taken together, these provisions assign several specific powers concerning foreign relations to the political branches of the federal government; notably, they apportion all of the foreign relations powers that Blackstone identified as Crown prerogatives¹⁵⁸ between the President, the Senate, and Congress as a whole. The Constitution disables states from exercising these powers in pursuit of their own foreign relations.¹⁵⁹ In addition, the Constitution enables the federal government to override state law by a variety of means—by exercising its express constitutional powers, by making a “Treaty,” or by enacting a “Law.” All of these methods rely on “the supreme Law of the Land” and thus override contrary state law.¹⁶⁰ Addressing one of the flaws that Randolph saw in the Articles of Confederation, the Constitution requires state legislators and executive officials (as well as state judges) to take an oath “to support this Constitution” and its hierarchy of authorities.¹⁶¹

C. Foreign Relations and the Judicial Branch

The Constitution also uses state and federal judiciaries to uphold the political branches’ conduct of foreign relations. It provides two limited judicial mechanisms to uphold federal political authority when federal

156. U.S. Const. art. I, § 10, cl. 1.

157. *Id.* art. I, § 10, cl. 3.

158. See *supra* notes 108–118 and accompanying text.

159. Although Article I, Section 10 disables the states in key respects from conducting their own foreign policy, it does contain several omissions. For example, it does not prohibit the states from sending and receiving ambassadors. Nonetheless, the Founders understood that some federal powers necessarily imply exclusivity. See *The Federalist* No. 32, *supra* note 133, at 200 (Alexander Hamilton) (explaining Constitution conferred exclusive federal power and alienated state sovereignty “where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*”); *The Federalist* No. 82, *supra* note 133, at 553–54 (Alexander Hamilton) (stating that “where an authority is granted to the union with which a similar authority in the states would be utterly incompatible,” such authority is “exclusively delegated to the federal head”). Because the Founders understood that the “union will undoubtedly be answerable to foreign powers for the conduct of its members,” *The Federalist* No. 80, *supra* note 133, at 536 (Alexander Hamilton), permitting states to send and receive ambassadors “would necessarily undermine the foreign relations of the United States as a whole,” Clark, *Federal Common Law*, *supra* note 74, at 1298.

160. U.S. Const. art. VI, cl. 2 (defining “the supreme Law of the Land” and stating that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

161. *Id.* art. VI, cl. 3.

and state law, or federal and state actors, come into conflict: (1) The Supremacy and Arising Under Clauses provide for judicial enforcement of the supreme law of the land—i.e., the Constitution, laws, and treaties of the United States, and (2) Article III authorizes federal court jurisdiction over categories of cases likely to implicate various branches of the law of nations. This section explains these two mechanisms and their limits.

1. *The Supremacy of Federal Enactments.* — The Founders of the Constitution adopted the Supremacy and Arising Under Clauses of the Constitution to prevent states from undermining the proper enforcement of enacted federal laws. Through these clauses, they designated the “Constitution,” “Laws,” and “Treaties” as supreme municipal law in the states, binding on state judges and enforceable in federal courts. Unlike other provisions of the Constitution,¹⁶² these provisions make no reference to the customary law of nations, and participants in the ratification debates did not understand them to incorporate such law per se. At the same time, members of the founding generation would have understood certain perfect rights to be integral to political branch recognition of foreign nations—and thus would have assumed them to supply crucial background context regarding the legal consequences of the political branches’ exercise of their constitutional powers of recognition.

The Supremacy Clause provides:

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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁶³

In parallel language, the Arising Under Clause provides: “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”¹⁶⁴

As explained, scholars adhering to the modern position have asserted that the customary law of nations constitutes part of “the Laws of the United States” within the meaning of these clauses. Accordingly, in their view, it qualifies as “the supreme Law of the Land” and provides a predicate for federal arising under jurisdiction.¹⁶⁵ Scholars adhering to the revisionist position have refuted this assertion, arguing that the text and structure of the Constitution demonstrate that “Laws of the United States” in the Supremacy and Arising Under Clauses refer solely to acts of

162. See, e.g., *id.* art. I, § 8, cl. 10 (granting Congress power “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).

163. *Id.* art. VI, cl. 2.

164. *Id.* art. III, § 2, cl. 1.

165. See *supra* notes 2–3 and accompanying text.

Congress.¹⁶⁶ The framing and ratification of these clauses lend support to the argument that “Laws” meant acts of Congress, not forms of customary law, including the customary law of nations.¹⁶⁷

The delegates to the Federal Convention of 1787 considered several means by which to ensure the supremacy of national prerogatives against the states. Among the most debated means was a congressional negative of state laws contravening national prerogatives,¹⁶⁸ which Madison deemed “essential to the efficacy & security of the Genl. Govt.”¹⁶⁹ The Convention, however, following debate on the negative, ultimately rejected it.¹⁷⁰ Immediately thereafter, Luther Martin proposed a supremacy provision as an alternative:

[T]he Legislative acts of the U. S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U. S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.¹⁷¹

166. See *supra* note 4 and accompanying text; see also Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va. J. Int'l L.* 587, 597–616 (2002) [hereinafter Bradley, *Alien Tort Statute*] (arguing that “Laws of the United States” in Supremacy and Arising Under Clauses was not originally understood to encompass the law of nations).

167. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1334–37 (2001) [hereinafter Clark, *Separation of Powers*] (equating “Law” as used in Article I, Section 7, with “Laws” as used in the Supremacy Clause); cf. Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 *Harv. L. Rev.* 869, 875 (2007) [hereinafter Bradley et al., *Sosa*] (arguing pre-*Erie* courts “did not view general common law as having the status of [preemptive] federal law”).

For extended treatment of the histories of the Supremacy and Arising Under Clauses, see Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 *Duke L.J.* 263, 292–317 (2007) [hereinafter Bellia, *Origins*] (discussing Arising Under Clause); Clark, *Separation of Powers*, *supra*, at 1346–55 (discussing Supremacy Clause); James S. Liebman & William F. Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 *Colum. L. Rev.* 696, 702–73 (1998) (discussing Supremacy and Arising Under Clauses).

168. The “Virginia Plan,” as put forth by Edmund Randolph on May 29, 1787, provided at least three such mechanisms. First, it would have empowered the national legislature “to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.” 1 *Farrand’s Records*, *supra* note 132, at 21. Second, it would have empowered the national legislature “to call forth the force of the Union” against states that violated the articles of the plan. *Id.* Third, it would have provided for a national judiciary comprising “inferior tribunals” and “one or more supreme tribunals” with jurisdiction over several classes of cases, including those involving “the national peace and harmony.” *Id.* at 21–22.

169. 2 *id.* at 27.

170. *Id.* at 27–28.

171. *Id.* at 28–29 (quoting Luther Martin resolution). The language of this supremacy provision tracked the language of a supremacy provision that William Paterson’s initial “New Jersey Plan” had included:

The Convention unanimously adopted this proposal to bind state judiciaries to national “acts” and “treaties” as “the supreme law of the respective States.”¹⁷²

The Convention next considered what role a national judiciary should play in maintaining the supremacy of enacted federal laws. It ultimately adopted a resolution proposed by Madison to extend jurisdiction to “cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.”¹⁷³ Madison apparently included the arising under category to ensure—following the defeat of the negative—that Congress could enable federal courts to apply federal laws as rules of decision in order to uphold their supremacy over contrary state law.¹⁷⁴

In further proceedings, the Convention conformed the language of the Supremacy Clause to that of the Arising Under Clause, strengthening both provisions as interlocking means of ensuring the supremacy of federal law.¹⁷⁵ It unanimously extended the Supremacy Clause to encompass not only national laws and treaties, but the Constitution itself.¹⁷⁶ Soon thereafter it extended federal court jurisdiction beyond cases arising under “laws” passed by the national legislature to encompass cases arising under “this Constitution”¹⁷⁷ and under “treaties made or which shall be made” under the authority of the United States.¹⁷⁸ Through this process, as James Liebman and William Ryan have explained, the Framers

[A]ll Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding

1 id. at 245.

172. 3 id. at 286–87.

173. 2 id. at 38–39.

174. Luther Martin expressed this understanding of events in his *Information to the General Assembly of the State of Maryland*. He stated that his view at the Convention was that, in light of the Supremacy Clause that he introduced, state court jurisdiction in the first instance over “all cases that should arise under the laws of the general government” would suffice to maintain the supremacy of federal laws. Luther Martin, *Information to the General Assembly of the State of Maryland* (Nov. 29, 1787), reprinted in 2 *The Complete Anti-Federalist* 27, 57 (Herbert J. Storing ed., 1981). The “majority” of delegates, however, he explained, believed that inferior national courts were necessary “for the enforcing of [national] laws.” *Id.*

175. Peter Strauss has recently suggested that the Convention’s revision of the Supremacy Clause to refer to “Laws” instead of “Acts” argues in favor of reading the clause to encompass unwritten law. See Peter L. Strauss, *The Perils of Theory*, 83 *Notre Dame L. Rev.* 1567, 1568–71 (2008). For arguments that this shift “is best understood as merely a stylistic change,” see Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 *Notre Dame L. Rev.* 1681, 1688 (2008) [hereinafter Clark, *Procedural Safeguards*].

176. 2 *Farrand’s Records*, *supra* note 132, at 381–82, 389, 394–95, 409.

177. *Id.* at 430.

178. *Id.* at 431.

devised a “*judicial* review device” to replace “federal *legislative* review of state laws for consistency with national law.”¹⁷⁹

In short, evidence from the framing of the Supremacy and Arising Under Clauses suggests that the Framers understood these clauses to be concerned solely with the enforcement of laws of the United States *made* under the authority of the United States—the “Constitution,” “Laws,” and “Treaties”—by domestic political actors according to distinct sets of procedures found in the Constitution.¹⁸⁰

Of course, to the extent that the Constitution, a federal statute, or a treaty incorporated aspects of the customary law of nations, those aspects would be part of preemptive, jurisdiction-supporting federal law. The Founders plainly would have understood that the federal political branches could trigger the clauses by incorporating aspects of the law of nations into federal laws and treaties.¹⁸¹ As the next section will explain, federal officials initially embraced, but later repudiated, the idea that the United States as a whole had somehow received the common law, and thus the law of nations. As occasions arose for providing fuller explanations of constitutional powers, members of the founding generation would come to describe the Constitution itself as requiring courts to respect certain perfect rights of the foreign nations in order to uphold the prerogatives of the political branches. These perfect rights of sovereigns were defined by the law of nations. Absent such constitutional mandate or political branch incorporation, the terms of the Supremacy and Arising Under Clauses were not understood to encompass the law of nations.

2. *Enforcement of the Law of Nations.* — Because the Arising Under Clause did not cover all cases involving the law of nations, the Constitution provided an alternative mechanism to ensure the proper application of the broader law of nations—giving federal courts jurisdiction over categories of cases in which various branches of the law of nations were likely to apply. Certain Framers favored going further and giving

179. Liebman & Ryan, *supra* note 167, at 733. The ratification debates reflect this understanding of the Supremacy and Arising Under Clauses. Participants described arising under jurisdiction as encompassing cases in which a law made under the authority of the United States provided a determinative rule of decision. See Bellia, *Origins*, *supra* note 167, at 306–12. Likewise, participants justified arising under jurisdiction as a means of ensuring impartial enforcement of federal enactments and promoting their uniform interpretation. See *id.* at 312–16.

180. See U.S. Const. art. VII (specifying procedures for initial “Establishment of this Constitution”); *id.* art. V (establishing procedures for amending “this Constitution”); *id.* art. I, § 7, cl. 2 (prescribing procedures for transforming bill into law); *id.* art. II, § 2, cl. 2 (setting forth procedures for making treaties); see also Clark, *Separation of Powers*, *supra* note 167, at 1331 (“Both the specificity of, and the purposeful variations among, the procedures prescribed by the Constitution for adopting the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ suggest exclusivity.”).

181. For example, Congress enacted a statute to punish those who commit “the crime of piracy, as defined by the law of nations,” on the high seas. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14. The Supreme Court upheld Congress’s incorporation of the law of nations by reference in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–60 (1820).

federal courts jurisdiction over all cases arising under the law of nations.¹⁸² The Convention, however, chose instead to extend the judicial power to several types of cases in which the law of nations was likely to apply. Prominent Framers strenuously argued for federal jurisdiction over these categories (particularly those implicating the law of state-state relations) in order to prevent state courts from generating foreign conflict by disregarding such law.

Proponents of the Constitution emphasized that the United States must observe the law of nations in order to obtain a place of respect among other nations.¹⁸³ Indeed, the states' inability to treat British creditors fairly (as required by the Treaty of Peace)¹⁸⁴ or to protect foreign ambassadors (as required by the law of nations)¹⁸⁵ stood among the events that precipitated the Federal Convention. As mentioned, when Edmund Randolph opened the Convention, one of the first points he made was that the confederation was powerless to counteract a state that "acts against a foreign power contrary to the laws of nations or violates a treaty."¹⁸⁶ Both Randolph and Madison expressed concern that states, by disregarding the law of nations, would lead the confederation into armed conflict. Madison opposed Paterson's "New Jersey Plan" in part because the federal court jurisdiction it provided was insufficient to "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars."¹⁸⁷

182. An outline of the Pinckney Plan found among the Wilson papers proposed establishing "a federal judicial Court" with appellate jurisdiction over "all Causes wherein Questions shall arise . . . on the Law of Nations." 2 Farrand's Records, *supra* note 132, at 136. Similarly, another document in Wilson's hand proposed giving the federal judiciary authority to hear appeals in all cases that may arise "on the Law of Nations, or general commercial or marine Laws." *Id.* at 157 (emphasis omitted).

183. See *infra* note 295 and accompanying text.

184. Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 *Yale J. Int'l L.* 1, 6–20 (1996) (explaining that Founders adopted alienage jurisdiction in response to states' attempts to prevent British creditors from collecting their debts).

185. See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am. J. Int'l L.* 461, 478 (1989) (recounting congressional decision to "vest at least one set of federal courts with explicit jurisdiction over" cases involving violations of the law of nations, "in the knowledge that the federal judiciary could be counted on to enforce the law of nations as a national obligation," and to avoid risk that "state courts . . . might not recognize and apply the law of nations").

186. 1 Farrand's Records, *supra* note 132, at 24. According to Randolph:

If a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the confederation] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war. If the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender.

Id. at 24–25.

187. *Id.* at 316; see also A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), in 2 *The Complete Anti-Federalist*, *supra* note 174, at 86, 88 (asserting that "the law of nations is unprovided with sanctions in many cases,

Article III plainly contemplates federal court jurisdiction over several categories of cases likely to involve branches of the law of nations well known to the Framers. In addition to the Arising Under Clause (encompassing the Constitution, laws, and treaties¹⁸⁸), Article III specifically delineated additional categories of cases likely to involve the national peace and harmony. It is significant that the Framers included these categories as distinct heads of jurisdiction separate and apart from the arising under grant. The Arising Under Clause and the Supremacy Clause were inextricably linked to the proposition that enacted federal law was supreme law that all courts, federal and state, must strive to enforce properly and construe uniformly. Accordingly, the Framers delineated other cases involving “national peace and harmony” as distinct from cases arising under the three enacted forms of the supreme law of the land. As finalized and ratified, Article III extends the federal judicial power

to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.¹⁸⁹

Although several American officials, like earlier English writers, would come to describe the law of nations as part of the law of the land, the structure of Article III confirms that they did not mean to convey that all such law was “the supreme Law of the Land” any more than their English counterparts did. Nor did they believe such law in itself to be law “made in pursuance” of the Constitution.¹⁹⁰

In 1828, Chief Justice Marshall made this point explicitly in *American Insurance Co. v. Canter*.¹⁹¹ In the course of ascertaining whether an inferior territorial court, created by the Florida territorial legislature, had jurisdiction to adjudicate “cases in admiralty,” the Supreme Court held that such cases are not in themselves “cases arising under the laws and

which deeply affect public dignity and public justice” and predicting that the confederation might be “doomed to be plunged into war, from its wretched impotency to check offences against this law”). In the Virginia ratifying convention, Madison also argued that the failure of states to honor the law of nations was negatively affecting commercial intercourse. See 10 *The Documentary History of the Ratification of the Constitution* 1469 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter *Documentary History of the Ratification*] (“We well know, Sir, that foreigners cannot get justice done them in these [state] Courts, and this has prevented many wealthy Gentlemen from trading or residing among us.”).

188. See *supra* notes 175–179 and accompanying text.

189. U.S. Const. art. III, § 2.

190. For additional historical and structural reasons why the Founders would not have understood the common law and the law of nations to be “made in pursuance” of the Constitution, see Clark, *Procedural Safeguards*, *supra* note 175, at 1685–87.

191. 26 U.S. (1 Pet.) 511 (1828).

Constitution of the United States.”¹⁹² Congress had created two Superior Courts in the territory of Florida and given them exclusive jurisdiction in “all cases arising under the laws and Constitution of the United States.”¹⁹³ One party claimed that the exercise of admiralty jurisdiction by the inferior territorial court was inconsistent with the Superior Court’s exclusive jurisdiction.¹⁹⁴

The Supreme Court squarely rejected this argument. Marshall began by reciting that Article III extends the judicial power to three distinct classes of cases¹⁹⁵: “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, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.”¹⁹⁶ According to Marshall, these categories are not interchangeable:

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.¹⁹⁷

In short, the Supreme Court expressly stated in *Canter* that cases of admiralty and maritime jurisdiction—involving an important branch of the law of nations—were not categorically cases arising under “the Laws of the United States” within the meaning of Article III.¹⁹⁸

192. *Id.* at 545.

193. *Id.* at 543.

194. *Id.* at 515.

195. These three categories of “Cases,” along with six other categories of “Controversies,” comprise the nine heads of Article III jurisdiction. U.S. Const. art. III, § 2.

196. *Canter*, 26 U.S. (1 Pet.) at 545 (quoting U.S. Const. art. III, § 2).

197. *Id.* at 545–46.

