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## *ARTICLES*

### THE LAW OF NATIONS AS CONSTITUTIONAL LAW

*Anthony J. Bellia Jr.\* and Bradford R. Clark\*\**

*COURTS and scholars continue to debate the status of customary international law in U.S. courts, but have paid insufficient attention to the role that such law plays in interpreting and upholding several specific provisions of the Constitution. The modern position argues that courts should treat customary international law as federal common law. The revisionist position contends that customary international law applies only to the extent that positive federal or state law has adopted it. Neither approach adequately takes account of the Constitution's allocation of powers to the federal political branches in Articles I and II or the effect of these powers on judicial precedent applying the law of nations throughout U.S. history. Several specific powers—such as the powers to send and receive ambassadors, declare war, issue letters of marque and reprisal, and make rules governing captures—can only be*

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\*\* William Cranch Research Professor of Law, George Washington University Law School. We thank Tricia Bellia, Paul Berman, Curtis Bradley, Anthony Colangelo, Barry Cushman, Philip Hamburger, Bill Kelley, Renée Lettow Lerner, John Manning, Sean Murphy, Henry Monaghan, Ed Swaine, Amanda Tyler, and Carlos Vázquez for insightful comments and suggestions. In addition, we thank participants in the Foreign Relations Law Colloquium at Georgetown University Law Center and in a faculty workshop at The George Washington University Law School for helpful comments on prior drafts of this Article. We also thank Notre Dame research librarian Patti Ogden for her expert research assistance, and George Washington University law students Ali Naini and Scott Richardson and Notre Dame law student Erinn Rigney for excellent research assistance.

*understood by reference to background principles of the law of nations. At the time of the Founding, it was reasonably assumed that U.S. courts would recognize the traditional rights of foreign sovereigns under the law of nations as a means of respecting the Constitution's allocation of specific foreign relations powers to the political branches. Considered in this light, the Supreme Court's decisions applying traditional principles derived from the law of nations throughout U.S. history have largely—if not exclusively—served to implement this allocation of powers. From this perspective, both the modern and the revisionist positions rest partly on erroneous premises. The modern position errs in claiming that the best way to read Supreme Court precedent applying the law of nations is that federal courts have independent Article III power to adopt such law as federal common law. Consistent with the original public meaning of the Constitution, this precedent is better read to apply certain traditional principles of the law of nations when necessary to uphold the political branches' recognition, war, reprisal, and capture powers under Articles I and II. The revisionist position overlooks the role of these powers by requiring the political branches or states to adopt traditional principles of the law of nations before courts may apply them. Historical understandings and judicial practice suggest that courts must apply traditional principles of the law of nations not only when the federal political branches or the states have adopted them, but also when Articles I and II require courts to do so. In such instances, the law of nations functions as constitutional law.*

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## INTRODUCTION

There is an ongoing debate over the status of customary international law—the modern law of nations—in U.S. courts.<sup>1</sup> This debate has focused primarily on whether federal courts have Article III power to adopt such law as “federal common law” or whether they must defer to state law in the absence of a federal statute or treaty. This debate, however, has largely overlooked the role of the law of nations in understanding the powers assigned to the federal political branches by Articles I and II of the Constitution. For those who argue that courts should recognize customary interna-

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<sup>1</sup> The phrase “customary international law” is generally used to refer 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) [hereinafter Restatement (Third) of Foreign Relations]. Today, the phrase “customary international law” is more commonly used than the phrase “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.

tional law as a form of federal common law (the “modern” position),<sup>2</sup> the law of nations applies even if not adopted by the political branches or the states. For those who contend that state law governs the status of customary international law in the absence of a federal statute or treaty (the “revisionist” position),<sup>3</sup> the law of nations applies only when state or federal law incorporates it. This debate has paid too little attention to other portions of the Constitution—particularly, to specific provisions of Articles I and II that require federal (and state) courts to apply certain traditional principles of the law of nations. Taken in historical context, Articles I and II allocate specific foreign relations powers to the political branches that can only be understood by reference to background principles of the law of nations well known at the time of the Founding. The original public meaning of these Article I and II powers provides a more persuasive justification for the historical role of the law of nations in the U.S. federal system than modern assertions that courts should decide what parts of customary international law to apply as federal common law under Article III.<sup>4</sup> In particular, the Supreme Court’s application of traditional principles of the law of nations in cases from the Founding to the present has often served “as a means of upholding the Constitution’s allocation of foreign affairs powers [in Articles I and II] to Congress and the President.”<sup>5</sup> Understanding the Court’s precedents in these terms not only helps to make sense of its decisions, but also provides guidance for future cases.

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<sup>2</sup> See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 *Sup. Ct. Rev.* 295, 295; Harold Hongju Koh, *Is International Law Really State Law?*, 111 *Harv. L. Rev.* 1824, 1826–27 (1998); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *Fordham L. Rev.* 393, 393–94 (1997).

<sup>3</sup> See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* 815, 820–21 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 *Va. L. Rev.* 1617, 1622–23 (1997).

<sup>4</sup> See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *Colum. L. Rev.* 1, 5–6 (2009) [hereinafter Bellia & Clark, *Federal Common Law*]. Professor Ernie Young has proposed an alternative under which customary international law would be considered a form of “general law” available for adoption by—but not binding on—state and federal courts. See Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 *Va. J. Int’l L.* 365, 369–70 (2002).

<sup>5</sup> Bellia & Clark, *Federal Common Law*, *supra* note 4, at 7.

In a previous article, we invoked the Constitution's general allocation of powers to argue that the law of nations doctrine of "perfect rights" helped to explain a great deal of the "federal common law of foreign relations."<sup>6</sup> In this Article, we go beyond those earlier claims to argue that certain attributes of the law of nations (including the doctrine of perfect rights) actually help to define the content of particular provisions of Articles I and II dealing with the allocation of foreign relations powers.<sup>7</sup> Although the Constitution mentions the "law of nations" only in the Offences Clause, a number of other discrete constitutional provisions can only be understood by reference to that body of law.<sup>8</sup> Most of these provisions are open-ended, and a reasonable member of the Founding generation would have ascertained the details by reference to well-known principles of the law of nations. From this perspective, the role of traditional law of nations principles in U.S. courts is not a function of federal judicial power to make federal common law under Article III. Rather, the role of the traditional law of nations follows both from the assignment of specific foreign relations powers to the political branches under Articles I and II and from the exercise of these powers to conduct foreign relations. First, the political branches possess exclusive power under Articles I and II to send and receive ambassadors and make treaties, and thereby to recognize foreign nations and governments. As an original matter, the exercise of this power was reasonably understood to require states and courts to respect certain rights of recognized foreign nations under the law of nations. Second, the political branches possess exclusive power under Articles I and II to make war and order reprisals and captures against other nations. The law of nations in-

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<sup>6</sup> See *id.*

<sup>7</sup> In our prior work, we considered traditional principles of the law of state-state relations—principles that implicate the foreign relations powers of the federal political branches. By 1789, the phrase "law of nations" had come to refer not only to principles of state-state relations but also to other aspects of general law, including the law merchant. See *id.* at 19. Unlike the law of state-state relations, these other branches of the law of nations did not directly implicate the foreign relations powers of the United States. We intend to address these other branches in future work.

<sup>8</sup> Article I authorizes Congress to define and punish offenses against the law of nations. See U.S. Const. art. I, § 8, cl. 10. As discussed in greater detail below, however, certain constitutional constructs—such as treaties, recognition, declarations of war, letters of marque and reprisal, and captures—are unintelligible without reference to background principles of the law of nations.

formed the meaning of these powers, which, understood in context, gave the political branches—exclusive of states or courts—the power to decide whether to uphold or abrogate certain well-established rights of foreign sovereigns.<sup>9</sup>

These understandings of Articles I and II, we contend, more effectively explain Supreme Court decisions involving the law of nations in U.S. courts than alternative arguments about whether federal courts have Article III power to treat customary international law as federal common law. Certain Supreme Court decisions have expressly tied adherence to the law of nations to Articles I and II—especially the decisions of the Marshall Court—while other decisions have implicitly invoked the allocation of powers these provisions reflect.<sup>10</sup> Most, if not all, Supreme Court opinions applying the traditional law of nations have reached results consistent with this allocation of powers approach. And no Supreme Court decision has ever applied customary international law as modern, preemptive, jurisdiction-conferring “federal common law.”

Reading the Constitution’s allocation of foreign relations powers in light of well-known background principles of the law of nations does not require acceptance of an indefinite concept of “foreign af-

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<sup>9</sup> In response to our earlier work, Professor Henry Monaghan has suggested that the approach we identified understands federal judges to be “engaged in some form of *constitutional interpretation* based upon freestanding conceptions of federalism or separation of powers.” Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 *Colum. L. Rev.* 731, 763 (2010). As we explain in this Article, however, specific constitutional provisions—not merely “freestanding” separation of powers notions—were originally understood to require U.S. courts to apply certain principles derived from the law of nations. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1944–45 (2011) [hereinafter Manning, *Separation of Powers*]. In other words, our understanding of the Constitution relies on specific constitutional provisions read in light of the background principles of the law of nations against which they were drafted. See John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387, 2467 (2003) [hereinafter Manning, *Absurdity Doctrine*] (explaining that “background conventions, if sufficiently firmly established, may be considered part of the interpretive environment in which [the lawmaker] acts”). Professor Monaghan has also suggested that our approach raises questions under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), because Congress can revise the rules that judges derive from the law of nations. Monaghan, *supra*, at 764–65. As we explain, however, because our approach seeks to preserve the political branches’ prerogatives under their assigned constitutional powers, any decision by the political branches to abrogate the traditional rights of foreign nations is simply an exercise of their powers and thus consistent with *Marbury*.

<sup>10</sup> See *infra* Sections III.B & III.C.

fairs” power divorced from the constitutional text,<sup>11</sup> and has little in common with “the much-maligned dormant foreign affairs rationale of *Zschernig v. Miller*.”<sup>12</sup> To the contrary, this approach draws on the original public meaning of several *specific* constitutional powers—such as the power to recognize foreign nations, the war power, and the powers to authorize reprisals and captures—which can only be understood against background assumptions provided by the law of nations. Our approach identifies two ways in which courts have used the law of nations to uphold the Constitution’s allocation of powers. First, the mere assignment of certain powers to the political branches sometimes implies that other actors may not take actions contrary to the law of nations when doing so would contradict this assignment. Second, the political branches’ exercise of their assigned powers (such as recognition) sometimes carries with it predictable implications defined by the law of nations and thus, as a matter of federal constitutional law, obligates other governmental actors to respect those aspects of the law of nations.

At the time of the Founding, the Constitution’s recognition, war, reprisal, and capture powers were reasonably understood to require courts and states to respect traditional rights of foreign sovereigns under the law of nations to avoid usurping the political branches’ exclusive possession or exercise of such powers. Historically, nations enjoyed certain “perfect” rights under the law of nations, and the violation of such rights gave the aggrieved nation just cause for war.<sup>13</sup> Such rights included rights to enjoy territorial sovereignty, conduct diplomatic relations, enjoy neutral commerce and use of the seas, and peaceably enjoy liberty.<sup>14</sup> Under the law of nations, recognition signified that a nation would respect another nation’s possession of these traditional rights of free and independent states.<sup>15</sup> In other words, those rights were well-established legal incidents or consequences of recognition, and a reasonable person

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<sup>11</sup> Cf. Manning, Separation of Powers, *supra* note 9 (criticizing the development of a freestanding separation of powers doctrine divorced from the meaning of specific provisions of the constitutional text).

<sup>12</sup> Contra Carlos M. Vázquez, Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position, 86 *Notre Dame L. Rev.* 1495, 1602–03 (2011) (citing 389 U.S. 429 (1968)).

<sup>13</sup> See Bellia & Clark, Federal Common Law, *supra* note 4, at 16–19.

<sup>14</sup> See *id.* (describing perfect rights).

<sup>15</sup> *Id.* at 89.



versed in applicable legal conventions surely would have understood them as such. Because the Constitution gives the political branches exclusive power over recognition, failure by either states or courts to respect the traditional rights of a recognized foreign state would have contradicted the political branches' decision to recognize the state in question.<sup>16</sup> In addition, under the law of nations, one nation's violation of another nation's perfect rights gave the aggrieved nation just cause for war.<sup>17</sup> Accordingly, the failure of states or courts to respect perfect rights of foreign states would have been inconsistent with the political branches' exclusive powers to determine questions of war and peace. Finally, the Constitution gave Congress exclusive power to authorize captures and reprisals against foreign nations, their subjects, and their property. Absent authorization by the political branches, courts would interfere with the Constitution's allocation of the capture and reprisal powers if they granted litigants' requests to seize another nation's vessels, citizens, or property in retaliation for acts of that nation.

In debating the role of customary international law in U.S. courts, scholars have invoked various Supreme Court decisions involving principles derived from the law of nations. These decisions consistently have served to uphold the Constitution's exclusive allocation of recognition, war, capture, and reprisal powers to the political branches even though the Court has not always explicitly tied its decisions to these constitutional provisions. Starting in the early days of the Republic, the Marshall Court signaled that the relative constitutional powers of the political branches and the courts sometimes required the judiciary to protect the rights of foreign sovereigns. For example, the Court upheld the immunity of foreign warships in U.S. ports, notwithstanding claims that the nation in question had violated U.S. rights.<sup>18</sup> Similarly, the Court protected the traditional rights of recognized sovereigns, including neutral use of the high seas and territorial sovereignty. Later, the

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<sup>16</sup> In the absence of recognition, courts have greater latitude. See *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (denying head of state immunity to General Manuel Noriega because the President had never recognized Noriega as the legitimate head of Panama and had manifested an intent to deny such immunity by capturing and prosecuting him).

<sup>17</sup> See Bellia & Clark, *Federal Common Law*, *supra* note 4, at 16–19.

<sup>18</sup> See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 123 (1812).

Court applied newly emerging international rights of foreign states, such as the immunity of coastal fishing vessels from capture during hostilities.<sup>19</sup> Significantly, the Court also has long adhered to the act of state doctrine, a rule of decision that requires courts to respect one of the traditional incidents of recognition—territorial sovereignty—by upholding the acts of recognized foreign states taken within their own territory.<sup>20</sup>

At the Founding, governmental interference with territorial sovereignty gave the aggrieved nation just cause for war, providing an important reason—along with recognition—for U.S. courts not to interfere with the acts of foreign sovereigns taken within their own territory. Today, of course, international law no longer recognizes the violation of perfect rights as just cause for war. In addition, many of the traditional rights of foreign states—such as territorial sovereignty—have broken down in the face of the international community’s embrace of certain exceptions. In response, the Supreme Court might have attempted to adjust its decisions to take account of shifting concepts of sovereign rights and appropriate remedies for their violation. Yet it has not. Rather, even after it became clear that international law no longer recognized absolute territorial sovereignty, the Court continued to adhere to the act of state doctrine “in its traditional formulation.”<sup>21</sup> Indeed, the Court went out of its way to make clear that state and federal courts alike are bound to apply the traditional doctrine until the political branches act to change it. The reason, the Court explained, is that the doctrine has “‘constitutional’ underpinnings” that sound in general notions of separation of powers.<sup>22</sup> We suggest that the persistent judicial application of this doctrine implements specific allocations of power in the U.S. Constitution that transcend the international law origins of the doctrine.

This Article proceeds in four Parts. Part I surveys the current debate over the status of customary international law in U.S. courts. It concludes that neither the modern position nor the revi-

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<sup>19</sup> See *The Paquete Habana*, 175 U.S. 677, 686 (1900).

<sup>20</sup> See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309–10 (1918); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>21</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

<sup>22</sup> *Id.* at 423.

sionist approach accurately portrays the way that the traditional law of nations has interacted with the Constitution since the Founding. This Part explains that the law of nations provided a crucial backdrop against which the Founders adopted various provisions of Articles I and II that allocate specific war and foreign relations powers to the political branches of the federal government. These powers, we explain, cannot be understood without resort to the law of nations.

Part II reviews the critical period from the Declaration of Independence through the Constitutional Convention of 1787. During this period, the United States placed great significance both on recognizing other nations and on being recognized by them. Recognition signaled that the recognizing country accepted the nation in question as a free and independent state possessed of a well-understood set of rights and privileges under the law of nations. The Constitution's allocation of exclusive power to the political branches to make treaties and send and receive ambassadors provided necessary means for the United States to obtain and ensure respect for rights under the law of nations. Likewise, the Constitution's allocation of exclusive power to Congress to declare war and grant letters of marque and reprisal precluded states and courts from violating the law of nations in a manner that could initiate a war and from retaliating against foreign nations for their misdeeds.

Part III examines a range of Supreme Court decisions from the early Republic through the modern era, explaining how each is consistent with this allocation of powers under the Constitution. These decisions either applied the law of nations to protect the rights of recognized foreign states or declined litigants' requests to retaliate against foreign property or citizens without congressional authorization. In certain cases, the Supreme Court understood the political branches' recognition of a particular foreign state or government as a commitment by the United States to respect traditional sovereign rights. In other cases, the Court went farther and upheld additional rights as a way of avoiding judicial action that could initiate or escalate a war. In still others, the Court declined litigants' attempts to obtain satisfaction for the misconduct of foreign sovereigns. The Court's ongoing respect for the traditional rights of foreign nations—even rights that have become less absolute over time—may be explained not as a function of a federal

common law of international relations, but rather as a constitutional doctrine grounded in the original understanding of the political branches' exclusive Article I and II powers to recognize and pursue certain actions against other nations. Moreover, the Court's adherence in certain cases to emerging sovereign rights of nations also may be explained as both an incident of recognition and a necessary means of avoiding judicial action that could initiate or escalate a war, or interfere with the political branches' exclusive authority to make reprisals against other nations.

Finally, Part IV considers the implications of the Constitution's allocation of powers for the larger debate over the status of customary international law in U.S. courts. The modern position would treat all forms of customary international law as preemptive federal common law, including not only traditional rules respecting nations' sovereignty, but also rules limiting the authority of nations over their own citizens. The modern position has sought support for the federal common law approach in Supreme Court precedent involving the traditional rights of sovereigns under the law of nations. The federal common law approach, however, is not the most persuasive way to read such precedent, which, as we explain, has served to uphold the allocation of specific powers to the political branches under Articles I and II. Under the allocation of powers approach, the Constitution itself justifies part of the modern position—that federal and state courts must apply traditional principles of the law of nations—without the need for resort to federal common law. We do not seek here to undertake a comprehensive critique of the modern position, especially its claim that federal courts must apply contemporary customary international law rules respecting the relationship between nations and their own citizens. Our point is that Supreme Court precedent applying traditional principles of the law of nations does not necessarily imply this conclusion. Indeed, certain Supreme Court decisions have given preference to traditional sovereignty-respecting principles of the law of nations over contemporary sovereignty-limiting ones. In *Banco Nacional de Cuba v. Sabbatino*, for instance, the Court refused to apply a rule of customary international law limiting the authority of a sovereign nation to act; rather, the Court applied a traditional rule of the law of nations disallowing courts from questioning the

sovereign acts of foreign nations.<sup>23</sup> The modern position—that all rules of customary international law constitute preemptive federal law—does not directly follow from the Constitution’s allocation of foreign relations powers to the political branches or from judicial application of traditional principles of the law of nations.<sup>24</sup>

The Constitution’s allocation of powers to the political branches also has implications for the revisionist approach. The revisionist approach posits that courts may not apply traditional principles of the law of nations absent adoption by the political branches or the states. This approach struggles to explain cases in which federal courts have applied traditional principles of the law of nations that neither the political branches nor the states have adopted. Such cases may be understood, however, to apply the Constitution itself as a rule of decision insofar as Articles I and II require courts to apply certain traditional principles of the law of nations. Historical understandings and judicial practice suggest that judges, other public officials, and scholars should understand U.S. courts’ obligation to apply traditional rules of the law of nations as a means of upholding the political branches’ exclusive powers under Articles I and II, not as an example of federal judicial power to make federal common law under Article III.

### I. THE CURRENT DEBATE

The modern position that customary international law constitutes a form of federal common law arguably originated with a brief essay written by Philip Jessup one year after the Supreme Court’s landmark decision in *Erie Railroad Co. v. Tompkins*.<sup>25</sup> *Erie*

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<sup>23</sup> *Id.*

<sup>24</sup> In this Article, we do not address claims that the federal judicial application of general law before *Erie* supports judicial treatment of customary international law as federal common law. Nor do we address claims that the modern position draws support from Founding-era statements suggesting that the law of nations is “part of the laws of the United States.” See 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, 205–06 (2008). Although we have addressed both of those claims in our prior work, our point for present purposes is that Supreme Court precedent addressing the traditional rights of foreign nations may be explained under Articles I and II, not as exercises of Article III judicial power to apply federal common law.

<sup>25</sup> 304 U.S. 64 (1938).

famously declared that “[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.”<sup>26</sup> Jessup argued that “Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum.”<sup>27</sup> In Jessup’s 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.”<sup>28</sup> Accordingly, he concluded that “[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.”<sup>29</sup>

A quarter century later, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court cited Jessup’s essay approvingly in support of its conclusion that the act of state doctrine “must be treated exclusively as an aspect of federal law.”<sup>30</sup> The Restatement (Third) of Foreign Relations subsequently relied on *Sabbatino* to support the distinct propositions that “[i]nternational law . . . [is] law of the United States,” and that “[c]ourts in the United States are bound to give effect to international law.”<sup>31</sup> A reporters’ note recounted the *Sabbatino* discussion of Jessup’s views, and relied on “the implications of *Sabbatino*” to conclude that “the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”<sup>32</sup> Many international law scholars came to regard this modern position as “an ‘unquestioned’ principle of the law of foreign relations.”<sup>33</sup>

Revisionist scholars nonetheless questioned the Restatement’s approach. The first challenge came in 1986 from Professor Phillip Trimble, who argued that “courts should never apply customary in-

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<sup>26</sup> Id. at 78.

<sup>27</sup> Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int’l L. 740, 743 (1939).

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> 376 U.S. 398, 425 (1964).

<sup>31</sup> Restatement (Third) of Foreign Relations, supra note 1, § 111(1), (3), reporters’ notes 1, 3.

<sup>32</sup> Id. § 111 reporters’ note 3.

<sup>33</sup> Brilmayer, supra note 2; see also Koh, supra note 2, at 1825 (describing the modern position as “the hornbook rule”).

ternational law except pursuant to political branch direction.”<sup>34</sup> His rationale was grounded in democratic legitimacy. He argued that “if customary international law can be made by practice wholly outside the United States it has no basis in popular sovereignty at all.”<sup>35</sup> Professor Arthur Weisburd similarly advanced a challenge to the treatment of customary international law as federal common law.<sup>36</sup> The most recent challenge came from Professors Curtis Bradley and Jack Goldsmith.<sup>37</sup> Building on the work of Trimble and Weisburd, Bradley and Goldsmith argued that the modern position is inconsistent with *Erie*, federalism, separation of powers, and democratic legitimacy. Moreover, they specifically questioned the Restatement’s embrace of the modern position on the ground that it provided no independent authority for that position.<sup>38</sup> Bradley and Goldsmith concluded in their work that customary international law “should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so.”<sup>39</sup>

Proponents of the modern position responded by disputing these challenges. For example, Professor Gerald Neuman attempted to blunt the force of critiques based on democratic legitimacy by arguing that although the process associated with the formation of customary international law “is not direct democracy, it is a form of representative democracy” because the political branches participate in this process.<sup>40</sup> Likewise, Professor Harold Koh argued that *Erie* is inapplicable to the enforcement of customary international law in federal courts because the Constitution grants the federal government exclusive power over foreign affairs.<sup>41</sup> More

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<sup>34</sup> Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 716 (1986).

<sup>35</sup> Id. at 721.

<sup>36</sup> A.M. Weisburd, State Courts, Federal Courts, and International Cases, 20 Yale J. Int’l L. 1, 2 (1995).

<sup>37</sup> See Bradley & Goldsmith, Customary International Law, *supra* note 3, at 817.

<sup>38</sup> Id. at 834–37.

<sup>39</sup> Curtis A. Bradley & Jack L. Goldsmith, Federal Courts and the Incorporation of International Law, 111 Harv. L. Rev. 2260, 2260 (1998).

<sup>40</sup> Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371, 383–84 (1997).