198. Four years earlier, Chief Justice Marshall similarly implied that general principles of law were not “Laws of the United States” under which a case could arise for purposes of Article III jurisdiction. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824). The Court addressed whether a case brought by the Bank of the United States arose under the act of Congress establishing the Bank and defining its capacities, even though general principles of law provided the determinative rule of decision. Marshall framed the jurisdictional question as whether the fact that “general principles of the law” were involved in the case, in addition to an act of Congress, meant the case did not arise under federal law. *Id.* at 819–21. *Osborne* held that so long as a federal law “forms an ingredient” of the original cause, “it is in the power of Congress to give [inferior federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it.” *Id.* at 823. This holding necessarily implied that, absent a federal law

This conclusion in no way diminished the importance of other jurisdictional categories likely to entail application of the law of nations. Most important, the law of state-state relations could provide rules of decision not only in admiralty cases, but also in ambassadorial and alienage cases.¹⁹⁹ In *The Federalist*, Hamilton explained why federal jurisdiction in cases involving state-state relations was necessary to “the peace of the confederacy.”²⁰⁰ This jurisdiction

rests on a plain proposition, that the peace of the whole ought not to be left at the disposal of a part. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.²⁰¹

With respect to maritime disputes in particular, Hamilton observed that even “[t]he most bigotted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary cognizance of maritime causes.”²⁰² These cases “so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.”²⁰³

Even under the Articles of Confederation, Hamilton noted, “[t]he most important part of” admiralty and maritime cases—prize cases—fell within the jurisdiction of the national judiciary,²⁰⁴ which heard “the trial of piracies and felonies committed on the high seas; and . . . appeals in all cases of captures.”²⁰⁵ Prize cases arguably had the greatest potential to affect war and peace. Two warring powers had the right, under the law of nations, to make prizes of their adversaries’ ships, goods, and effects captured at sea.²⁰⁶ In the eighteenth and early nineteenth centuries, nations

forming an “ingredient” of the original cause, the operation of general law in the case would be insufficient to establish constitutional arising under jurisdiction.

199. Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 Va. J. Int’l L. 649, 655–58 (2002) (suggesting inclusion of these three types of jurisdiction meant violations of the law of nations would not give rise to federal question jurisdiction); see also Bradley, *Alien Tort Statute*, *supra* note 166, at 598–600 (explaining that these categories “gave the federal courts substantial authority to hear disputes involving the law of nations”).

200. *The Federalist* No. 80, *supra* note 133, at 534 (Alexander Hamilton).

201. *Id.* at 535–36.

202. *Id.* at 538.

203. *Id.*

204. *Id.*; see also Clark, *Federal Common Law*, *supra* note 74, at 1337 (discussing Hamilton’s remarks and “significance of the proper disposition of prize cases to the peace of the Union”).

205. Articles of Confederation art. IX, § 1.

206. Clark, *Federal Common Law*, *supra* note 74, at 1334.

encouraged privateers to capture enemy ships by permitting them to obtain title through condemnation proceedings in admiralty courts.²⁰⁷ Admiralty jurisdiction not only facilitated this function, but also remedied abuses. “[B]ecause ‘a nation was responsible for the actions of its [privateers]’ . . . it was essential to the public peace and the amicable relations of nations that prize courts adhere closely to the law of nations.”²⁰⁸ As Justice Story explained, “[i]f justice be there denied, the nation itself becomes responsible to the parties aggrieved,” and the nation to which the aggrieved parties belong “may vindicate their rights, either by a peaceful appeal to negotiation, or by a resort to arms.”²⁰⁹

Federal jurisdiction was appropriate in cases of this kind because state courts might offend foreign nations by disregarding or misapplying the law of nations. This risk was not strictly limited to cases implicating perfect rights and the law of state-state relations. The law merchant, or general commercial law, would often furnish the rule of decision in diversity suits involving both American and foreign citizens, as *Swift v. Tyson* famously recognized.²¹⁰ Likewise, the law maritime typically governed in private maritime cases.²¹¹ The Founders recognized that federal jurisdiction over such cases was necessary to encourage interstate and international trade and commerce.²¹²

Hamilton went further and argued that jurisdiction was warranted even over cases “which may stand merely on the footing of the municipal law” rather than “arising upon treaties and the law of nations.”²¹³ Such jurisdiction was necessary because “an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*” could, “if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations.”²¹⁴ Hamilton justified federal court jurisdiction in these cases on

207. *Id.*

208. *Id.* at 1335 (quoting William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 *Am. J. Legal Hist.* 117, 124 (1993)).

209. Joseph Story, *Commentaries on the Constitution of the United States* § 865 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833).

210. 41 U.S. (16 Pet.) 1 (1842); see also *supra* note 85 and accompanying text (explaining *Swift*).

211. See Fletcher, *General Common Law*, *supra* note 74, at 1538–54 (providing example of how the law maritime applied in marine insurance cases).

212. See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *Law & Contemp. Probs.* 3, 18, 27 (1948) (explaining importance of international admiralty litigation and Founders’ perception that federal courts would be more sympathetic to business interests than would state courts). For example, at the Virginia Ratifying Convention, Madison argued in favor of diversity jurisdiction on the ground that it was necessary to counteract the prejudices of state courts that have “prevented many wealthy gentlemen from trading or residing among us.” 10 *Documentary History of the Ratification*, *supra* note 187, at 1469.

213. *The Federalist* No. 80, *supra* note 133, at 536 (Alexander Hamilton).

214. *Id.*

the ground that federal courts were less likely than state courts to sanction aggression upon the sovereignty of foreign nations, and thus more likely to keep the United States out of foreign conflict.

Jay likewise declared it to be “of high importance to the peace of America, that she observe the laws of nations towards all these Powers”²¹⁵ He emphasized the importance of federal court jurisdiction over cases implicating the law of nations to promote national uniformity in its application:

[U]nder the national Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner—whereas adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent²¹⁶

The primary way that the Constitution furthered respect for the law of nations was to authorize federal court jurisdiction over cases likely to implicate it, and to enable Congress to make such jurisdiction exclusive if necessary. “The wisdom of . . . committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government,” Jay observed, “cannot be too much commended.”²¹⁷

As Chief Justice of the United States, Jay provided a similar account of federal court jurisdiction in *Chisholm v. Georgia*.²¹⁸ He explained that before the Constitution was ratified

the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent. . . .

These were among the evils against which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.²¹⁹

In sum, the Founders thought that federal jurisdiction over cases likely to implicate the law of nations, or otherwise involve foreign relations, would avoid foreign conflict and foster economic growth. The Supremacy Clause, Arising Under Clause, and the other Article III juris-

215. The Federalist No. 3, *supra* note 133, at 14 (John Jay).

216. *Id.* at 15.

217. *Id.*

218. 2 U.S. (2 Dall.) 419 (1793).

219. *Id.* at 474 (emphasis omitted).

dictional grants worked together to uphold federal prerogatives in matters of international concern.

3. *Early Limitations on Judicial Enforcement.* — It is worth noting, however, a crucial limitation of these judicial mechanisms: Insofar as they existed to uphold political branch authority, Congress retained authority to define the extent to which their exercise by courts was necessary. The Constitution specified the creation of “one Supreme Court,” but left it to Congress to decide whether to create “inferior Courts” and to specify their jurisdiction.²²⁰ Congress, of course, created lower federal courts in 1789, but did not vest them with original jurisdiction over cases arising under the Constitution, laws, and treaties of the United States.²²¹ In addition, although Congress authorized jurisdiction in diversity suits between foreign citizens and state citizens, it imposed a \$500 amount in controversy requirement.²²² This forced most existing British creditors to sue in state court where they were unlikely to recover.²²³ They could raise their rights under the Treaty of Peace in those proceedings, but federal judicial recourse could only be had through appeal by writ of error in the Supreme Court.²²⁴

In at least two areas, however, Congress carefully structured federal jurisdiction to enable federal courts to prevent state violations of the law of nations in the first instance. First, section 13 of the Judiciary Act of 1789 gave the Supreme Court exclusive original “jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations.”²²⁵ In addition, a year later Congress used its power to define and punish offenses against the law of nations to establish that, upon conviction, those who prosecute, solicit, or execute any writ or process against “any ambassador or other public minister of

220. U.S. Const. art. III, § 1.

221. In 1801 the outgoing Federalist Congress for the first time gave federal courts original “cognizance . . . of all cases in law or equity, arising under the constitution and laws of the United States,” Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, but the Jeffersonian Republican Congress repealed that grant in 1802 (along with other measures outgoing Federalists had enacted to strengthen the Federalist judiciary), see Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132. Congress did not again confer jurisdiction on federal courts to hear cases arising under federal law until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

222. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.

223. See William R. Casto, *The First Congress’s Understanding of Its Authority over the Federal Courts’ Jurisdiction*, 26 B.C. L. Rev. 1101, 1111–12 (1985) (noting many British creditors were unable to vindicate rights in federal court); Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1487–88 (same); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 78 (1923) (linking amount in controversy requirement to maximum sum allegedly owed by assignees of confiscated property from revolutionary era).

224. § 25, 1 Stat. at 85–86.

225. § 13, 1 Stat. at 80.

any foreign prince or state . . . shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years.”²²⁶ These statutes had their intended effect: Until Congress codified diplomatic immunity in 1978, no suits appear to have been successfully prosecuted against ambassadors or other public ministers.²²⁷

Second, section 9 of the Judiciary Act gave lower federal courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.”²²⁸ Significantly, this provision was understood to give federal courts exclusive jurisdiction over prize cases²²⁹—a category of cases governed by the law of nations and liable to provoke a war if handled improperly.²³⁰ Congress’s treatment of prize cases and cases against ambassadors shows that it had multiple tools at its disposal to ensure compliance with the law of nations. In the Judiciary Act, Congress carefully used federal court jurisdiction to prevent state courts from offending the law of nations in ways that posed particular threats to the peace of the United States.

* * *

The Constitution provided limited judicial mechanisms for maintaining federal political authority in foreign relations. The Supremacy Clause obligated state courts to follow enacted federal law, while the Arising Under Clause authorized federal court jurisdiction as an additional enforcement mechanism. Jurisdiction over other cases implicating foreign relations would in turn help avoid foreign conflict initiated by actors other than the national political branches. It was clear to the Founders that federal jurisdiction over cases implicating the law of nations would serve to maintain federal authority in foreign affairs. It was not immediately clear, however, how the law of nations related to federal or state

226. Crimes Act of 1790, ch. 9, §§ 25–26, 1 Stat. 112, 118.

227. Clark, *Federal Common Law*, supra note 74, at 1315 (citing 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4050, at 238–39 (2d ed. 1988)); see also Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (codified as amended at 22 U.S.C. §§ 254a–254e (2000)) (incorporating Vienna Convention on Diplomatic Relations as U.S. law, requiring diplomats to obtain liability insurance, authorizing suits against insurers, and codifying other aspects of diplomatic immunity); 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4050, at 199–200 (3d ed. 2007) (finding no successful cases during period of exclusive original jurisdiction in Supreme Court, which ended in 1978).

228. § 9, 1 Stat. at 77.

229. See *Jennings v. Carson*, 13 F. Cas. 540, 542–43 (D. Pa. 1792) (No. 7281) (explaining that prize cases were regarded as “civil causes of admiralty and maritime jurisdiction” and thus fell within the federal courts’ “exclusive original cognizance” under Judiciary Act); see also Clark, *Federal Common Law*, supra note 74, at 1350–53 (examining federal courts’ admiralty jurisdiction under Judiciary Act).

230. See Clark, *Federal Common Law*, supra note 74, at 1334–37; supra notes 204–209 and accompanying text.

municipal law, or the extent to which the Constitution *required* courts to apply the law of nations in such cases. The next Part describes the initial confusion that surrounded these questions and how the Court came to resolve them.

III. EARLY ENFORCEMENT OF THE LAW OF NATIONS

The Constitution does not specify the status of the law of nations in U.S. courts. In England, the common law simply incorporated the law of nations as municipal law. In America, the states received the common law of England, presumptively incorporating the law of nations as part of each state's law. Whether the national government also received the common law—and therefore the law of nations—was not definitively resolved until a few decades after the founding. Beginning in 1812, the Supreme Court recognized that there can be no common law of the United States,²³¹ and thus no wholesale incorporation of the law of nations as federal municipal law. Thereafter, federal courts continued to apply certain aspects of the law of nations—not because they were part of a true federal common law, but either (as in *Swift*) because that was the applicable rule of decision or (as relevant here) because such law was understood to supply the operational detail of the Constitution's allocation of foreign relations powers.

The law of nations was not monolithic in this regard. As *Erie* would later recognize, with respect to matters within the reserved or concurrent powers of the states (such as the general commercial law), states were free to depart from the law of nations absent enacted federal law to the contrary. Short of prescribing the substantive law, Congress could also steer at least some of these cases into federal court by conferring concurrent or exclusive jurisdiction on federal courts. By contrast, with respect to matters outside the reserved powers of the states (such as the rights of foreign sovereigns, diplomats, and heads of state), the Supreme Court respected the perfect rights of sovereigns for reasons that would seem to bind state and federal courts alike.

Specifically, the Court read the political branches' Article I and II powers over foreign relations—especially the recognition and war powers—to require judicial enforcement of perfect sovereign rights. It is not uncommon for the Court to read constitutional provisions in light of background principles of the common law or law of nations against which they were drafted, and the foreign relations powers are no exception. The law of nations supplied a well-known set of default rules relating to perfect rights that would have informed the Founders' understanding of the federal political branches' recognition and war powers. The Court

231. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (“There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union.”); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32–33 (1812) (rejecting federal common law crimes).

followed such rules as a means of implementing the federal political branches' exclusive constitutional prerogatives to recognize foreign nations, manage questions of war and peace, and decide on behalf of the nation whether, when, and how to risk war by departing from such rules. At the same time, however, the Court declined to apply competing principles of the law of nations when such application would have undermined, rather than furthered, the constitutional prerogatives of the political branches.

A. *The Early Debate over Federal Reception of the Common Law*

Prior to ratification, states adopted the common law of England, which incorporated the law of nations. After ratification, state courts continued to apply the law of nations as part of their municipal common law,²³² including the common law of crimes. The question quickly arose whether the United States could prosecute individuals in federal court for committing common law crimes. The Judiciary Act of 1789 gave federal courts exclusive jurisdiction of crimes and offenses “cognizable under the authority of the United States.”²³³ For the next two decades, public officials in the United States debated whether federal courts had jurisdiction to define and punish common law offenses against the United States in the absence of further congressional action.²³⁴ In other words, they debated whether the United States had a *municipal* common law of crimes²³⁵ that incorporated, among other things, certain offenses against the law of nations. This debate was not limited to federal common law crimes, however, because its resolution turned on whether the United States (as opposed to the individual states) had received the common law of England.

To understand contemporaneous opinions of early executive branch officials and judges, one must appreciate their initial assumption that the United States—like the states—had received the common law and thus could prosecute and punish common law crimes, including offenses

232. See, e.g., *Brown v. Union Ins. Co. at New-London*, 4 Day 179, 186–87 (Conn. 1810) (opinion of Swift, J.) (stating that “our acknowledgement of the authority of the law of nations, and our adoption of the Marine Law, have established principles decisive of this question,” and “[t]he same consequences must result from our having adopted the law of merchants”); *Pearsall v. Dwight*, 2 Mass. (1 Tyng) 84, 89 (1806) (“This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law.”); *Desebats v. Berquier*, 1 Binn. 336, 345 (Pa. 1808) (opinion of Tilghman, C.J.) (“[W]e have always been sensible of the importance of paying a high regard to the law of nations. It is considered as incorporated with, and forming a part of, our common law.”); see also *supra* Part II.A.

233. § 9, 1 Stat. at 76–77 (providing district court jurisdiction); § 11, 1 Stat. at 78–79 (providing circuit court jurisdiction).

234. See *Clark, Separation of Powers*, *supra* note 167, at 1404–12 (describing debate and its eventual resolution).

235. At the time of the founding, penal laws—including common law criminal offenses—were conceived to be local rather than general laws. Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 *Geo. L.J.* 949, 959–65 (2006).

against the law of nations. Under English law, criminal penalties and private remedies were matters of municipal governance.²³⁶ It was on the assumption that the United States had received a municipal common law of crime that public officials discussed how violations of the law of nations constituted judicially cognizable offenses against the United States.

For example, in 1792, Attorney General Edmund Randolph considered whether the arrest of a public minister's domestic servant was punishable as a common law offense,²³⁷ either under the Crimes Act of 1790²³⁸ or as a violation of the law of nations. He began his opinion by explaining that "[t]he law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land."²³⁹ Immediately thereafter, Randolph emphasized the importance of respecting foreign sovereignty: "[W]ith regard to foreigners, every change [that a nation makes to the law of nations] is at the peril of the nation which makes it."²⁴⁰ Randolph recognized, however, that Congress could by statute supersede what otherwise would be the common law's incorporation of the law of nations. And regarding the case at hand—"that of arresting a domestic"—Randolph stated that "Congress appear to have excluded every resort to the law of nations."²⁴¹ Accordingly, the minister could challenge the arrest by appealing "to the federal act alone."²⁴²

Randolph's assumption that a violation of the law of nations was punishable under federal common law was soon tested. A crucial issue facing the new nation was its stance in the war between England and France. Following the French Revolution, President Washington submitted a series of questions to his cabinet, including the following: (1) "Shall a minister from the Republic of France be received?" and (2) "If received, shall it be absolutely or with qualifications; and, if with qualifications, of what kind?"²⁴³ Jefferson urged full recognition, while Hamilton urged recep-

236. See *id.* at 955–56; *supra* notes 31–36 and accompanying text.

237. 1 Op. Att'y Gen. 26 (1792).

238. Act of Apr. 30, 1790, ch. 9, § 25, 1 Stat. 112, 117–118.

239. 1 Op. Att'y Gen. at 27.

240. *Id.*

241. *Id.* at 28.

242. *Id.* In his opinion, Randolph considered not only the legality of the arrest, but the legality of the entry into the house to serve the execution. Randolph explained that if the act of Congress criminalized the arrest, the act of entering would be "absorbed in the arrest." *Id.* In that case, the federal courts could entertain a prosecution, as they "are open to all cases cognizable under the authority of the United States." *Id.* If, on the other hand, the act of Congress did not criminalize the arrest, the arrest would be punishable, "if at all, under the law of nations, as being left untouched by the municipal act." *Id.* Were this the case, "the mere going into the house and executing a precept will probably sustain a prosecution; but, at best, it would be esteemed *summum jus*" (a matter of extreme right that, if enforced, would produce injustice). *Id.*

243. George Washington, Questions Submitted by the President to the Cabinet Respecting a Proclamation of Neutrality, and the Reception of a French Minister (Apr. 18, 1793), reprinted in 10 *The Writings of George Washington* 533, 533 (Jared Sparks ed.,

tion with reservations.²⁴⁴ Although Washington received the French envoy Edmond Charles Genet (known as Citizen Genet) without reservation, he soon issued his famous Neutrality Proclamation in an attempt to keep the United States at peace.²⁴⁵ The effect of the Proclamation was to renounce any suggestions of alliance between the United States and France under preexisting treaties.²⁴⁶ In other words, the United States sought to maintain friendly relations with two nations it now recognized as equal and independent states under the law of nations.²⁴⁷

The Neutrality Proclamation declared that the United States would punish citizens who committed, aided, or abetted hostilities against any of the warring powers. Although Congress had enacted no applicable statute, the President issued “instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall within the cognizance of the courts of the United States violate the law of nations with respect to the powers at war”²⁴⁸ The proclamation relied on three assumptions: The United States had received the common law, the common law incorporated the law of nations, and federal prosecutors and judges were free to enforce such law through criminal prosecutions without congressional authorization.

Prominent members of Washington’s cabinet agreed. Hamilton, writing as Pacificus, described the effect of the Proclamation of Neutrality:

The true nature & design of such an act is—to make known to the powers at War and to the Citizens of the Country, whose Government does the Act that such country is in the condition of a Nation at Peace with the belligerent parties, and under no obligation of Treaty, to become an associate in the war with either of them; . . . and as a consequence of this state of things, to

Boston, Russell, Shattuck, and Williams, and Hilliard, Gray and Co. 1836) [hereinafter Writings of Washington]. Washington also asked: “Are the United States obliged by good faith to consider the treaties heretofore made with France as applying to the present situation of the parties? May they either renounce them or hold them suspended till the government of France shall be *established*?” Id.

244. See Goebel, *supra* note 143, at 105–12 (comparing Jefferson’s “de facto principle of recognition” and Hamilton’s nonintervention policy).

245. George Washington, Proclamation of Neutrality (Apr. 22, 1793), reprinted in Writings of Washington, *supra* note 243, at 535 [hereinafter Proclamation of Neutrality].

246. See Goebel, *supra* note 143, at 112.

247. At the time, nations were understood to have a perfect right to remain neutral. See Vattel, *supra* note 17, at *333 (“When a war breaks out between two nations, all other states that are not bound by treaties, are free to remain neut[ral]”). Nations had to be vigilant, however, about maintaining neutrality, which required “*a strict impartiality towards the belligerent powers*.” Id. at *332. Should a nation “favour one of the parties [at war] to the prejudice of the other, she cannot complain of being treated by him as an adherent and confederate of his enemy.” Id.

248. Proclamation of Neutrality, *supra* note 245, at 535. For further discussion of the Neutrality Proclamation, see David P. Currie, The Constitution in Congress: The Third Congress, 1793–95, 63 U. Chi. L. Rev. 1, 4–14 (1996) (discussing immediate response to proclamation and its constitutionality).

give warning to all within its jurisdiction to abstain from acts that shall contravene those duties, under the penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention.²⁴⁹

The proclamation, he concluded, “informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the Infractors of them.”²⁵⁰

Secretary of State Thomas Jefferson similarly explained to the French Minister that the United States, to preserve its neutrality, had a right under the law of nations to prohibit France from arming vessels in the United States to use against England.²⁵¹ He indicated that a domestic vessel armed against nations with which the United States was at peace would offend the law of nations. Accordingly, Jefferson described such vessels as “marked in their very equipment with offence to the laws of the land, of which the law of nations makes an integral part.”²⁵² Here, Jefferson referred to the law of nations as the law of the land in the same manner as Randolph had.

In the summer of 1793, Chief Justice Jay more thoroughly explained the theory behind prosecutions based on the law of nations. In charging the grand jury in Richmond, Virginia, he explained that the circuit court had “cognizance only of offences against the laws of the United States,” and that “[t]he Constitution, the statutes of Congress, the laws of nations, and treaties constitutionally made compose the laws of the United States.”²⁵³ In directing the grand jurors to return indictments for com-

249. Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 *The Papers of Alexander Hamilton* 33, 34 (Harold C. Syrett ed., 1969).

250. *Id.* at 43. The Jay Treaty soon gave Hamilton another occasion to examine the law of nations. *Defence No. XX* of his “Camillus” essays defended Article 10, which prohibited the United States or Britain from confiscating or sequestering the debts, money, or security of the subjects or citizens of the other. Alexander Hamilton, *To Defence No. XX* (Oct. 23–24, 1795), reprinted in 19 *The Papers of Alexander Hamilton*, supra note 249, at 329, 329, 346–47. Hamilton examined whether the United States had a right under its treaties or the law of nations to confiscate or sequester enemy property found within the United States, declaring: “‘Tis indubitable that the customary law of European Nations is as a part of the common law and by adoption that of the U States.” *Id.* at 342. He found that modern law barred a nation from confiscating or sequestering the property of another nation on account of war. Therefore, the modern law of nations coincided with Article 10 of the treaty. *Id.* at 347. This opinion concerned the extent to which U.S. obligations under the Jay Treaty conformed to the contemporaneous law of nations; it did not consider the operation of the law of nations as a rule of decision in federal courts.

251. Letter from Thomas Jefferson to the French Minister (Edmund Charles Genet) (June 5, 1793), in 6 *The Writings of Thomas Jefferson* 282, 283 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895).

252. *Id.*

253. John Jay, *Charge to Grand Jury, Richmond, Virginia* (May 22, 1793) [hereinafter *Jay, Grand Jury*], reprinted in 3 *The Correspondence and Public Papers of John Jay* 478, 478–79 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891) [hereinafter *Jay, Public Papers*]. Jay had similarly charged a grand jury in New Hampshire in 1790: “The objects of your inquiry are, all offences committed against the laws of the United States in

mon law crimes against the United States premised upon offenses under the law of nations, Jay stated that their obligation to do so derived in part from the deference courts and individuals owe Congress in foreign affairs. He explained that “the laws of reason and morality” directed independent governments “to abstain from violence, to abstain from interfering in their respective domestic government and arrangements, [and] to abstain from causing quarrels and dissensions.”²⁵⁴ Because of the “respect” that “nations owe to each other,” Jay charged, “[i]f in this district you should find any persons engaged in fitting out privateers or enlisting men to serve against either of the belligerent powers, and in other respects violating the laws of neutrality, you will present them.”²⁵⁵ In Jay’s view, the Constitution’s allocation of powers required individuals, courts, and grand jurors to respect the rights of foreign sovereigns and leave retaliatory action to the political branches:

Of national violations of our neutrality our government only can take cognizance. Questions of peace and war and reprisals and the like do not belong to courts of justice, nor to individual citizens, nor to associations of any kind, and for this plain reason: because the people of the United States have been pleased to commit them to Congress.²⁵⁶

Likewise, if a foreign nation committed an infraction of the law of nations against the United States or its citizens, it was not within the province of federal courts to respond:

Such measures involve a variety of political considerations, such, for instances, as these: Is it advisable immediately to declare war? Would it be more prudent first to remonstrate, or demand reparation, or direct reprisals? Are we ready for war? Would it be wise to risk it at this juncture, or postpone running that risk until we can be better prepared for it? These and a variety of similar considerations ought to precede and govern the decision of those who annul violated treaties, order reprisals, or declare war.²⁵⁷

this District, or on the high seas by persons now in the District. . . . [T]he laws of nations make part of the laws of this, and of every other civilized nation.” John Jay, *The Charge of Chief Justice Jay, to the Grand Juries on the Eastern Circuit*, N.H. Gazette, June 3, 1790, at 2.

254. Jay, *Grand Jury*, supra note 253, reprinted in Jay, *Public Papers*, supra note 253, at 481.

255. *Id.*, reprinted in Jay, *Public Papers*, supra note 253, at 482–83.

256. *Id.*, reprinted in Jay, *Public Papers*, supra note 253, at 483–84; see also *Henfield’s Case*, 11 F. Cas. 1099, 1101–04 (C.C.D. Pa. 1793) (No. 6360) (reciting charge of Chief Justice Jay, to grand jury in Richmond, Virginia, which described the “laws of nations” as part of “law of the United States,” and explained that “they who commit, aid, or abet hostilities against . . . powers [relative to whom the United States are in a state of neutrality] . . . offend against the laws of the United States, and ought to be punished”).

257. Jay, *Grand Jury*, supra note 253, reprinted in Jay, *Public Papers*, supra note 253, at 484–85.

“Until war is constitutionally declared,” Jay concluded, “the nation and all its members must observe and preserve peace, and do the duties incident to a state of peace.”²⁵⁸ Thus, “[a]s judges and grand jurors, the merits of those political questions are without our province.”²⁵⁹

Justice James Wilson delivered a similar charge to the federal grand jury in Pennsylvania that indicted Gideon Henfield for agreeing to serve as the captain of a French privateer tasked with attacking British ships.²⁶⁰ Wilson instructed that “the common law” had been “received in America,” that “the law of nations” to “its full extent is adopted by her,” and that “infractions of that law form a part of her code of criminal jurisprudence.”²⁶¹ He further stated that “a citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country.”²⁶² At trial, Henfield’s counsel protested the lack of congressional authorization for the prosecution. In charging the petit jury, Justice Wilson (on behalf of himself, Justice Iredell, and Judge Peters) rejected this suggestion:

It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed.²⁶³

Perhaps concerned by the lack of a federal statute, the jury voted to acquit Henfield.²⁶⁴ President Washington responded by requesting legislation,²⁶⁵ and Congress promptly enacted the Neutrality Act.²⁶⁶ The Act expressly prohibited breaches of United States neutrality, including the acts that gave rise to Henfield’s indictment.²⁶⁷

258. *Id.*, reprinted in Jay, *Public Papers*, supra note 253, at 485.

259. *Id.*

260. *Henfield’s Case*, 11 F. Cas. at 1115–17.

261. *Id.* at 1106–07 (citing 4 Blackstone, supra note 26, at *67).

262. *Id.* at 1108.

263. *Id.* at 1120. For an insightful account of Justice Wilson’s views regarding the relationship between the law of nations and the common law in the United States, see Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 *Geo. Wash. L. Rev.* 113, 163–64, 184–89 (2003).

264. Currie, supra note 248, at 15 & n.63.

265. 4 *Annals of Cong.* 11 (1793).

266. See ch. 50, § 1, 1 Stat. 381, 381–82 (1794).

267. *Id.* (prohibiting U.S. citizens within United States from accepting commission under foreign army or navy).

Nonetheless, throughout the 1790s, federal courts continued to enforce federal common law crimes on the assumption that the United States had received the common law.²⁶⁸ In 1798, Justice Chase, sitting on the circuit court, became the first judge to question this assumption. In *United States v. Worrall*, the defendant was indicted for attempting to bribe a federal Commissioner of Revenue.²⁶⁹ Worrall's counsel disputed "that the common law is the law of the United States, in cases that arise under their authority."²⁷⁰ He argued that "[t]he nature of our Federal compact, will not . . . tolerate this doctrine."²⁷¹ Justice Chase agreed. An "indictment solely at common law," he declared, "cannot be maintained in this Court."²⁷² In his view, it was "essential, that Congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect Courts to try the criminal, or to pronounce a sentence on conviction."²⁷³

The issue soon resurfaced as part of a heated debate between incumbent Federalists and ascendant Jeffersonian Republicans over the constitutionality of the Sedition Act. The Act made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious" statements about Congress, the government, or the President.²⁷⁴ Republicans charged that the Act was unconstitutional because it was an exercise of "a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto."²⁷⁵ Federalists responded that "the Act presented no 'constitutional difficulty' because the federal courts were already authorized to punish seditious libel as a common-law crime."²⁷⁶ Republicans denied the central premise of the

268. See, e.g., *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298–99, 27 F. Cas. 714, 715 (C.C.D. Pa. 1794) (No. 16,122a) (upholding indictment of defendant for sending threatening letters, behavior that was treasonous in England and indictable at common law); *United States v. Smith*, 27 F. Cas. 1147, 1147–48 (C.C.D. Mass. 1792) (No. 16,323) (upholding federal court jurisdiction over, and conviction of, defendant for common law contempt for counterfeiting bank bills). For an illuminating history of *Ravara* and an argument that the prosecution was based on a broad understanding of "the common law of the United States," see John D. Gordan III, *United States v. Joseph Ravara: "Presumptuous Evidence," "Too Many Lawyers," and a Federal Common Law Crime, in Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, at 106, 140 (Maeva Marcus ed., 1992).

269. 2 U.S. (2 Dall.) 384, 384, 28 F. Cas. 774, 774 (C.C.D. Pa. 1798) (No. 16,766).

270. *Id.* at 391, 28 F. Cas. at 777 (emphasis omitted).

271. *Id.* ("[T]he very powers that are granted [to the central government] cannot take effect until they are exercised through the medium of a law").

272. *Id.* at 393, 28 F. Cas. at 778.

273. *Id.* at 394, 28 F. Cas. at 779.

274. Ch. 74, § 2, 1 Stat. 596, 596 (1798) (expired 1801).

275. James Madison, [Virginia] Resolutions of 1798, in 6 *The Writings of James Madison* 326, 328 (Gaillard Hunt ed., 1906).

276. William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 149 (1995) (quoting Letter from Oliver Ellsworth to Timothy Pickering (Dec. 12, 1798)); see also H.R. Rep. No. 5-110 (1799), reprinted in 1 *American State Papers: Miscellaneous* 181, 184 (1834) (resolving to not

Federalists' defense: "that the common or unwritten law' . . . makes a part of the law of these States, in their united and national capacity."²⁷⁷

James Madison led the Republican attack and raised two powerful objections to the idea that the Constitution incorporated the common law. First, he specifically denied that the common law was adopted by the Constitution²⁷⁸ because the consequence would be that "the authority of Congress [would be] co-extensive with the objects of common law."²⁷⁹ That conclusion would mean that Congress's power would be "no longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever."²⁸⁰ Second, Madison argued that federal incorporation of the common law "would confer on the judicial department a discretion little short of a legislative power."²⁸¹ He explained that such incorporation would "present an immense field for judicial discretion" because it would require federal courts "to decide what parts of the common law would, and what would not, be properly applicable to the circumstances of the United States."²⁸² In his view, giving federal judges this degree of discretion "over the law would, in fact, erect them into legislators."²⁸³

The debate subsided in 1801 with Thomas Jefferson's election as President and the expiration of the Sedition Act.²⁸⁴ In 1806, however, federal prosecutors charged two Federalist editors with common law seditious libel. The case reached the Supreme Court in 1812, and the Court rejected federal common law crimes.²⁸⁵ Because both the Attorney General and the defendant's counsel declined to argue the case, Justice

repeal Alien and Sedition Acts); 9 *Annals of Cong.* 2989 (1799) ("[T]he act in question cannot be unconstitutional, because it makes nothing penal that was not penal before, and gives no new powers to the court, but is merely declaratory of the common law.").

277. Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), *in* 6 *The Writings of James Madison*, *supra* note 275, at 347, 372 [hereinafter *Madison, Letter*].

278. *Id.* at 382.

279. *Id.* at 380.

280. *Id.*; see also 9 *Annals of Cong.* 3012 (1799) (statement of Rep. Nicholas) ("The nature of the [common] law of England makes it impossible that it should have been adopted in the lump into such a Government as this is; because it was a complete system for the management of all the affairs of a country.").

281. *Madison, Letter*, *supra* note 277, at 380.

282. *Id.* at 381.

283. *Id.* Thomas Jefferson was even more emphatic:

Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of ungiven powers have been . . . solitary, un consequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the [United States], without the adoption of their legislature, and so infinitely beyond their power to adopt.

Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), *in* 7 *The Writings of Thomas Jefferson*, *supra* note 251, at 383–84.

284. See Daniel Sisson, *The American Revolution of 1800*, at 439–51 (1974).

285. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

Johnson issued a brief opinion on behalf of the Court.²⁸⁶ He framed the question as “whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases.”²⁸⁷ Undoubtedly referring to the debate surrounding the Sedition Act, Johnson stated that the question had long been “settled in public opinion.”²⁸⁸ Before a federal court may exercise jurisdiction in such a case, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”²⁸⁹

Through its rejection of a federal common law of crimes, the Court rejected the assumption that federal courts could enforce the law of nations in the same way as English courts—as part of a national municipal common law requiring no legislative enactment. This holding did not banish the law of nations from playing any role in federal court. As the next section explains, the Supreme Court would come to enforce the perfect rights of sovereigns under the law of nations as a consequence of—and in deference to—the constitutional authority of the political branches to control the United States’s engagement with foreign nations.

B. Upholding the Constitution’s Allocation of Powers

In the nation’s first decades, federal courts not only attempted to apply the law of nations as part of a municipal common law of crime; they also applied it uncontroversially in dozens of other cases. Often, they applied the law merchant or the law maritime to resolve private commercial disputes.²⁹⁰ In so doing, courts did not treat these branches of the

286. *Id.* at 32.

287. *Id.*

288. *Id.*

289. *Id.* at 34. For further discussion of the judiciary’s initial embrace—and ultimate rejection—of federal common law crimes, see Clark, Separation of Powers, *supra* note 167, at 1404–12. Sitting as a Circuit Justice, Justice Story tried to distinguish *Hudson & Goodwin* in a case involving prosecution of an individual for forcibly rescuing a prize—an offense against the law of nations. See *United States v. Coolidge*, 25 F. Cas. 619 (C.C.D. Mass. 1813) (No. 14,857). Before *Coolidge* reached the Supreme Court, Justice Johnson also had occasion to revisit the question of federal common law crimes in a case involving an offense against the law of nations—piracy. See *Trial of William Butler for Piracy* 35 (C.C.D.S.C. 1813) (original pamphlet in Harvard Law School library; copy on file with the *Columbia Law Review*). Unlike Justice Story, Justice Johnson concluded that the Constitution did not permit federal courts to punish such offenses in the absence of congressional authorization. (Justice Johnson is strongly presumed to be the author of the *William Butler* opinion, though it is unsigned. See Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin*, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes, 101 *Yale L.J.* 919, 926 n.34 (1992).) When *Coolidge* finally reached the Supreme Court, a majority simply declined “to review their former decision in [*Hudson & Goodwin*], or draw it into doubt.” *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416 (1816).