<sup>41</sup> Koh, *supra* note 2, at 1831–32; see also Stephens, *supra* note 2, at 404 (“When they set about drafting a Constitution to reformulate the terms of the union, the framers

fundamentally, both scholars relied on language from past Supreme Court opinions—such as *The Paquete Habana*—indicating that “[i]nternational law is part of our law.”<sup>42</sup> They argued that only the modern position can account for such language.<sup>43</sup> Finally, they stressed that the revisionist position would prevent federal courts from applying important categories of uncodified customary international law. For example, Neuman cited consular immunity “as an uncomplicated example to illustrate the need for federal common law in domestic litigation.”<sup>44</sup> Similarly, Koh invoked the immunity of visiting heads of state to demonstrate the need to treat customary international law as federal common law.<sup>45</sup>

Neither the modern position nor the revisionist position fully accounts for the role that the traditional law of nations has played in the U.S. constitutional system. As we explain in this Article, the Constitution’s exclusive allocation of certain foreign relations powers to the political branches in Articles I and II—including powers over recognition, war, captures, and reprisals—was originally understood to require states and courts to respect certain rights of foreign sovereigns in order to uphold the allocation or exercise of these powers. These powers can only be fully understood by reference to background principles of the law of nations in existence at the time of their adoption. For example, a decision by the political branches to recognize a foreign nation or government necessarily implied that the United States—including its courts and individual states—would respect the rights of the recognized nation under the law of nations. Likewise, the Constitution’s allocation of war powers to the political branches historically required courts and states to respect the perfect rights of foreign nations in order to avoid giving such nations just cause for war. Finally, the Constitution’s allocation to Congress of the powers to make captures and authorize reprisals denied the judiciary power to sanction such actions on their own. Since the Founding, the Supreme Court has protected the traditional rights of foreign sovereigns when necessary to up-

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focused on the need to ensure federal control over enforcement of the law of nations.”).

<sup>42</sup> 175 U.S. 677, 700 (1900).

<sup>43</sup> See Koh, *supra* note 2, at 1828 n.23; Neuman, *supra* note 40, at 374–75.

<sup>44</sup> Neuman, *supra* note 40, at 391.

<sup>45</sup> Koh, *supra* note 2, at 1829.



hold the Constitution's allocation of recognition, war, capture, and reprisal powers to the political branches of the federal government.

There is a canon of Supreme Court cases involving the law of nations—such as *Murray v. The Schooner Charming Betsy*,<sup>46</sup> *The Paquete Habana*,<sup>47</sup> and *Sabbatino*<sup>48</sup>—that scholars have invoked in defending the modern and revisionist positions. Each of these cases involved a principle of the law of nations protecting the sovereign rights of foreign nations. Of course, in the twentieth century customary international law increasingly recognized limitations on nations' sovereignty, including how nations must act toward their own citizens. Adherents of the modern and revisionist positions have attempted to use historical materials and judicial precedents to formulate a uniform rule governing how federal courts should treat *all* rules of customary international law, be they traditional sovereignty-respecting rules or later-emerging sovereignty-limiting rules.

The modern position would treat all customary international law—including modern sovereignty-limiting rules—as self-executing federal common law applicable in state and federal courts. In some cases, however, this approach would undermine rather than further the Constitution's allocation of powers. *Sabbatino*—a decision often (mis)cited by proponents of the modern position—illustrates the point. *Sabbatino* applied a traditional sovereignty-protecting rule favored by a recognized foreign state (the act of state doctrine) rather than a modern sovereignty-limiting rule of customary international law favored by the claimant (a rule against discriminatory confiscation of private property).<sup>49</sup> Constitutional considerations led the Court to enforce the former but not the latter rule as a matter of federal law.

The revisionist position, on the other hand, would subordinate all uncodified principles of the law of nations to contrary state law. This would create a host of practical difficulties and would contradict a great deal of historical practice. Denial of diplomatic or head of state immunity, for example, would contradict the political branches' recognition of a foreign government and historically

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<sup>46</sup> 6 U.S. (2 Cranch) 64 (1804).

<sup>47</sup> 175 U.S. 677 (1900).

<sup>48</sup> 376 U.S. 398 (1964).

<sup>49</sup> See *infra* notes 370–408 and accompanying text.

could have even led to war. Accordingly, it is necessary to determine whether there is an alternative explanation of the historical practice that is consistent with the constitutional lessons of *Erie* while also respecting the sovereignty-protecting rules traditionally enforced by federal courts.

## II. CONSTITUTIONAL INCORPORATION OF THE LAW OF NATIONS

The U.S. constitutional tradition generally treats the bargained-for provisions adopted pursuant to the procedures set forth in Article VII as authoritative law.<sup>50</sup> Indeed, although some modern scholars question whether the text should be authoritative,<sup>51</sup> almost all regard it as at least relevant to constitutional meaning. Broadly speaking, the original document created a federal system with two main features: federalism and separation of powers. The document is much more precise than this, however, and one must consult its specific provisions to understand the public meaning it originally conveyed. The meaning of these provisions is not always self-evident, especially when sought more than two centuries after their adoption. Legal texts are frequently written against the backdrop of well-developed, pre-existing bodies of law.<sup>52</sup> On these occasions, the text functions as a kind of shorthand, and cannot be fully understood without resort to background assumptions and concepts. The Constitution is no exception. For example, the Constitution's references to the right to trial by "Jury"<sup>53</sup> and the "Privilege of the Writ of Habeas Corpus"<sup>54</sup> can only be understood by reference to background principles of the common law from which these terms

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<sup>50</sup> See John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2037-38 (2009). Especially in cases of first impression, the Supreme Court has a long tradition of attempting to recover the meaning of the constitutional text in historical context. See *id.* at 2038 & n.157 (collecting cases).

<sup>51</sup> See Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 205, 225 (1980) (stating that today's Americans "did not adopt the Constitution, and those who did are dead and gone"); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 880 (1996) ("Following a written constitution means accepting the judgments of people who lived centuries ago in a society that was very different from ours.").

<sup>52</sup> See Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. (forthcoming Sept. 2012).

<sup>53</sup> U.S. Const. art. III, § 2, cl. 3.

<sup>54</sup> *Id.* art. I, § 9, cl. 2.

were drawn. Similarly, the Constitution employs various terms drawn from the law of nations, such as “War,”<sup>55</sup> “Letters of Marque and Reprisal,”<sup>56</sup> “Captures,”<sup>57</sup> “Treaties,”<sup>58</sup> “Ambassadors,”<sup>59</sup> and “admiralty.”<sup>60</sup> The Constitution does not define such terms because—at the time of their adoption—they all had well-known meanings derived from established bodies of law with which the Founders were familiar.

We start from the assumption that the Founders used terms drawn from the law of nations in their ordinary sense and drafted the Constitution, in part, to enable the United States to fulfill its obligations under the law of nations. In doing so, the Founders made important choices both about the division of foreign relations powers between the states and the federal government and about the allocation of such powers among the three branches of the federal government. Accurately decoding these choices requires interpreters to give careful consideration to background principles of the law of nations and how they interact with the Constitution’s allocation of powers.<sup>61</sup>

Many provisions of the Constitution—including its assignment of specific foreign relations powers—were drafted against the backdrop of well-established principles drawn from the law of nations. These principles shed light both on the meaning of the specific foreign relations powers in the Constitution and on their assignment to the political branches of the federal government (as opposed to courts or the states).<sup>62</sup> The law of nations established a set of recip-

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<sup>55</sup> Id. § 8, cl. 11.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id. art. II, § 2, cl. 2.

<sup>59</sup> Id.; id. § 3.

<sup>60</sup> Id. art. III, § 2, cl. 1.

<sup>61</sup> It is commonplace for interpreters to read textual provisions in light of the established conventions that accompany the subject matter of the text. For example, federal criminal statutes are read to include common law defenses such as self-defense, and federal statutes of limitation are read to permit equitable tolling. These practices go beyond the use of background meanings we propose, but are part of the larger notion that the enactment of certain well-known terms or phrases often carries with it certain implications that are not always apparent on the face of the enacted text.

<sup>62</sup> As John Manning has explained, “[i]f the meaning of a text depends on the shared background conventions of the relevant linguistic community, then any reasonable user of language must know ‘the assumptions shared by the speakers and the intended audience.’” Manning, *Absurdity Doctrine*, supra note 9 (quoting Frank H. Easter-

rocal rights and obligations that governed interactions among recognized sovereign states. These rules were designed to maintain peace and facilitate friendly relations between nations and their citizens. The most important rights under the law of nations at the time of the Founding were known as “perfect rights.” These included the rights to peaceably enjoy liberty, to exercise neutral rights on the high seas, to conduct diplomatic relations, and to exercise territorial sovereignty. Violation of a nation’s perfect rights by another nation gave the offended nation just cause for war. These principles were well known to members of the Founding generation, who sought to establish a government capable of complying with and reaping the benefits of the law of nations. Upon declaring independence, for example, the United States sought recognition by other nations not only to obtain military support and loans, but also to secure and enjoy its full rights under the law of nations. In the 1780s, following the War of Independence, actions by states in violation of other nations’ rights under both treaties and the law of nations increasingly undermined the United States’ relations with other nations and risked embroiling the new nation in new wars.

To avoid such violations and secure the United States’ rights as a recognized nation, the Founders adopted a Constitution allocating exclusive authority to make key foreign policy decisions on behalf of the United States to the political branches of the federal government. Several constitutional provisions—including those granting recognition, war, capture, and reprisal powers—gave the political branches sole power to make important decisions regarding U.S. relations with other nations. In context, these provisions were reasonably understood to forbid states and courts from establishing their own independent foreign policy by violating the traditional rights of recognized foreign nations without authorization from the political branches. Under this reading, if courts or states violated a recognized nation’s rights under the law of nations, they would countermand the exclusive constitutional authority of the federal political branches to recognize a foreign nation (and thereby to pledge U.S. respect for its rights under the law of nations). In addi-

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brook, *What Does Legislative History Tell Us?*, 66 *Chi.-Kent L. Rev.* 441, 443 (1990)).

tion, such unauthorized violations by courts or states might contradict the political branches' exclusive constitutional powers to commence war, issue reprisals, and authorize captures against another nation.

The approach that we describe here is based on an objective reading of the powers conferred by the Constitution rather than the subjective intent of the individuals who drafted and ratified these provisions.<sup>63</sup> The law of nations established a well-known set of rights and obligations of free and independent states. Respect for these rights and obligations was integral to the conduct of foreign relations and crucial to whether a nation would be at peace or war. The Founders apparently saw no need to spell out all of these assumptions and implications in drafting the Constitution. Rather, they were content to draft the Constitution against the backdrop of well-established principles of the law of nations. A reasonable and skilled reader of the Constitution, familiar with the states' shared legal traditions, would have understood that the powers set forth in the document—to recognize foreign nations, declare war, grant letters of marque and reprisal, and authorize captures—necessarily interacted with the law of nations.<sup>64</sup> If the meaning of any of these

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<sup>63</sup> As others have explained, a multimember, multistate ratification process like the one spelled out in Article VII cannot yield an identifiable, collective, subjective intent. See Brest, *supra* note 51, at 225. A way to maintain fidelity to the decisions made by those who drafted and ratified the Constitution is to assume that they meant to have the text they approved interpreted in accordance with the linguistic conventions prevailing at the time. See Joseph Raz, *Intention in Interpretation*, in *The Autonomy of Law: Essays on Legal Positivism* 249, 268 (Robert P. George ed., 1996). Among originalists, moreover, original public meaning has largely replaced original intent as the dominant approach. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. Chi. L. Rev.* 101, 105 (2001); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541, 552 (1994); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *Geo. Wash. L. Rev.* 1119 (1998); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Geo. L.J.* 1113, 1139–48 (2003); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *Geo. Wash. L. Rev.* 1127 (1998).

<sup>64</sup> Legal backdrops often play an important part in determining the objective meaning of enacted texts. For example, a statute creating a new cause of action in tort need not specify that the plaintiff has the burden of proof because the statute is written against the background of a well-established tradition to that effect.

provisions was ambiguous, however, the Founders presumably expected that their meaning would be settled over time.<sup>65</sup>

*A. Rights of Recognized Sovereigns Under the Law of Nations*

To understand the law of nations background against which the Constitution was adopted, one must begin with the writings of the eighteenth-century Swiss philosopher, Emmerich de Vattel. Vattel's treatise, *The Law of Nations*, was the most well-known work on the law of nations in England and America at the time of the Founding.<sup>66</sup> In this treatise, Vattel described the established rights of recognized sovereign nations under the law of nations. A "sovereign state," Vattel explained, is any "nation that governs itself . . . without any dependence on a foreign power."<sup>67</sup> Such sovereign nations "are naturally equal, and receive from nature the same obligations and rights [as those of any other state]."<sup>68</sup> Thus, he explained, "[e]very nation, every sovereign and independent state, deserves consideration and respect, because it makes an immediate figure in the grand society of the human-race."<sup>69</sup>

All recognized sovereign nations enjoyed several especially important perfect rights under the law of nations—rights so foundational that nations were justified in enforcing them by resort to war. One such right was "the right of embassy."<sup>70</sup> "Every sovereign

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<sup>65</sup> See The Federalist No. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) ("All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

<sup>66</sup> See 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."); Bellia & Clark, *Federal Common Law*, supra note 4, at 15–16; 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").

<sup>67</sup> 1 Emmerich de Vattel, *The Law of Nations* bk. I, § 4, at 10 (London, J. Newberry et al. 1759).

<sup>68</sup> Id. intro., § 18, at 6.

<sup>69</sup> Id. bk. II, § 35, at 133.

<sup>70</sup> 2 id. bk. IV, § 57, at 133; see 2 Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* 156 (Tenney Frank trans., Clarendon Press 1930) (1737) ("Among writers on public law it is usually agreed that only a sovereign power has a right to

state . . . has,” Vattel explained, “a right to send and receive public ministers.”<sup>71</sup> Vattel considered the rights to establish embassies and to send and receive public ministers as necessary to effectuating all other rights. “[N]ations,” he explained, “should treat with each for the good of their affairs, for avoiding reciprocal damages, and for adjusting and terminating their differences.”<sup>72</sup> Public ministers were “necessary instruments in affairs which sovereigns have among themselves, and to that correspondence which they have a right of carrying on.”<sup>73</sup> Vattel described the right to send public ministers—and the corresponding rights, privileges, and immunities of public ministers—as inviolable because the “respect due to sovereigns should reflect on their representatives, and chiefly on their ambassadors, as representing his master’s person in the first degree.”<sup>74</sup>

The right to send and receive ambassadors was intertwined with the question whether a particular state or government was legitimate. At times of monarchical succession or insurrection, a foreign nation faced the question of when to recognize a new government, including when to receive an ambassador from it. In such cases, Vattel explained, “there is no rule more certain, or more agreeable to the law of nations,” than that a nation may recognize the sovereign in “possession.”<sup>75</sup> In times of civil war, a foreign nation temporarily might have to recognize two governments as having rights under the law of nations in order to remain neutral and avoid interfering with the warring factions’ domestic affairs.<sup>76</sup>

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send ambassadors.”); Hugo Grotius, *The Rights of War and Peace* 376–78 (London, W. Innys, et al. 1738) (describing the right of embassy); 2 Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* § 1044, at 526 (Joseph H. Drake trans., Clarendon Press 1934) (1764) (“Nations have a perfect right to send ambassadors to other nations.”).

<sup>71</sup> 2 Vattel, *supra* note 67, bk. IV, § 57, at 133.

<sup>72</sup> *Id.* § 55, at 132.

<sup>73</sup> *Id.* § 57, at 133.

<sup>74</sup> *Id.* § 80, at 142.

<sup>75</sup> *Id.* § 68, at 136; see also Bynkershoek, *supra* note 70, at 157–58 (explaining that it “would be impossible” to distinguish whether “a ruler . . . holds his sovereignty by just title, or whether he has acquired it unjustly,” and thus “[i]t is sufficient for those who receive the embassy that he is in possession of sovereignty”).

<sup>76</sup> As Vattel explained,

civil war breaks the bands of society and of government, or at least it suspends their force and effect; it produces in the nation two independent parties, considering each other as enemies, and acknowledging no common judge: therefore of

In addition to the right of embassy, Vattel identified several other perfect rights enjoyed by recognized nations under the law of nations. Many of these rights related to territorial sovereignty. For example, nations had “a right to preserve themselves”—“a right not to suffer any other to obstruct its preservation, its perfection, and happiness, that is, to preserve itself from all injuries” that other nations might attempt to inflict.<sup>77</sup> They also had the exclusive right to govern within their territorial domains, for no nation “[has] the least authority to interfere in the government of another state.”<sup>78</sup> “Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.”<sup>79</sup> Accordingly, no “foreign power [may] take cognizance of the administration of this sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”<sup>80</sup> Vattel emphasized the connection between sovereignty and territory: “The empire united to the domain, establishes the jurisdiction of the nation in its territories, or the country that belongs to it.”<sup>81</sup> Not only should nations not usurp “the territory of another,” Vattel explained, but “they should also respect it, and abstain from every act contrary to the rights of the sovereign: for a foreign nation can claim no right to it.”<sup>82</sup>

Finally, each nation had an equal and perfect right to use the high seas. This right derived from the importance of commerce and access to the resources of the sea. All recognized nations, Vattel explained, enjoyed freedom of commerce, the “right to trade with those which shall be willing to correspond.”<sup>83</sup> Thus, “[t]he right of navigating and fishing in the open sea, being then a right common

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necessity these two parties must, at least for a time, be considered as forming two separate bodies, two distinct people.

<sup>2</sup> Vattel, *supra* note 67, bk. III, § 293, at 109; see also Grotius, *supra* note 70, at 378 (explaining that during times of civil war, “one Nation may for the Time be accounted two”).

<sup>77</sup> Vattel, *supra* note 67, bk. II, § 49, at 137.

<sup>78</sup> *Id.* § 54, at 138.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* § 55, at 138.

<sup>81</sup> *Id.* § 84, at 147.

<sup>82</sup> *Id.* § 93, at 151.

<sup>83</sup> *Id.* § 24, at 128.



to all men,”<sup>84</sup> a nation had no “right to lay claim to the open sea, or to attribute the use of it to itself to the exclusion of others.”<sup>85</sup> “[T]he nation who attempts to exclude another from that advantage,” Vattel concluded, “does it an injury, and gives a sufficient cause for war.”<sup>86</sup>

Indeed, Vattel recognized that violation of any of these perfect rights—to send and receive ambassadors, exercise territorial sovereignty, avoid injuries inflicted by other nations, and enjoy open use of the high seas—gave the aggrieved nation just cause for war. Under general principles of law, a perfect right was a right that the holder could carry into execution without legal restraint, including by force. An imperfect (or inchoate) right, in contrast, was subject to legal restrictions upon its exercise.<sup>87</sup> A “*perfect right*” under the law of nations, Vattel explained, “is that to which is joined the right of constraining those who refuse to fulfil the obligation resulting from it; and the imperfect right is that unaccompanied by this right of constraint.”<sup>88</sup> Therefore, when one sovereign failed to obtain satisfaction for the violation of its perfect rights from another, the nation had just cause for waging war to compel the corresponding duty.<sup>89</sup> The concept of perfect rights was well recognized in England and had deep roots in writings on the law of nations by not only Vattel, but also such well-known writers as Pufendorf and Burlamaqui.<sup>90</sup> The idea appeared in judicial opinions and in public

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<sup>84</sup> Id. bk. I, § 282, at 114.

<sup>85</sup> Id. § 281, at 113.

<sup>86</sup> Id. § 282, at 114.

<sup>87</sup> See Grotius, *supra* note 70, at 282 n.2 (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”); 2 T. Rutherford, *Institutes of Natural Law, Being the Substance of a Course of Lectures on Grotius de Jure Belli et Pacis* 28–29 (Philadelphia, W. Young, 2d ed. 1799) (“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.”).

<sup>88</sup> Vattel, *supra* note 67, intro., § 17, at 5.

<sup>89</sup> Id. § 22, at 6–7.

<sup>90</sup> See, e.g., 1 J.J. Burlamaqui, *The Principles of Natural and Politic Law* 348 (Nugent trans., Boston, Joseph Bumstead, 4th ed. rev. and corrected 1792) (1747 & 1751) (translation combining separate works) (“Offensive wars are those which are made to

discourse about the relations of England with other nations.<sup>91</sup> As the next Section explains, the Founders were familiar with perfect rights under the law of nations and the serious consequences of failing to respect them.

### *B. Independence and the Rights of Recognized Nations*

Beginning with the Declaration of Independence, the United States sought recognition as a sovereign nation entitled to all rights accompanying that status under the law of nations. Following independence, members of the Founding generation grew increasingly concerned with state violations of other nations' rights in the years leading up to the Federal Convention. The Founders drafted the Constitution with appreciation for the importance of securing international recognition of the United States and of respecting other nations' sovereign rights. Accordingly, the meaning of many constitutional powers—and the significance of their assignment to the political branches—cannot be fully appreciated without reference to background principles of the law of nations.

#### *1. The Declaration of Independence and Recognition*

The Declaration of Independence provides important insight into the weight that the Founders placed on both the law of nations and recognition of the United States by foreign nations. The Declaration not only declared the colonies' independence from Great Britain, but also implicitly sought recognition from the other nations of the world in order to secure important rights under the law of nations.<sup>92</sup> After reciting “a history of repeated injuries and usur-

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constrain others to give us our due, in virtue of a perfect right we have to exact it of them . . . .”); 2 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*.”); *id.* at 1294 (describing as “causes of just wars”: “assert[ing] our claim to whatever others may owe us by a perfect right” and “obtain[ing] reparation for losses which we have suffered by injuries”); see also Bellia & Clark, *Federal Common Law*, *supra* note 4, at 17.

<sup>91</sup> See Bellia & Clark, *Federal Common Law*, *supra* note 4, at 17–18.

<sup>92</sup> See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. Rev.* 932, 942 (2010) (“[T]he primary audience for the Declaration was in Europe; what the drafters sought was precisely international recognition.”). See

pations”<sup>93</sup> by King George III against the colonies, the Declaration asserted:

That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.<sup>94</sup>

The use of the phrase, “Free and Independent States,” was a clear reference to the law of nations. If these “United States” achieved this status, then other nations would have to respect their rights to prevent and vindicate injuries by other nations (“Power to levy War” and “conclude Peace”), make treaties (“contract Alliances” and “establish Commerce”), enjoy neutral use of the high seas (“establish Commerce”), and exercise territorial sovereignty and diplomatic rights (“all other Acts and Things which Independent States may of right do”).

Widespread and complete recognition of the United States as free and independent states would follow a protracted and uncertain path.<sup>95</sup> Eighteenth-century writers described recognition less as a positivistic act by other nations than as a self-evident status. As Vattel stated, “[e]very nation, every sovereign and independent state, deserves consideration and respect, because it makes an immediate figure in the grand society of the human-race.”<sup>96</sup> In the eighteenth century, European nations generally regarded recognition of existing states as “self-evident, quasi-automatic and only ‘declaratory’ in its effect.”<sup>97</sup> It was less certain, however, how new

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generally David Armitage, *The Declaration of Independence: A Global History* (2007) (describing the Declaration’s international dimensions).

<sup>93</sup> The Declaration of Independence para. 2 (U.S. 1776).

<sup>94</sup> *Id.* para. 32.

<sup>95</sup> See Golove & Hulsebosch, *supra* note 92, at 942–43 (“The founders knew that the recognition they received was tentative and uncertain in what it entailed and that it remained defeasible for a considerable period of time . . .”).

<sup>96</sup> Vattel, *supra* note 67, bk. II, § 35, at 133.

<sup>97</sup> Wilhelm G. Grewe, *The Epochs of International Law 500* (Michael Byers trans. and rev., 2000) (1984).

states came to enjoy the right of recognition. As Professor David Armitage has explained, “the means by which new states might acquire that right, if they had not previously possessed it, became a central topic of international legal argument only in the late eighteenth century, partly in response to the issues of recognition raised by the Declaration of Independence itself.”<sup>98</sup> Before the Declaration of Independence, nations and writers discussed recognition of new sovereigns according to a principle of “dynastic legitimacy”—“that new states could be formed only with the free consent of their legitimate parent sovereign, regardless of how a new state might actually justify its own establishment.”<sup>99</sup> As explained, however, Vattel and other writers suggested that a nation could recognize a new sovereign on the basis of its “actual possession” of independent authority. The War of Independence (and later the French Revolution) tested the norm of dynastic legitimacy.<sup>100</sup> Given the competing concepts of dynastic legitimacy and effective possession, the Founders appreciated the political challenge of obtaining recognition for the United States, especially before Great Britain relinquished its claim to the colonies in 1782.