290. See Fletcher, *General Common Law*, *supra* note 74, at 1538–54 (describing cases).

law of nations as either state law or preemptive federal law; they simply applied the law without attributing it to any particular sovereign.²⁹¹

From the first years of the Republic, however, public officials attached special significance to judicial enforcement of the law of state-state relations, particularly the perfect rights of sovereigns. At first glance, this branch of the law of nations appears to have operated in the same way as the others, such as the law merchant or private law maritime. Cases upholding perfect rights were decided well before Congress gave inferior federal courts arising under jurisdiction in 1875.²⁹² Moreover, none of these early cases attempted to invoke the Supreme Court's appellate arising under jurisdiction over state law cases denying enforcement of a federal right;²⁹³ rather, all originated in federal courts under other heads of jurisdiction. Most of the cases in which federal courts invoked the law of nations as a rule of decision fell within the federal courts' jurisdiction over admiralty and maritime cases, which the Marshall Court expressly held did not automatically trigger arising under jurisdiction.²⁹⁴

Nonetheless, judges and other public officials considered adherence to the law of state-state relations uniquely important to the peace and dignity of the United States.²⁹⁵ In 1793, Secretary of State Thomas Jefferson sent a letter to Chief Justice John Jay and the other Justices of the Supreme Court seeking advice on twenty-nine questions about the

291. See Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. Pa. L. Rev. 825, 889–91 (2005) [hereinafter Bellia, *Federal Common Law*] (describing operation of general law); Clark, *Federal Common Law*, supra note 74, at 1283–85 (same); Fletcher, *General Common Law*, supra note 74, at 1517–21 (same).

292. See supra note 221 and accompanying text.

293. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (granting Supreme Court jurisdiction over final state court judgments that ruled against federal right “drawn in question”). By the end of the nineteenth century, some litigants unsuccessfully attempted to invoke the Supreme Court's appellate jurisdiction to review state court determinations of general law under the law of nations. See, e.g., *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (holding that Supreme Court has “no right to review” whether defendant's forcible seizure in foreign country prevents trial in state court because question is one “of common law, or of the law of nations”); *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1875) (holding that Supreme Court lacked appellate jurisdiction to review “general laws of war, as recognized by the law of nations applicable to this case” because they do not involve “the constitution, laws, treaties, or executive proclamations, of the United States”). For an argument that the Supreme Court could review a state court's denial of a foreign ambassador's assertion of diplomatic immunity under the law of nations, see Clark, *Federal Common Law*, supra note 74, at 1320 n.349.

294. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828) (“A case in admiralty does not, in fact, arise under the Constitution or the laws of the United States.”); see supra notes 191–198 and accompanying text (explaining how *Canter* Court did not understand law maritime to be part of “the Laws of the United States” within meaning of Article III).

295. See Jay, *Early American Law*, supra note 74, at 839–45 (explaining that such U.S. officials advocated adherence to law of nations to avoid war and establish the United States as a power among nations); cf. Janis, supra note 49, at 37 (explaining that James Kent, in his *Commentaries on American Law*, was “interested . . . that the United States be perceived by other countries as a qualified sovereign partner in the European Christian community of nations”).

obligations of the United States under treaties and the state-state relations branch of the law of nations.²⁹⁶ Jefferson recognized that violations of treaties and the law of nations could both embroil the United States in foreign conflict and diminish its standing with other nations; he claimed that opinions from the Court on these questions would “secure us against errors dangerous to the peace of the U.S. and their authority ensure the respect of all parties.”²⁹⁷ The Washington Administration recognized that courts had only limited opportunities to adjudicate such questions, which “are often presented under circumstances which do not give a cognizance of them to the tribunals of the country,”²⁹⁸ either because such tribunals lacked jurisdiction or the laws afforded no judicially cognizable remedy.²⁹⁹ Chief Justice Jay famously declined to answer the questions Jefferson posed, citing “strong arguments against the propriety of our extra-judicially deciding the questions.”³⁰⁰ Jay acknowledged, however, that adherence to the law of nations was crucial “to the preservation of the rights, peace, and dignity of the United States.”³⁰¹ In subsequent years, as justiciable controversies arose, the Court would confront several of the questions that Jefferson had posed.

Significantly, it was primarily in cases involving the law of state-state relations that federal courts declared the law of nations to be part of the law of the land.³⁰² Justices were aware that disregard of certain principles of the law of nations—especially the perfect rights of sovereigns—could trigger bilateral foreign conflict. They did not merely enforce the law of nations when it applied; if faced with a choice between competing principles of the law of nations, Justices applied the principle that avoided conflict over those that might generate conflict.

In the wartime prize cases of the 1810s, the Court began expressly tying the application of the law of nations to the Constitution’s allocation of powers. It justified this course on the ground that the political branches had exclusive authority to take actions—such as disregarding perfect rights under the law of nations—that could embroil the United States in foreign conflict. Linking the law of nations to the Constitution’s allocation of powers coincided with two developments. First, the Court rejected the theory that the United States had received the common law

296. Letter from Thomas Jefferson to the Chief Justice and Judges of the Supreme Court of the United States (July 18, 1793), *in* 6 *The Writings of Thomas Jefferson*, *supra* note 251, at 351.

297. *Id.*

298. *Id.*

299. See *Bellia*, Cause of Action, *supra* note 25, at 784–92 (explaining limitations on availability of remedies at law and in equity at time of founding).

300. Letter from Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 *Jay*, *Public Papers*, *supra* note 253, at 488.

301. *Id.* at 489.

302. See *Janis*, *supra* note 49, at 62 (observing that Marshall Court opinions referring to international law as “part of the law of the United States[,] . . . most famously involved ticklish questions about respecting foreign sovereigns”).

(and by incorporation the law of nations) as part of federal municipal law. Second, the United States had gained experience with foreign conflict—conflict that could necessitate political branch decisions contrary to the law of nations. The Court enforced perfect rights to avoid generating foreign conflict and to preserve the constitutional prerogatives of Congress and the President, recognizing, however, that the political branches were free to make law in derogation of the law of nations, and that such law would bind courts as the supreme law of the land.

Whether principles of the law of nations preempted contrary state law was not debated during these early decades: Congress gave federal courts exclusive jurisdiction over cases most likely to involve the law of state-state relations, and these cases did not involve conflicting state law. In certain cases, however, the Court applied law of nations principles for the stated reason that the Constitution's allocation of powers required it. These cases all involved law of nations principles that Blackstone deemed essential to upholding national prerogatives in foreign affairs,³⁰³ such as the power to send and receive ambassadors, to make treaties, and to control war and peace. As discussed, the Founders apportioned these prerogatives between Congress and the President. By reasoning that the constitutional allocation of powers required adherence to certain principles of the law of nations, the Court laid the groundwork for its future holding that such principles apply in both state and federal court, and even in the face of contrary state law.

Interpreting the Constitution in light of background principles known to the Founders is nothing new. Such principles provide crucial context. Accordingly, the Court has interpreted many provisions of the Constitution to incorporate aspects of the common law or law of nations. The Court has read the Fourth Amendment's prohibition on unreasonable searches and seizures, for instance, to incorporate common law rights it meant to protect.³⁰⁴ The extension of federal judicial power in Article III to "Cases, in Law and Equity," is incomprehensible without reference to understandings of law and equity that subsisted in English law.³⁰⁵ The power of Congress to "grant Letters of Marque and Reprisal" exclusive of

303. See *supra* Part I.C.

304. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995) ("[T]he common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry.").

305. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (explaining Article III "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'"). The Seventh Amendment provides another example along these lines. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446–47 (1830) (explaining that "[t]he phrase 'common law' in the Seventh Amendment 'is used in contradistinction to equity, and admiralty, and maritime jurisprudence'").

states is likewise meaningless without reference to what such letters were understood to be under the law of nations.³⁰⁶

The same analysis applies, for present purposes, to Articles I and II. One cannot understand the powers to send and receive ambassadors—and thereby recognize foreign nations—without reference to the perfect rights that nations afforded one another under the law of nations at the time this power was conferred. Likewise, one cannot understand the powers to declare and conduct war and to conclude peace without reference to the customary respect for the perfect rights of nations in peacetime because disregard of such rights gave nations just cause for war. The Constitution's assignment of these precise powers to Congress and the President suggests exclusivity.³⁰⁷ Were courts or states free to disregard perfect rights, they could trigger a war and usurp the political branches' exclusive powers over war and peace. As Blackstone explained regarding English practice,³⁰⁸ judicial respect for the perfect rights of sovereigns served to sustain the sovereign prerogatives of political authorities to determine such questions of foreign relations. Moreover, when other aspects of the law of nations threatened to disturb political branch prerogatives by potentially embroiling the nation in war, the Court felt free to disregard them.

This section explains how federal courts—in particular, the Supreme Court—employed the law of nations from ratification through the War of 1812 to respect perfect rights and, correspondingly, to preserve the constitutional prerogatives of the federal political branches to recognize foreign nations and determine when the United States should risk conflict with such nations. Notwithstanding debate over the existence of a federal municipal common law, Justices recognized that respecting perfect rights of sovereigns under the law of nations operated to sustain federal political authority over questions of war and peace. After the Supreme Court rejected a federal municipal common law in 1812, the Court made the allocation of power justification for enforcing perfect rights more explicit.

1. *Avoiding Bilateral Foreign Conflict.* — In the years immediately following ratification, the Supreme Court (or individual Justices) described

306. See, e.g., *Barron v. City of Balt.*, 32 U.S. 243, 249 (1833) (Marshall, C.J.) (explaining that for a state “[t]o grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress”).

307. See Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 Cal. L. Rev. 699, 724–25 (2008) [hereinafter Clark, *Role of Structure*] (arguing the precise procedures prescribed in the Constitution for amending the Constitution, and adopting laws and treaties of the United States, should be regarded as exclusive); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663, 1737–38 (2004) (explaining that “despite its general powers under the Necessary and Proper Clause, Congress . . . cannot prescribe a method of appointing ‘Officers of the United States’ different from the specific methods laid out in the carefully drawn terms of the Appointments Clause”).

308. See *supra* Parts I.B.3, I.C.

how judicial failure to apply certain principles of the law of nations in a given case would disrespect the perfect rights of another nation. In 1795, *Talbot v. Jansen* considered whether Ballard, a United States citizen, and Talbot, an alleged French citizen, had lawfully captured *The Magdalena*, a Dutch vessel owned by citizens of the Netherlands.³⁰⁹ The evidence showed Ballard actually made the capture, but that Talbot had outfitted Ballard's vessel with the necessary guns.³¹⁰ The Court refused to sanction the capture of a neutral vessel that would violate rights of neutrality and the use of the seas; if sanctioned, such a capture would provide just cause for war against the United States.³¹¹ Writing in seriatim, Justice Paterson found the capture, if made by Ballard alone, to be "altogether unjustifiable" because it was of a vessel of a country "at peace" with the United States.³¹² The question, therefore, was whether Talbot could detain the vessel pursuant to a French commission. Justice Paterson explained that under the law of nations Talbot, though French, could not use United States vessels to capture ships of nations "friendly" with the United States: "The principle deducible from the law of nations, is plain;—you shall not make use of our neutral arm, to capture vessels of your enemies, but of our friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded."³¹³

Justice Iredell similarly explained that unauthorized acts of hostility against a foreign nation violate the law of nations: "[N]o hostilities of any kind, except in necessary self-defence, can lawfully be practised by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority."³¹⁴ Indeed, he continued, "[e]ven in the case of one enemy against another enemy . . . there is no colour of justification for any offensive hostile act, unless it be authorised by some act of the government giving the public constitutional sanction to it."³¹⁵ Like Paterson, Iredell noted that to sanction this capture because it was made under pretense of a French commission would be "insulting to the French Republic, which, from a regard to its own honour and a principle of justice, would undoubtedly disdain all piratical assistance."³¹⁶ In an oft-cited passage, Iredell concluded that the unauthorized capture of a neutral vessel by a United States citizen was "so palpa-

309. 3 U.S. (3 Dall.) 133, 133–34 (1795).

310. *Id.* at 155, 157 (opinion of Paterson, J.).

311. *Id.* at 154–57; see also Vattel, *supra* note 17, at *126, *336–37 (describing rights of neutrality and use of the seas as perfect rights).

312. *Talbot*, 3 U.S. (3 Dall.) at 154 (opinion of Paterson, J.).

313. *Id.* at 156–57. Justice Cushing agreed in principle. Since Ballard was an American citizen and France had not commissioned this capture, "shall not the property, which he has thus taken from a nation at peace with the United States, and brought within our jurisdiction, be restored to its owners?" *Id.* at 168–69 (opinion of Cushing, J.) (emphasis omitted).

314. *Id.* at 160 (opinion of Iredell, J.).

315. *Id.* at 160–61.

316. *Id.* at 159 (emphasis omitted).

ble a violation of our own law (I mean the common law, of which the law of nations is a part . . .) as well as of the law of nations generally; that I cannot entertain the slightest doubt, but that . . . *prima facie*, the District Court had jurisdiction.”³¹⁷ This statement is consistent with the circuit court opinion that Iredell joined two years earlier in *Henfield’s Case*, defending the common law prosecution of an American citizen for breaching United States neutrality in violation of the law of nations.³¹⁸ At the time, Iredell and others simply assumed that the common law (including the law of nations) applied in the United States and supplied federal courts with jurisdiction over, and rules of decision to govern, common law crimes. He simultaneously recognized, however, that the Court had to respect neutral rights because only the government could authorize an act of hostility against another nation.

In another 1795 case, *United States v. Peters*, the Supreme Court applied a rule of the law of nations respecting a foreign nation’s perfect right of territorial sovereignty instead of a competing rule of the law of nations that, in operation, would have undermined its territorial sovereignty.³¹⁹ The question was whether a United States district court could hear a libel for damages against a French vessel, the *Cassius*, at port in Philadelphia. James Yard, a Philadelphia merchant, charged in his libel that the *Cassius*, commissioned by France to cruise against enemy ships, had violated the law of nations by capturing his vessel on the high seas and taking it to France for adjudication.³²⁰ Just two years earlier, as explained, President Washington had recognized the new French government and sought to maintain friendly relations with France.³²¹ The Court issued a writ of prohibition divesting the U.S. district court of jurisdiction, the exercise of which would violate the law of nations:

[B]y the laws of nations, the vessels of war of belligerent powers, duly by them authorized, to cruise against their enemies, and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral ships, in time of war; and the said vessels of war, their commanders, officers and crews, are not amenable before the tribunals of neutral powers for their conduct therein³²²

317. *Id.* at 161. Chief Justice Rutledge agreed with his colleagues that the capture violated the law of nations, explaining, in addition, that the Court had jurisdiction of the cause on the basis of admiralty. *Id.* at 169 (opinion of Rutledge, C.J.).

318. See *supra* notes 260–267 and accompanying text.

319. 3 U.S. (3 Dall.) 121 (1795).

320. *Id.* at 130.

321. See *supra* notes 243–252 and accompanying text.

322. *Peters*, 3 U.S. (3 Dall.) at 130–31; see also *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 91 (1795) (stating that prize cases are “determined by the law of nations” and that “[a] prize court is, in effect, a court of all the nations in the world, because all persons, in every part of the world, are concluded by its sentences”); 6 *The Documentary History of the*

The Court described Yard's libel as "contriving and intending to disturb the peace and harmony subsisting between the United States and the French Republic."³²³ Indeed, it characterized the district court proceedings as "in contempt of the government of the United States, against the laws of nations, and the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States."³²⁴ Thus, rather than proceed to determine whether France had violated neutral rights by capturing the *Cassius*, the Court determined that the law of nations required it to respect territorial sovereignty by leaving this question exclusively to the courts of the capturing country.³²⁵

This case presents an early, clear example of the Supreme Court enforcing the perfect rights of a recognized foreign sovereign and preventing the federal courts from embroiling the United States in foreign conflict. If denied justice by the French tribunal, the aggrieved party was free to seek redress from the political branches of the federal government, which could decide—in the exercise of their foreign relations powers—what action, if any, the United States should take on his behalf. Under the Constitution, however, the judiciary was powerless to take the lead by disregarding the territorial rights of a recognized foreign sovereign under the law of nations and thereby risking foreign conflict.

2. *Interpreting Acts of Congress.* — In *Talbot* and *Peters*, the Court enforced the law of nations in ways that avoided offending the sovereign rights of other nations. The Court was cautious about offending such rights even when interpreting acts of Congress. When a statute did not

Supreme Court of the United States, 1789–1800, at 719–27 (Maeva Marcus et al. eds., 1998). Indeed, courts generally respected the territorial sovereignty of foreign courts by giving faith and credit to their ordinary judgments. See Vattel, *supra* note 17, at *166 (describing respect that courts of one sovereign owe to judgments rendered by courts of another). That said, courts did not respect the judgments of foreign courts acting beyond their territorial sovereignty. This "conflict of laws" rule—derived from deeply held notions of territorial sovereignty and equality—was well established. See *id.* at *165–66 (recognizing absolute connection between sovereign's authority and its territory, and arguing foreign sovereign must respect another jurisdiction's judgment against its subjects found in that jurisdiction); see also *infra* notes 342–355 and accompanying text (discussing *Rose v. Himely*). Along these lines, the Court also refused to acknowledge the legitimacy of tribunals that foreign nations established within the territorial jurisdiction of the United States. In *Glass v. The Sloop Betsey*, the Court addressed two questions: first, whether United States district courts possessed the full powers of admiralty courts and, second, "whether any foreign nation had a right, without the positive stipulations of a treaty, to establish in this country, an admiralty jurisdiction for taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its enemies." 3 U.S. (3 Dall.) 6, 15 (1794). After holding that district courts do possess the full powers of admiralty, the Court held that "no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties." *Id.* at 16 (emphasis omitted).

323. *Peters*, 3 U.S. (3 Dall.) at 130 (emphasis omitted).

324. *Id.* at 131 (emphasis omitted).

325. *Id.* at 130; see also Vattel, *supra* note 17, at *155–69 (describing obligation to respect perfect rights of others to govern within their own domains).

clearly invade the sovereign rights of another nation, the Court read it to respect those rights, and thereby protected the United States from conflicts that Congress had not plainly authorized. When Congress clearly intended to take action that risked foreign conflict, however, the Court enforced congressional directives as written.

a. *Reading Unclear Acts of Congress to Respect Perfect Rights.* — The famous 1804 case, *Murray v. The Schooner Charming Betsy*,³²⁶ exemplifies the Court's practice of interpreting unclear congressional directives to respect perfect rights recognized under the law of nations.³²⁷ During the undeclared hostilities with France, Congress enacted the Non-Intercourse Act of 1800, prohibiting commercial intercourse between residents of the United States and residents of any French territory.³²⁸ In *The Charming Betsy*, the Court held that this Act did not authorize seizure of an American-built vessel that an American captain sold at a Dutch Island to an American-born Danish burgher, who proceeded to carry the vessel for trade to a French island.³²⁹ Chief Justice Marshall, writing for the Court, began by observing that a federal statute "ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."³³⁰ He determined that the Act did not plainly express such an intent: "If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed."³³¹ By applying this canon of construction, Marshall ensured that Congress, rather than the Court, would determine whether the United States should risk foreign conflict by interfering with perfect rights under the law of nations to engage in neutral commerce.³³² Unless and until Congress clearly manifested its intent to interfere with such rights, the Court would not risk imputing to Congress such a major foreign policy decision.

b. *Upholding Clear Congressional Derogations from the Law of Nations.* — When, however, Congress enacted clear laws generating or risking con-

326. 6 U.S. (2 Cranch) 64 (1804).

327. For an earlier example, see *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 29–32 (1801).

328. Federal Non-intercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801).

329. *The Charming Betsy*, 6 U.S. (2 Cranch) at 64–65, 120–21.

330. *Id.* at 118.

331. *Id.* at 119 (emphasis omitted).

332. See Vattel, *supra* note 17, at *336–37 (recognizing perfect right of neutral nation to engage in neutral trade). Curtis Bradley has argued that, as a matter of separation of powers, courts should adhere to *The Charming Betsy* canon, *inter alia*, to generally avoid putting "the United States in violation of international law contrary to the wishes of the political branches." Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *Geo. L.J.* 479, 525–26 (1998).

flict, the Court recognized a duty on its part to enforce such directives notwithstanding their deviation from background rules of the law of nations. For example, in *Bas v. Tingy*,³³³ decided in 1800, the Court applied a federal statute suspending the law of nations in some respects and regulating salvage rights in ships or goods “retaken from the enemy.”³³⁴ One question presented was whether France, with whom the United States was engaged in the “Quasi-War,” was an “enemy” under the statute.³³⁵ Justice Chase observed that “[t]here are four acts, authorised by our government, that are demonstrative of a state of war.”³³⁶ After enumerating these acts, he explained that “[t]his suspension of the law of nations, this right of capture and re-capture, can only be authorised by an act of the government, which is, in itself, an act of hostility.”³³⁷ Chase went on to enforce the congressional directive, as did each of the other Justices.³³⁸

Similarly, in *The Schooner Adeline*, the Court applied an act of Congress specifying the value of a ship’s cargo that recaptors were entitled to recover as salvage.³³⁹ The recaptors argued that the Court should assess value according to the law of nations, which provided a greater amount than the statute. The statute, they argued, was “an unreasonable departure from an universal usage founded on justice and common utility.”³⁴⁰ The Court rejected this argument, following the express language of the statute: “The statute is expressed in clear and unambiguous terms We cannot interpose a limitation or qualification upon the terms which the legislature has not itself imposed.”³⁴¹

3. *The Ascendancy of the Allocation of Powers Approach*. — In the tumultuous early decades of the nineteenth century, the Court came to link more expressly the ideas discussed in the preceding sections—that courts should enforce perfect rights under the law of nations unless and until Congress clearly derogated from them—with the constitutional structure. Specifically, the Court recognized that the Constitution allocates to the political branches, not courts, the powers to recognize foreign nations and to risk bilateral conflict with such nations by interfering with their perfect rights.

333. 4 U.S. (4 Dall.) 37 (1800).

334. Act of Mar. 2, 1799, ch. 24, § 7, 1 Stat. 709, 716 (repealed 1800).

335. *Bas*, 4 U.S. (4 Dall.) at 37.

336. *Id.* at 43–44 (recounting congressional authorization to resist attempted search by French vessel, capture any vessel attempting to compel search, recapture seized American vessel, and capture any armed French vessel).

337. *Id.* at 44.

338. *Id.*

339. 13 U.S. (9 Cranch) 244 (1815).

340. *Id.* at 279–80 (argument of counsel).

341. *Id.* at 287 (Story, J.). Conversely, of course, Congress could grant greater protection to foreign sovereign interests than the law of nations provided. See, e.g., *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 428 (1814) (“The right of capture is entirely derived from the law It is a limited right, which is subject to all the restraints which the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed.”).

*Rose v. Himely*³⁴² decided in 1808, illustrates the Court's emerging practice of linking respect for the rights of foreign sovereigns to the Constitution's allocation of powers. A French privateer captured cargo in international waters that the original owner had shipped from the French colony of Santo Domingo.³⁴³ The privateer took the cargo to Cuba and sold it to a purchaser who, in turn, brought it to South Carolina. The original owner filed a libel there to recover his goods. While this action was pending, a tribunal sitting in Santo Domingo pronounced a sentence of condemnation in absentia, and the purchaser defended his title on this basis.³⁴⁴ The question before the Court was whether U.S. courts must give effect to the foreign judgment.

Before answering this question, the Court deemed it necessary to consider "the relative situation of St. Domingo and France."³⁴⁵ It was important to the Court, as a preliminary matter, to identify the sovereign whose rights were at issue: The question whether the United States had recognized a breakaway territory as a sovereign nation was analytically antecedent to the question whether the Court must uphold its rights under the law of nations. Santo Domingo had been a colony of France and had declared its independence. At the time of suit, however, "France still asserted her claim of sovereignty, and had employed a military force in support of that claim."³⁴⁶ Invoking Vattel, the purchaser argued that Santo Domingo, "having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact."³⁴⁷ The Court rejected this argument on the ground that it is for the government rather than its courts to decide whether and when to recognize a colony as a sovereign nation:

But the language of [Vattel] is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.³⁴⁸

The reason for this ruling was that judicial recognition of Santo Domingo as an independent nation—while France still claimed sovereignty—would be regarded by France as a violation of "that exclusive dominion which every nation possesses within its own territory."³⁴⁹ Accordingly, decisions regarding when and how to recognize Santo Domingo,

342. 8 U.S. (4 Cranch) 241 (1808), overruled in part by *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

343. *Id.* at 241–42.

344. *Id.*

345. *Id.* at 272 (emphasis omitted).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 274.

like the original decision to recognize France, must be made by the political branches rather than the courts.³⁵⁰ In a subsequent case, Marshall elaborated the allocation of powers rationale underlying this conclusion:

[These questions] belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.³⁵¹

While thus upholding the territorial sovereignty of France as the properly recognized nation, *Rose v. Himely* also illustrates the limits of such sovereignty. Had the French privateer taken the captured cargo to a French tribunal and obtained a sentence of condemnation, U.S. courts would have applied the law of nations to foreclose reexamination of its judgment.³⁵² In this case, however, the Court stressed that the ship “was captured more than *ten* leagues from the coast of St. Domingo, [and] was never carried within the jurisdiction of the tribunal of that colony.”³⁵³ Under these circumstances, the sentence rendered by that court while the goods were in South Carolina constituted an exercise of extraterritorial “jurisdiction which, according to the law of nations, its sovereign could not confer.”³⁵⁴ Because the court of Santo Domingo “had no jurisdiction,” the Court reasoned, “the proceedings are *coram non iudice*, and must be disregarded.”³⁵⁵

The Court’s reliance on the Constitution’s allocation of powers was also evident in *The Schooner Exchange v. McFaddon*,³⁵⁶ decided in 1812—the same year the Court repudiated federal common law crimes.³⁵⁷ A federal court had permitted the original owners of a French warship found in the port of Philadelphia to libel the vessel on the grounds that French nationals had “violently and forcibly taken” the ship from them on the high seas “in violation of the rights of the libellants, and of the law of nations,” and that “no sentence or decree of condemnation had been pronounced against her, by any [French] court of competent jurisdiction.”³⁵⁸ The question was “whether an American citizen can assert, in an

350. “No doctrine [was] better established,” according to Justice Story, than that sovereigns have exclusive authority to recognize new states that emerge from revolutions. *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 324 (1818). “[U]ntil such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.” *Id.*

351. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818).

352. *Rose*, 8 U.S. (4 Cranch) at 276 (“If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive.”).

353. *Id.*

354. *Id.*

355. *Id.*

356. 11 U.S. (7 Cranch) 116 (1812).

357. See *supra* notes 285–289 and accompanying text.

358. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117.

American court, a title to an armed national vessel [of another country], found within the waters of the United States.”³⁵⁹ The Court answered “no,” finding it to be a “principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.”³⁶⁰

Significantly, the opinion made clear that this immunity was a consequence of the Constitution’s allocation of foreign relations powers. The exemption for foreign warships in the United States, like diplomatic immunity, could not derive its “validity from an external source” because the “jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”³⁶¹ Thus, it “must be traced up to the consent of the nation itself”³⁶² in conformity with “those principles of national and municipal law by which it ought to be regulated.”³⁶³ In this case, the Court suggested that the United States’s consent could be implied from the practice of nations and could be destroyed only by “the sovereign power of the nation.”³⁶⁴

This “sovereign power” rested with the political branches, not the courts. This meant that warships were immune from judicial process, unless and until the political branches decided otherwise. Chief Justice Marshall acknowledged that, “[w]ithout doubt, the sovereign of the place is capable of destroying” the immunity suggested by the law of nations.³⁶⁵ “He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals.”³⁶⁶ The first method involves the use of military force, and the second involves the exercise of legislative power. In no case, however, could the nation’s courts disregard the implied immunity of foreign warships on their own.

Marshall went even further. To ensure that the political branches, not the courts, make the decision to risk foreign conflict by invading the rights of foreign sovereigns, the opinion imposed a clear statement rule similar to the one employed in *The Charming Betsy*: “But until such power [to destroy implied immunity] be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.”³⁶⁷ That the decision rested on the allocation of powers draws additional support from Marshall’s suggestion “that the sovereign power of the nation is alone competent to avenge wrongs committed by a sover-

359. *Id.* at 135.

360. *Id.* at 145–46.

361. *Id.* at 136.

362. *Id.*

363. *Id.* at 135–36.

364. *Id.* at 146.

365. *Id.*

366. *Id.*

367. *Id.*

aign, that the questions to which such wrongs give birth are rather questions of policy than of law, [and] that they are for diplomatic, rather than legal discussion.”³⁶⁸

The Court’s holding that the United States could deviate from the practice of nations, but only on the basis of clear instructions by the political branches, is in accord with its refusal in *Peters* to adjudicate an alleged violation of neutral rights on the ground that the law of nations precluded another country’s courts from interfering with the exclusive territorial jurisdiction of the capturing country’s prize courts.³⁶⁹ In both cases, the Court refused to determine whether captures of American vessels by French vessels violated the neutral rights of the United States under the law of nations, instead applying principles that upheld the prerogatives of the political branches by avoiding conflict with France.

There is, however, one potentially significant difference between these decisions. *Peters* applied a rule (the exclusive territorial jurisdiction of prize courts) derived from a perfect right (the exclusive territorial sovereignty of states). By contrast, *The Schooner Exchange* applied a practice of nations (the immunity of foreign warships) that went beyond clearly defined perfect rights.³⁷⁰ In both cases, however, the Constitution’s allocation of powers favored judicial application of the rule in question because departure could have led to war. *Peters* upheld the Constitution’s allocation of war powers by respecting perfect rights because any violation of such rights would have given France just cause for war. Although *The Schooner Exchange* did not involve an established perfect right, it ap-

368. *Id.* The Court similarly acknowledged the political branches’ power to depart from the law of nations in *Thirty Hogsheads of Sugar v. Boyle*. 13 U.S. (9 Cranch) 191 (1815). During the War of 1812, the Court considered whether it should condemn, as enemy property, produce that a Dane had shipped on a British vessel from Santa Cruz, a Danish island that Britain had subdued. *Id.* at 195. In an opinion by Chief Justice Marshall, the Court held that condemnation was proper even though Denmark was not an enemy country. Under the law of nations as enforced in British courts, the soil produce of the island became British, and thus enemy property, when Britain took control of the island. *Id.* at 197. The Court proceeded to adopt this rule for the United States. Marshall explained that “[t]he law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America.” *Id.* at 198. It was appropriate for the United States to adopt this rule because, “[t]he United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law.” *Id.* Though “principles [of the law of nations] will be differently understood by different nations under different circumstances,” British prize law “continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.” *Id.* That power belonged not to the courts, but to the political branches.

369. See *supra* notes 319–325 and accompanying text (describing *Peters*).

370. *The Schooner Exchange* did, however, describe the immunity that it accorded foreign warships as analogous to the immunity of foreign ministers, 11 U.S. (7 Cranch) at 145–46, a perfect right in Vattel’s lexicon, Vattel, *supra* note 17, at *452–64. Nonetheless, Vattel did not explicitly describe the former immunity as a perfect right.

plied a customary immunity just as important to the peace of nations.³⁷¹ Indeed, counsel for the United States warned that “[i]f the courts of the United States should exercise such a jurisdiction it will amount to a judicial declaration of war.”³⁷² Thus, an essential part of the Court’s rationale for following the practice of nations in *The Schooner Exchange* was that the Constitution assigns responsibility to the political branches, not the courts, to determine whether the United States should take action likely to provoke war with another nation.³⁷³

The War of 1812 generated a flurry of significant prize cases in the Supreme Court. The Act of Congress declaring war against Great Britain authorized the President to issue commissions to privateers to cruise against British vessels and goods.³⁷⁴ In a subsequent act, Congress required any American vessel leaving the United States for a foreign port to give a bond with security that it would not trade with enemies of the United States.³⁷⁵ In the next few years, the Supreme Court resolved the legality of several captures made by privateers pursuant to the declaration of war and presidential commissions. It enforced the congressional directive of conflict, but respected the prerogatives of Congress to limit the degree of conflict by carrying the directive no further than Congress had clearly provided in light of the background principles of the law of nations against which Congress had legislated.³⁷⁶

371. The Court explained that interference with a sovereign’s public armed ship, like interference with a public minister, “cannot take place, without affecting his power and his dignity.” *The Schooner Exchange*, 11 U.S. (7 Cranch) at 144.

372. *Id.* at 126.

373. Because the Court’s decision rested on the Constitution’s allocation of powers, *The Schooner Exchange* suggests that states—like federal courts—are precluded from denying immunity to French warships. In addition to implicating federal war powers, failure to uphold immunity arguably would have undermined U.S. recognition of France. As the Court explained in another case, the judiciary must respect the sovereign rights of a foreign state because “[t]o him all the departments of the government make but one sovereignty.” *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 299 (1822). Under this theory, a violation of such rights by either the federal judiciary or the states would usurp powers assigned to the political branches. See Clark, *Federal Common Law*, *supra* note 74, at 1300–06, 1308–09, 1319 (explaining application of the law of nations is sometimes necessary to preserve constitutional authority of federal political branches to conduct foreign relations).

374. Act of June 18, 1812, ch. 102, 2 Stat. 755.

375. Act of July 6, 1812, ch. 129, § 1, 2 Stat. 778, 778–79 (repealed 1815).

376. For example, *The Rapid* considered whether Congress had authorized capture of an American vessel engaged in trade with the enemy. 12 U.S. (8 Cranch) 155, 160 (1814). Because the vessel qualified as belligerent under background principles of the law of nations, the Court found the capture to be lawful. *Id.* at 163. Based on these principles, the Court proceeded to decide in several other 1814 cases whether vessels captured by commissioned American privateers were belligerent (and thus liable to lawful capture) under the law of nations. See *The Grotius*, 12 U.S. (8 Cranch) 456, 460 (1814) (finding case to differ “in no material respect from that of the *Joseph*”); *The Joseph*, 12 U.S. (8 Cranch) 451, 454–56 (1814) (upholding capture under *The Rapid* and *The Alexander* and explaining that captures may be made on high seas or within territorial limits of the United States); *The Hiram*, 12 U.S. (8 Cranch) 444, 451 (1814) (“Upon the whole, the Court is of

One of the most important decisions from this period is *Brown v. United States*.³⁷⁷ It provides an interesting contrast to *The Schooner Exchange* insofar as *Brown* held unlawful a confiscation of enemy property—that the law of nations *permitted*—on the ground that Congress had not authorized it. The Court considered whether the U.S. Attorney for the District of Massachusetts could lawfully confiscate British property (550 tons of pine timber scheduled to be shipped from the United States to Great Britain) found within the United States at the commencement of hostilities between the United States and Britain.³⁷⁸ Apparently without the President’s knowledge or consent, the U.S. Attorney filed a libel to condemn the timber as enemy property.³⁷⁹

Chief Justice Marshall had “no doubt” that the United States had “power” to confiscate this property under the law of nations: “That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded.”³⁸⁰ That the United States had power to confiscate the property, however, was insufficient to sustain the confiscation.³⁸¹ Congress had to exercise that power to make it lawful. Since Congress had not done so, Marshall feared that judicial condemnation of the property would usurp political authority vested by the Constitution in Congress.³⁸²

Marshall expressly rejected the argument that the principle of the law of nations that subjects enemy property to confiscation “constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power.”³⁸³ War “is not an absolute confiscation of this property, but simply confers the right of confiscation” upon the sovereign.³⁸⁴ In other words, the custom under the law of nations that a nation may confiscate enemy property during war

opinion that there is no substantial difference between this case and that of the *Julia*”); *The St. Lawrence*, 12 U.S. (8 Cranch) 434, 444 (1814) (“The *St. Lawrence* was certainly guilty of trading with the enemy; and, being taken on her way from one of his ports to the United States, she is liable, on that ground, to be confiscated as prize of war”); *The Sally*, 12 U.S. (8 Cranch) 382, 383 (1814) (“This case cannot be distinguished from that of the *Rapid*.”); *The Venus*, 12 U.S. (8 Cranch) 253, 297–99, 315–16 (1814) (holding that capture of property by American privateers was unlawful if American citizens, who had settled in Great Britain, had shipped property before learning of war’s outbreak and showed intent to return to United States); *The Aurora*, 12 U.S. (8 Cranch) 203, 219–20 (1814) (finding *The Julia* to control); *The Julia*, 12 U.S. (8 Cranch) 181, 190 (1814) (holding that use of enemy’s license or protection on voyage to neutral country subjects vessel and goods to lawful capture); *The Alexander*, 12 U.S. (8 Cranch) 169, 179 (1814) (“The principles settled in the case of the *Rapid* decides this cause so far as respects the character of the *Alexander* and her cargo.”).