After declaring independence, U.S. delegates quickly sought recognition from several other nations. In September 1776, the Continental Congress appointed commissioners to request recognition of the states’ independence and sovereignty from France. Congress directed the commissioners also to seek “a recognition of our independency and sovereignty” from other nations with representatives in the French court and “to conclude treaties of peace, amity, and commerce between their princes or states and us.”<sup>101</sup> France eventually came to recognize the United States in 1778 by

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<sup>98</sup> Armitage, *supra* note 92, at 85–86.

<sup>99</sup> Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776*, at 30, 41 (2010); see also Armitage, *supra* note 92, at 86 (explaining that before the Declaration of Independence, “discussions of state recognition in European public law had concerned individual rulers’ rights of dynastic succession”).

<sup>100</sup> See Fabry, *supra* note 99, at 24–25.

<sup>101</sup> Additional Instructions to Benjamin Franklin, Silas Deane, and Arthur Lee, Commissioners from the United States of America to the King of France (Oct. 16, 1776), in 2 *The Revolutionary Diplomatic Correspondence of the United States* 172, 172 (Francis Wharton ed., Washington, Gov’t Printing Office 1889).

making treaties of alliance and amity and commerce.<sup>102</sup> Because Britain denied the independence of the United States at this time, King George III described French recognition of the United States as “an aggression on the honour of his crown, and the essential interests of his kingdoms . . . subversive of the law of nations, and injurious to the rights of every sovereign power in Europe.”<sup>103</sup> “France responded by appealing to the ‘incontestable principle of public law’ that the fact of the effective possession of US independence was enough to justify the king to sign treaties with the United States without examining the legality of that independence.”<sup>104</sup> In other words, France and Britain each drew on a different strain of the law of nations. Britain claimed that the United States was not entitled to *de jure* recognition because Britain had not yet renounced its dynastic rights, while France claimed that the United States was entitled to *de facto* recognition because it held effective possession of sovereignty.<sup>105</sup> The United States also sought recognition from the Dutch Republic, Spain, and Russia. Of these, only the Dutch Republic would recognize the United States before Britain did so. By the time Britain took this step in 1782, the British cabinet had already conceded that U.S. independence was a

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<sup>102</sup> Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12; Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6.

<sup>103</sup> Message from King George III to both Houses of Parliament (Mar. 17, 1778), in *The Annual Register, or a View of the History, Politics, and Literature, For the Year 1778.*, at 290, 290 (1779).

<sup>104</sup> Fabry, *supra* note 99, at 30 (quoting Observations of the Versailles Court in relation to the British Justificatory Memoir (1779), in *2 Sources Relating to the History of the Law of Nations* 446, 448 (Wilhelm G. Grewe ed., 1988)). In 1789, the German jurist Georg Friedrich von Martens wrote that when there is

an open rupture between the sovereign and his subjects . . . a foreign nation . . . does not appear to violate its perfect obligations nor to deviate from the principles of neutrality, if, in adhering to the possession (without examining into its legality), it treats as . . . an independent nation, people who have declared, and still maintain themselves independent.

G.F. von Martens, *A Compendium of the Law of Nations* 80–81 (William Cobbett trans., London, Cobbett & Morgan 1802). Moreover, he continued, once the revolting party “has entered into the possession of the independence demanded, the dispute becomes the same as those which happen between independent states.” *Id.* at 81. Thus, “any foreign prince has a right to lend assistance to the party whom he believes has justice on his side.” *Id.*

<sup>105</sup> Fabry, *supra* note 99, at 30–31. For an extended discussion of Founding-era conceptions of *de facto* sovereignty, see Anthony J. Colangelo, “*De Facto* Sovereignty”: *Boumediene* and Beyond, 77 *Geo. Wash. L. Rev.* 623, 641–53 (2009).

foregone conclusion.<sup>106</sup> Notwithstanding French and Dutch recognition of the United States, other nations adhered to the principle of dynastic legitimacy and did not recognize the United States before Britain did so.<sup>107</sup>

In November 1782, Britain formally acknowledged U.S. independence in the provisional peace treaty ending the War of Independence. Article I echoed the Declaration of Independence by providing that “His Britannic Majesty acknowledges the said United States . . . to be free, sovereign and independent States.”<sup>108</sup> Once Britain recognized the United States, other nations eventually followed suit. Sweden,<sup>109</sup> Prussia,<sup>110</sup> and Morocco<sup>111</sup> entered treaties of amity and commerce with the United States in 1783, 1785, and 1787, respectively. Moreover, Spain recognized the United States in 1783 when it formally received William Carmichael “as the *chargé des affaires* of the United States.”<sup>112</sup> At the time of the Federal Convention, however, the United States was

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<sup>106</sup> See 1 The Revolutionary Diplomatic Correspondence, supra note 101, at 293–94 (“Foreign monarchs, more or less absolute, could not be expected to hurriedly recognize the independence of provinces which were still in the throes of war with a sovereign with whom these monarchs were at peace, and when to these monarchs revolution was a word in itself very unacceptable.”); see also Fabry, supra note 99, at 32.

<sup>107</sup> Julius Goebel observed that “[i]t has been traditional among historians and publicists to regard the acknowledgment of the independence of the American colonies by France, if not as a perversion of the recognition principle, at least as a very fine example of premature recognition which presaged the growth of the de facto theory.” Julius Goebel, Jr., *The Recognition Policy of the United States* 72 (1915). Goebel argued, however, that at the time French acknowledgment of U.S. independence was inextricably inter-related with its active intervention in the War of Independence and not “a clean-cut issue” of “simple recognition.” *Id.* Intervention and recognition, he argued, could be disaggregated “only when there was an acknowledgment of independence by the parent state itself.” *Id.* at 92. This was attributable in part “to the fact that the idea of legitimate right was not only a basic principle of European public law but was a political reality which appeared to be indisputable.” *Id.*

<sup>108</sup> Provisional Articles, U.S.-Gr. Brit., art. I, Nov. 30, 1782, 8 Stat. 54.

<sup>109</sup> Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60.

<sup>110</sup> Treaty of Amity and Commerce, U.S.-Prussia, July–Sept. 1785, 8 Stat. 84.

<sup>111</sup> Treaty of Peace and Friendship, U.S.-Morocco, Jan. 1787, 8 Stat. 100.

<sup>112</sup> See Letter from William Carmichael to Robert Livingston, U.S. Sec’y for Foreign Affairs (Feb. 21, 1783), in 6 The Revolutionary Diplomatic Correspondence, supra note 101, at 259, 259; Letter from William Carmichael to Robert Livingston, U.S. Sec’y for Foreign Affairs (Mar. 13, 1783), in 6 The Revolutionary Diplomatic Correspondence, supra note 101, at 294, 294; Letter from William Carmichael to Robert Livingston, U.S. Sec’y for Foreign Affairs (Aug. 30, 1783), in 6 The Revolutionary Diplomatic Correspondence, supra note 101, at 663, 663.

still seeking recognition from several other nations. Heading into the Convention, Americans familiar with the law of nations understood the significance of recognition and the rights to territorial sovereignty, diplomatic relations, and use of the high seas that it implied.<sup>113</sup> Before it was recognized, “the United States could not sign international treaties, have diplomatic relations, form formal military alliances, raise foreign loans, join international organizations, or benefit from regularized trade and commerce.”<sup>114</sup> Moreover, until it was recognized, the United States “could not successfully claim protection of state rights as they were interpreted at the time.”<sup>115</sup>

## 2. *State Offenses Against the Law of Nations*

The Founders also appreciated that violation of a recognized nation’s sovereign rights could give the offended nation just cause for war under the law of nations. While the United States was seeking recognition from other nations in the 1780s, American states were notoriously violating other nations’ rights secured by the law of nations.<sup>116</sup> During the Articles of Confederation period, certain states failed to comply with the 1783 Treaty of Paris with Great Britain<sup>117</sup> by impeding British creditors from recovering debts.<sup>118</sup> States violated the law of nations by failing to punish or otherwise redress acts of violence committed by their citizens against British subjects.<sup>119</sup> They interfered with the rights of ambassadors and mishan-

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<sup>113</sup> As James Duane—a prominent Federalist and future delegate to the New York ratifying convention—explained in 1784, “if we should not recognize the law of nations, neither ought the benefit of that law to be extended to us: and it would follow that our *commerce*, and our *persons*, in foreign parts, would be unprotected by the great sanctions, which it has enjoined.” *Arguments and Judgments of the Mayor’s Court of the City of New York in a Cause Between Elizabeth Rutgers and Joshua Waddington*, at xvii, 21, 23–24 (1786).

<sup>114</sup> Fabry, *supra* note 99, at 35.

<sup>115</sup> *Id.*

<sup>116</sup> See generally Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 494–507 (2011) [hereinafter Bellia & Clark, *Alien Tort Statute*]; Bellia & Clark, *Federal Common Law*, *supra* note 4, at 29–31 (describing state violations of the law of nations).

<sup>117</sup> *Definitive Treaty of Peace, U.S.-Gr. Brit.*, Sept. 3, 1783, 8 Stat. 80.

<sup>118</sup> See Bellia & Clark, *Alien Tort Statute*, *supra* note 116, at 498–501 (describing such violations and their potential consequences).

<sup>119</sup> See *id.* at 501–03 (describing such violations and their potential consequences).

dled cases involving other nations' free and neutral use of the high seas. The Continental Congress tried but was unable to stem the tide of law of nations violations by the states.<sup>120</sup>

Members of the Founding generation were well aware that such violations of other nations' sovereign rights undermined the United States' efforts to achieve greater recognition and risked triggering war against the United States. In April 1787, James Madison warned in his influential pamphlet, *Vices of the Political System of the United States*, that such violations posed grave dangers to the peace and security of the United States:

From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. . . . The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.<sup>121</sup>

When Edmund Randolph opened the Federal Convention of 1787, one of the first defects he identified with the Confederation was its inability to prevent or redress “acts against a foreign power contrary to the laws of nations.”<sup>122</sup> He concluded that the Confederation “therefore [could not] prevent a war.”<sup>123</sup> A top priority of the Convention, then, was to devise a constitution that would en-

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<sup>120</sup> See *id.* at 494–506.

<sup>121</sup> James Madison, *Vices of the Political System of the United States* (Apr. 1787), reprinted in 9 *The Papers of James Madison* 345, 349 (Robert A. Rutland et al. eds., 1975).

<sup>122</sup> 1 *The Records of the Federal Convention of 1787*, at 24–25 (Max Farrand ed., 1966).

<sup>123</sup> *Id.* at 25.



able the United States to meet its obligations under the law of nations and to prevent unintended wars.<sup>124</sup>

*C. Constitutional Incorporation of the Law of Nations*

The inability of the Confederation Congress to ensure that the United States met its obligations under the law of nations continued to be a matter of public interest and alarm while the Constitution was being drafted. This political background provides context for understanding the text of Articles I and II. In 1787, during the Federal Convention, a New York City constable entered the residence of Pieter Johan van Berckel, Dutch minister plenipotentiary to the United States, with a warrant to arrest a member of his household.<sup>125</sup> Van Berckel protested to John Jay, the American foreign affairs secretary, who in turn reported the complaint to Congress.<sup>126</sup> Although the United States and the Netherlands had recognized each other, the Confederation was powerless to redress this violation of the latter's perfect rights. Jay reported that he could only refer the matter to "the Governor of the State of New York, to the End that such judicial Proceedings may be had on the Complaint . . . as Justice and the Laws of Nations may require."<sup>127</sup> This outcome was not satisfactory to Jay and others, however, because it meant that the actions of any one American state could undermine friendly relations between another nation and the United States as a whole.

A primary goal of the Federal Convention was to adopt provisions that would empower the United States to maintain peace by meeting its obligations under the law of nations and, conversely, to give federal officials exclusive power to decide when to engage in hostilities with other nations. The Founders pursued those goals through express provisions; they explicitly assigned to the federal

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<sup>124</sup> As Professors David Golove and Daniel Hulsebosch recently explained, "[t]he fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a 'civilized state' worthy of equal respect in the international community." Golove & Hulsebosch, *supra* note 92, at 935.

<sup>125</sup> 34 *Journals of the Continental Congress, 1774-1789*, at 109 (Roscoe R. Hill ed., 1937).

<sup>126</sup> *Id.* at 109, 111.

<sup>127</sup> *Id.* at 111.

political branches various foreign relations powers whose meaning could only be ascertained by reference to the law of nations.<sup>128</sup> In particular, they gave the political branches exclusive power to recognize foreign nations, signifying respect for their accompanying rights under the law of nations, and to decide when to make war, issue reprisals, and authorize captures against them. The full significance of these powers could only be understood by reference to certain background principles of the law of nations. In context, the Constitution's allocation of these powers to the political branches served to constrain courts and states from violating other nations' rights unless and until the political branches exercised their power to abrogate them. In other words, the new Constitution responded to state (including judicial) practices under the Articles of Confederation by specifically assigning foreign relations and war powers to the political branches and thereby denying states and courts the authority to negate or usurp those powers by violating the sovereign rights of foreign nations.

As Professor John Manning has explained, "when an enacted text establishes a new power and specifies a detailed procedure for carrying that power into effect, interpreters should read the resultant specification as exclusive."<sup>129</sup> This interpretive convention "has deep roots in our constitutional tradition."<sup>130</sup> Read in context, Articles I and II vested the federal political branches with exclusive authority to recognize foreign sovereigns, make war and peace, authorize captures, and issue letters of marque and reprisal against foreign nations. All of these powers, moreover, carried connotations under the law of nations.

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<sup>128</sup> See Anthony J. Bellia Jr. & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 *Notre Dame L. Rev.* 1795, 1801–02 (2010) [hereinafter *Bellia & Clark, Political Branches*] (describing the Constitution's allocation of important foreign relations powers to the federal government's political branches). This may explain why the Supremacy Clause does not mention the law of nations despite the Founders' desire to require states to comply with certain aspects of the law of nations. Because particular provisions of Articles I and II implicitly incorporate those aspects of the law of nations that the Founders wished to bind the states, the inclusion of those provisions in "[t]his Constitution" ensured the requisite federal supremacy. See U.S. Const. art. VI, cl. 2.

<sup>129</sup> Manning, *Separation of Powers*, *supra* note 9, at 2006.

<sup>130</sup> *Id.* at 2006–07.

First, the Constitution vested the federal political branches with the exclusive means of recognizing foreign sovereigns.<sup>131</sup> At the time of the Founding, pre-existing European nations were presumed to be entitled to recognition as a matter of course. As the Founders understood from their own experience with independence, however, nations had to make political judgments about whether to recognize new or emerging nations and governments. The Constitution vested exclusive authority in the federal political branches over the means of recognition, including the powers to make treaties and to send and receive ambassadors. Recognition signified that one nation would respect the rights of another as a free and independent state under the law of nations. At the time, any violation by an American state or court of the perfect rights that traditionally accompanied recognition would contradict the political branches' decision to recognize the nation in question and usurp their exclusive power to determine on behalf of the United States whether, when, and how to abrogate those rights.

Second, the Constitution gave the federal political branches exclusive authority to make war, issue reprisals, and authorize captures.<sup>132</sup> These exclusive powers to commence, conduct, escalate,

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<sup>131</sup> Scholars have debated the respective powers of Congress and the President to recognize foreign sovereigns. See, e.g., David Gray Adler, *The President's Recognition Power: Ministerial or Discretionary?*, 25 *Presidential Stud. Q.* 267, 279–80 (1995) (arguing that the Constitution committed the recognition power to the President by virtue of the reception clause but that this function is ministerial); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo. Wash. L. Rev.* 527, 556–57 (1999) (arguing that the Constitution gives the President alone the recognition power and that this encompasses the authority free from legislative control to pursue executive policy objectives in the exercise of that power); Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 *U. Rich. L. Rev.* 801, 860–62 (2011) (arguing that the recognition power was not vested in the President by the Constitution under an originalist reading). We need not resolve these debates. The important point, for present purposes, is that the Constitution allocated these powers, in whatever combination, to the federal political branches exclusively, rather than to courts or states.

<sup>132</sup> Scholars have debated, however, the respective distribution of these powers between Congress and the President. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv. L. Rev.* 689, 800 (2008) (arguing that the Commander in Chief power is more than a legally insignificant title but not as expansive as modern Presidents claim); Raoul Berger, *War-Making by the President*, 121 *U. Pa. L. Rev.* 29, 82 (1972) (arguing that the Constitution allocated “virtually all of the war-making powers” to Congress rather than the President); Charles A. Lofgren, *War-Making*

and avoid hostilities with other nations reinforced the conclusion that the Constitution's allocation of power required states and courts to respect the perfect rights of recognized nations and to refrain from retaliating against foreign nations or their subjects without authorization from the political branches. Any violation of a foreign nation's perfect rights—by any part of the United States—was an act of hostility that subjected the United States to possible reprisal or even war. Because the Constitution gave the political branches exclusive authority to initiate and conduct war—and prohibited states from engaging in war—the Constitution was reasonably understood in context to require states and courts to refrain from violating the perfect rights of foreign nations.

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Under the Constitution: The Original Understanding, 81 *Yale L.J.* 672, 699–700 (1972) (arguing that the original understanding of the power “to declare War” encompassed the initiation of hostilities and that the power to issue letters of marque and reprisal constitutes evidence of this); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231, 355–56 (2001) (arguing that the Constitution textually divided all foreign affairs powers between the President and Congress); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 *Tex. L. Rev.* 299, 301–02, 304 (2008) [hereinafter Prakash, *Separation and Overlap*] (arguing that the Constitution allocates some war powers exclusively to Congress and some concurrently to Congress and the President); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 *Cornell L. Rev.* 45, 50–51 (2007) [hereinafter Prakash, *Declare War*] (arguing that the power to declare war includes all commencements of hostilities and is exclusive to Congress under the original reading of the Constitution); Michael D. Ramsey, *Textualism and War Powers*, 69 *U. Chi. L. Rev.* 1543, 1546, 1548 (2002) [hereinafter Ramsey, *Textualism and War Powers*] (arguing that textual division of the executive power and the power to declare war allocated different, but substantial, war-related powers to both Congress and the President); Abraham D. Sofaer, *The Power over War*, 50 *U. Miami L. Rev.* 33, 33–34 (1995) (disagreeing with John Hart Ely about the President's capacity to act absent congressional authorization on the shared premise that Congress is the final repository of the power over war); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 *Cornell L. Rev.* 695, 772 (1997) (arguing that the reason the Constitution allocated the war powers to Congress was to avoid presidential self-aggrandizement); Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 *Mich. L. Rev.* 61, 66 (2007) [hereinafter Wuerth, *International Law*] (arguing that international law can help interpret the Commander in Chief Clause). We need not enter these debates because the important point, for present purposes, is not the precise allocation of war powers between Congress and the President but the fact that, in some combination, they share these powers to the exclusion of federal courts or the states.

*1. Political Branch Authority Over Recognition*

The Constitution empowers the federal political branches to send and receive ambassadors and to make treaties—the traditional means by which nations signified recognition of each other. There were legal consequences to recognition that reasonable people conversant with applicable legal conventions would have known and understood. In a sense, any text authorizing recognition of a foreign power incorporated such consequences by reference. Accordingly, the failure by courts or states to respect the sovereign rights of recognized foreign nations and governments would contradict the political branches' decision on behalf of the United States to accord this status.

As discussed, at the time of the Founding, writers on the law of nations described recognition of established sovereign states as merely declaratory of the pre-existing rights of such states under the law of nations.<sup>133</sup> The Founders were well aware from their own experience, however, that recognition of new states or governments could involve delicate political judgments and positivistic acts of acknowledgment. France and the Dutch Republic recognized the United States before Britain did so, subjecting these nations to potentially serious political consequences. After Britain acknowledged the United States' independence in 1782, Sweden, Prussia, and Morocco proceeded to recognize the United States, but other nations, including Russia, refrained from doing so even up through the Federal Convention. In whatever form, recognition was understood by both the conferring and the receiving nation to be an acknowledgment that the state in question was entitled to certain rights under the law of nations.

The Constitution gave the federal political branches exclusive power to exercise the means by which one nation signified its recognition of another. At the time of the Founding, one such means was to make treaties of amity and commerce. Sending and receiving ambassadors also indicated recognition.<sup>134</sup> In England, the

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<sup>133</sup> See *supra* notes 96–97 and accompanying text.

<sup>134</sup> See Adler, *supra* note 66, at 146–49 (arguing that recognition was a precondition to receiving foreign ministers based on a factual determination rather than presidential discretion as to foreign policy). Arguably, acts of Congress appropriating money to pay the expenses and salary of an ambassador to a country seeking recognition could also constitute an act of recognition. See Julius Goebel, Jr., *The Recognition*

Crown had “the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.”<sup>135</sup> Moreover, the Crown also had the exclusive “prerogative to make treaties, leagues, and alliances with foreign states and princes.”<sup>136</sup> The Constitution assigned both of these powers exclusively to the political branches. Article II provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties.”<sup>137</sup> Moreover, Article II provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls”<sup>138</sup> and that “he shall receive Ambassadors and other public Ministers.”<sup>139</sup> The allocation of these precise powers to the political branches and the specification of detailed procedures for making treaties and appointing ambassadors implied that federal courts could not exercise them.

The Constitution’s specification of these powers and procedures suggests a negative implication that states were disabled from exercising them as well. Article I, Section 10 confirms this implication. Under the Articles of Confederation, states reserved the authority to exercise certain powers of the Confederation Congress if Congress consented to such acts, including making treaties and sending and receiving embassies.<sup>140</sup> The states also reserved limited authority to exercise certain powers of the Confederation Congress, such as the power to make war if invaded or in imminent danger and to issue letters of marque and reprisal during war.<sup>141</sup> Article I, Section 10 of the Constitution further curtailed state authority by expressly providing that states absolutely may not exercise certain powers of the political branches, may exercise others only with congressional

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Policy of the United States 131–33 (1915) (recounting the early nineteenth-century debate over recognition of South American governments and whether to send ministers to the new nations).

<sup>135</sup> 1 William Blackstone, Commentaries \*254.

<sup>136</sup> *Id.* at \*257.

<sup>137</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* § 3.

<sup>140</sup> “No State, without the Consent of the united States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, prince or state.” Articles of Confederation of 1777, art. VI.

<sup>141</sup> *Id.*

consent, and may exercise still others only in limited circumstances. Specifically, Article I, Section 10 provides in absolute terms that “[n]o State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal.”<sup>142</sup> It further provides 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.<sup>143</sup>

Thus, Article I, Section 10 makes clear that states may not enter treaties with other nations, a traditional means of recognition. Interestingly, Article I, Section 10 does not address the power to send and receive ambassadors, which, under the Articles of Confederation, states only could do with the consent of Congress. Absent its consent, the Confederation Congress had “the sole and exclusive right and power . . . of sending and receiving ambassadors.”<sup>144</sup> Although Section 10 does not expressly prohibit states from sending and receiving ambassadors, the conferral of this power on the political branches necessarily implied exclusivity. Without power to make treaties, agreements, or compacts with foreign nations, a power of embassy in states would have been futile. More fundamentally, the states’ exercise of such a power would have been “absolutely and totally *contradictory* and *repugnant*” to the vesting of such authority in the political branches.<sup>145</sup> Because the Founders understood that the “union will undoubtedly be answerable to foreign powers for the conduct of its members,”<sup>146</sup> permitting states to

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<sup>142</sup> U.S. Const. art. I, § 10, cl. 1.

<sup>143</sup> *Id.* cl. 3.

<sup>144</sup> Articles of Confederation of 1777, art. IX.

<sup>145</sup> The Federalist No. 32, *supra* note 65, at 200 (Alexander Hamilton) (explaining that the 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*”); see also The Federalist No. 82, *supra* note 65, 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”).

<sup>146</sup> The Federalist No. 80, *supra* note 65, at 536 (Alexander Hamilton).

exchange ambassadors with foreign states “would necessarily undermine the foreign relations of the United States as a whole.”<sup>147</sup>

When the political branches exercised their power to make treaties, send and receive ambassadors, or engage in other formal acts of recognition, they were signifying that the United States would recognize and respect the other nation’s sovereign rights under the law of nations. This was the essential meaning of recognition under well-known principles of the law of nations. To the Founders, the power to recognize foreign nations in treaties or by sending and receiving ambassadors would have been incomplete (if not nonsensical) if its exercise by the political branches did not connote a commitment on behalf of the entire United States (including its courts and states) to respect the recognized nation’s rights under the law of nations. Accordingly, the political branches’ exercise of their constitutional powers to recognize foreign nations constrained states and courts from violating the perfect rights of such nations.

Consider the United States’ relationship with France, the first nation to recognize the United States as a free and independent sovereign. The 1778 Treaty of Amity and Commerce—in which France first recognized the United States and the United States affirmed its recognition of France—provided that “[t]here shall be a firm, inviolable and universal peace” between the two nations.<sup>148</sup> That year, the United States received its first accredited envoy from France, Conrad Alexandre Gérard de Rayneval. In 1789, Eléonor-François-Elie, Comte de Moustier, served as minister plenipotentiary to the United States. The United States’ recognition of France committed the United States to a friendly relationship with France, under which both nations would respect the rights of the other under the law of nations. This commitment forbade recurrence of incidents like the van Berckel affair, in which the State of New York had violated the rights of the Dutch Ambassador, and the Confederation Congress had been powerless to counteract the violation. Under the Constitution, continued recognition of France would have preempted any state law authorizing action in violation of the rights of French ambassadors. Such pre-

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<sup>147</sup> Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1298 (1996).

<sup>148</sup> Treaty of Amity and Commerce, U.S.-Fr., art. I, Feb. 6, 1778, 8 Stat. 12.



emption, moreover, would have facilitated state common law actions against state officials by depriving them of the defense that their actions were authorized by law.<sup>149</sup> In addition, Congress could—and did—subject state officers who violated the rights of ambassadors to federal criminal liability under its power to define and punish offenses against the law of nations.<sup>150</sup> As Vattel explained, “[t]o admit a minister, to acknowledge him in such quality, is engaging to grant him the most particular protection, and that he shall enjoy all possible safety.”<sup>151</sup> It is impossible to understand the meaning and effect of the political branches’ constitutional power to “receive ambassadors” without resort to this background principle of the law of nations.

The constitutional protection that recognition afforded other nations extended beyond the rights of received ambassadors in residence. In late 1789, France recalled its minister plenipotentiary to the United States so he could undertake another assignment. Imagine that a U.S. state with a grievance against France organized an effort to seize the ship carrying him back to France and return him to the United States to stand trial for alleged wrongdoing. The capture would have violated the law of nations by interfering with France’s right to peaceful use of the high seas and by subjecting France to state-sanctioned acts of violence against its citizens and officials. Even if, strictly speaking, the state was not violating the rights of a received public minister when it held him in jail, the capture and detention would have contradicted the political branches’ constitutional power to recognize other nations. Alternatively, imagine that a U.S. state organized an effort to capture the French King (or any French subject for that matter) in French territory. The capture would have violated France’s perfect right to territorial sovereignty, among other principles of the law of nations.<sup>152</sup> By recognizing France, the political branches signified that the United States would respect her perfect rights. Any state or judicial act

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<sup>149</sup> Cf. Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 *Harv. L. Rev.* 1817, 1904–07 (2010) (describing the analogous operation of the Constitution in common law civil actions to strip officers of the defense that they were acting pursuant to the law).

<sup>150</sup> Crimes Act of 1790, ch. 9, § 28, 1 Stat. 112, 118.

<sup>151</sup> 2 Vattel, *supra* note 67, bk. IV, § 82, at 142.

<sup>152</sup> As Vattel explained, recognized nations enjoyed this perfect right under the law of nations. See *supra* notes 324–325 and accompanying text.

that violated another nation's perfect rights—for example, by interfering with rights of ambassadors, neutral use of the high seas, or territorial sovereignty—would have countermanded recognition, given the offended nation just cause for war, and (as discussed below) possibly amounted to an unauthorized reprisal.

## *2. Political Branch Authority Over War and Peace*

The Constitution's allocation of war powers to the federal political branches implicitly prohibited courts and states from violating the perfect rights of foreign sovereigns under the law of nations. When the Constitution was adopted, violations of a nation's perfect rights gave that nation just cause for war, and could signal the start of an undeclared war. The assignment of exclusive powers to the political branches denied the states and courts the power to commit the nation to war. The law of nations reinforced this assignment by providing background rules that, if followed by states and courts, would avoid giving other nations just cause for war against the United States.

In England, the Crown had “the sole prerogative of making war and peace” because “the right of making war . . . [was] vested in the sovereign power.”<sup>153</sup> The Constitution assigns Congress and the President the powers to make and conduct war. Article I gives Congress numerous powers over war-making, including to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;”<sup>154</sup> “raise and support Armies”;<sup>155</sup> “provide and maintain a Navy;”<sup>156</sup> “provide for calling forth the Militia to . . . repel Invasions;”<sup>157</sup> “provide for organizing, arming, and disciplining, the Militia”;<sup>158</sup> 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.”<sup>159</sup> Moreover, Article II grants the President certain

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<sup>153</sup> Blackstone, *supra* note 135, at \*257.

<sup>154</sup> U.S. Const. art. I, § 8, cl. 11.

<sup>155</sup> *Id.* cl. 12.

<sup>156</sup> *Id.* cl. 13.

<sup>157</sup> *Id.* cl. 15.

<sup>158</sup> *Id.* cl. 16.

<sup>159</sup> *Id.* cl. 18.

war powers, providing that “[t]he executive Power shall be vested in a President of the United States of America;”<sup>160</sup> that “[t]he President shall be 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;”<sup>161</sup> and that the President “shall take Care that the Laws be faithfully executed.”<sup>162</sup> The allocation of these powers to the political branches—combined with the specific lawmaking procedures by which the Constitution requires Congress to exercise many of them—suggests that they were meant to be exclusive of judicial exercise.<sup>163</sup> Moreover, Article I, Section 10 expressly provides that states may engage in war only when “actually invaded, or in such imminent Danger as will not admit of delay.”<sup>164</sup> The Constitution also vests the political branches with authority to establish peace with other nations. As explained, the Constitution gives the political branches exclusive authority to make treaties and to send and receive the ambassadors and public ministers who would negotiate such instruments.<sup>165</sup>

At the time of the Founding, it was well established that wars could be declared or undeclared. As Matthew Hale noted, “[a] war that is *non solemniter denuntiatur*”—that is, one arising “when two nations slip suddenly into a war without any solemnity”—was the kind of war that “ordinarily happeneth among us.”<sup>166</sup> Such a conflict was “a real, tho not solemn war.”<sup>167</sup> For example, even though England had not issued a formal declaration of war against

<sup>160</sup> Id. art. II, § 1, cl. 1.

<sup>161</sup> Id. § 2, cl. 1.

<sup>162</sup> Id. § 3.

<sup>163</sup> See supra note 132 and accompanying text.

<sup>164</sup> U.S. Const. art. I, § 10, cl. 3.

<sup>165</sup> See supra note 131 and accompanying text.

<sup>166</sup> 1 Matthew Hale, *Historia Placitorum Coronae: The History of Pleas of the Crown* 163 (London, E. & R. Nutt, & R. Gosling 1736).

<sup>167</sup> Id. Bacon’s Abridgement explained, citing Hale,

A general War . . . is of two Kinds; . . . 1. *Bellum solemniter denunciatur*. 2. *Bellum non solemniter denunciatur*. The first is, when War is solemnly declared or proclaimed by our King . . . 2dly, When a Nation slips suddenly into a War without any Solemnity . . . and hereupon a real though not a solemn War may and hath formerly arisen . . .

4 Matthew Bacon, *A New Abridgment of the Law* 175 (Dublin, Luke White, 6th ed. 1793). For a discussion of how “the existence of war could be either a ‘matter of record,’ . . . or simply a ‘question of fact,’” in light of these sources, see Philip Hamburger, *Beyond Protection*, 109 *Colum. L. Rev.* 1823, 1935 (2009).

the North American colonies in 1776, the Declaration of Independence listed as a grievance against the King that he has been “waging War against us.”<sup>168</sup>

Scholars have long debated whether the Declare War Clause gives Congress exclusive authority to initiate conflict with other nations, or whether the President has some share of that power under the Executive Power, Commander in Chief, and Take Care Clauses. Some scholars argue that the Declare War Clause gives Congress power to confer formal declared status on wars but that the President has some authority to commence undeclared wars.<sup>169</sup> Others contend categorically that only Congress may commence war,<sup>170</sup> declared or undeclared, or at least that Congress alone may commence offensive wars.<sup>171</sup> Regardless of how one resolves these questions, a reasonably informed member of the Founding generation would have understood the Constitution’s allocation of war powers to the political branches collectively to preclude courts and states from potentially triggering a war by violating the perfect rights of foreign sovereigns under the law of nations.

Consider first the view that the Declare War Clause gives Congress exclusive power to initiate U.S. conflict with other nations. Professor Saikrishna Prakash has argued that “[i]n the context of the Constitution, the grant of ‘declare war’ power means that only Congress can decide whether the United States will wage war.”<sup>172</sup> Accordingly, he contends, “declare war” was a broad phrase encompassing “a number of hostile actions short of general warfare.”<sup>173</sup> “In particular, it became common to regard as a declaration of war any words or actions that signaled that a nation had decided to wage war. These signals could be formal or informal” and could include “ambassadorial dismissals,” “aiding a nation at war,” “permitting [private parties] to take the enemy’s naval ves-

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<sup>168</sup> The Declaration of Independence para. 25 (U.S. 1776).

<sup>169</sup> See, e.g., Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 Mich. L. Rev. 1364, 1369, 1375–76 (1994) (book review).

<sup>170</sup> Prakash, *Declare War*, supra note 132.

<sup>171</sup> See, e.g., Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 Cornell L. Rev. 169, 169–70 (2007).

<sup>172</sup> Prakash, *Declare War*, supra note 132, at 50.

<sup>173</sup> *Id.* at 49.

sels,” or seizing foreign vessels.<sup>174</sup> Some of these signals were not only overt political acts of hostility but also clear law of nations violations, such as seizing foreign vessels. These acts violated other nations’ perfect rights, giving them just cause for war and thus possibly inviting hostilities. Under Prakash’s theory, certain conduct constituting a violation of the perfect rights of a foreign sovereign—including rights to conduct diplomatic relations, to territorial sovereignty, to use the high seas, and to peaceable enjoyment of security—could constitute an informal declaration of war by signaling hostility and giving the aggrieved nation just cause for waging war against the United States. If Prakash is correct, then the Declare War Clause may be understood to constrain the ability of states and courts to provoke hostilities by violating the perfect rights of foreign sovereigns.

If, on the other hand, the power to declare war was intended not to give Congress exclusive power to initiate conflict (but rather, perhaps, to confer a more limited power to classify an armed conflict as a formal war<sup>175</sup>), the constitutional powers governing war arguably still incorporated other sovereigns’ perfect rights under the law of nations. Several scholars have argued that the President has authority under the Constitution to initiate armed conflict under the Executive Power, Commander in Chief, and Take Care Clauses.<sup>176</sup> No scholar appears to contend, however, that the Constitution originally was understood to allow states or the federal judiciary to initiate armed conflict. Indeed, Article I expressly forbids a state to “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”<sup>177</sup> It is thus reasonable to understand the combined Article I and II powers of Congress and the President to initiate conflict with foreign nations—and the Article I prohibition on states from engaging in war—to constrain states (and courts) from taking actions that quite predictably would have invited other nations to wage war against the United States under the law of nations.

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<sup>174</sup> *Id.* at 53–54, 78–79.

<sup>175</sup> See, e.g., Bobbitt, *supra* note 169, at 1375–76.

<sup>176</sup> See, e.g., *id.* at 1373–74; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Calif. L. Rev.* 167, 198 (1996).

<sup>177</sup> U.S. Const. art. I, § 10, cl. 3.

### 3. Political Branch Authority Over Reprisals and Captures

A similar argument applies to Congress's power to make reprisals against other nations. In England, the power to issue letters of marque and reprisal was a prerogative of the King.<sup>178</sup> Article I grants Congress power not only "[t]o declare War," but also to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."<sup>179</sup> These powers—all integrally dependent upon the law of nations for their content—appear in the same clause, following the clause that grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>180</sup> Article I also expressly forbids states from issuing letters of marque and reprisal.<sup>181</sup> Under the Articles of Confederation, Congress had "the sole and exclusive right and power . . . of establishing rules for deciding in all cases, what captures on land or water shall be legal," and "of granting letters of marque and reprisal in times of peace."<sup>182</sup> The Articles prohibited the states from issuing "letters of marque or reprisal, except it be after a declaration of war by the united States in congress assembled."<sup>183</sup> Article I, Section 10 of the Constitution changed that background division of powers by categorically excluding states from issuing such letters.

By the eighteenth century, the phrase "letter of marque and reprisal" had generally come to refer to a sovereign act authorizing a private vessel, citizen, or public forces to capture foreign property as satisfaction for an injury committed by the foreign state or its subjects.<sup>184</sup> As Vattel explained:

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<sup>178</sup> Blackstone, *supra* note 135, at \*257–59.

<sup>179</sup> U.S. Const. art. I, § 8, cl. 11.

<sup>180</sup> *Id.* cl. 10.

<sup>181</sup> *Id.* § 10, cl. 1.

<sup>182</sup> Articles of Confederation of 1777, art. IX, para. 1.

<sup>183</sup> *Id.* art. VI, para. 5.

<sup>184</sup> See Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035, 1044–45 (1986) (explaining that "by the eighteenth century, letters of marque and reprisal referred primarily to sovereign utilization of private forces, and sometimes public forces, to injure another state . . . [and] was used interchangeably with the terms reprisal, privateer, and commission"); Ramsey, *Textualism and War Powers*, *supra* note 132, at 1599 ("In the eighteenth century, marque and reprisal referred specifically to the seizure of foreign property in satisfaction of a specific injury committed by the foreign state.").

Reprisals are used between nation and nation to do justice to themselves, when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt, to repair an injury, or to make a just satisfaction, the other may seize what belongs to it . . . [or] arrest some of the citizens, and not release them till [it has] received intire satisfaction.<sup>185</sup>

Other writers on the law of nations known to members of the Founding generation expressed the same general understanding.<sup>186</sup> Blackstone described letters of marque and reprisal similarly in his well-known *Commentaries on the Laws of England*. Such letters

are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonymous; and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found.<sup>187</sup>

Vattel, Blackstone, and other writers emphasized that only a sovereign could order reprisals under the law of nations. “It . . . belongs only to sovereigns,” Vattel explained, “to use and order reprisals.”<sup>188</sup> For Blackstone, it was “obvious” that only the “sover-

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<sup>185</sup> Vattel, *supra* note 67, bk. II, §§ 342, 351, at 249, 252.

<sup>186</sup> See 2 Burlamaqui, *supra* note 90, at 180 (7th ed., corrected, 1830) (“By reprisals then we mean *that imperfect kind of war, or those acts of hostility, which sovereigns exercise against each other . . . by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice; with a view to obtain security, and to recover our right, and in case of refusal, to do justice to ourselves, without any other interruption of the public tranquillity.*”); Grotius, *supra* note 70, at 542 (describing “[a]nother kind of forcible Execution . . . *Reprisals among divers Nations*, called so by our modern Lawyers, which the *Saxons* and *English* call *Withernam*, and the *French* . . . *Letters of Mark* . . .”) (internal citations omitted); Wolff, *supra* note 70, § 589, at 302 (“Reprisals are defined as the taking away of the goods of citizens of another nation or even of the ruler of a state in satisfaction of a right or by way of pledge.”).

<sup>187</sup> Blackstone, *supra* note 135, at \*259; see also Joseph Story, *Commentaries on the Constitution of the United States* bk. III, § 688, at 490 (Carolina Academic Press 1987) (1833) (describing the grant of letters of marque and reprisals as a “hostile measure for unredressed grievances . . . most generally the precursor of an appeal to arms by general hostilities”).

<sup>188</sup> Vattel, *supra* note 67, bk. II, § 346, at 250.

eign power” may “determine when reprisals may be made; else every private sufferer would be a judge in his own cause.”<sup>189</sup> Moreover, if private individuals could make reprisals without authorization of the sovereign, they could lead the sovereign into war without its consent. Reprisals had long been understood as a possible means for nations to resolve their disputes without resorting to war. Vattel explained that

as the law of humanity prescribes to nations no less than to individuals, the mildest measures, when they are sufficient to obtain justice; whenever a sovereign can, by the way of reprisals, procure a just recompence, or a proper satisfaction, he ought to make use of this method, which is less violent, and less fatal than war.<sup>190</sup>

That said, reprisals often did lead to war, as writers on the law of nations observed. Burlamaqui wrote that “[a]s reprisals are acts of hostility, and often the prelude or forerunner of a complete and perfect war, it is plain that none but the sovereign can lawfully use this right, and that the subjects can make no reprisals, but by his order and authority.”<sup>191</sup>

Against this background, Article I gave Congress power to issue letters of marque and reprisal during war or peace and denied this power to the states.<sup>192</sup> Under the Articles of Confederation, Congress had the power “of granting letters of marque and reprisal in times of peace,”<sup>193</sup> but states also had the power to grant letters af-

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<sup>189</sup> Blackstone, *supra* note 135, at \*259. See also Vattel, *supra* note 67, bk. II, § 346, at 250 (explaining that “[i]t then belongs only to sovereigns to use and order reprisals” because “[s]overeigns transact their affairs between themselves, they carry on business with each other directly, and can only consider a foreign nation as a society of men who have only one common interest”).

<sup>190</sup> Vattel, *supra* note 67, bk. II, § 354, at 253.

<sup>191</sup> 2 Burlamaqui, *supra* note 90, at 182 (7th ed., corrected 1830); see also 2 Samuel von Pufendorf, *De Officio Homini et Civis Juxta Legem Naturalem Libri Duo* 140 (Frank Gardner Moore trans., Oxford Univ. Press 1927) (1688) (stating that reprisals “are frequently the prelude to wars”).

<sup>192</sup> For discussions of why Article I was framed to give Congress this power, see Lobel, *supra* note 184, at 1060 (explaining that the shift from “make war” to “declare war” in Article I “made it necessary to include the use of force in time of peace among the enumerated congressional powers”); Wuerth, *International Law*, *supra* note 132, at 92–93 (“The change [from ‘make war’] to ‘Declare War,’ therefore, made necessary the specific allocation of marque and reprisals powers to Congress.”).

<sup>193</sup> Articles of Confederation of 1777, art IX, para. 1.



ter a declaration of war.<sup>194</sup> The Constitution granted Congress exclusive power to issue any and all letters of marque and reprisal, expressly forbidding states from doing so. At the Federal Convention, Elbridge Gerry suggested a provision be “inserted concerning letters of marque” in addition to Congress’s power to “declare war” because “he thought [such letters were] not included in the power of war.”<sup>195</sup> In other words, the power to issue letters of marque and reprisal was necessary because the power to order reprisals during peacetime was not encompassed by the power to declare war. Madison expressed the same understanding of this power in *The Federalist No. 44*, explaining that under the Constitution letters of marque and reprisal “must be obtained, as well during war as previous to its declaration, from the government of the United States.”<sup>196</sup> Joseph Story echoed this explanation in his *Commentaries on the Constitution*. Although Congress’s Article I power to declare war may have included “the incidental power to grant letters of marque and reprisal,” he explained, “the express power ‘to grant letters of marque and reprisal’ may not have been thought wholly unnecessary, because it is often a measure of peace, to prevent the necessity of a resort to war.”<sup>197</sup> On this understanding, the reprisal power gave Congress a way to avenge wrongs committed or sanctioned by a foreign nation by means short of war.

James Madison emphasized the necessity that the power to issue all reprisals, including during peacetime, be exclusively vested in Congress. Exclusive congressional authority to issue all reprisals “is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those, for whose conduct the nation itself is to be responsible.”<sup>198</sup> Members of the Founding generation well appreciated

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<sup>194</sup> Id. art. VI, para. 5.

<sup>195</sup> 2 The Records of the Federal Convention of 1787, at 326 (Max Farrand ed., 1911).

<sup>196</sup> The Federalist No. 44, supra note 65, at 299 (James Madison).

<sup>197</sup> Story, supra note 187, §§ 572–73, at 411–12; see also 1 James Kent, Commentaries on American Law \*61 (O.W. Holmes, Jr. ed., 12th ed., Boston, Little, Brown & Co. 1873) (stating that “[r]eprisals by commission, or letters of marque and reprisal . . . is another mode of redress for some specific injury, which is considered to be compatible with a state of peace”).

<sup>198</sup> The Federalist No. 44, supra note 65, at 299 (James Madison).

that, if not managed carefully, reprisals could lead to war. Thomas Jefferson recognized this danger in 1793 during his tenure as Secretary of State:

[T]he making of [a] reprisal on a nation is a very serious thing. Remonstrance & refusal of satisfaction ought to precede; & when reprisal follows it is considered as an act of war, & never yet failed to produce it in the case of a nation able to make war.—Besides, if the case were important enough to require reprisal, & ripe for that step, Congress must be called on to take it; the right of reprisal being expressly lodged with them by the constitution, & not with the executive.<sup>199</sup>

In addressing Congress's reprisal power, St. George Tucker explained in his famous edition of *Blackstone's Commentaries* that if "the several states possess[ed] the power of declaring war, or of commencing hostility without the consent of the whole, the union could never be secure of peace."<sup>200</sup> Moreover, "since the whole confederacy is responsible for any such act, it is strictly consonant with justice and sound policy, that the whole should determine on the occasion which may justify involving the nation in a war."<sup>201</sup> By giving Congress exclusive power to authorize reprisals against foreign nations on behalf of the United States, the Constitution prohibited states or courts from taking justice into their own hands.<sup>202</sup>

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<sup>199</sup> Thomas Jefferson, Opinion on "The Little Sarah" (May 16, 1793), in 7 *The Works of Thomas Jefferson* 332, 335 (Paul Leicester Ford ed., 1904).

<sup>200</sup> 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* app. 140, 271 (Philadelphia, William Young Birch & Abraham Small 1803).

<sup>201</sup> *Id.*

<sup>202</sup> Scholars have debated whether the reprisal power gave Congress exclusive authority to launch any form of limited hostilities short of war or only a very specific form of limited hostilities. Compare Lobel, *supra* note 184, at 1060–61 ("By including the *marque* and reprisal clause in article I, section 8, the Framers attempted to insure that Congress would always be the branch to authorize armed hostilities against foreign nations, even if those hostilities were launched in time of peace."), and Lofgren, *supra* note 132, at 697 ("[W]hile one cannot pretend that the matter is beyond all doubt, it seems plain that knowledge of the theory and practice of war and reprisal would have helped convince a late-eighteenth century American that the Constitution vested Congress with control over the commencement of war, whether declared or undeclared."), with Ramsey, *Textualism and War Powers*, *supra* note 132, at 1599 ("The *marque* and reprisal power was, in short, a specific form of limited hostilities."),

In addition to authorizing Congress to issue letters of marque and reprisal, Article I authorized Congress to “make Rules concerning Captures on Land and Water.” This clause empowered Congress to make laws regulating the taking of enemy and neutral property.<sup>203</sup> The original meaning of the Captures Clause is disputed in some respects. Scholars have debated whether this provision gave Congress power to authorize captures only during declared war or during peacetime as well, and whether “captures” included captures of persons as well as property.<sup>204</sup> In an extensive study, Professor Ingrid Wuerth has argued “that the Captures Clause gave Congress the power to determine what moveable property could be taken by public and private armed forces as prize, and the power to control the adjudication and division of such property.”<sup>205</sup> Notwithstanding these debates, there is no question that the Captures Clause forbade states from authorizing captures during war, for to do so would be to “engage in war” in violation of Article I, Section 10. Moreover, as explained, Article I’s conferral of exclusive power on Congress to issue letters of marque and reprisal forbade states from authorizing the capture of foreign property during peacetime.<sup>206</sup>

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and J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 *Harv. J. L. & Pub. Pol’y* 465, 480 (2005) (“[T]here is no evidence that the Framers intended for the phrase ‘letters of marque and reprisal’ to serve as a shorthand for all conceivable forms of hostility that were not predicated on a prior declaration of war.”). This debate concerns the respective powers of Congress and the President to initiate hostilities on behalf of the United States. We need not enter this debate because, for our purposes, the important point is that Articles I and II vested these powers in the federal political branches (whatever the respective division between them) and not in states or courts.