377. 12 U.S. (8 Cranch) 110 (1814).

378. *Id.* at 121–23.

379. *Id.* at 121–22.

380. *Id.* at 122.

381. *Id.* at 123.

382. *Id.* at 129.

383. *Id.* at 128.

384. *Id.* at 123.

is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.³⁸⁵

Under the Constitution, Marshall continued, it rests with Congress, not courts, to make the sovereign determination whether the United States should confiscate enemy property during war: “[F]rom the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law”³⁸⁶ “Like all other questions of policy,” the question whether to confiscate enemy property found within the United States, “is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.”³⁸⁷ Thus, “until that will shall be expressed, no power of condemnation can exist in the Court.”³⁸⁸

Finally, Marshall determined that Congress’s declaration of war did not, in itself, “authorize proceedings against the persons or property of the enemy found, at the time, within the territory.”³⁸⁹ Contrasting the confiscation of enemy property found within the United States with that captured on the high seas, he noted how the declaration of war specifically authorized the President to commission privateers and make general reprisals against British vessels and goods.³⁹⁰ This seizure, however, was not made by a commissioned privateer, nor had the U.S. Attorney acted “under the authority of letters of marque and reprisal.”³⁹¹ Indeed, Marshall specifically found that the U.S. Attorney did not make the seizure “under any instructions from the president of the United States.”³⁹² Accordingly, since “the power of confiscating enemy property is in the legislature, and . . . the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of

385. *Id.* at 128.

386. *Id.* at 123.

387. *Id.* at 129.

388. *Id.* at 123.

389. *Id.* at 126.

390. *Id.* at 127.

391. *Id.*

392. *Id.* at 121–22. Marshall suggests here that the declaration of war may have empowered the President to formally authorize seizures through letters of marque and reprisal or some other form of instruction, but had not so empowered U.S. Attorneys acting without a formal instruction from the President.

war,” the courts were without authority to issue a sentence of condemnation.³⁹³

Fairly read, *Brown* rests exclusively on a principle of constitutional allocation of powers—namely, that the political branches must determine the extent to which the United States will engage in, or escalate, hostilities with foreign nations. In *Brown*, unlike prior cases, the law of nations was not integral to the constitutional analysis. *The Schooner Exchange*, for example, reserved to Congress the power to create or escalate bilateral foreign conflict by authorizing an act that the law of nations *prohibited* (disregarding foreign warship immunity).³⁹⁴ *Brown*, however, reserved to Congress the power to create or escalate foreign conflict by engaging in an act that the law of nations *permitted* (confiscating enemy property). *The Schooner Exchange* Court preserved congressional authority through judicial enforcement of a principle of the law of nations; the *Brown* Court preserved congressional authority by declining to exercise a sovereign prerogative under the law of nations. In both cases, the Court sought to uphold the Constitution’s allocation of powers by preserving a foreign relations power that it believed rested exclusively with Congress.

Lastly, in 1815, the Court resolved one of the most famous War of 1812 capture cases, *The Nereide*,³⁹⁵ by reference to the perfect rights of sovereigns and the Constitution’s allocation of powers. The question presented was whether it was lawful for a commissioned United States privateer to capture goods belonging to a neutral (a Spaniard) that the privateer found on an enemy (English) vessel.³⁹⁶ According to the Court, “a neutral has a perfect right to transport his goods in a belliger-

393. *Id.* at 129. In effect, since the declaration of war did not plainly authorize a U.S. Attorney to confiscate enemy property found in the United States in these circumstances, the Court applied a clear statement rule akin to that of *The Charming Betsy*, *supra* notes 326–332 and accompanying text, to avoid foreign conflict that Congress had not expressly authorized. In dissent, Justice Story disagreed with Chief Justice Marshall’s conclusion that the declaration of war had not authorized the confiscation. Justice Story first explained that he found the confiscation of enemy property located within the United States to be lawful under the law of nations. *Brown*, 12 U.S. (8 Cranch) at 139–45 (Story, J., dissenting). He next asked “whether congress (for with them rests the sovereignty of the nation as to the right of making war, and declaring its limits and effects) have authorized the seizure of enemies’ property afloat in our ports.” *Id.* at 145. He found that the Act did authorize it, and that even if it did not do so expressly, the President has “a right to employ all the usual and customary means acknowledged in war, to carry it into effect.” *Id.* Thus, “there being no limitation in the act, it seems to follow that the executive may authorize the capture of all enemies’ property, wherever, by the law of nations, it may be lawfully seized.” *Id.* Justice Story, like Chief Justice Marshall, did not question the authority of the political branches in foreign affairs or assert that federal courts should take the lead in incorporating any of the law of nations as federal law. He simply believed, unlike Chief Justice Marshall, that Congress had authorized the seizure in question and that the President had authority to effectuate it absent congressional limitation.

394. See *supra* notes 356–373 and accompanying text.

395. 13 U.S. (9 Cranch) 388 (1815).

396. *Id.* at 388–90.

ent vessel.”³⁹⁷ Although “[b]elligerents have a full and perfect right to capture enemy goods and articles going to their enemy,” the law of nations rendered neutral goods exempt from capture.³⁹⁸ The captors nonetheless argued, among other things, that since “Spain . . . would subject American property, under similar circumstances, to confiscation, . . . the property, claimed by Spanish subjects in this case, ought to be condemned [sic] as prize of war.”³⁹⁹ Chief Justice Marshall, writing for the Court, emphatically rejected this argument on the ground that it was not the judiciary’s place to decide whether or how to retaliate against a foreign government for its breach of the law of nations:

[T]he court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics.⁴⁰⁰

Marshall continued: “If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose.”⁴⁰¹ He concluded that until “such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.”⁴⁰²

Scholars have cited this passage as evidence that federal courts should take the lead over the political branches in generally adopting principles of the law of nations as jurisdiction-creating, preemptive federal law.⁴⁰³ The language cannot bear the full weight of this argument. In context, Marshall was observing that federal courts must adhere to per-

397. *Id.* at 426.

398. *Id.* at 427. Like the Court, Vattel described neutral nations to “enjoy perfect liberty to trade” in “goods which have no relation to war An attempt to interrupt or put a stop to this trade would be a violation of the rights of neutral nations, a flagrant injury to them.” Vattel, *supra* note 17, at *336–37 (emphasis omitted).

399. *The Nereide*, 13 U.S. (9 Cranch) at 422.

400. *Id.* at 422–23. In *Ware v. Hylton*, Virginia debtors similarly argued that Great Britain’s failure to carry out certain provisions of the Treaty of Paris absolved them of their contractual obligations. 3 U.S. (3 Dall.) 199, 202 (1796). The Court rejected this argument and ultimately enforced the debt, holding that the Treaty of Paris preempted Virginia’s debt confiscation statute. *Id.* at 237, 245.

401. *The Nereide*, 13 U.S. (9 Cranch) at 423.

402. *Id.*

403. See Koh, *supra* note 2, at 1825 n.8, 1827–28 (“It seems unlikely that the Chief Justice would have understood the Supreme Court to be ‘bound by the law of nations’ had that law merely represented the law of the several states.”); Stephens, *supra* note 2, at 394–95 & n.8 (“[I]f international law is part of federal law, it is the law of the land, binding

fect rights under the law of nations in order to preserve the constitutional prerogatives of the political branches and avoid creating conflict with other nations. Indeed, Marshall proceeded in just this fashion in *The Nereide*. He described as a “universally recognized . . . rule of the law of nations” that “a neutral may lawfully put his goods on board a belligerent ship, for conveyance on the ocean.”⁴⁰⁴ By upholding this principle and restoring captured goods to their Spanish owner absent congressional direction to the contrary, the Court respected Spain’s neutral rights and refrained from generating bilateral foreign conflict that the political branches had not sanctioned.

* * *

In the infancy of the United States, both potential and actual foreign conflicts generated numerous occasions for federal courts to consider the status of the law of nations within the American federal system. At the time, the law of nations governing state-state relations respected the perfect rights of independent sovereigns, and thus tended to avoid war among nations. In the first two decades following ratification, the Court explained how upholding perfect rights—sometimes in preference to other principles of the law of nations that would constrain foreign sovereignty—kept the judiciary from generating such conflict. With the repudiation of federal common law crimes and the onset of the prize cases that arose during the War of 1812, the Court came to use the language of allocation of powers to describe judicial adherence to rules drawn from the law of nations. The Court inferred from the Constitution’s allocation of foreign relations powers to the political branches that it should apply principles of the law of nations when necessary to avoid war with other nations. Because prize cases, in particular, often dealt with the perfect rights of territorial sovereignty and neutrality, the Court came to view adherence to the law of nations in prize cases as “a necessary appendage to the power of war, and negotiation with foreign nations.”⁴⁰⁵

In such cases, the Court enforced perfect rights as an implicit requirement of the Constitution’s allocation of recognition and war powers to the political branches. By respecting such rights, the Court avoided giving nations reason to wage hostilities against the United States, sustaining the powers of the political branches to determine whether and to

on the states pursuant to the supremacy clause; and state courts are bound to follow federal court decisions as to its meaning.”).

404. *The Nereide*, 13 U.S. (9 Cranch) at 425. This rule is “founded on the plain and simple principle that the property of a friend remains his property wherever it may be found.” *Id.*

405. Story, *supra* note 209, § 866; see also *La Amistad de Rues*, 18 U.S. (5 Wheat.) 385, 390–91 (1820) (stating that failure of “neutral prize tribunals” to exercise their jurisdiction according to the law of nations would create “irritations and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties”).

what extent the United States should be at war or peace. This structural inference was grounded in background assumptions about the relationship between the prerogatives of the political branches in foreign affairs and the rights of sovereignty recognized by the law of nations. In almost all cases in which the Court applied the law of nations to uphold the Constitution's allocation of powers, it invoked a law of nations principle recognized as a perfect right—the violation of which gave a sovereign just cause for war.⁴⁰⁶ In the English system, Blackstone described judicial enforcement of such rights as essential to sustaining the prerogatives of the Crown in foreign relations.⁴⁰⁷ It is evident that the Marshall Court likewise considered judicial enforcement of the perfect rights of sovereigns as essential to sustaining the constitutional prerogatives of the political branches in foreign affairs.

None of these cases expressly involved preemption of state law; in each, the federal court exercised exclusive jurisdiction, and state law did not purport to provide a conflicting rule of decision. Moreover, none involved a question of arising under jurisdiction. But insofar as allocation of powers supplied a rule of decision in these cases, there are implications for preemption and arising under jurisdiction. The Constitution preempts conflicting state law, and presumably would have governed as the rule of decision had these cases originally been brought in state court or had they involved conflicting state law. It is beyond the scope of this Article to catalogue those principles of the law of nations that the Founders would have deemed essential to upholding the constitutional allocation of powers. Suffice it to say that each case in which the Court applied the law of nations involved what was understood to be a right whose violation could lead to war or escalate an existing war. In theory, the constitutional rule of decision that applied to certain of these cases could have been a predicate for arising under jurisdiction (had Congress authorized it), but alternative bases authorized by Congress were generally adequate at the time to confer jurisdiction in such cases.⁴⁰⁸

406. Even in the earlier cases of the 1790s, when the Court applied principles of the law of nations to keep the United States out of conflict without expressly referencing separation of powers, the Court did so by respecting the perfect rights of sovereigns.

407. See *supra* Part I.C.

408. It is important to bear in mind that many, if not most, cases falling under other heads of Article III jurisdiction—including those likely to implicate the law of nations—would not have involved this constitutional rule of decision. Countless cases that fell within non-arising under Article III jurisdiction and in which the law of nations could provide a rule of decision in federal court would not have involved separation of powers. Cases involving the law merchant and private law maritime would not generally involve separation of powers, see *supra* notes 290–291 and accompanying text, nor necessarily would cases involving envoys, see Vattel, *supra* note 17, at *461 (“They are not public ministers, and consequently not under the protection of the law of nations.”), or foreigners, see, e.g., *id.* at *172 (“[F]oreigners who commit faults are to be punished according to the laws of the country.”); *id.* at *173 (“[D]isputes that may arise . . . between a foreigner and a citizen, are to be determined . . . according to the laws of the place.”). Thus, the Arising Under Clause would not subsume the other categories of Article III

IV. A STRUCTURAL FEDERAL COMMON LAW OF NATIONS

Some contemporary scholars have characterized customary international law as federal common law because federal courts appear to “make” its rules and state courts are bound to follow such rules even in the face of contrary state law. In reality, the Supreme Court has *not* considered itself free to adopt or abandon these rules at will. Rather, as this Part explains, the Court has continued to apply the traditional perfect rights of sovereigns (or their modern counterparts) as a way of implementing the Constitution’s allocation of powers over foreign relations. In other words, the Court’s application of these rules does not rest on an interpretation of any lawmaking powers it purportedly enjoys under Article III, but on its interpretation of Congress’s and the President’s exclusive powers under Articles I and II. From this perspective, it follows that states must adhere to these rules not because they are supreme in and of themselves, but because they uphold the Constitution’s assignment of foreign affairs powers to the federal political branches and its corresponding denial of such powers to the states. As in the eighteenth and nineteenth centuries, adherence to such rules has functioned as an incident of recognition and preserved amicable bilateral relations between the United States and other nations, leaving to the political branches the often complex policy questions of whether, how, and when to depart from such rules.

This Part describes how, from the early decades of the Republic and across changing eras of American legal thought, the Court has continued to enforce what were traditionally considered perfect rights of sovereign nations (or close analogues) as a means of upholding key allocation of powers principles. Viewing judicial adherence to such rights as necessary to uphold the Constitution’s allocation of powers provides a persuasive constitutional basis for the Court’s most important decisions from the founding to the present.

A. *Pre-Erie Enforcement of the Law of Nations*

Throughout the nineteenth century, the Court continued to employ principles of the law of nations as it had in the first two decades. It applied much of the law of nations without considering its source, and ad-

jurisdiction, but there would be some overlap—a common and unremarkable phenomenon. That some cases would qualify for federal jurisdiction under both the Arising Under Clause and another head of Article III jurisdiction was an unavoidable (and unremarkable) feature of delineating categories of cases in which federal court jurisdiction would serve the purposes of union. For example, it is unremarkable that cases between citizens of different states might fall under both diversity and arising under jurisdiction if governed by, for instance, a federal statute; or that cases to which the United States is a party might fall under both party-based and arising under jurisdiction if governed by federal law. It would have been impossible for the Framers to devise mutually exclusive categories of federal jurisdiction and there is no apparent reason why they would have attempted to do so.

hered to traditional rules of state-state relations as a means of upholding federal allocation of powers. Continuing well beyond the nation's first decades, federal courts applied the law of nations in countless cases over which they had jurisdiction without pausing to consider its source. Two situations in which such law was frequently applied were diversity cases and cases of admiralty and maritime jurisdiction involving private rights. In neither type of case did courts generally regard the law of nations as constituting part of "the Laws of the United States" within the meaning of either Article III's Arising Under or Article VI's Supremacy Clauses. In this respect, these judges were in accord with the Framers.⁴⁰⁹

For example, in the nineteenth century, the Supreme Court did not consider the law merchant—a branch of the law of nations—to be part of "the Laws of the United States" within the meaning of the Supremacy Clause. *Swift v. Tyson* applied the law merchant to resolve a commercial dispute between citizens from different states.⁴¹⁰ Neither federal nor state courts considered the other's decisions on questions of general law to be binding in subsequent cases.⁴¹¹ In *Swift* itself, of course, the Court declared that even assuming "the doctrine to be fully settled in New York," it was necessary for the Court "to express [its] own opinion of the true result of the commercial law."⁴¹² Shortly thereafter, New York's highest court was urged to follow "the opinion of Mr. Justice Story in the recent case of *Swift v. Tyson*," but the court declined the invitation and described the Supreme Court as a "tribunal, whose decisions are not of paramount authority" on questions of general law.⁴¹³ If the law merchant had been considered part of "the Laws of the United States," then New York courts would not have been free to disregard *Swift* and their decisions would have provided a basis for Supreme Court review. In fact, as the *Erie* Court later explained, the federal courts' inability to bind state courts is what "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court."⁴¹⁴ Moreover, *Swift* expressly acknowledged, as English courts long had, that general commercial law did not supplant local variations and usages.⁴¹⁵ In the pre-*Erie* era, federal courts with jurisdiction

409. See supra Part II.C.

410. 41 U.S. (16 Pet.) 1 (1842). Of course, jurisdiction in cases applying the *Swift* doctrine was based on diversity of citizenship rather than federal question jurisdiction.

411. See Fletcher, General Common Law, supra note 74, at 1538–54 (describing cases in which that principle operated). See generally Caleb Nelson, The Persistence of General Law, 106 Colum. L. Rev. 503, 506 (2006) (explaining that "state and federal judges exercised independent judgment" on questions of general law around time of *Swift*). When the Supreme Court began "federalizing" aspects of general law in the late nineteenth and early twentieth centuries, some state courts came to describe Supreme Court determinations of general federal law as binding. See Bellia, Federal Common Law, supra note 291, at 897–900.

412. *Swift*, 41 U.S. (16 Pet.) at 18, 19.

413. *Stalker v. M'Donald*, 6 Hill 93, 95, 112 (N.Y. Sup. Ct. 1843).

414. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–75 (1938).

415. See supra note 85 and accompanying text.

(whether based on admiralty, diversity, or some other category) simply followed the law of nations in cases where it applied and typically saw no need to explain the precise source of such law.