<sup>203</sup> See Prakash, *Separation and Overlap*, *supra* note 132, at 319–20 (describing Congress’s powers under the Captures Clause).

<sup>204</sup> See Sidak, *supra* note 202, at 465–67; Aaron D. Simowitz, *The Original Understanding of the Capture Clause*, 59 *DePaul L. Rev.* 121, 122 (2009).

<sup>205</sup> Ingrid Wuerth, *The Captures Clause*, 76 *U. Chi. L. Rev.* 1683, 1735 (2009) [hereinafter Wuerth, *Captures Clause*].

<sup>206</sup> It has been argued that Congress’s Article I power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,” U.S. Const. art. I, § 8, cl. 10, also included an authorization to make reprisals against other nations. Professor Andrew Kent has argued that “an eighteenth-century audience could well have understood [this] power to be available not only to punish individuals by enacting domestic regulatory statutes, but also to . . . punish foreign nations by deploying a wide range of national coercive powers.” J. Andrew Kent, *Con-*

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In sum, the Constitution's conferral on the political branches of war, reprisal, and capture powers—understood in light of background principles of the law of nations—were reasonably understood to constrain states and federal courts from taking certain actions without political branch authorization. This allocation of powers was designed to enable the United States to comply with its commitments under the law of nations, and the law of nations itself helped to reinforce and define this allocation of powers. From this perspective, the reasonable import of the Constitution's exclusive allocation of war powers to Congress and the President is that courts and states were prohibited from engaging in acts of war or acts that would give foreign nations just cause to wage war against the United States, such as violating nations' perfect rights under the law of nations. Likewise, the reasonable import of the Constitution's exclusive assignment of reprisal and capture powers to Congress is that courts and states lack constitutional power to sanction reprisals and captures unauthorized by Congress. If these matters were at all unclear at the time of the Founding, the Supreme Court quickly decided a series of cases on the assumption that the Constitution's assignment of recognition, war, reprisal, and capture powers generally required courts to uphold political branch authority by respecting the traditional rights of foreign sovereigns under the law of nations.

### III. THE SUPREME COURT'S APPLICATION OF THE LAW OF NATIONS

From the beginning of the Republic, the Supreme Court has relied on principles derived from the law of nations to determine and uphold the allocation of foreign relations powers both among the branches of the federal government and between the federal government and the states. The relative constitutional powers of the political branches and the courts have played a role in shaping many of the Court's decisions protecting rights of foreign sover-

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gress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations, 85 Tex. L. Rev. 843, 852 (2007). As Professor Wuerth has argued, "this is likely why James Madison thought the Captures Clause was redundant to the Offenses Clause—the latter gave Congress a *general* power to act against countries that violated the law of nations, the former was a more specific power that could be used for the same purpose." Wuerth, Captures Clause, *supra* note 205, at 1737.

eigns.<sup>207</sup> First, the Court has suggested that when the United States formally recognizes a foreign nation, judicial denial of sovereign rights incident to recognition would violate the Constitution's allocation of powers to the political branches. Second, from the beginning, the Court understood the Constitution to reserve for the political branches the decision whether to risk initiating or escalating a war by denying foreign nations their traditional rights under the law of nations. Third, the Court has respected the authority of the political branches to decide whether to override the rights of a foreign nation in retaliation for alleged violations of U.S. rights. This line of analysis is consistent with the Constitution's vesting of exclusive authority to issue reprisals in Congress. To be sure, not all of the Court's cases frame their argument in the constitutional terms we identify here. Indeed, as the discussion below suggests, a number of them make no mention of the Constitution at all. Accordingly, we do not contend that our approach is compelled by the cases. Rather, we believe that many cases support our approach, all are consistent with that approach, and none contradicts it.

This Part examines a range of decisions from the early Republic through the present, explaining how each applied the law of nations in a manner consistent with the Constitution's exclusive allocation of recognition, war, capture, and reprisal powers to the political branches. In some opinions, especially from the Marshall Court, the Court rested its decision explicitly on this allocation of powers. For example, in 1808 in *Rose v. Himely*,<sup>208</sup> the Court explained that it was for the political branches, not the courts, to recognize a breakaway colony from France as a new independent state. As long as the political branches continued to recognize France's sovereignty over the colony, courts would respect "that exclusive dominion which every nation possesses within its own

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<sup>207</sup> One might wonder whether these decisions simply applied traditional principles of the law of state-state relations as general law in the same way that federal courts applied the law merchant in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and preceding cases. As we explain, however, the Supreme Court applied traditional principles of the law of state-state relations in many cases in order to uphold specific constitutional powers assigned to the political branches—either expressly or as necessary implications of the Court's analysis.

<sup>208</sup> 8 U.S. (4 Cranch) 241 (1808), overruled in part by *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281, 284–85 (1810).

territory” under the law of nations.<sup>209</sup> In other cases, the Court applied the law of nations to avoid usurping the powers of the political branches to retaliate against other nations through war or reprisals. In 1815 in *The Nereide*,<sup>210</sup> for instance, the Marshall Court upheld neutral rights of Spain under the law of nations because it was “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.”<sup>211</sup>

Over time, the Court invoked the specific powers of the political branches less explicitly in applying traditional principles derived from the law of nations. In some cases, the Constitution’s allocation of powers to the political branches provided an important line of analysis in the Court’s opinion. In other cases, the Court protected traditional rights of foreign sovereigns under the law of nations without referring to the Constitution’s allocation of powers but nonetheless acted in a manner consistent with that allocation. In the twentieth century, the Court sometimes returned to the practice of invoking the constitutional powers of the political branches to justify application of traditional principles of the law of nations. For example, in *United States v. Pink*,<sup>212</sup> the Court determined that New York’s failure to apply the act of state doctrine—derived from traditional principles of the law of nations—to an act of the Soviet Union “amount[ed] in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia,” and stated that “[s]uch power is not accorded a State in our constitutional system.”<sup>213</sup>

This Part does not attempt to prove that the Court has relied in every case applying the law of nations on a specific Article I or II power as an express basis for doing so. Rather, in each case, the ruling under the law of nations at a minimum reinforced—if not expressly invoked—the allocation of war and foreign relations power established by the constitutional text.

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<sup>209</sup> *Id.* at 272–74.

<sup>210</sup> 13 U.S. (9 Cranch) 388 (1815).

<sup>211</sup> *Id.* at 422.

<sup>212</sup> 315 U.S. 203 (1942).

<sup>213</sup> *Id.* at 233.

*A. Early Supreme Court Cases*

Soon after ratification of the Constitution, the Supreme Court heard cases implicating the traditional rights of foreign nations in U.S. courts. In these early cases, the Justices recognized the likelihood that failure to uphold the rights of a foreign sovereign under the law of nations would precipitate conflict with the offended sovereign without authorization from the political branches. Although the Court did not refer expressly to specific Article I and II powers in these initial cases, the Court's adherence to such rights served to uphold political branch recognition of a foreign nation, to avoid giving that nation just cause for war against the United States, and to preserve Congress's power to authorize reprisals. In the ensuing decades, the Marshall Court would explain more explicitly that the Constitution's allocation of powers required the judiciary to apply certain principles of the law of nations until abrogated by the political branches.

In 1795, in *United States v. Peters*,<sup>214</sup> the Supreme Court applied an established rule of the law of nations favoring France's territorial sovereignty to reject a claim that France had violated U.S. rights under the law of nations.<sup>215</sup> Although the Court did not explicitly invoke the Constitution's allocation of recognition and war powers to the political branches, this allocation appears to have influenced the Court's decision. As explained, France was the first European nation to recognize the United States when the two nations entered into a Treaty of Amity and Commerce and a Treaty of Alliance in 1778.<sup>216</sup> The United States henceforth received an official ambassador from France, and, following the French Revolution, President Washington recognized the new French government in 1793 by receiving Citizen Genet.<sup>217</sup> These events were well known, especially to members of the Supreme Court, who received a request from the Washington administration to provide advice regarding the United States' obligations toward France under the

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<sup>214</sup> 3 U.S. (3 Dall.) 121 (1795).

<sup>215</sup> *Id.* at 126–27.

<sup>216</sup> See *supra* notes 102, 148 and accompanying text.

<sup>217</sup> See Julius Goebel, Jr., *The Recognition Policy of the United States* 105–12 (1915).

law of nations.<sup>218</sup> Chief Justice Jay famously declined this request, citing “strong arguments against the propriety of our extra-judicially deciding the questions.”<sup>219</sup>

*Peters* presented the Supreme Court with an actual case that raised questions involving U.S. obligations towards France under the law of nations. The question presented was whether a United States district court could assess damages against the *Cassius*, a vessel commissioned by France to cruise against enemy ships. James Yard, a Philadelphia merchant, charged in his libel that the *Cassius*, now at port in Philadelphia, had violated the law of nations by capturing his neutral U.S. vessel on the high seas and taking it to France where it was adjudicated to be a lawful prize.<sup>220</sup> The Supreme Court issued a writ of prohibition divesting the U.S. district court of jurisdiction on the ground that the exercise of such jurisdiction would violate the law of nations:

[B]y the laws of nations, the vessels of war of belligerent powers, duly by them authorized, to cruize 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 therein . . . .<sup>221</sup>

Under the law of nations, warring powers had the right to make prizes of their adversaries’ ships, goods, and effects captured at

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<sup>218</sup> Letter from Thomas Jefferson to the Chief Justice and Judges of the Supreme Court of the United States (July 18, 1793), *reprinted in* 6 *The Writings of Thomas Jefferson* 351, 351 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895).

<sup>219</sup> Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 488, 488 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891) [hereinafter *Jay, Public Papers*].

<sup>220</sup> *Peters*, 3 U.S. (3 Dall.) at 130–31.

<sup>221</sup> *Id.* at 129–30; 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 Supreme Court of the United States, 1789–1800*, at 719–27 (Maeva Marcus et al. eds., 1998).



sea.<sup>222</sup> In the eighteenth and early nineteenth centuries, nations authorized privateers to capture enemy ships and obtain title by bringing captures to admiralty courts in the captor's nation for adjudication.<sup>223</sup> Such courts not only transferred title if the prize was lawful, but also remedied abuses when neutral ships were captured improperly.<sup>224</sup> Either way, such prize determinations constituted official acts taken within a nation's territory, and the law of nations required the courts of other nations to treat them as conclusive.<sup>225</sup> Because the law of nations precluded judicial review elsewhere, the only way for the victims of erroneous determinations to obtain redress was to convince their government to espouse their claims on behalf of the nation or to authorize reprisals.<sup>226</sup> As Justice Joseph Story would explain in his *Commentaries on the Constitution*, "[i]f justice be . . . denied [by the capturing nation's courts], 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."<sup>227</sup>

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<sup>222</sup> Clark, *supra* note 147, at 1334.

<sup>223</sup> *Id.*

<sup>224</sup> See *id.* at 1335 ("[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 . . .'" (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))).

<sup>225</sup> See *Peters*, 3 U.S. (3 Dall.) at 129 (stating that "by the laws of nations, and the treaties subsisting between the United States and the Republic of France, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the said Republic, for legal adjudication, by vessels of war belonging to the sovereignty of the said Republic, acting under the same, and of all questions incidental thereto, does of right, and exclusively, belong to the tribunals and judiciary establishments of the said Republic, and to no other tribunal, or tribunals, court, or courts, whatsoever") (emphasis omitted).

<sup>226</sup> Espousal was based on the fiction that "an injury to an alien was also an injury to the alien's country of origin." Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 *Va. J. Int'l L.* 809, 822 (2005). This fiction "facilitated the elevation of a dispute to the state-to-state level recognized under international law." *Id.*; see also Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 *Colum. L. Rev.* 833, 851 (2007) (discussing the historical importance of espousal).

<sup>227</sup> Story, *supra* note 187, § 865, at 615; see also Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original*

This background sheds light on why the *Peters* Court perceived this suit to threaten both the peace of the United States and the prerogatives of its government. The Court described Yard's suit as, to begin with, "contriving and intending to disturb the peace and harmony subsisting between the United States and the French Republic."<sup>228</sup> This assertion presumably rested on well-known principles of the law of nations that gave France just cause to retaliate against the United States if it violated France's territorial integrity. The Court also 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."<sup>229</sup> This sentence presupposes that, unless the political branches chose to retaliate or provoke war with France, courts were bound to give effect to the incidents of recognition.

Indeed, a decision against the rights of France could reasonably have been taken to stand "in contempt" of three specific powers of the political branches—recognition, war, and reprisal. First, a judicial inquiry into the legality of the capture would have contradicted the decision of "the government of the United States" to recognize France and its government.<sup>230</sup> Second, a decision at odds with a French prize court could have triggered hostilities by overriding an official act of the French government taken within its own territory. Finally, absent clear congressional authorization, a judicial remedy against a French ship for France's alleged violation of the United States' neutral rights could reasonably have been understood to usurp the exclusive Article I power of Congress to decide whether and when to make reprisals against other nations.

In another 1795 decision, *Talbot v. Jansen*,<sup>231</sup> the Supreme Court considered whether Ballard, a U.S. citizen, and Talbot, an alleged French citizen, had lawfully captured a private vessel owned by citizens of the Netherlands.<sup>232</sup> The evidence indicated that Ballard

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and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States, 104 Colum. L. Rev. 1765, 1855–56 (2004) (explaining espousal).

<sup>228</sup> *Peters*, 3 U.S. (3 Dall.) at 130 (emphasis omitted).

<sup>229</sup> *Id.* at 131 (emphasis omitted).

<sup>230</sup> *Id.*; see also Vattel, *supra* note 67, bk. II, §§ 79–84, at 146–48 (describing the obligation to respect the perfect rights of others to govern within their own domains).

<sup>231</sup> 3 U.S. (3 Dall.) 133 (1795).

<sup>232</sup> *Id.* at 133–34.

made the capture, and that Talbot had outfitted Ballard's U.S. vessel with armaments.<sup>233</sup> The Court determined that the capture violated the Netherlands' right to neutral use of the high seas and that restitution was required.<sup>234</sup> The Netherlands was the second European nation to recognize the United States in 1781, and the two nations entered into a Treaty of Amity and Commerce in 1782.<sup>235</sup> If not redressed, the erroneous capture of a Dutch ship by a U.S. citizen would have violated the Netherlands' rights as a recognized sovereign nation and given it just cause for war against the United States.<sup>236</sup>

Writing in seriatim, the Justices applied the law of nations to disapprove the capture. 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.<sup>237</sup> 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 a United States vessel to capture the ship of a nation "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."<sup>238</sup>

Justice Iredell similarly explained that courts must apply the law of nations to redress acts of hostility that the political branches have not authorized against foreign nations: "[N]o hostilities of any kind, except in necessary self-defence, can lawfully be practised by

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<sup>233</sup> Id. at 155, 157 (opinion of Paterson, J.).

<sup>234</sup> Id. at 169–70 (order).

<sup>235</sup> See Treaty of Amity and Commerce, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32.

<sup>236</sup> *Talbot*, 3 U.S. (3 Dall.) at 154–57 (opinion of Paterson, J.); see also Vattel, *supra* note 67, §§ 279–81, at 113–14; 2 Vattel, *supra* note 67, bk. III, §§ 103–04, at 36–37 (describing rights of neutrality as perfect rights).

<sup>237</sup> *Talbot*, 3 U.S. (3 Dall.) at 154 (opinion of Paterson, J.).

<sup>238</sup> 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). Chief Justice Rutledge also 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.).

one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority.”<sup>239</sup> In an oft-cited passage, Justice Iredell concluded that the unauthorized capture of a neutral vessel by a United States citizen was “so palpable 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.”<sup>240</sup> Although he invoked the law of nations and the common law,<sup>241</sup> Justice Iredell also recognized that the Constitution required the Court to uphold neutral rights under the law of nations in the absence of the exercise of “some public authority” by “the government” abrogating such rights and risking war with another country. Stressing the power of “the government” to conduct foreign relations, he explained that “[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.”<sup>242</sup> As in *Peters*, the relationship between the law of nations and the constitutional allocation of power was implicit, but the substantive fit between the two bodies of law is both clear and telling. In subsequent years, the Marshall Court had occasion to describe more explicitly the connection between the traditional rights of foreign sovereigns under the law of nations and the Constitution’s allocation of war and foreign relations powers to the political branches.

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<sup>239</sup> *Id.* at 158, 160 (opinion of Iredell, J.). Like Justice Paterson, Justice 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.” *Id.* at 159 (emphasis omitted).

<sup>240</sup> *Id.* at 161.

<sup>241</sup> At the time *Talbot* was decided, some public officials in the United States believed that the United States had a municipal common law, which, like English common law, incorporated certain principles of the law of nations. See Bellia & Clark, *Federal Common Law*, *supra* note 4, at 47–55. In *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812), the Supreme Court held that there was no municipal common law of the United States. The decision in *Talbot*, however, did not rest exclusively upon belief in a municipal common law of the United States incorporating the law of nations principles the Court applied. As explained, Justice Iredell also (if not primarily) rested his opinion upon the Constitution’s allocation of foreign relations powers to the political branches. See 3 U.S. (3 Dall.) at 163–64 (opinion of Iredell, J.).

<sup>242</sup> *Talbot*, 3 U.S. (3 Dall.) at 160–61 (opinion of Iredell, J.).

*B. The Marshall Court Decisions*

The Marshall Court faced several questions regarding the proper application of the law of nations in U.S. courts. Two themes emerged from the Court's decisions. First, the Court sought to uphold the rights of established foreign sovereigns and avoid premature judicial recognition of breakaway nations. These steps avoided sparking hostilities with foreign states and reserved sensitive decisions to the political branches. Second, the Court developed several additional doctrines ensuring that the political branches rather than the courts made any decision that contradicted the rights associated with recognition, amounted to a form of reprisal, or risked generating hostilities with foreign states.

*1. Upholding the Rights of Foreign States*

The Marshall Court routinely applied the law of nations to uphold the rights of established foreign states under the law of nations. After the United States declared its independence from Great Britain in 1776 and claimed to possess the rights of independent states, various territories and colonies belonging to France and Spain sought to establish their own independence. These developments presented courts with novel questions as they strove to apply the law of nations in a manner consistent with the Constitution's allocation of powers. The Supreme Court quickly established that the Constitution gave the political branches the exclusive power to decide whether and when to recognize breakaway territories as free and independent states. According to the Court, this conclusion followed not only from the recognition power, but also from the war power because premature recognition by the judiciary risked embroiling the United States in hostilities with European powers.

In 1808 in *Rose v. Himely*, the Marshall Court determined that the Constitution's allocation of the recognition power to the political branches required courts to uphold the traditional rights of recognized foreign sovereigns under the law of nations and deny such rights to an unrecognized colony seeking independence.<sup>243</sup> The dispute began when a French privateer captured cargo in interna-

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<sup>243</sup> 8 U.S. (4 Cranch) at 272.

tional waters shipped from the French colony of Santo Domingo.<sup>244</sup> The privateer sold the cargo in Cuba to a purchaser who brought it to South Carolina. The original owner filed a libel there to recover the 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 the basis of this decree.<sup>245</sup> The question before the Court was whether U.S. courts had to give effect to the foreign judgment.

To answer this question, which depended on the character of the foreign tribunal, the Court thought it necessary to consider “the relative situation of St. Domingo and France.”<sup>246</sup> Santo Domingo had been a colony of France and declared its independence in 1804. At the time of suit, however, “France still asserted her claim of sovereignty, and had employed a military force in support of that claim.”<sup>247</sup> Under principles of dynastic legitimacy,<sup>248</sup> France remained the recognized sovereign. The purchaser of the cargo, however, invoked the principle of effective possession described by Vattel, and 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.”<sup>249</sup> The Court rejected this argument on the ground that the government of the United States—rather than its courts—must decide whether and when to recognize a breakaway colony as an independent nation:

[T]he 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.<sup>250</sup>

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<sup>244</sup> *Id.* at 241.

<sup>245</sup> *Id.* at 241–42.

<sup>246</sup> *Id.* at 272 (emphasis omitted).

<sup>247</sup> *Id.*

<sup>248</sup> See *supra* notes 99–107 and accompanying text.

<sup>249</sup> *Rose*, 8 U.S. (4 Cranch) at 272.

<sup>250</sup> *Id.* (emphasis omitted).

A premise of this conclusion was that judicial recognition of Santo Domingo as an independent nation—while France still claimed sovereignty—would contradict the United States’ recognition of France and risk war with that nation. Recognition of France necessarily implied that the United States would respect “that exclusive dominion which every nation possesses within its own territory.”<sup>251</sup> Failure to respect France’s sovereignty over all of its territory would have violated that nation’s perfect rights under the law of nations and given it just cause for war. Accordingly, the Court concluded that decisions regarding when and how to recognize Santo Domingo as an independent nation must be made by the political branches rather than the courts.<sup>252</sup>

The Court applied the same principle in subsequent cases. In 1818 in *Gelston v. Hoyt* (another case involving Santo Domingo), Justice Story stated on behalf of the Court that “[n]o doctrine is better established, than that it belongs exclusively to governments to recognise new states in the revolutions which may occur in the world.”<sup>253</sup> Accordingly, “until 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.”<sup>254</sup>

The same year, Chief Justice Marshall observed in *United States v. Palmer* that “questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence,” are “generally rather political than legal in their character.”<sup>255</sup> Under the Constitution’s allocation of powers, he explained, such questions are for the political branches rather than the courts to decide:

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<sup>251</sup> *Id.* at 274.

<sup>252</sup> The Court ultimately ruled in favor of the original owner because 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.” *Id.* at 276. “If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive.” *Id.* In this case, however, because the court of Santo Domingo never obtained jurisdiction over the goods, the Court concluded that “the proceedings are *coram non jndice*, and must be disregarded.” *Id.*

<sup>253</sup> 16 U.S. (3 Wheat.) 246, 324 (1818). Here, as Justice Iredell had in *Talbot*, Justice Story used the phrase “the government” to refer to the political branches of the federal government as contradistinguished from the judiciary.

<sup>254</sup> *Id.*

<sup>255</sup> 16 U.S. (3 Wheat.) 610, 626, 634 (1818).

They 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. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it.<sup>256</sup>

In accordance with these principles, the Court made clear the following year in *The Divina Pastora* that the Constitution required it to apply the law of nations to uphold recognition determinations by the political branches. When “the government of the United States . . . recognize[s] the existence of a civil war between Spain and her colonies, but remain[s] neutral, the Courts of the Union are bound to consider as lawful, those acts which war authorizes, and which the new governments in South America may direct against their enemy.”<sup>257</sup> Conversely, when “the Government of the United States” has not “acknowledged the existence of any Mexican republic or state at war with Spain,” the Court cannot “consider as legal, any acts done under the flag and commission of such republic or state.”<sup>258</sup> Such cases underscored the Marshall Court’s position that the proceedings of U.S. courts with respect to foreign nations “depend . . . entirely on the course of the government.”<sup>259</sup>

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<sup>256</sup> Id. at 634. In accordance with this view, Chief Justice Marshall, sitting as a Circuit Justice, opined a year earlier that because “our executive had never recognized the independence of Buenos Ayres [from Spain], it was not competent to the court to pronounce its independence.” *United States v. Hutchings*, 26 F. Cas. 440, 442 (Marshall, Circuit Justice, C.C.D. Va. 1817) (No. 15,429).

<sup>257</sup> *The Divina Pastora*, 17 U.S. (4 Wheat.) 52, 63–64 (1819).

<sup>258</sup> *The Nueva Anna*, 19 U.S. (6 Wheat.) 193, 193–94 (1821).

<sup>259</sup> *Palmer*, 16 U.S. (3 Wheat.) at 634–35. These decisions bear some resemblance to the political question doctrine, particularly the idea that courts will not adjudicate cases involving “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). Whether one chooses to characterize these decisions as political question cases or constitutional decisions, however, the essential inquiry remains the same. As Professor Wechsler has observed, “all the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a



## 2. Preserving Exclusive Political Branch Prerogatives

In addition to upholding the rights of recognized foreign states under the law of nations, the Marshall Court developed several doctrines designed to ensure that the political branches—rather than courts—made sensitive decisions either to abrogate another nation's rights under the law of nations or to take actions apt to trigger or escalate hostilities with another nation.

First, the Supreme Court adopted a clear statement requirement designed to ensure that the political branches acted knowingly and intentionally in abrogating the rights of foreign nations, and that courts would not inadvertently abrogate such rights. A clear statement requirement erred in favor of upholding the rights of foreign sovereigns because erroneous abrogation of such rights would contradict recognition and could even lead to war. *Murray v. The Schooner Charming Betsy*<sup>260</sup> is illustrative. 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.<sup>261</sup> The Court construed this Act not to authorize seizure of an American-built Danish vessel purchased from an American captain at a Danish island and used by an American-born Danish burgher to conduct trade with a French island.<sup>262</sup> Seizure of the vessel would have violated the right of Denmark—a recognized sovereign—to engage in neutral commerce. 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.”<sup>263</sup> He determined that the Non-Intercourse 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

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finding that itself requires an interpretation.” Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7–8 (1959).

<sup>260</sup> 6 U.S. (2 Cranch) 64 (1804).

<sup>261</sup> Non-Intercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801).

<sup>262</sup> *Charming Betsy*, 6 U.S. (2 Cranch) at 64–65, 120–21. Denmark recognized the United States in 1792, and the United States received Denmark's ambassador in 1801.

<sup>263</sup> *Id.* at 118.

commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed.”<sup>264</sup>

The Court did not invoke Articles I and II in its analysis, but the whole point of the canon was to ensure that the political branches—rather than courts—made the “extraordinary” decision to abrogate another country’s rights under the law of nations. Although the Court did not spell out the potential adverse consequence of such abrogation (war), this aspect of the law of nations was well known at the time. From this perspective, a clear statement requirement prevented courts from usurping at least two powers assigned by the Constitution to the political branches. First, a judicial decision interfering with neutral rights would have contradicted the political branches’ recognition of Denmark by denying rights associated with recognition. Second, a judicial decision interfering with Denmark’s perfect right to engage in neutral commerce may have usurped the political branches’ exclusive authority to initiate war by generating hostilities between the United States and Denmark.<sup>265</sup> The *Charming Betsy* canon prevented courts from interpreting ambiguous statutes to interfere with other nations’ established rights unless Congress and the President clearly manifested their intention to do so.

In *The Schooner Exchange v. McFaddon*, the Court applied a similar clear statement requirement to uphold a usage of nations exempting foreign warships from a nation’s territorial jurisdiction.<sup>266</sup> The Court based its decision to adhere to this usage on the Constitution’s allocation of powers. The case began when the original owners of a French warship anchored in the port of Philadelphia initiated a libel to recover 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.”<sup>267</sup> Because “no sentence or decree of condemnation had been pronounced against her, by any [French] court of competent jurisdiction,” the law of nations did not pre-

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<sup>264</sup> Id. at 119 (emphasis omitted).

<sup>265</sup> See 2 Vattel, supra note 67, bk. III, §§ 111–12, at 39–40 (recognizing the perfect right of a neutral nation to engage in neutral trade).

<sup>266</sup> 11 U.S. (7 Cranch) 116, 146–47 (1812).

<sup>267</sup> Id. at 117.

clude an inquiry into title (as was the case in *Peters*).<sup>268</sup> Accordingly, as stated by the Court, the question was “whether an American citizen can assert, in an American court, a title to an armed national vessel [of another country], found within the waters of the United States.”<sup>269</sup>

Some background—including the expedited disposition of the case—helps to illuminate the Supreme Court’s decision. The plaintiffs filed their libel against the French warship in the district court on August 24, 1811, claiming that it had been illegally seized from them on the high seas. In response, the U.S. Attorney “(at the instance of the executive department of the government of the United States, as it is understood,) filed a *suggestion*” of immunity with the court.<sup>270</sup> This suggestion was based, in part, on “the political relations between the United States and France.”<sup>271</sup> According to the U.S. Attorney,

[I]n as much as there exists between the United States of America and Napoleon, emperor of France . . . a state of peace and amity; the public vessels of [France] . . . may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation.<sup>272</sup>

The district court agreed and dismissed the case on October 4, 1811 on the ground that “a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country.”<sup>273</sup> The circuit court reversed this determination on October 28, 1811, and the U.S. Attorney appealed to the Supreme Court.<sup>274</sup> Because this was “a cause in which the sovereign right claimed by NAPOLEON, the reigning emperor of the French, and the political relations between the United States and France, were involved,” the Court accepted the Attorney

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<sup>268</sup> Id. at 117, 146–47.

<sup>269</sup> Id. at 135.

<sup>270</sup> Id. at 117–18.

<sup>271</sup> Id. at 116.

<sup>272</sup> Id. at 118.

<sup>273</sup> Id. at 119–20.

<sup>274</sup> Id. at 120.

General's request that the case be heard "in preference to other causes which stood before it on the docket."<sup>275</sup>

The case was argued on February 24, 1812.<sup>276</sup> At argument, the U.S. Attorney maintained that the Constitution's allocation of powers compelled reversal. In his view, "[i]f the courts of the United States should exercise such a jurisdiction[,] it will amount to a judicial declaration of war."<sup>277</sup> Indeed, he went so far as to argue that the judiciary's exercise of jurisdiction in a case of this nature "will absorb all the functions of government, and leave nothing for the legislative or executive departments to perform."<sup>278</sup> Presumably because of the threat this case posed to U.S.-French relations, the Supreme Court handed down its decision in favor of immunity just one week after argument, on March 3, 1812.<sup>279</sup>

The Supreme Court made clear that its decision to uphold the immunity of foreign warships was a consequence of the Constitution's allocation of powers. The Court began by explaining that immunity for foreign warships in the United States could not derive its "validity from an external source" because the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute."<sup>280</sup> Thus, such immunity "must be traced up to the consent of the nation itself" in conformity with "those principles of national and municipal law by which it ought to be regulated."<sup>281</sup> In this case, the Court suggested that the United States' consent could be inferred from the practice of nations toward foreign warships—an "implication" that only "the sovereign power of the nation" could destroy.<sup>282</sup>

The Court's decision thus appeared to rest on the Constitution's allocation of war and reprisal powers to the political branches. A judicial decision upholding seizure of a French warship almost certainly would have triggered hostilities with France. If the "sovereign power" to authorize such a seizure and thereby commence hostilities rested solely with the political branches, then courts

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<sup>275</sup> *Id.* at 116 (emphasis omitted).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 126.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 135.

<sup>280</sup> *Id.* at 136.

<sup>281</sup> *Id.* at 135–36.

<sup>282</sup> *Id.* at 146.

would have to treat warships as immune from process until the political branches instructed otherwise. Chief Justice Marshall acknowledged that, “[w]ithout doubt, the sovereign of the place is capable of destroying” the immunity suggested by the practice of nations.<sup>283</sup> “He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals.”<sup>284</sup> The first method would involve the use of force (including a reprisal), and the second would involve the exercise of legislative power. Because the political branches had taken neither course, courts had to consider “national ships of war, entering the port of a friendly power open for their reception, . . . as exempted by the consent of [the sovereign] power from its jurisdiction.”<sup>285</sup> A contrary decision would have risked military retaliation by France.

Perhaps for this reason, the Supreme Court again took the added precaution of requiring the political branches to express any contrary instructions clearly. Congress had arguably conferred jurisdiction over libel suits like this one by vesting the district courts with general admiralty jurisdiction. The Court, however, construed the Judiciary Act narrowly not to confer jurisdiction over warships. According to the Court, “until [the sovereign] power 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.”<sup>286</sup>

Significantly, Chief Justice Marshall also rejected counsel’s argument that courts should deny immunity in this case because France’s initial seizure of the vessel violated U.S. rights under the law of nations. In keeping with the Constitution’s assignment of the reprisal power to Congress, he found “great weight” in the argument “that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, 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.”<sup>287</sup> In other words, the *Schooner Exchange* Court understood

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<sup>283</sup> Id.

<sup>284</sup> Id.

<sup>285</sup> Id. at 145–46.

<sup>286</sup> Id. at 146 (emphasis added).

<sup>287</sup> Id.; see also *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), discussed *infra* notes 299–301 and accompanying text.

the Constitution to assign the political branches—rather than courts—the responsibility for deciding whether and when to take action against a foreign sovereign in response to its improper seizure of the ship in question.

The Marshall Court again preserved the exclusive powers of the political branches to conduct war and make rules regarding captures in *Brown v. United States*.<sup>288</sup> In *Brown*, 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 when the War of 1812 broke out with England. The Act of Congress declaring war against Britain authorized the President to issue commissions to privateers to capture British vessels and goods on the high seas, but said nothing about the property of British subjects found on land.<sup>289</sup> Apparently acting without the President’s knowledge or approval, the U.S. Attorney filed a libel to condemn the timber as enemy property.<sup>290</sup>

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.”<sup>291</sup> But Marshall rejected any suggestion that this principle of the law of nations “constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power.”<sup>292</sup> “[W]ar is not an absolute confiscation of this property, but simply confers the right of confiscation” upon the sovereign.<sup>293</sup> A sovereign’s decision to exercise this right “depends on political considerations which may continually vary.”<sup>294</sup>

The Constitution, Marshall explained, gives Congress—rather than courts—the power to decide whether the United States will confiscate enemy property during war: “from the structure of our

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<sup>288</sup> 12 U.S. (8 Cranch) 110 (1814).

<sup>289</sup> Act of June 18, 1812, ch. 102, 2 Stat. 755.

<sup>290</sup> *Brown*, 12 U.S. (8 Cranch) at 121–22. Marshall specifically noted that the U.S. Attorney did not seem to have “made the seizure under any instructions from the president of the United States.” *Id.*

<sup>291</sup> *Id.* at 122.

<sup>292</sup> *Id.* at 128.

<sup>293</sup> *Id.* at 123.

<sup>294</sup> *Id.* at 128.

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 . . . .”<sup>295</sup> “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.”<sup>296</sup> Thus, “until that will shall be expressed, no power of condemnation can exist in the Court.”<sup>297</sup>

Understood against background principles of the law of nations, *Brown* rested on the Constitution’s allocation of war powers, particularly the power to make rules governing wartime captures. Recognition of Great Britain did not render the property of its citizens immune from capture during war. To the contrary, the law of nations clearly permitted the United States to capture enemy property on land during a war. Any decision to do so, however, would have escalated the war, encouraged Britain to confiscate American property in England, and made peace harder to achieve. Given these consequences for the conduct of the war with Great Britain, it is not surprising that the Court understood the Constitution to require Congress—rather than courts—to make the decision to authorize such captures and risk such consequences.<sup>298</sup>

Finally, the Supreme Court again upheld the exclusive powers of the political branches to retaliate against other nations in *The Ne-reide*,<sup>299</sup> a well-known prize case from 1815. The question was whether a United States privateer should be held liable for violating the neutral rights of Spain by capturing goods belonging to a neutral (Spanish) individual found on an enemy (English) vessel. The privateer urged the Court to uphold his capture of Spanish property on the ground that “Spain . . . would subject American

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<sup>295</sup> Id. at 123.

<sup>296</sup> Id. at 129.

<sup>297</sup> Id. at 123.

<sup>298</sup> We take no position here on the relative constitutional powers of Congress and the President in this context. See Bellia & Clark, Political Branches, *supra* note 128, at 1810–20 (describing the Supreme Court’s shifting understanding of the relative powers of Congress and the President to depart from the law of nations).

<sup>299</sup> 13 U.S. (9 Cranch) 388 (1815).

property, under similar circumstances, to confiscation.”<sup>300</sup> In rejecting this claim, the Court made plain that the Constitution entrusted the political branches with the exclusive power of deciding whether and how to retaliate against a nation or its subjects for their misconduct:

[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.<sup>301</sup>

The Constitution vests the power to authorize reprisals and captures in Congress, not courts. Accordingly, the Court explained, “[i]f 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. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.”<sup>302</sup> In this context, the Captures Clause—in addition to the political branches’ recognition, war, and reprisal powers—operated to make the law of nations “part of the law of the land.” This constitutional allocation of powers required courts to follow the law of nations absent abrogation by the political branches.

### *C. Modern Supreme Court Jurisprudence*

In the eighteenth century, prize cases provided frequent opportunities for courts to consider the rights of foreign sovereigns under the law of nations. The Marshall Court upheld such rights in order

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<sup>300</sup> Id. at 422.

<sup>301</sup> Id. at 422–23.

<sup>302</sup> Id. at 423.



to allow the political branches to decide whether, when, and how to depart from such rights in the exercise of their specific constitutional powers over recognition, war, reprisal, and capture. Privateers were rarely used after the War of 1812, and prize cases formed an increasingly small portion of the Supreme Court's docket. This did not mean, however, that the Court heard no cases involving the traditional rights of foreign sovereigns under the law of nations. In the first half of the twentieth century, the Court continued to uphold such rights in various contexts, especially in act of state cases. In several cases, the Court indicated that it was upholding the rights of foreign sovereigns in order to avoid usurping constitutional powers of the political branches, especially the recognition power. In other cases, the Court was less explicit about its rationale, but nonetheless upheld traditional sovereign rights in ways that avoided interference with the political branches' recognition and war powers. In the second half of the twentieth century, the Court continued to uphold the traditional rights of recognized foreign states, but expressed a more general separation-of-powers rationale for doing so.

### 1. The Paquete Habana

The Supreme Court decided a significant prize case at the beginning of the twentieth century, *The Paquete Habana*.<sup>303</sup> This case has been widely discussed in debates regarding the status of customary international law in U.S. courts because of its iconic statement, echoing the *Nereide*, that “[i]nternational law is part of our law.”<sup>304</sup> The case may be understood, however, as little more than a continuation of the Marshall Court's tradition of upholding the rights of foreign sovereigns in U.S. courts until the political branches direct otherwise. 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 Florida where the district court, sitting in admiralty, condemned the vessels and cargoes as prizes of war.<sup>305</sup> The question before the Supreme Court was whether “the fishing smacks were

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<sup>303</sup> 175 U.S. 677 (1900).

<sup>304</sup> *Id.* at 700.

<sup>305</sup> *Id.* at 714.

subject to capture by the armed vessels of the United States during the recent war.”<sup>306</sup> Although coastal fishing vessels were not traditionally exempt from capture under the law of nations, the Court found that the exemption had “gradually ripen[ed] into a rule of international law.”<sup>307</sup> The Court applied this new rule to restore the captured vessels and their cargo to their original owners.

After reviewing the practice of nations (including the United States),<sup>308</sup> the Court explained in a famous passage that it would follow international law to decide “questions of right” in the absence of any “controlling executive or legislative act or judicial decision” to the contrary.<sup>309</sup> According to the Court:

International law is 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 experience, have made themselves peculiarly well acquainted with the subjects of which they treat.<sup>310</sup>

After reviewing the relevant decisions and commentary in detail, the Court concluded 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.”<sup>311</sup>

Those who argue that *The Paquete Habana* should be understood to apply customary international law as federal common law have struggled to explain the Court’s repeated claim that the President could override it unilaterally through a “controlling ex-

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<sup>306</sup> Id. at 686.

<sup>307</sup> Id.

<sup>308</sup> The Court pointed to early American adherence to the exemption in its treaties of 1785, 1799, and 1828 with Prussia, and stressed that “[i]n the war with Mexico in 1846, the United States recognized the exemption of coast fishing boats from capture.” Id. at 690–91, 696.

<sup>309</sup> Id. at 700.

<sup>310</sup> Id.

<sup>311</sup> Id. at 708.

ecutive act.”<sup>312</sup> The Court’s claim makes sense, however, if its decision rests not on federal common law, but on the Constitution’s allocation of powers to the political branches to declare, conduct, and escalate war. The Court suggested that U.S. courts should apply a rule of international law exempting fishing vessels from capture as a kind of default rule until the political branches decide otherwise in the exercise of their respective constitutional powers: “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.”<sup>313</sup> Tellingly, the Court analogized the case to *Brown v. United States*:<sup>314</sup> *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.”<sup>315</sup> This statement suggests that—as in *Brown*—the Court was sensitive to the Constitution’s allocation of powers. If, as the Court found, the law of nations had developed to grant Spanish fishing vessels immunity from capture, then a judicial decision to violate Spain’s rights by permitting such captures could have escalated or prolonged hostilities between the two nations. As the Court recognized, Congress and the President—in the exercise of their constitutional powers to wage war and make captures—might well decide to abrogate Spain’s rights by subjecting Spanish fishing boats to confiscation. But, in the absence of clear instructions to this effect from the political branches, the Court refused to take it upon itself to override Spain’s rights under the law of nations and risk escalation of the war.

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<sup>312</sup> See, e.g., Michael J. Glennon, Can the President Do No Wrong?, in *Agora: May the President Violate Customary International Law?*, 80 *Am. J. Int’l L.* 913, 923, 927, 930 (1986) (arguing that “*The Paquete Habana* provides no support for exempting the President” from customary international law); Stephens, *supra* note 2, at 398 (arguing for “the federal status of customary international law” but accepting that “executive actions override inconsistent customary law”).

<sup>313</sup> *The Paquete Habana*, 175 U.S. at 708.

<sup>314</sup> 12 U.S. (8 Cranch) 110 (1814).

<sup>315</sup> *The Paquete Habana*, 175 U.S. at 711.

## 2. *The Act of State Doctrine*

As prize cases receded into history, an important series of cases emerged that similarly called upon the Supreme Court to decide the extent to which the Constitution's allocation of powers required courts to uphold the traditional rights of foreign sovereigns under the law of nations, particularly the right to territorial sovereignty. In keeping with the Marshall Court tradition, the Court often tied its decisions in these cases to the recognition power and, more broadly, to the Constitution's allocation of powers to the political branches.

### a. *The Venezuelan Revolution*

The first significant case, *Underhill v. Hernandez*,<sup>316</sup> arose at the end of the nineteenth century. In early 1892, a revolution began in Venezuela seeking to replace the existing government.<sup>317</sup> General Hernandez “was carrying on military operations in support of the revolutionary party.”<sup>318</sup> George Underhill was a U.S. citizen performing government contracts in Venezuela when the revolution began. Underhill sought to leave the country, but was detained and coerced to operate the city's waterworks for several months by General Hernandez and his forces before being allowed to leave.<sup>319</sup> Underhill subsequently sued Hernandez for damages in New York federal court. The court dismissed the case on the ground that Hernandez was acting as a military commander representing a de facto government, and the court of appeals affirmed.

The Supreme Court affirmed on the basis of what has come to be known as the act of state doctrine—a doctrine that derives from traditional principles of territorial sovereignty under the law of nations and that follows from the Constitution's allocation of recognition and war powers to the political branches. Preliminarily, the Court described the obligations of third-party nations to warring factions in civil wars:

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<sup>316</sup> 168 U.S. 250 (1897).

<sup>317</sup> *Id.* at 250–51.

<sup>318</sup> *Id.* at 254.

<sup>319</sup> *Id.* at 251, 254.

Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force, generally speaking foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation.<sup>320</sup>

Writers on the law of nations had long recounted that third-party nations generally would not judge the merits of civil wars but rather would effectively consider each faction a separate sovereign for the duration of the war (and the prevailing party as such after the war).<sup>321</sup>

In accordance with these principles, the Court explained that, “[t]he acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards . . . was recognized by the United States.”<sup>322</sup> The Court applied the act of state doctrine to validate the acts retroactively and dismiss the case. In doing so, the Court explained that any redress for such acts must be obtained through the actions of the political branches rather than the courts:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>323</sup>

The act of state doctrine, as described in this passage, has deep roots in the traditional rights of nations to territorial sovereignty. As Vattel explained, “[o]f all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.”<sup>324</sup> Accordingly, no “foreign power [may] take cognizance of

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<sup>320</sup> *Id.* at 252–53.

<sup>321</sup> See 2 Vattel, *supra* note 67, bk. III, § 293, at 109–10.

<sup>322</sup> *Underhill*, 168 U.S. at 254.

<sup>323</sup> *Id.* at 252.

<sup>324</sup> Vattel, *supra* note 67, bk. II, § 54, at 138.

the administration of this sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”<sup>325</sup>

The *Underhill* Court’s formulation of the act of state doctrine upheld not only territorial sovereignty under the law of nations, but also the Constitution’s allocation of recognition and war powers to the political branches by requiring *courts* to respect the territorial sovereignty of recognized foreign states. The Court began with the traditional principle of the law of nations that “[e]very sovereign State is bound to respect the independence of every other sovereign State.”<sup>326</sup> The analysis then shifted to separation of powers and the role of courts. The Court declared that “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”<sup>327</sup> In this case, the government in question had been “recognized by the United States,”<sup>328</sup> and therefore judicial scrutiny of its acts would have contradicted recognition by denying the territorial sovereignty that recognition acknowledged. Moreover, during civil war, “[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.”<sup>329</sup> This principle was consistent with writings on the law of nations, and ensured that—even in the absence of recognition—courts would not risk war by interfering with the territorial sovereignty of foreign states. Both of these rationales supported the Court’s conclusion that *Underhill* could not obtain redress by litigating in U.S. courts, but only by persuading the political branches to pursue “the means open to be availed of by sovereign powers as between themselves,” such as diplomatic negotiations, reprisal, or even war.<sup>330</sup>

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<sup>325</sup> Id. § 55, at 138.

<sup>326</sup> *Underhill*, 168 U.S. at 252.

<sup>327</sup> Id.

<sup>328</sup> Id. at 253.

<sup>329</sup> Id. at 252.

<sup>330</sup> Id.

*b. The Russian Revolution*

The Supreme Court continued to apply the act of state doctrine on numerous occasions.<sup>331</sup> Two decisions arising out of the United States' recognition of the Soviet Union underscore the constitutional dimensions of the doctrine and its ability to preempt contrary state law. Although these decisions are usually treated as establishing presidential power to make sole executive agreements with the force of federal law, the President's recognition power and the act of state doctrine were integral to the Court's holdings. *United States v. Belmont*<sup>332</sup> and *United States v. Pink*<sup>333</sup> upheld a sole executive agreement made by President Roosevelt as part of his decision to recognize the Soviet Union in 1933. These cases are often cited for the proposition that such agreements—at least in conjunction with recognition of a foreign government—preempt contrary state law.<sup>334</sup> Careful examination of *Belmont* and *Pink*, however, suggests that the President's exercise of his independent constitutional power to recognize the Soviet Union—rather than the mere fact of his agreement to do so—served to displace state law by triggering the act of state doctrine.<sup>335</sup> Although commentators often cite *Banco Nacional de Cuba v. Sabbatino*<sup>336</sup> as the first decision to proclaim that the act of state doctrine preempts contrary state law,<sup>337</sup> *Belmont* and *Pink* established this principle decades earlier.

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<sup>331</sup> See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 (1918); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

<sup>332</sup> 301 U.S. 324, 330 (1937).

<sup>333</sup> 315 U.S. 203, 230 (1942).

<sup>334</sup> Both opinions contain language to this effect. See *Pink*, 315 U.S. at 230–31 (stating that “state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement”); *Belmont*, 301 U.S. at 327 (stating that “no state policy can prevail against the international compact here involved”). The Supreme Court subsequently relied on *Belmont* and *Pink* to support the proposition that “valid executive agreements are fit to preempt state law, just as treaties are.” *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416–17 (2003).

<sup>335</sup> See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 Va. L. Rev. 1573, 1637–52 (2007) [hereinafter Clark, *Domesticating*].

<sup>336</sup> 376 U.S. 398 (1964).

<sup>337</sup> See Bradley & Goldsmith, *Customary International Law*, supra note 3, at 859 (noting that “*Sabbatino* stated that the act of state doctrine is a rule of federal common law binding on the states”); Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, *Sosa*, *Customary International Law*, and the Continuing Relevance of *Erie*,

On July 5, 1917, the United States recognized the Provisional Russian Government as the successor to the Imperial Russian Government, which disbanded after the Tsar abdicated in February of that year. In October, the Bolsheviks overthrew the Provisional Government, but the United States continued to recognize the latter as the de jure government of Russia. In 1918 and 1919, the de facto Russian government nationalized Russian corporations and all of their property, wherever located.<sup>338</sup> Many of these companies did business and kept funds abroad, especially in New York and London. In the ensuing years, courts struggled with litigation among various classes of claimants due to “the hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic.”<sup>339</sup> These hazards and embarrassments were compounded prior to 1933 because the United States continued to recognize the long-defunct Provisional Russian Government. Accordingly, courts allowed the defunct government to sue on behalf of Russia because “courts may not independently make inquiry as to who should or should not be recognized.”<sup>340</sup>

On November 16, 1933, President Roosevelt recognized the government of the Union of Socialist Soviet Republics as part of an exchange of diplomatic letters with Maxim Litvinov.<sup>341</sup> Under the so-called Litvinov Agreement, the Soviet Union “released and assigned to the United States” all amounts due to the Soviet Union from American nationals, “with the understanding that the Soviet Government was to be duly notified of all amounts realized by the

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120 Harv. L. Rev. 869, 879 (2007) [hereinafter Bradley et al., *Sosa*] (stating that *Sabbatino* “held that the act of state doctrine . . . is a rule of federal common law binding on the states”); Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617, 1627 (1997) (“The Supreme Court first applied the doctrine [of the federal common law of foreign relations] in *Banco Nacional de Cuba v. Sabbatino*.”); Jack L. Goldsmith, The New Formalism in United States Foreign Relations Law, 70 U. Colo. L. Rev. 1395, 1406 (1999) (suggesting that *Sabbatino* changed prior understandings by making clear that the act of state doctrine must be treated as preemptive federal law).