By contrast, in prize cases—and other cases involving the perfect rights of foreign nations—federal courts frequently applied rules derived from the law of nations as a way of upholding the constitutional prerogatives of Congress and the President to recognize foreign states and maintain amicable relations with such states.⁴¹⁶ This practice continued beyond the early years of the Republic. *The Paquete Habana*⁴¹⁷ provides an important example. During the Spanish-American War, U.S. naval forces established a blockade near Cuba and captured two Spanish fishing vessels attempting to reach Havana. The vessels were brought to Key West where the district court, exercising admiralty jurisdiction, held that the vessels and cargoes were prizes of war.⁴¹⁸ The question before the Supreme Court was whether “the fishing smacks were subject to capture by the armed vessels of the United States during the recent war.”⁴¹⁹ The Court chose to adhere to the “ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law” that coastal fishing vessels are exempt from capture.⁴²⁰

After reviewing the practice of nations (including the United States),⁴²¹ the Court explained in a famous passage that it would follow such law in the absence of any “controlling executive or legislative act or judicial decision” to the contrary.⁴²² According to the Court:

International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and

416. See *supra* Part III. The Civil War gave rise to an interesting variation. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), the Supreme Court famously upheld President Lincoln’s decision to blockade Southern ports following the commencement of the Civil War, even though Congress had not declared war and no foreign power was involved. The Court invoked the law of nations and relied on Vattel for the proposition that during a civil war, the opposing parties must be considered as “‘stand[ing] in precisely the same predicament as two nations who engage in a contest and have recourse to arms.’” *Id.* at 667 (quoting Vattel, *supra* note 17, at *425).

417. 175 U.S. 677 (1900).

418. *Id.* at 714.

419. *Id.* at 686.

420. *Id.*

421. Among other things, the Court pointed to early American adherence to that rule in its treaties of 1785, 1799, and 1828 with Prussia. Although noting that England had failed to follow the rule “during the wars of the French Revolution,” *id.* at 691, the Court stressed that “[i]n the war with Mexico, in 1846, the United States [subsequently] recognized the exemption of coast fishing boats from capture,” *id.* at 696.

422. *Id.* at 700.

experience have made themselves particularly well acquainted with the subjects of which they treat.⁴²³

After reviewing the works of jurists and commentators in some detail, the Court was convinced that “it is an established rule of international law, founded on considerations of humanity . . . [and] mutual convenience . . . that coast fishing vessels . . . are exempt from capture as prize of war.”⁴²⁴

Although the Court spent many pages demonstrating the existence and contours of this rule, it offered only a single sentence directly addressing why the rule applied to this case: “This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.”⁴²⁵ The Court’s failure to provide further elaboration has rendered its rationale notoriously opaque. Considered in the context of the precedent upon which it relied and its discussion of executive power, however, the opinion seems to fit comfortably within the allocation of powers framework established by the Court’s earlier decisions.

Indeed, the Court analogized the case to *Brown v. United States*⁴²⁶: *Brown* “appears to us to repel any inference that coast fishing vessels, which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated, must be condemned by a prize court.”⁴²⁷ This statement suggests that—as in *Brown*—courts should defer to the political branches regarding conduct that foreign nations would regard as an escalation of hostilities. Although the modern immunity of fishing boats was not a traditionally identified perfect right, it served the same function by establishing a rule of conduct whose violation could escalate a war. Under our Constitution, Congress, and perhaps the President, might decide to subject fishing boats to confiscation. But this would be a major foreign policy decision of the type that could have expanded or prolonged hostilities with Spain. As the Court recognized in *Brown*, Congress rather than the courts should control the decision to escalate hostilities, even in the context of a declared war: “Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written.”⁴²⁸

The Paquete Habana’s reliance on *Brown* comports with its subsequent discussion of executive power. Proponents of treating international law as federal common law have long puzzled over the Court’s repeated sug-

423. Id.

424. Id. at 708.

425. Id.

426. 12 U.S. (8 Cranch) 110 (1814).

427. *The Paquete Habana*, 175 U.S. at 711.

428. *Brown*, 12 U.S. (8 Cranch) at 128–29.

gestions that the President could override customary international law.⁴²⁹ If international law truly is a part of *federal* law, then how could the President alone instruct the judiciary to disregard such law? The Court's position is less puzzling once one realizes that, under *Brown* and other nineteenth century prize cases like *The Schooner Exchange*, rules derived from the law of nations did not apply of their own force, but instead as default rules necessary to preserve the Constitution's assignment of foreign relations powers. From this perspective, in the absence of political branch authorization, the judiciary could depart from rules whose violation would trigger or escalate a war only by usurping powers assigned to Congress and the President. On the other hand, a "controlling executive . . . act" taken by the President pursuant to his foreign relations powers or congressional mandate⁴³⁰ could authorize—or indeed require—courts to depart from the law of nations. The President might decide to withdraw our ambassador, expel Spain's ambassador, or otherwise limit recognition during the war. Alternatively, Congress might authorize the President, in prosecuting the war, to capture fishing vessels otherwise exempt from capture under the law of nations.

It is not our purpose here to delineate the respective powers of the political branches in foreign relations. Suffice it to say that the most reasonable reading of *The Paquete Habana*, considered as a whole and in historical context, is that the Court applied a rule of the law of nations analogous to a perfect right in order to preserve for the political branches the decision to escalate hostilities beyond what they had previously authorized. Historically, perfect rights served as a place holder for the underlying constitutional principle that the political branches, rather than the courts, are responsible for deciding whether to take action that might draw the nation into war, or escalate an existing war. Over time, that principle unsurprisingly accommodated new applications as circumstances changed and the world grew more complex. But the underlying principle—rooted in the Constitution's allocation of powers—remained constant.

B. Erie and the Rise of Legal Positivism

Although allocation of powers provided a rationale for upholding perfect rights and their modern counterparts in cases like *The Schooner Exchange* and *The Paquete Habana*, it had less obvious relevance to other branches of the law of nations, such as the law merchant. As explained, nineteenth century federal and state courts applied the law merchant as a form of general law without deciding whether such law was state or fed-

429. See, e.g., Michael J. Glennon, Raising *The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 Nw. U. L. Rev. 321, 324 (1986) (summarizing commentators' "extensive disagreement as to whether the President may violate international law").

430. *The Paquete Habana*, 175 U.S. at 700.

eral. *Swift v. Tyson*⁴³¹ is the most famous example. The allocation of powers rationale we identify did not require courts to apply private customary international law such as the law merchant or the law maritime. Such law did not define the attributes of state sovereignty, and failure to adhere to it did not give nations just cause for war. To the contrary, U.S. states and foreign nations voluntarily chose to apply private customary international law as a mutually beneficial means of promoting interstate and international commerce. Adherence served the same ends as compliance with modern counterparts such as the Uniform Commercial Code and analogous international agreements.

From the beginning, the Supreme Court's approach to private international law was different than its approach to the perfect rights of sovereigns under the law of nations. In diversity cases, the Court famously applied general commercial law unless, as required by section 34 of the Judiciary Act, there were contrary "local statutes" or "long-established local customs having the force of laws."⁴³² The Court applied the law merchant in these cases not because such law applied of its own force, but (at least when it decided *Swift*) because state common law incorporated such law. The *Swift* Court made this point explicitly when it observed "that the Courts of New York do not found their decisions . . . upon any local statute, or positive, fixed or ancient local usage: but they deduce the doctrine from the general principles of commercial law."⁴³³ So long as state courts continued to apply general (as opposed to local) law in commercial cases, federal courts sitting in diversity were free to do the same.⁴³⁴ At the same time, of course, states were free to depart from the law merchant, as they eventually did. Unlike a decision to override perfect rights, such a departure did not implicate the Constitution's allocation of foreign affairs powers.

Federal courts' adherence to general law in areas now clearly governed by state law, however, did raise distinct constitutional problems. In *Erie Railroad Co. v. Tompkins*, the Court overturned the *Swift* doctrine as "'an unconstitutional assumption of powers by the Courts of the United States."⁴³⁵ States had long since abandoned adherence to the general law merchant in commercial cases,⁴³⁶ and federal courts had expanded the concept of "general law" to include historically local areas of law such

431. 41 U.S. (16 Pet.) 1 (1842).

432. *Id.* at 18.

433. *Id.*

434. See Clark, Federal Common Law, *supra* note 74, at 1286–87.

435. 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

436. See Bradford R. Clark, *Erie's Constitutional Source*, 95 Cal. L. Rev. 1289, 1293–94 (2007) [hereinafter Clark, *Constitutional Source*] (describing how "state courts gradually abandoned reliance on the general law merchant in favor of localized commercial doctrines" and "state legislatures enacted specific statutes to govern commercial transactions within their jurisdiction").

as torts and even some property rights.⁴³⁷ According to the Court, the federal courts' continued application of general law in diversity cases was untenable because, in the absence of enacted federal law, state law provides the rule of decision in federal courts. General law was neither enacted federal law nor state law. Quoting Justice Holmes, the Court endorsed a fundamental tenet of legal positivism that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."⁴³⁸ Accordingly, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."⁴³⁹

Erie immediately raised questions about whether federal courts could continue to apply rules derived from the law of nations in preference to state law. A year after the decision, Philip Jessup argued in a three-page article that "Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum."⁴⁴⁰ According to Jessup, "[a]ny question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power."⁴⁴¹ In his view, "[i]t would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."⁴⁴² Although Jessup's assessment makes an important point about federalism and the allocation of foreign affairs power to the federal government, he failed to provide a full account of why adherence to at least some rules derived from international law is consistent with—and even required by—the Constitution's allocation of powers. As discussed below in Part IV.C, such an explanation is available at least with respect to the traditional perfect rights of sovereigns under the law of nations.

The post-*Erie* status of customary international law was soon tested in *Bergman v. De Sieyes*, a diversity case removed to federal court.⁴⁴³

437. See *Erie*, 304 U.S. at 75–76 (detailing expansion of *Swift* doctrine); Tony Freyer, *Harmony & Dissonance: The Swift & Erie Cases in American Federalism* 71 (1981) ("[T]he federal judiciary continued to enlarge the body of general law so that by 1890 it included some 26 doctrines.").

438. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

439. *Id.* at 78. One of us has recently argued that, properly understood, *Erie* rests on the negative implication of the Supremacy Clause—that is, state law applies unless preempted by "the supreme Law of the Land." See Clark, *Constitutional Source*, *supra* note 436, at 1306–11 (arguing *Erie* Court "presupp[os]e[d] that federal courts have no independent lawmaking authority to displace state law"); see also Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 *Harv. L. Rev.* 1, 11–12 (1975) ("*Erie* recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law." (citations omitted)).

440. Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 *Am. J. Int'l L.* 740, 743 (1939).

441. *Id.*

442. *Id.*

443. 170 F.2d 360 (2d Cir. 1948).

Bergman, a New Yorker, sued De Sieyes, a citizen and accredited minister of France, by serving him as he passed through New York en route to his post in Bolivia.⁴⁴⁴ De Sieyes asserted diplomatic immunity under traditional principles of international law; at the time, there was no federal statute or treaty conferring such immunity in U.S. courts.⁴⁴⁵ Thus, the question was whether a federal court, sitting in diversity, should apply state, federal, or international law to this defense. The Second Circuit, through Judge Learned Hand, held that because service occurred while the case was in state court, “the law of New York determines its validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us.”⁴⁴⁶ After surveying New York decisions and secondary sources, the court concluded that “we are disposed to believe that the courts of New York would today hold that a diplomat in transitu would be entitled to the same immunity as a diplomat in situ.”⁴⁴⁷

To those who saw international law as a form of federal law, “[i]t made no sense that questions of international law should be treated as questions of state rather than federal law; that they could be determined independently, finally and differently by the courts of fifty states,” and that such “determinations . . . by state courts were not reviewable by the Supreme Court” as federal questions.⁴⁴⁸ Hand did leave open the possibility that a state’s departure from international law could give rise to a federal question: “Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here.”⁴⁴⁹ The court did not need to reach this question because it found

444. *Id.* at 360–61. This case was not one “affecting Ambassadors, other public Ministers and Consuls” within the meaning of Article III because such jurisdiction only applies to ambassadors, ministers, and consuls assigned to the United States by a foreign sovereign. See *Ex Parte Gruber*, 269 U.S. 302, 303 (1925) (noting Article III, Section 2, Clause 2 “refers to diplomatic and consular representatives accredited to the United States by foreign powers”).

445. Congress eventually enacted the Diplomatic Relations Act of 1978, which incorporates the Vienna Convention on Diplomatic Relations and confers immunity on diplomats assigned to the United States as well as diplomats in transit. 22 U.S.C. §§ 254a–254e (2000).

446. *Bergman*, 170 F.2d at 361.

447. *Id.* at 363.

448. Henkin, *supra* note 3, at 1559; see also *id.* at 1558 (“So great a judge as Learned Hand apparently assumed that international law was part of state common law for this purpose and that a federal court in diversity cases had to apply international law as determined by the courts of the state in which it sat.”); Note, International Law—Diplomatic Immunity—Applicability of the Rule of *Erie R. Co. v. Tompkins* to International Law, 33 Minn. L. Rev. 540, 540 (1948) (noting “disturbing language used by Judge Learned Hand” in *Bergman* and arguing that international law should be part of federal common law).

449. *Bergman*, 170 F.2d at 361.

that state law incorporated the customary international law of diplomatic immunity.⁴⁵⁰

Bergman raises the constitutional question whether, in the absence of an applicable federal statute or treaty, state law may override the perfect rights of recognized foreign states traditionally provided by the law of nations.⁴⁵¹ On the one hand, states might retain this power (at least regarding matters within their territory), with the political branches free to supersede unsatisfactory state law by statute or treaty. On the other hand, states might be required to adhere to perfect rights for the same reason that federal courts must: to preserve the Constitution's allocation of foreign relations powers and to avoid provoking war. The decision by the President and the Senate to recognize France by exchanging ambassadors fairly implies that the United States—all of them—recognize France as an independent state entitled to exercise all of its perfect rights under the law of nations. One of these rights was the ability to deploy ambassadors with diplomatic immunity, and this right was broad enough to include diplomats in transit. Under these circumstances, exercising state court jurisdiction over France's ambassador in transit would interfere with France's perfect rights, fail to effectuate U.S. recognition of France, and risk serious conflict. Thus, one could readily conclude under historical practice and judicial precedent that the Constitution's allocation of powers requires state courts—no less than federal courts—to uphold the prerogatives of the political branches by respecting the immunity of ambassadors in transit.

C. *Sabbatino and the Allocation of Powers Approach*

The Supreme Court could have followed Judge Hand's approach when it confronted the status of the act of state doctrine several years later in *Banco Nacional de Cuba v. Sabbatino*.⁴⁵² Instead, it squarely held that the doctrine's scope and applicability must be treated as questions of federal law binding in both state and federal courts. Although the Court justified this conclusion in part by pointing to the existence of several "enclaves of federal judge-made law which bind the States,"⁴⁵³ the decision is best understood overall as a consequence of the Constitution's allocation of foreign affairs powers to the political branches of the federal government.⁴⁵⁴ *Sabbatino* arose out of Cuba's decision to nationalize

450. *Id.*

451. See generally Ramsey, *supra* note 4, at 350–51 (rejecting federal courts' ability "to enforce the law of nations in conflict with state law").

452. 376 U.S. 398 (1964). The act of state doctrine establishes that the courts of one country will not reexamine the acts of a recognized foreign sovereign taken within its own territory. *Id.* at 401.

453. *Id.* at 426.

454. Cf. Monaghan, *supra* note 439, at 3 (identifying examples of "constitutional common law" inspired and authorized by various constitutional provisions, but "subject to amendment, modification, or even reversal by Congress").

sugar companies located in Cuba and owned in part by American citizens. The suit asked the judiciary to decide whether the original owner or the Cuban government was entitled to the proceeds of sugar sold by Cuba.⁴⁵⁵ The answer turned on the validity of Cuba's expropriation. The Supreme Court held that Cuba was entitled to the proceeds because, as a matter of federal law, courts may:

not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.⁴⁵⁶

The Court acknowledged that it might have avoided the question whether the case was governed by state or federal law because "New York has enunciated the act of state doctrine in terms that echo those of federal decisions."⁴⁵⁷ Nonetheless, it concluded that "the scope of the act of state doctrine must be determined according to federal law."⁴⁵⁸

In *Sabbatino*, the Supreme Court held that the Constitution required federal and state courts both to adhere to a rule based on traditional notions of territorial sovereignty (the act of state doctrine),⁴⁵⁹ and to disregard a more recent rule of customary international law curtailing territorial sovereignty (the proffered prohibition against discriminatory, un-

455. *Sabbatino*, 376 U.S. at 398.

456. *Id.* at 428.

457. *Id.* at 424.

458. *Id.* at 427. The Court's requirement that a foreign sovereign government be "extant and recognized by this country at the time of suit," *id.* at 428, appears to tie the act of state doctrine to the political branches' power to send and receive ambassadors. As one of us recently explained: "Recognition acknowledges on behalf of the United States that a foreign state is entitled to all the rights traditionally associated with sovereign states, including sovereignty within its own territory. The act of state doctrine implements recognition by upholding this sovereignty." Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 Va. L. Rev. 1573, 1651 (2007).

459. Rules like the act of state doctrine have deep roots in the traditional perfect right of territorial sovereignty under the law of nations. See *supra* notes 67–68 and accompanying text. For example, in *The Santissima Trinidad* the Court considered whether U.S. courts must recognize as a public ship a vessel commissioned by the government of Buenos Aires, even though no bill of sale was produced to support transfer of ownership from the original owner. 20 U.S. (7 Wheat.) 283, 334–36 (1822). The Court held that a duly authenticated commission "imports absolute verity." *Id.* at 336. The Court also spoke in broad terms suggestive of the act of state doctrine:

Nor will the Courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy.

Id. The Court explained that this "has been the settled practice between nations," and that it "cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns." *Id.*

compensated takings).⁴⁶⁰ Both aspects of the holding were necessary to the decision and to uphold the constitutional prerogatives of the political branches to recognize foreign states and maintain amicable bilateral relations. Although commentators often cite *Sabbatino* for the proposition that customary international law itself qualifies as a kind of binding federal law,⁴⁶¹ the actual decision refutes this proposition. First, the act of state doctrine did not reflect the current status of customary international law. As the Court observed, “international law does not require application of the [act of state] doctrine.”⁴⁶² Rather, “[m]ost of the countries rendering decisions on the subject fail to follow the rule rigidly.”⁴⁶³ Since *Sabbatino* did require courts—as a matter of federal law—to apply the doctrine strictly, it gave foreign sovereigns *greater* protection than they enjoyed under customary international law at the time.