<sup>338</sup> See *Belmont*, 301 U.S. at 326; cf. *Pink*, 315 U.S. at 210–11 (describing nationalization of Russian insurance companies).

<sup>339</sup> *People v. Russian Reinsurance Co.*, 175 N.E. 114, 115 (N.Y. 1931).

<sup>340</sup> *Lehigh Valley R.R. Co. v. Russia*, 21 F.2d 396, 400 (2d Cir. 1927).

<sup>341</sup> Exchange of Communications Between the President of the United States and Maxim B. Litvinov, People’s Commissar for Foreign Affairs of the Union of Soviet Socialist Republics (Nov. 16, 1933), in 28 Am. J. Int’l L. 2, 2–3 (Supp. 1934).



United States from such release and assignment.”<sup>342</sup> Following this assignment, the United States (as assignee of the Soviet Union’s interest) sued August Belmont, a private banker doing business in New York, in federal court to recover money deposited with him prior to 1918 by Petrograd Metal Works, a Russian corporation.<sup>343</sup>

The district court dismissed the complaint, and the Second Circuit affirmed. The court of appeals distinguished between “property physically located within Russian territory” and “property outside [Russia’s] own territory.”<sup>344</sup> With respect to the former class of property, the court acknowledged “that after recognition of the Soviet government by the executive branch of our own government, the courts of this country must enforce titles and rights valid according to Russian law with respect to such property.”<sup>345</sup> With respect to property found in New York, however, the court considered itself free to apply “the policy of New York,”<sup>346</sup> which declined “to enforce confiscatory decrees with respect to property located [in the state] at the date of the decree.”<sup>347</sup> The court determined Belmont’s debt to the Russian corporation to be property located within New York, and accordingly concluded that neither the confiscating government—nor the United States as its assignee—could claim valid title.<sup>348</sup>

The Supreme Court reversed. The Court began its analysis by broadly stating that “we are of opinion that no state policy can prevail against the international compact here involved.”<sup>349</sup> The Court explained that “[t]he recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments.”<sup>350</sup> The effect of recognition was central to the Court’s decision. “[W]ho is the sovereign of a territory,” the Court explained, “is not a judicial question, but one the determination of which by the political departments conclusively

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<sup>342</sup> *Belmont*, 301 U.S. at 326.

<sup>343</sup> *Id.* at 325–26.

<sup>344</sup> *United States v. Belmont*, 85 F.2d 542, 543 (2d Cir. 1936).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 544.

<sup>347</sup> *Id.* at 543.

<sup>348</sup> *Id.* at 543–44.

<sup>349</sup> *Belmont*, 301 U.S. at 327.

<sup>350</sup> *Id.* at 330.

binds the courts; and . . . recognition by these departments is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence.”<sup>351</sup> Having described the effect of recognition, the Court took “judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet Government.”<sup>352</sup> “The effect of this [recognition] was to validate, so far as this country is concerned, all acts of the Soviet Government here involved . . . .”<sup>353</sup> Thus, the Court suggested, “the international compact here involved” preempted state law because it included *recognition* of the Soviet Union.<sup>354</sup>

Recognition, in turn, triggered the act of state doctrine and required courts to respect the territorial sovereignty of the Soviet Union by upholding the acts of its (recognized) government taken within its own territory. In applying the act of state doctrine to preempt state law, the Court recited the general principle “that every sovereign state must recognize the independence of every other sovereign state; and that the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory.”<sup>355</sup> Because the President recognized the Soviet government, the Constitution required the Court to treat all acts of the Soviet government as valid, including its confiscation of all Russian corporations. The Court thus rejected the lower courts’ distinction based on the location of the corporation’s property as “irrelevant.”<sup>356</sup> No state power “can be interposed as an obstacle to the effective operation of a federal constitutional power”—here the rec-

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<sup>351</sup> Id. at 327–28 (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918)).

<sup>352</sup> Id. at 330.

<sup>353</sup> Id. Professor Joseph Dellapenna agrees that *Belmont* held “that the act of state doctrine, as federal law, displaced any inconsistent state policy.” Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 *Vill. L. Rev.* 1, 19 (1990). Professor Michael Ramsey, by contrast, concludes that the act of state doctrine “does not appear relevant to any issue raised in the case” because the property in question was located in New York when it was confiscated. Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 *N.C. L. Rev.* 133, 147 n.52 (1998). Ramsey’s analysis misses the mark because the *Belmont* Court “understood the act of state doctrine to apply not on the basis of the situs of the debt, but on the basis of the situs of the Russian corporation.” Clark, *Domesticating*, *supra* note 335, at 1643.

<sup>354</sup> *Belmont*, 301 U.S. at 327.

<sup>355</sup> Id. (citing *Underhill*, 168 U.S. at 252).

<sup>356</sup> Id. at 332.

ognition power exercised through the medium of an international compact.<sup>357</sup>

Five years later, in *United States v. Pink*, the Supreme Court again confronted state resistance to Soviet confiscations. The First Russian Insurance Company was incorporated under the laws of the former Empire of Russia and opened a New York branch in 1907.<sup>358</sup> Pursuant to New York law, the company maintained reserves in New York with the Superintendent of Insurance to secure the payment of claims resulting from its New York operations.<sup>359</sup> Although the Soviet Union nationalized all Russian insurance companies (including First Russian) in 1918 and 1919, the New York branch continued to do business until 1925, when the Superintendent of Insurance took possession of its assets pursuant to a court order.<sup>360</sup> The Superintendent paid all claims of domestic creditors of the New York branch and had a surplus of more than one million dollars.<sup>361</sup>

Pursuant to the Litvinov assignment, the United States brought suit in state court seeking to recover all remaining funds held by the Superintendent.<sup>362</sup> The trial court dismissed the complaint, and the New York Court of Appeals affirmed<sup>363</sup> based on an earlier decision in which the Court of Appeals reasoned that property deposited with the state by the New York branch of a Russian insurance company “has always been in the custody of the State,” and “[a]t no time could the insurance company or the Russian government have transferred it to Russia.”<sup>364</sup> On this view, the property remained “subject exclusively to the laws of the State,” and the United States as assignee had no greater right to the property than its assignor under state law.<sup>365</sup>

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<sup>357</sup> Id.

<sup>358</sup> *Pink*, 315 U.S. at 210.

<sup>359</sup> Id.

<sup>360</sup> Id. at 211.

<sup>361</sup> Id.

<sup>362</sup> Id. at 213.

<sup>363</sup> *United States v. Pink*, 32 N.E. 2d 552, 552 (N.Y. 1940) (per curiam).

<sup>364</sup> *Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 20 N.E.2d 758, 766 (N.Y. 1939).

<sup>365</sup> Id. at 768. The Supreme Court affirmed the judgment in *Moscow Fire* by an equally divided vote. See *United States v. Moscow Fire Ins. Co.*, 309 U.S. 624 (1940) (per curiam).

The Supreme Court reversed in *Pink*. As in *Belmont*, the Court relied primarily on the legal effect of the President's recognition of the Soviet Union to validate that nation's earlier confiscation of the Russian company. That confiscation, once validated by recognition, gave the Soviet Union—as the successor to the corporation—the right to recover the company's property wherever located. The Court stated that “the *Belmont* case is . . . determinative of the present controversy, unless the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result.”<sup>366</sup> Holding that New York could not elevate the claims of foreign creditors over those of the United States (as assignee of the Russian company's claim) without negating the effect of the President's recognition and violating the act of state doctrine, the Court made clear that the doctrine binds not only the courts (as a matter of the Constitution's separation of powers), but also the states (as a matter of the Constitution's division of powers). According to *Pink*, New York courts violated the act of state doctrine (and the Soviet Union's territorial sovereignty) by refusing “to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question.”<sup>367</sup> *Pink* explicitly tied the supremacy of the act of state doctrine over contrary state law to the President's exercise of his recognition power: “The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system.”<sup>368</sup>

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<sup>366</sup> *Pink*, 315 U.S. at 226.

<sup>367</sup> *Id.* at 231.

<sup>368</sup> *Id.* at 233. In addition, the Court explained,

[i]t was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.

*Id.* at 230. In oft-quoted language that might suggest broad executive power to make non-treaty agreements with other nations, the Court also stated that “state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.” *Id.* at 230–31. In context, however, this language should be understood to refer to agreements like the one at issue in *Pink*—that is, an executive agreement made in the exercise of the President's independent consti-

*c. The Cuban Revolution*

The United States first recognized Cuba's independence from Spain in 1898.<sup>369</sup> Following the revolution of 1959, the United States severed diplomatic relations in 1961, but continued to recognize Cuba and maintain a naval base at Guantanamo Bay pursuant to a 1903 agreement. *Sabbatino* was a diversity suit that arose out of the new Cuban government's nationalization of sugar companies located in Cuba and owned in part by American citizens.<sup>370</sup> The parties asked the Court to decide whether Cuba or the original owner was entitled to the proceeds of sugar sold by the company after the expropriation.<sup>371</sup> The original owner alleged that the expropriation violated an emerging norm of customary international law, but Cuba maintained that the act of state doctrine precluded the judiciary from examining the validity of its action. The Supreme Court sided with Cuba and held that, 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.<sup>372</sup>

The Court cited *Belmont* and *Pink*, among other cases, as precedent for judicial adherence to the act of state doctrine.<sup>373</sup> The Court acknowledged that it might have avoided determining whether the act of state doctrine operates as federal law because "New York has enunciated the act of state doctrine in terms that echo those of federal decisions."<sup>374</sup> Nonetheless, it proceeded to explain why "the scope of the act of state doctrine must be determined according to federal law."<sup>375</sup>

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tutional powers, such as the recognition power. See Clark, *Domesticating*, supra note 335, at 1577.

<sup>369</sup> 31 Cong. Rec. 4062–64 (1898).

<sup>370</sup> 376 U.S. at 400–03.

<sup>371</sup> *Id.* at 400–01.

<sup>372</sup> *Id.* at 428.

<sup>373</sup> *Id.* at 416–17.

<sup>374</sup> *Id.* at 424.

<sup>375</sup> *Id.* at 427.

The Court grounded the act of state doctrine primarily in the Constitution's allocation of powers to the political branches. In particular, by specifying that the doctrine applies only to the acts of a foreign government "extant and recognized by this country at the time of suit," the Court tied the act of state doctrine to the Constitution's allocation of the recognition power to the political branches of the federal government. Since the Founding, recognition signified that the United States would respect a foreign state's territorial sovereignty under the law of nations. To be sure, the political branches retained the ability to override a foreign state's territorial sovereignty in the exercise of their constitutional powers. But the act of state doctrine ensured that courts would not do so in the absence of authorization from the political branches. Historically, the doctrine not only upheld recognition, but also ensured that courts would not unilaterally give a foreign nation just cause for war by violating its perfect right to territorial sovereignty. Thus, in the nineteenth century and early twentieth century, the Court could have justified the act of state doctrine by reference to the Constitution's specific allocation of both recognition and war powers to Congress and the President.<sup>376</sup>

By 1964, however, international law had begun to recognize exceptions to territorial sovereignty. Moreover, by this time interference with territorial sovereignty was no longer considered just cause for war. Accordingly, the *Sabbatino* Court openly acknowledged that "international law does not require application of the [act of state] doctrine,"<sup>377</sup> and that "[m]ost of the countries render-

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<sup>376</sup> Even at that time, however, the Constitution did not disable courts from examining the acts of foreign states when the political branches authorized them to do so. See *id.* at 423 (stating 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"). In such cases, adjudication would not undermine the Constitution's allocation of powers because the political branches rather than the courts would make the crucial decision to override territorial sovereignty. For example, soon after *Sabbatino*, Congress enacted a statute authorizing the judiciary to examine Cuba's acts of expropriation. See Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2006)). Accordingly, on remand, the judiciary applied the statute 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).

<sup>377</sup> *Sabbatino*, 376 U.S. at 421.

ing decisions on the subject fail to follow the rule rigidly.”<sup>378</sup> Despite this development, the Court understood the Constitution to require U.S. courts to continue to apply the act of state doctrine strictly.<sup>379</sup> Recall that the original owners of the sugar companies urged the Court to recognize an exception to the doctrine on the ground that uncompensated takings by foreign sovereigns violated modern norms of customary international law.<sup>380</sup> In response, the Court acknowledged “that United States courts apply international law as part of our own *in appropriate circumstances*.”<sup>381</sup> Although the Court did not define “appropriate circumstances,” it cited *Ware v. Hylton*,<sup>382</sup> *The Nereide*,<sup>383</sup> and *The Paquete Habana*<sup>384</sup> for this proposition. In *The Nereide* and *The Paquete Habana*, as we explained, the Court applied the law of nations to uphold the political branches’ exclusive powers to retaliate and make war against other nations.<sup>385</sup> In *Hylton*, the Court applied the Paris Peace Treaty of 1783 as federal law.<sup>386</sup> *Sabbatino*, which involved a request to apply a non-traditional rule of customary international law limiting a nation’s authority to act within its own territory, presented different circumstances than any of these cases. The original owner of the confiscated property asked the Court to redress an act of a foreign nation committed in its own territory, not to respect that nation’s territorial sovereignty. In these different circumstances, the Court rejected the original owner’s invitation to apply the asserted principle of international law. Although the Court seemed skeptical that international law had evolved as far as the original owner claimed, it did not pause to determine whether international law in fact prohibited such conduct by Cuba. Instead, the Court indicated

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<sup>378</sup> Id.

<sup>379</sup> The *Sabbatino* Court held that state and federal courts must continue to apply the doctrine “in its traditional formulation.” Id. at 401. That formulation flatly “precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.” Id.

<sup>380</sup> Id. at 406–07, 428–30.

<sup>381</sup> Id. at 423 (emphasis added).

<sup>382</sup> 3 U.S. (3 Dall.) 199 (1796).

<sup>383</sup> 13 U.S. (9 Cranch) 388 (1815).

<sup>384</sup> 175 U.S. 677 (1900).

<sup>385</sup> See *supra* Subsections III.B.2 & III.C.1.

<sup>386</sup> See 3 U.S. (3 Dall.) at 281 (opinion of Wilson, J.).

“that the act of state doctrine is applicable even if international law has been violated.”<sup>387</sup>

In reaching this conclusion, the Court emphasized that the “act of state doctrine does . . . have ‘constitutional’ underpinnings.”<sup>388</sup> These underpinnings, the Court explained, relate to the Constitution’s general allocation of foreign relations powers between the political branches and the courts. The act of state doctrine “arises out of the basic relationships between branches of government in a system of separation of powers,”<sup>389</sup> 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.”<sup>390</sup> The doctrine reflects the judiciary’s “strong 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.”<sup>391</sup> In other words, it implements “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.”<sup>392</sup> The Court saw the act of state doctrine as implementing not only the Constitution’s allocation of foreign relations powers to the political branches rather than the judiciary, but also the Constitution’s assignment of foreign affairs powers to the federal government rather than the states. Accordingly, in keeping with its application of the act of state doctrine to preempt state law in *Belmont* and *Pink*, the Court declared the doctrine to be “a principle of decision binding on federal and state courts alike.”<sup>393</sup>

Although the *Sabbatino* Court described the act of state doctrine as having “constitutional underpinnings,” the Court did not rest its decision upon specific constitutional provisions. Instead, the Court

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<sup>387</sup> *Sabbatino*, 376 U.S. at 431.

<sup>388</sup> *Id.* at 423.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 427–28.

<sup>391</sup> *Id.* at 423.

<sup>392</sup> *Id.* at 425. The Court suggested that any remedy for wrongs created by foreign acts of state 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)).

<sup>393</sup> *Id.* at 427.



appears to have invoked “a freestanding separation of powers doctrine,”<sup>394</sup> supported by federal interests akin to those supporting the application of federal law to “water apportionment and boundary disputes.”<sup>395</sup> *Sabbatino* would not have been without precedent, however, if it had gone beyond general notions of separation of powers and grounded its decision to adhere to the act of state doctrine in one or more specific constitutional provisions.

One possible approach would have been to conclude that the meaning of the recognition and war powers is static, and was fixed at the Founding when territorial sovereignty was a perfect right. On this theory, only the political branches, not courts, may decide when to override the traditional rights of foreign sovereigns. In other words, notwithstanding the relaxation of territorial sovereignty under international law, the Constitution’s allocation of recognition and war powers to the political branches continues to require courts to adhere to the act of state doctrine today. The Court did not articulate or attempt to defend this argument. Moreover, it seems unlikely that the Founders expected the law of nations to remain static. To the contrary, there is evidence that they thought such law might change over time.<sup>396</sup>

The *Sabbatino* Court, however, suggested two other possible rationales for adhering to the act of state doctrine that relate to specific political branch powers under Articles I and II. One possible rationale is that, although traditional notions of territorial sovereignty have weakened over time, they remain deep-seated. Thus, although unlikely to provoke a war, any departure should still be

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<sup>394</sup> Manning, Separation of Powers, *supra* note 9, at 1944. As Professor Manning has explained, reliance on freestanding separation of powers is problematic because there is no single historical baseline for understanding “separation of powers.” *Id.* Rather, the separation of powers reflected in our Constitution is the result of “many particular decisions about how to allocate and condition the exercise of federal power.” *Id.* at 1945.

<sup>395</sup> *Sabbatino*, 376 U.S. at 427; see also *id.* at 427 n.25 (“Various constitutional and statutory provisions indirectly support this determination . . . by reflecting a concern for uniformity in this country’s dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.”).

<sup>396</sup> See U.S. Const. art. I, § 8, cl. 10 (granting Congress power to *define* and punish offenses against the law of nations); William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,” 19 *Hastings Int’l & Comp. L. Rev.* 221, 242 (1996) (arguing that “the Founding Generation . . . expected the law of nations to evolve”).

authorized by the political branches because it could interfere with the President's exercise of his constitutional powers. The *Sabbatino* Court made an argument along these lines:

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.<sup>397</sup>

The Court also suggested that any decision to recognize the relaxation of the traditional sovereign rights was itself committed to the executive branch as part of its power to conduct foreign relations.<sup>398</sup>

The reprisal power offers another potential rationale for requiring courts and states to adhere to the act of state doctrine in the absence of contrary instructions from the political branches. The Constitution gives Congress the exclusive power to authorize repri-

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<sup>397</sup> *Sabbatino*, 376 U.S. at 431–32. Concerns about creating friction with other nations may also underlie the Supreme Court's presumption against giving federal statutes extraterritorial effect. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2875, 2888 (2010) (reaffirming this presumption in the course of holding that the Securities Exchange Act does not provide “a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges”). The Court stressed that “[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” *Id.* at 2877 (internal quotations omitted). Indeed, judicial doctrines designed to avoid unauthorized interference with the territorial sovereignty of other nations date back at least to the Marshall Court. See *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.”).

<sup>398</sup> According to the Court:

When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.

*Sabbatino*, 376 U.S. at 432–33.

sals against foreign nations or their subjects in response to their misconduct.<sup>399</sup> Were a court to invalidate an act of state in response to a litigant's assertion of wrongdoing by the state, the court would arguably usurp the exclusive power of Congress to authorize "reprisals" on behalf of the United States. Accordingly, judicial refusal to invalidate an act of state—however objectionable or illegal—arguably serves to uphold Congress's exclusive power to decide whether, when, and how the United States should retaliate against another nation.

The *Sabbatino* Court made two arguments along these lines. First, in response to respondent's claim that the Court should deny Cuba access to U.S. courts because "Cuba . . . does not permit [U.S.] nationals . . . to obtain relief in its courts,"<sup>400</sup> the Court determined that only the political branches, not the courts, may retaliate against other nations. "The freezing of Cuban assets exemplifies the capacity of the political branches to assure, through a variety of techniques . . . that the national interest is protected against a country which is thought to be improperly denying the rights of United States citizens."<sup>401</sup> Because "none of the acts of our Government have been aimed at closing the courts of this country to Cuba," the Court declined to take the lead over the political branches in imposing that sanction.<sup>402</sup> Second, in response to respondent's claim that the Court should hold Cuba's expropriation of sugar companies invalid, the Court noted that the Executive has various means at its disposal "to assure that United States citizens who are harmed are compensated fairly," including diplomacy and "economic and political sanctions."<sup>403</sup> A unilateral judicial attempt, however, to remedy such wrongdoing "could seriously interfere" with such Executive action.<sup>404</sup>

As early as *The Nereide*,<sup>405</sup> the Marshall Court acknowledged the importance of leaving decisions of a retaliatory nature to the politi-

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<sup>399</sup> See U.S. Const. art. I, § 8, cl. 11 (authorizing Congress to "grant Letters of Marque and Reprisal"); id. § 10, cl. 1 (denying states power to "grant Letters of Marque and Reprisal").

<sup>400</sup> *Sabbatino*, 376 U.S. at 408.

<sup>401</sup> Id. at 412.

<sup>402</sup> Id. at 411–12.

<sup>403</sup> Id. at 431.

<sup>404</sup> Id. at 432.

<sup>405</sup> 13 U.S. (9 Cranch) 388 (1815).

cal branches. There, as explained, a U.S. privateer argued that he should not be held liable for capturing goods in violation of Spain's neutral rights because "Spain . . . would subject American property, under similar circumstances, to confiscation."<sup>406</sup> The Court rejected this argument on the ground 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."<sup>407</sup> By the same token, the *Sabbatino* Court could have grounded its refusal to invalidate Cuba's title to goods that it unjustly (or illegally) expropriated in the reprisal power, which reserves to the political branches the authority to make the "political" decisions regarding whether and how to retaliate against Cuba.<sup>408</sup>

*d. The German Democratic Republic*

*Zschernig v. Miller*<sup>409</sup> is one of the Supreme Court's more controversial decisions favoring the rights of a foreign sovereign because it seemed to rely on dormant foreign affairs preemption. It may be possible, however, to understand even this decision by reference to the Constitution's specific allocation of powers. At the end of World War II, the Allied Powers (the United States, Britain, France, and the Soviet Union) divided occupied Germany into four zones. After tensions arose between the Soviet Union and the western powers, the Federal Republic of Germany ("FRG"), commonly known as West Germany, was created out of the American, British, and French zones on September 21, 1949. The Soviets responded by creating the German Democratic Republic ("GDR"), commonly known as East Germany, out of their zone on October 7, 1949. The United States' position was that the GDR

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<sup>406</sup> *Id.* at 422.

<sup>407</sup> *Id.*

<sup>408</sup> 376 U.S. at 431–32. Several other cases decided in the eighteenth and nineteenth centuries on the basis of the war and recognition powers might also have been decided on the basis of the negative implication of the reprisal power. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), discussed *supra* notes 266–287 and accompanying text; *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795), discussed *supra* notes 214–229 and accompanying text.

<sup>409</sup> 389 U.S. 429 (1968).

lacked “any legal validity.”<sup>410</sup> The United States also stated that it would “continue to give full support to the Government of the German Federal Republic at Bonn in its efforts to restore a truly free and democratic Germany.”<sup>411</sup> The United States did not change its stance until 1974 when it recognized the GDR as a separate nation and established diplomatic relations.<sup>412</sup>

*Zschernig* was decided prior to the United States’ recognition of the GDR and thus at a time when the United States recognized the FRG as the sole legitimate government of the entire German territory. The case involved a challenge to an Oregon statute that provided for escheat to the state when a nonresident alien claimed real or personal property as an heir of an Oregon resident. Escheat occurred unless the foreign heir made three showings: (1) U.S. citizens had a reciprocal right to take property on the same terms as citizens or inhabitants of the foreign heir’s country; (2) U.S. citizens had a right to receive payment here of funds from estates in the foreign heir’s country; and (3) foreign heirs had a right to receive the proceeds of Oregon estates “without confiscation.”<sup>413</sup>

Residents of East Germany claimed to be the sole heirs of an Oregon resident who died intestate in 1962. The Oregon Supreme Court permitted the claimants to take the deceased’s real property under Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany. As interpreted in an earlier Supreme Court case, the treaty applied to real, but not personal, property.<sup>414</sup> Accordingly, the Oregon court applied its more restrictive statute to block the inheritance of personal property. Although the Supreme Court declined to overrule its prior interpretation of the treaty, it nonetheless reversed on the ground that the Oregon statute was “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”<sup>415</sup> To be sure, the Court’s opinion contains extremely broad language. For example, the Court noted that the Oregon statute

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<sup>410</sup> East German Government Established Through Soviet Fiat, 21 Dep’t St. Bull. 634, 634 (1949).