Second, the Court concluded “that the act of state doctrine is applicable even if international law has been violated.”⁴⁶⁴ As they had in the lower courts, the original owners urged the Court to recognize an exception to the doctrine on the ground that uncompensated takings by foreign sovereigns violate modern norms of customary international law.⁴⁶⁵ The Court rejected this invitation without pausing to determine whether international law in fact prohibited such conduct. In its view, recognition of any such exception—and the judiciary’s consequent enforcement of international law *against* foreign sovereigns—would contradict deep-seated concepts of territorial sovereignty and interfere with the President’s conduct of foreign relations:

Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect.⁴⁶⁶

In other words, the Court understood the Constitution’s allocation of powers over foreign affairs to preclude both federal and state courts from second guessing the acts of a recognized foreign state taken within

460. See *Sabbatino*, 376 U.S. at 429 (citing authorities).

461. See, e.g., Henkin, *supra* note 3, at 1559–61 (“*Sabbatino* . . . effectively resolved the issue.”).

462. *Sabbatino*, 376 U.S. at 421.

463. *Id.*

464. *Id.* at 431.

465. *Id.* at 406–07, 428–30.

466. *Id.* at 431–32.

its own territory even if necessary to enforce a new and emerging norm of customary international law designed to restrict territorial sovereignty. On this view, the Constitution requires courts to leave efforts to enforce such norms—in traditional terms, to interfere with the perfect rights of foreign sovereigns—to the political branches. This is the necessary import of the Court’s adherence to the act of state doctrine “in its traditional formulation.”⁴⁶⁷ That formulation preserves the political branches’ authority to accept or reject Cuba’s territorial sovereignty by “preclud[ing] the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”⁴⁶⁸

The *Sabbatino* opinion states these conclusions in various ways. It observes that the “text of the Constitution does not require the act of state doctrine” in the sense of “irrevocably remov[ing] from the judiciary the capacity to review the validity of foreign acts of state.”⁴⁶⁹ Congress could, in other words, decide to abrogate the doctrine and direct courts to scrutinize disfavored acts of state.⁴⁷⁰ The Court went on to explain, however, that “[t]he act of state doctrine does . . . have ‘constitutional’ underpinnings”⁴⁷¹ rooted in the allocation of foreign relations powers to the political branches. The doctrine “arises out of the basic relationships between branches of government in a system of separation of powers,”⁴⁷² and “its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.”⁴⁷³ The act of state doctrine reflects the judiciary’s sense “that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole.”⁴⁷⁴ In other words, it reflects “a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community.”⁴⁷⁵ Because the act of state doctrine reflects the

467. *Id.* at 401.

468. *Id.* (emphasis added).

469. *Id.* at 423.

470. Congress took just this course following *Sabbatino*. In 1964, Congress enacted the second Hickenlooper Amendment, which limited the act of state doctrine in cases like *Sabbatino*. Foreign Assistance Act of 1964 (Hickenlooper Amendment), Pub. L. No. 88-633, §§ 301(d)(4), 620(e)(2), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)). In fact, in *Sabbatino* itself on remand, the judiciary applied the statute retroactively to defeat Cuba’s claim to the proceeds from expropriated sugar. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967).

471. *Sabbatino*, 376 U.S. at 423.

472. *Id.* at 423.

473. *Id.* at 427–28.

474. *Id.* at 423.

475. *Id.* at 425. For wrongs created by foreign acts of state, the Court suggested that the remedy lies not with the judiciary, but “‘along the channels of diplomacy’” conducted by the executive. *Id.* at 418 (quoting *Shapleigh v. Mier*, 299 U.S. 468, 471 (1937)).

Constitution's allocation of certain exclusive powers to the political branches, the Constitution does not require courts to follow the doctrine regardless of the wishes of the political branches. When the political branches choose to abrogate the doctrine, the Constitution permits—indeed, requires—courts to reject its application. In the absence of such abrogation, however, “the act of state doctrine is a principle of decision binding on federal and state courts alike,”⁴⁷⁶ and is best understood as “a consequence of domestic separation of powers.”⁴⁷⁷

The Supreme Court's decision to embrace a traditional rule rooted in perfect territorial rights and reject a modern rule curtailing such rights follows the pattern found in key decisions from the early republic, such as *United States v. Peters*⁴⁷⁸ and *The Schooner Exchange v. McFaddon*.⁴⁷⁹ In these cases, as in *Sabbatino*, the Court upheld perfect rights (or close analogues) to shield the conduct of a recognized foreign sovereign from judicial scrutiny, even though the claimant in each case argued that the challenged conduct violated distinct rights under the law of nations.⁴⁸⁰ Although *The Schooner Exchange* tied its holding to the separation of powers, the *Sabbatino* Court offered a more comprehensive constitutional rationale tied to both separation of powers and federalism.

Sabbatino also highlights an important point about the interaction of perfect rights and the Constitution over time. The Court has been willing to add to, but not subtract from, the list of sovereignty-respecting default rules that courts are required to apply in order to uphold the Constitution's allocation of powers. In *The Schooner Exchange* and *The Paquete Habana*, the Court augmented the traditional list of perfect rights with later-emerging customs favoring foreign sovereigns—namely, the immunity of foreign warships and fishing boats. Judicial adherence to these customs upheld the Constitution's allocation of powers in much the same

476. *Id.* at 427.

477. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 404 (1990). This understanding of the act of state doctrine has potential implications for the so-called *Bernstein* exception, under which courts sometimes relax the act of state doctrine at the request of the State Department. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375–76 (2d Cir. 1954) (*per curiam*) (amending previous ruling in same case, 173 F.2d 71 (2d Cir. 1949), after State Department expressly endorsed American courts passing judgment on acts of former Nazi regime). When Congress and the President abrogate the doctrine by statute, courts do not hesitate to follow their directions. See *supra* note 470 and accompanying text (explaining that Congress can adopt exceptions to act of state doctrine). When the executive branch unilaterally attempts to abrogate the doctrine, however, courts may conclude that such action encroaches on the powers reserved by the Constitution jointly to the political branches. Thus, although a plurality of the Supreme Court endorsed the *Bernstein* exception in *First National City Bank of New York v. Banco Nacional de Cuba*, 406 U.S. 759, 767–70 (1972) (plurality opinion), a majority of the Justices rejected it, *id.* at 773 (Douglas, J., concurring); *id.* (Powell, J., concurring); *id.* at 776–77 (Brennan, J., joined by Stewart, Marshall & Blackmun, JJ., dissenting).

478. 3 U.S. (3 Dall.) 121 (1795).

479. 11 U.S. (7 Cranch) 116 (1812).

480. See *supra* notes 319–325, 356–373 and accompanying text.

way as judicial adherence to the original perfect rights of sovereigns. In both cases, the rule in question avoided judicial initiation or escalation of hostilities, and thus preserved political branch control over war and peace. In *Sabbatino*, however, the Court refused to depart from a traditional rule of territorial sovereignty (historically regarded as a perfect right), even though the Court acknowledged that the community of nations no longer recognized absolute territorial sovereignty. The Court based this refusal on the Constitution's allocation of powers as well. In effect, the Court held that any decision to abandon the traditional perfect rights of recognized foreign sovereigns would foster resentment and thus should be made by the political branches rather than the courts or the states.⁴⁸¹

Sabbatino's method of constitutional interpretation harkens back to the Marshall Court's respect for perfect rights as a means of preserving the constitutional prerogatives of the political branches. This approach relies on history and structure. As discussed, the Constitution assigns the power to send and receive ambassadors to the President and the Senate. This power cannot be understood without reference to what it meant to recognize another nation at the founding. Recognition implied that the United States would respect the rights of the state in question under the law of nations. The political branches might decide to contradict those rights in the exercise of their foreign affairs powers, but the decision to do so was theirs alone under the Constitution. Judicial respect for perfect rights also kept the courts from triggering a war. Violation of a foreign nation's perfect rights gave it just cause for war. Because the Constitution vests control over war and peace in the political branches, courts and states must respect perfect rights in order to avoid usurping political branch authority.

This understanding of the Constitution relies on "the method of inference from the structures and relationships created by the constitution."⁴⁸² Although subject to abuse if taken too far,⁴⁸³ this method of constitutional interpretation has deep roots in our constitutional tradition going back at least to the Marshall Court. In this case, there is a tight fit between the constitutional text allocating foreign relations and war powers to Congress and the President, the structural inference that these powers are exclusive, and the requirement that courts and states adhere

481. The Court also seemed to tie the constitutional incorporation of international law to the importance of the issue to foreign relations. See *Sabbatino*, 376 U.S. at 428 ("It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.").

482. Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 7 (1969).

483. See Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 *Geo. L.J.* 833, 844 (2004) ("[T]he structural method may be dangerously open-ended . . ."); Adrian Vermuele & Ernest A. Young, *Commentary, Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 *Harv. L. Rev.* 730, 731–32 (2000).

to traditional perfect rights or appropriate analogues as a means of upholding these powers. Under these circumstances, there is little risk that the Court simply engaged in open-ended judicial lawmaking in cases like *The Paquete Habana* and *Sabbatino*.⁴⁸⁴ Rather, in each case, the Court applied a rule favoring a foreign sovereign in order to respect the constitutional prerogatives of the political branches under the Constitution.

By the end of the twentieth century, the United States had codified many rules based on perfect rights under the law of nations. Important examples include the Foreign Sovereign Immunities Act of 1976⁴⁸⁵ and the Diplomatic Relations Act of 1978.⁴⁸⁶ Nonetheless, some rules of this kind remain uncodified. The most prominent example is head of state immunity—a traditional perfect right of sovereigns under the law of nations. As long ago as 1812, Chief Justice Marshall observed that “the whole civilized world” recognizes “the exemption of the person of the sovereign from arrest or detention within a foreign territory.”⁴⁸⁷ Then, as now, recognizing such immunity in U.S. courts is a matter of constitutional importance, at least with respect to foreign states recognized by the United States. *Sabbatino* teaches that this immunity should be treated as a default rule that state and federal courts must follow in order to preserve the Constitution’s allocation of powers.

D. *Implications and Potential Objections*

This Article has attempted to situate the status of customary international law in U.S. courts in its proper historical and constitutional context. This context is essential to understanding how and why federal courts have used international law to decide actual cases over the past two centuries. This account, however, does not attempt to resolve all questions regarding the status of customary international law in U.S. courts. For example, we take no position on how courts should treat numerous modern rules of customary international law unknown to the Founders. Unlike the traditional law of nations, modern customary international law increasingly seeks to restrict how nations treat their own citizens in their own territory. Part of the current debate is whether U.S. courts should unilaterally incorporate such restrictions into U.S. law or wait for the political branches to do so through constitutional lawmaking procedures.

A narrow view of the historical practice suggests that courts should wait. The Constitution was drafted at a time when this kind of international law did not exist, and thus there is no clear historical or constitutional basis for requiring courts to apply such law as a means of imple-

484. See Clark, *Role of Structure*, supra note 307, at 723–25 (explaining proper use of structure in constitutional interpretation).

485. Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.) (codifying foreign sovereign immunity).

486. Pub. L. No. 95-393, 92 Stat. 808 (codified as amended at 22 U.S.C. §§ 254(a)–(e) (2000)) (codifying diplomatic immunity).

487. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

menting the Constitution's allocation of powers. More specifically, the political branches' recognition and war powers are not as directly implicated by the U.S. failure to adhere to modern rules of customary international law restricting how nations treat their citizens as they are by the failure to follow traditional sovereignty-respecting rules. As the *Sabbatino* Court explained, "since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."⁴⁸⁸ Although such resentment may no longer provide just cause for war, it could adversely affect U.S. foreign relations with the country in question. As *Sabbatino* demonstrates, courts might choose to uphold traditional notions of territorial sovereignty—and preempt state interference with such sovereignty—as a means of preserving the foreign relations prerogatives of the political branches.⁴⁸⁹

On the other hand, a broad view of the Constitution's allocation of foreign affairs powers might lead courts to incorporate elements of modern customary international law on their own. On this view, the judiciary's failure to adhere to such law could undermine the reputation of the United States in the international community and interfere with foreign relations more generally. Thus, courts might seek to preserve amicable relations by applying customary international law at least until the political branches direct otherwise. This approach shifts the focus from preservation of amicable bilateral relations to preservation of amicable multilateral relations.⁴⁹⁰ Of course, these simple accounts mask a number of complex interpretive questions involving changed circumstances, translation, separation of powers, and federalism. Our point here is simply that the historical and structural paradigms we have identified do not, in and of themselves, definitively resolve all questions confronting courts today.

Finally, the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*⁴⁹¹ neither contradicts our historical account nor definitively resolves the status of customary international law in U.S. courts. In that

488. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964).

489. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court arguably went further by invalidating an Oregon statute prohibiting nonresident aliens from inheriting property from Oregon residents unless the alien could prove, among other things, that his or her inheritance would not be confiscated, in whole or in part, by a foreign government. The Court reasoned that the Oregon statute "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. Although *Zschernig* is often criticized for permitting dormant foreign affairs preemption of state law, see, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1631 (1997), the Court's decision may be limited to instances in which a state attempts to use its law to interfere with the future acts of a foreign state taken within its own territory. On this account, the rationale for constitutional preemption in *Zschernig* is an extension of the rationale for preemption in *Sabbatino*.

490. Preemption of state law on this ground would rely on even broader dormant foreign affairs preemption than that suggested in *Zschernig*.

491. 542 U.S. 692 (2004).

case, the Court addressed whether the Alien Tort Statute (ATS) authorized a Mexican national to bring a particular cause of action arising under customary international law in federal court.⁴⁹² Originally enacted as part of the Judiciary Act of 1789, the ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴⁹³ In *Sosa*, the Court held that this provision is jurisdictional and would have been understood by the First Congress to provide a “limited, implicit sanction” to federal courts to entertain common law claims for a “handful” of international law violations—offenses against ambassadors, violations of safe conducts, and piracy.⁴⁹⁴ Today, the Court explained, “courts should require any claim [under the ATS] based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” that the Court identified.⁴⁹⁵

Although scholars have debated the meaning of this opinion, it does not call into question the practice we have described. First, the *Sosa* Court did not hold that customary international law inherently qualifies as a form of preemptive, jurisdiction-creating federal law.⁴⁹⁶ Rather, the Court concluded that Congress effected a limited statutory incorporation of the law of nations by enacting the ATS.⁴⁹⁷ Indeed, it appears implicit in the Court’s opinion that, absent the ATS, there would be no colorable basis for the Court to exercise jurisdiction over the claims at issue.⁴⁹⁸ Had the Court understood customary international law generally to be federal common law, its careful parsing of the ATS would have been unnecessary in light of the availability of general statutory arising under ju-

492. *Id.* at 712.

493. 28 U.S.C. § 1350 (2000).

494. *Sosa*, 542 U.S. at 712, 720.

495. *Id.* at 725.

496. See Bradley et al., *Sosa*, *supra* note 167, at 889–96 (characterizing *Sosa* as concluding that “although the ATS was not intended to create causes of action related to CIL, it has the effect today of authorizing federal courts to recognize post-*Erie* federal common law causes of action for a limited number of CIL violations”); cf. William A. Fletcher, International Human Rights in American Courts, 93 Va. L. Rev. 653, 672 (2007) (concluding that “part of the customary international law of human rights became federal common law in *Sosa* in 2004”).

497. *Sosa*, 542 U.S. at 724.

498. In the Court’s view, “the interaction between the ATS at the time of its enactment and the ambient law of the era,” *id.* at 714, reveals that the First Congress “meant to underwrite litigation of a narrow set of common law actions derived from the law of nations,” *id.* at 721. By 1875, when Congress enacted general federal question jurisdiction, the ambient law had changed and there is no indication that Congress meant to authorize courts to hear any additional claims based on the law of nations. See *id.* at 731 n.19 (“Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law.”).

risdiction.⁴⁹⁹ Second, the Court had no occasion to revisit the idea (implicit in opinions like *The Schooner Exchange*, *The Nereide*, and *Sabbatino*) that the Constitution requires courts to enforce certain principles derived from the law of nations to uphold the Constitution's allocation of powers. Rather, the Court's analysis is simply inapposite to this idea, addressing the distinct question whether the ATS sanctions federal adjudication of a particular alleged violation of the law of nations.⁵⁰⁰

CONCLUSION

Commentators fundamentally disagree about the status of customary international law in American courts. Proponents of the modern position claim that federal courts have power to enforce such law as supreme, jurisdiction-conferring federal common law regardless of whether the federal political branches have adopted it through constitutional lawmaking procedures. Proponents of the revisionist position claim that customary international law does not qualify as federal law absent such incorporation by the political branches. Both positions seek to draw support from historical practice and the structure of the Constitution. But neither adequately reflects the historical and structural context that has consistently informed the Supreme Court's resolution of the nation's most significant cases involving the law of nations. This Article recovers this crucial lost context and, in the process, suggests a third way of understanding how portions of the law of nations interact with the federal system. Simply put, some aspects of the law of nations—the traditional perfect rights of sovereigns and close analogues—have functioned as preemptive federal law because of the Constitution's allocation of foreign relations powers in Articles I and II. Courts have adhered to such rules out of deference to the federal political branches, which—unlike the courts—are charged with recognizing foreign states, conducting foreign relations, and deciding questions of war and peace. As the Court has recognized, both state and federal courts must adhere to these rules—absent contrary instructions from the political branches—in order to preserve the exclusive authority of Congress and the President to make important foreign policy decisions on behalf of the nation. The implications of this analysis for the interaction of modern customary international law and the federal system remain to be examined in detail. Any such examination, however, must take account of the historical and structural understandings recovered by this Article.

499. 28 U.S.C. § 1331 (2000) (conferring jurisdiction upon district courts for “all civil actions arising under the Constitution, laws, or treaties of the United States”).

500. To the extent that *Sosa* instructs courts to interpret the ATS in light of its historical context, it seems likely that the First Congress adopted the ATS to redress traditional violations of the law of nations such as the guarantee of safe conducts. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 *Colum. L. Rev.* 830, 882 (2006) (arguing ATS was enacted because of concerns that harm done to British subjects in violation of international law might disrupt trade and lead to war with Britain).