<sup>411</sup> Id. at 635.

<sup>412</sup> Agreement on the Establishment of Diplomatic Relations, U.S.-Ger. Dem. Rep., Sept. 4, 1974, 13 I.L.M. 1436 (1974).

<sup>413</sup> *Zschernig*, 389 U.S. at 430–31.

<sup>414</sup> See *Clark v. Allen*, 331 U.S. 503, 514–16 (1947).

<sup>415</sup> *Zschernig*, 389 U.S. at 432.

seemed “to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.”<sup>416</sup> State statutes that give rise to such criticisms affect “international relations in a persistent and subtle way” and “must give way if they impair the effective exercise of the Nation’s foreign policy.”<sup>417</sup> Because of such language, commentators have come to regard *Zschernig* as establishing a controversial doctrine of “dormant foreign affairs pre-emption.”<sup>418</sup>

There exists, however, a narrower potential ground for the Supreme Court’s decision in *Zschernig* that would have been consistent with the allocation of powers rationale employed in prior cases. At the time of the decision, the United States recognized the FRG as the legitimate government of *all* of Germany, and publicly took the position that the GDR was “without any legal validity.” In other words, the official position of the political branches—in the exercise of their recognition and war powers—was that the FRG was the sole legitimate government of both East and West Germany. This democratic government was recognized by, and had the full confidence of, the United States. Of course, this position ignored reality because East Germany was governed by a very different form of government. The Constitution, however, gave the political branches the right to make this determination on behalf of the United States, including its courts and states. As applied to East Germany, the Oregon statute sought to pull back the curtain and distinguish between democratic West Germany and communist East Germany. In other words, Oregon sought “to establish its own foreign policy”<sup>419</sup> in direct contravention of the policy established by the political branches in the exercise of their constitutionally assigned recognition powers. Accordingly, the *Zschernig* Court could have grounded its decision in a specific constitutional provision by applying the reasoning in *Pink* to this case: “The action of [Oregon] in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of [the

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<sup>416</sup> Id. at 440.

<sup>417</sup> Id.

<sup>418</sup> See, e.g., Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 *Vill. L. Rev.* 1259, 1294, 1313–15 (2001).

<sup>419</sup> *Zschernig*, 389 U.S. at 441.

Federal Republic of Germany]. Such power is not accorded a State in our constitutional system.”<sup>420</sup>

#### D. Foreign Immunities

The allocation of powers approach we have identified not only sheds new light on existing Supreme Court precedent, but also has the potential to help resolve matters that the Court has not yet decided. One of these matters is head of state immunity, which is one of the last uncodified rules drawn from the law of nations. The Constitution’s assignment of the recognition and war powers to the political branches supports the historical practice of granting heads of recognized foreign states immunity in both state and federal court. The approach we identify also sheds light on the status of diplomatic immunity before Congress codified it. Examination of this immunity suggests how courts should resolve questions surrounding head of state immunity.

##### 1. Diplomatic Immunity

Under traditional principles of the law of nations, ambassadors enjoyed absolute immunity from suit in foreign nations.<sup>421</sup> Indeed, the immunity of a nation’s diplomats was considered under the law of nations to be a perfect right, the violation of which gave the aggrieved nation just cause for war.<sup>422</sup> Such diplomatic immunity was not codified in the United States until 1978 with the enactment of the Diplomatic Relations Act.<sup>423</sup> Prior to that time, courts applied the law of nations to confer immunity. Following *Erie Railroad Co. v. Tompkins*,<sup>424</sup> in which the Supreme Court held that “[t]here is no federal general common law,”<sup>425</sup> some observers suggested that state law governed diplomatic immunity in the absence of an applicable federal statute or treaty. *Erie*, however, is irrelevant to the question if the Constitution’s allocation of the recognition and war

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<sup>420</sup> *Pink*, 315 U.S. at 233.

<sup>421</sup> See Bellia & Clark, Federal Common Law, *supra* note 4, at 19.

<sup>422</sup> *Id.* at 17–19.

<sup>423</sup> See 22 U.S.C. §§ 254a–254e (2006).

<sup>424</sup> 304 U.S. 64 (1938).

<sup>425</sup> *Id.* at 78.

powers to the political branches requires courts to uphold the immunity of diplomats from recognized foreign states.

The issue arose ten years after *Erie* in *Bergman v. De Sieyes*.<sup>426</sup> 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.<sup>427</sup> De Sieyes removed the case to federal court on the basis of diversity of citizenship jurisdiction and asserted diplomatic immunity under general principles of international law.<sup>428</sup> A threshold question was whether the court should apply state law or the general law of nations in evaluating this defense. Under the apparent influence of *Erie*, Judge Learned Hand wrote for the Second Circuit that “the law of New York determines [the validity of service], 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.”<sup>429</sup> 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.”<sup>430</sup>

Judge Hand’s suggestion that state law governed the question in *Bergman* was in tension with the Supreme Court’s long-standing treatment of the rights of foreign sovereigns in federal court. To be sure, *Erie*’s rationale applies to matters—such as torts and commercial transactions—that fall within the exclusive or concurrent

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<sup>426</sup> 170 F.2d 360 (2d Cir. 1948).

<sup>427</sup> *Id.* at 361.

<sup>428</sup> *Id.* at 360–61. At the time, there was no federal statute or treaty conferring such immunity in U.S. courts. 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. See 22 U.S.C. §§ 254a–254e.

<sup>429</sup> *Bergman*, 170 F.2d at 361; see Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1558 (1984) (“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.”).

<sup>430</sup> *Bergman*, 170 F.2d at 363. Judge 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.” *Id.* at 361.



authority of the states.<sup>431</sup> In such cases, judicial reliance on general law to disregard state law circumvents the political and procedural safeguards of federalism built into the Supremacy Clause.<sup>432</sup> But *Erie's* rationale does not apply to rules of decision established by the Constitution and thus beyond state power to abrogate. Under Supreme Court precedent applying traditional law of nations principles to uphold the Constitution's exclusive allocation of certain powers to the political branches, the Constitution itself displaces state law.

Seen in this light, *Bergman* implicated two powers assigned by the Constitution exclusively to the political branches: the recognition power and the power to declare war.<sup>433</sup> As explained in Part II, when one nation recognized another, it signified that it would respect the rights of the other's ambassadors under the law of nations, including diplomatic immunity. Accordingly, the decision by the political branches to recognize France would preclude states from taking any action inconsistent with the United States' recognition of France as an independent state entitled to exercise all of its rights under the law of nations. One such right was to deploy ambassadors with diplomatic immunity, including immunity in transit. Historically, interference with this right provided just cause for war.<sup>434</sup> Thus, at the time of the Founding, if a state violated the immunity of a French ambassador from suit, it placed all of the United States in violation of the law of nations and risked starting a war. Under the Constitution's allocation of powers, the Court has traditionally reserved such decisions to Congress and the President.

## 2. Head of State Immunity

Unlike diplomatic immunity, Congress has not yet codified head of state immunity. Chief Justice Marshall discussed the importance

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<sup>431</sup> See Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 53 *Wm. & Mary L. Rev.* (forthcoming 2013).

<sup>432</sup> See Bradford R. Clark, *Erie's Constitutional Source*, 95 *Calif. L. Rev.* 1289, 1309–10 (2007).

<sup>433</sup> See Bellia & Clark, *Federal Common Law*, *supra* note 4, at 31–32.

<sup>434</sup> *Id.* at 18.

of this immunity in *The Schooner Exchange*,<sup>435</sup> and it continues to enjoy broad support among nations. Because head of state immunity has not been adopted by federal treaties or statutes, some observers question whether such immunity is binding in state and federal court. Like diplomatic immunity (prior to codification) and the act of state doctrine, head of state immunity is derived from traditional principles of the law of nations widely recognized at the time the Constitution was adopted. In keeping with how the Court has understood those doctrines, head of state immunity is necessarily bound up with the exclusive constitutional powers of the political branches to recognize foreign states and maintain peaceful relations.

Head of state immunity is closely related to the broader doctrine of foreign sovereign immunity under the law of nations. Federal and state courts traditionally resolved claims to foreign sovereign immunity by looking to the general law of nations.<sup>436</sup> “For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country.”<sup>437</sup> Had the source of such immunity been questioned, courts might have invoked the political branches’ recognition powers, war powers, or both. In 1952, the State Department issued the Tate Letter, endorsing the “restrictive” theory of foreign sovereign immunity, which had largely replaced absolute immunity under international law.<sup>438</sup> Under this theory, “immunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign state’s strictly commercial acts.”<sup>439</sup> Because of diplomatic pressure and political considerations, the State Department sometimes “file[d] ‘suggestions of immunity in cases where immunity would not have been available under the re-

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<sup>435</sup> *McFaddon*, 11 U.S. (7 Cranch) at 137 (stating that “the whole civilized world” recognizes “the exemption of the person of the sovereign from arrest or detention within a foreign territory”).

<sup>436</sup> See Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 *Va. J. Int’l L.* 915, 924 (2011) [hereinafter Wuerth, *Foreign Official Immunity*].

<sup>437</sup> *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

<sup>438</sup> Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), *reprinted in* 26 *Dep’t St. Bull.* 984, 985 (1952).

<sup>439</sup> *Verlinden*, 461 U.S. at 487.

strictive theory.”<sup>440</sup> At the recommendation of the State Department, Congress enacted the Foreign Sovereign Immunities Act (“FSIA”) in 1976.<sup>441</sup> The Act essentially codified the restrictive theory of foreign sovereign immunity but “transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch.”<sup>442</sup>

Following the enactment of the FSIA, most federal courts construed the Act to govern not only the immunity of foreign states, but also the immunity of high-ranking foreign officials.<sup>443</sup> In 2010, in *Samantar v. Yousef*,<sup>444</sup> however, the Supreme Court held that “foreign state” as used in the Act does not “include an official acting on behalf of the foreign state.”<sup>445</sup> *Samantar* involved a suit against the former Prime Minister of Somalia for acts of torture and extrajudicial killing that he allegedly authorized while head of state. Although the Court found the FSIA to be inapplicable, it indicated that on remand the defendant “may be entitled to immunity under the common law.”<sup>446</sup> The Court did not discuss either the precise content of such “common law” or the justification for applying it in federal court.<sup>447</sup>

Head of state immunity goes to the heart of the ongoing debate over the status of customary international law in U.S. courts. For those who believe that state law governs the status of customary in-

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<sup>440</sup> *Austria v. Altmann*, 541 U.S. 677, 690 (2004) (quoting *Verlinden*, 461 U.S. at 487).

<sup>441</sup> Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602–11 (2006 & supp. 2010)).

<sup>442</sup> *Altmann*, 541 U.S. at 691.

<sup>443</sup> See *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

<sup>444</sup> 130 S. Ct. 2278 (2010).

<sup>445</sup> *Id.* at 2289.

<sup>446</sup> *Id.* at 2292–93.

<sup>447</sup> Recently, the Supreme Court has, however, suggested that the State Department may retain a “role in determinations regarding individual official immunity” similar to the role it played in determinations of foreign sovereign immunity prior to the enactment of the FSIA. *Id.* at 2291. Commentators are divided on the propriety and effect of case-by-case suggestions of immunity by the executive branch. Compare Wuerth, *Foreign Official Immunity*, *supra* note 436, at 923 (arguing against judicial deference to executive suggestions of immunity), with Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 *Vand. J. Transnat'l L.* 911, 918 (2011) (arguing in favor of judicial deference to executive suggestions of immunity).

ternational law in the absence of a federal statute or treaty,<sup>448</sup> immunity turns on whether state law incorporates the immunity in question (as New York law did in *Bergman*). For those who believe that customary international law constitutes federal common law,<sup>449</sup> immunity turns largely on the content of current international law. The allocation of powers approach provides a distinct basis for evaluating such matters.

Under this approach, there is a strong argument that the Constitution requires both state and federal courts to recognize immunity for the heads of recognized foreign states unless and until the political branches exercise their constitutional authority to abrogate such immunity. Current international law recognizes two kinds of immunity. *Ratione personae* is a status-based immunity that provides heads of state with absolute immunity from suit while in office.<sup>450</sup> *Ratione materiae* is a conduct-based immunity that shields former heads of state only for official acts taken while in office.<sup>451</sup> Historically, denial of either form of immunity would have been just cause for war. Even today, conferral of both forms of immunity remains an integral part of the political branches' constitutional power to recognize foreign states, governments, and heads of state.<sup>452</sup> Recognition signifies that the United States will respect the rights of the state in question under the law of nations. Thus, like failure to apply the act of state doctrine, failure by either state or federal courts to accord immunity to a sitting head of a state recognized by the United States would contradict the political branches' decision to recognize the state and government in question.<sup>453</sup> Under this line of reasoning, courts should apply a presump-

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<sup>448</sup> See supra note 3, and accompanying text.

<sup>449</sup> See supra note 2, and accompanying text.

<sup>450</sup> Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 *Green Bag 2d* 9, 18 (2009).

<sup>451</sup> *Id.*

<sup>452</sup> U.S. Const. art. II, § 3; see Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 *Green Bag 2d* 61, 70–71 (2010).

<sup>453</sup> Professor Ingrid Wuerth recently has argued that it is preferable for courts to decide head of state immunity questions on the basis of federal common law rather than on the basis of the Constitution's allocation of powers. See Wuerth, *Foreign Official Immunity*, supra note 436, at 965–66. She contends that “courts will have to . . . develop law on a number of questions,” including “waiver, who qualifies as a foreign official, whether the action should be considered one against the state itself, whether ultra vires acts should be accorded immunity, [and] whether torture or other acts that

tion that heads of recognized foreign states are entitled to immunity in federal and state courts until the political branches decide to withdraw such immunity.<sup>454</sup> Conversely, in the absence of political branch recognition, courts have greater latitude to reject claims of head of state immunity.<sup>455</sup>

#### IV. IMPLICATIONS FOR THE CURRENT DEBATE

The allocation of powers approach we have identified has several potential implications for the ongoing debate over the status of customary international law in U.S. courts. In short, neither the modern position nor the revisionist position follows from the Constitution's allocation of foreign relations powers to the political branches or the role that the law of nations has played in leading Supreme Court cases. Proponents of the modern position argue that federal and state courts should recognize and enforce all customary international law as supreme federal law whether or not the political branches have adopted it through constitutional law-

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violate *jus cogens* norms should be accorded immunity." Id. We agree that in head of state immunity cases courts may face many challenging questions, including those Professor Wuerth identifies. Moreover, we acknowledge that international law and the Constitution may not always provide clear answers to questions regarding the rights of foreign nations or their officials. Nonetheless, courts historically have employed an allocation of powers approach to resolve several such questions. In the absence of political branch instructions to the contrary, the Supreme Court has generally erred on the side of overprotecting the rights of foreign nations in order to avoid usurping the constitutional prerogatives of Congress and the President.

<sup>454</sup> We take no position here on the relative powers of Congress and the President in this context. See Bellia & Clark, Political Branches, *supra* note 128, at 1810–20 (describing the Supreme Court's shifting understanding of the relative powers of Congress and the President to depart from the law of nations). It is worth noting, however, that the President's power to recognize foreign states does not necessarily imply that Congress lacks all power to act in this area. Congress has important foreign affairs powers of its own, not to mention its power to "make all Laws which shall be necessary and proper for carrying into Execution" all "Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. We assume, therefore, that Congress could make exceptions to head of state immunity just as it has made exceptions to foreign sovereign immunity in the FSIA and to the act of state doctrine following *Sabbatino*.

<sup>455</sup> See *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (denying head of state immunity to General Manuel Noriega because the President had never recognized Noriega as the legitimate head of Panama and had manifested an intent to deny such immunity by capturing and prosecuting him).

making procedures.<sup>456</sup> They assert that courts should treat customary international law as a form of federal common law that is both preemptive of state law and sufficient to establish federal “arising under” jurisdiction.<sup>457</sup> Proponents of the revisionist position maintain that customary international law never applies in U.S. courts unless it has been adopted by the political branches as federal law or incorporated by the states as state law.<sup>458</sup> Each side claims original constitutional meaning and Supreme Court precedent as support for its position. The allocation of powers under Articles I and II, however, suggests that both the modern and revisionist positions rest at least in part upon erroneous or unproven premises.

#### A. *The Modern Position*

The modern position rests on the erroneous premise that the only way to read Supreme Court precedent applying the law of nations is that the Court has adopted customary international law as federal common law. Proponents of the modern position have relied heavily upon cases such as *Murray v. The Schooner Charming Betsy*,<sup>459</sup> *The Paquete Habana*,<sup>460</sup> and *Banco Nacional de Cuba v. Sabbatino*.<sup>461</sup> None of these cases, however, applied customary in-

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<sup>456</sup> See Brilmayer, *supra* note 2; Koh, *supra* note 2, at 1825; Stephens, *supra* note 2; see also Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 *Fordham L. Rev.* 463, 472 (1997); Neuman, *supra* note 40, at 371–72.

<sup>457</sup> See Henkin, *supra* note 429, at 1559–60.

<sup>458</sup> See Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 870; Goldsmith, *supra* note 3, at 1622; see also Trimble, *supra* note 34, at 671–73.

<sup>459</sup> 6 U.S. (2 Cranch) 64 (1804).

<sup>460</sup> 175 U.S. 677 (1900).

<sup>461</sup> 376 U.S. 398 (1964). In addition, proponents of the modern position have claimed support from *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), as have proponents of the revisionist position. In *Sosa*, the Court held that the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, which provides district courts with “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,” *id.*, did not confer federal court jurisdiction over a claim by a Mexican national for arbitrary arrest and detention. In describing the nature of claims encompassed by the ATS, the Court’s opinion was ambiguous and non-committal. For instance, in one passage, the Court stated that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.” *Sosa*, 542 U.S. at 732. It is unclear whether the Court used the phrase federal common law in this passage to refer to the claim for relief over which the ATS granted jurisdiction or the law of nations

ternational law as “federal common law”—a modern construct unknown at the Founding. Rather, as we have explained, courts reasonably may read each of these cases—and several others—to apply principles derived from the law of nations as a means of upholding specific foreign relations powers assigned by the Constitution to the political branches. To be sure, in some cases, the Court did not explicitly tie its application of a traditional law of nations principle to a specific Article I or II power. But neither did the Court expressly claim in any of these cases that customary international law is “federal common law.” Upon reflection, there are good reasons to favor an allocation of powers reading of these cases over a federal common law reading. First, an allocation of powers reading is more consistent with the Constitution’s original public meaning than a federal common law reading. As explained in Part II, the recognition, war, capture, and reprisal powers in Articles I and II would have been understood by a reasonable person at the time of the Constitution’s adoption to require courts to follow principles of the law of nations respecting foreign nations’ traditional sovereign rights. An allocation of powers reading of these cases reflects this understanding. A federal common law reading, on the other hand, is anachronistic because it relies on an understanding of federal common law that did not exist until the twentieth century.

Second, in *Sabbatino*—upon which proponents of the modern position heavily rely—the Court applied a traditional sovereignty-protecting rule of the law of nations (the act of state doctrine) over an alleged modern rule of customary international law (against uncompensated government takings) even as the Court observed that international law no longer required application of the act of state doctrine. In other words, the Court determined that a traditional rule of the law of nations with “‘constitutional’ underpinnings” was

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violation underlying the claim for relief. Elsewhere, however, the Court stated that it was not implying that “the grant of federal-question jurisdiction [in 28 U.S.C. § 1331] would be equally as good for our purposes as § 1350,” *id.* at 731 n.19, suggesting that neither the claim nor the underlying law of nations violation was federal common law for purposes of § 1331. Given *Sosa*’s lack of clarity, it is not surprising that proponents of both the modern and revisionist positions have invoked it for support. For an explanation of the original meaning of the ATS, see Bellia & Clark, Alien Tort Statute, *supra* note 116, at 446.

“applicable even if international law has been violated.”<sup>462</sup> If one understands customary international law as federal common law, then the Court’s decision makes little sense. The *Sabbatino* Court, however, nowhere said that customary international law is federal common law. It said that “courts apply international law as part of our own *in appropriate circumstances*,” citing cases that applied federal treaties or traditional sovereignty-respecting rules of the law of nations.<sup>463</sup> On the other hand, if one understands the act of state doctrine as a means of upholding the Constitution’s allocation of powers, then the Court was—as it declared—“constrained” to apply the doctrine rather than a competing rule holding Cuba accountable for an uncompensated taking. The Marshall Court relied on a similar understanding of the Constitution’s allocation of powers in *The Schooner Exchange v. McFaddon*.<sup>464</sup> There, the Court refused to remedy an alleged violation of the law of nations by France, instead holding a French warship immune from suit on the ground “that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign.”<sup>465</sup> In both *Sabbatino* and *McFaddon*, the Court applied a rule of decision that directly preserved the exclusive constitutional prerogatives of the political branches to redress law of nations violations by other countries.

For present purposes, we need not undertake a comprehensive critique of the modern position. Our point for now is simply that the modern position’s federal common law reading of Supreme Court cases applying traditional principles of the law of nations is not the only—or even the most persuasive—way to read those cases. To the contrary, an allocation of powers reading better reconciles the cases with the original public meaning of the recognition, war, capture, and reprisal powers and, moreover, explains *Sabbatino*’s insistence upon applying the act of state doctrine in preference to an alleged contrary modern rule of customary international law. At the same time, the allocation of powers approach provides constitutional support for a key part of the modern position—the proposition that courts must apply certain traditional principles of the law of nations (such as head of state immunity)

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<sup>462</sup> *Sabbatino*, 376 U.S. at 423, 431.

<sup>463</sup> *Id.* at 423 (emphasis added); see *supra* note 379 and accompanying text.

<sup>464</sup> 11 U.S. (7 Cranch) 116 (1812).

<sup>465</sup> *Id.* at 146.



even in the absence of adoption by the political branches. The allocation of powers approach, however, does not support the modern position's blanket claim that courts must apply all contemporary rules of customary international law.

*B. The Revisionist Position*

In contrast to the modern position, the revisionist position posits that courts may not apply customary international law in the absence of adoption by the political branches or the states.<sup>466</sup> This includes traditional principles of the law of nations (like diplomatic immunity and head of state immunity). As we have explained, even in the absence of such adoption, the Supreme Court has applied principles like these since the Founding as a means of upholding specific constitutional powers of the political branches. The judiciary's failure to apply these principles in appropriate cases would contradict the Constitution's specific allocation of those powers to the political branches, as those powers historically were understood.

This allocation of powers approach is not inconsistent with the general proposition that, at the time of the Founding, the law of nations was understood to be binding in courts only if domestic law incorporated it.<sup>467</sup> It does not follow from this proposition, as revisionists have claimed, that federal courts may apply the law of nations only if the political branches of the federal government or the states adopt it. Rather, the Constitution is a fundamental source of domestic law in the United States, and therefore U.S. courts not only may, but must, apply principles of the law of nations when the Constitution requires them to do so. As discussed, the Supreme Court has indicated on several occasions that the Constitution's allocation of foreign relations powers to the political branches requires courts and states to apply certain traditional principles of the law of nations in order to avoid usurping these powers. Histori-

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<sup>466</sup> Some revisionists have recently suggested that courts may recognize uncodified immunities—such as head of state immunity—at the suggestion of the executive branch alone. See Bradley et al., *Sosa*, supra note 337, at 935–36.

<sup>467</sup> See Hamburger, supra note 167, at 1947 (concluding that “the traditional presumption was that the law of nations was not obligatory as part of the law of the land, until it was incorporated by domestic law, and this was the path taken by the U.S. Constitution”).

cally, political branch recognition of a foreign state or government was reasonably understood to signify that the United States would respect a set of traditional rights under the law of nations binding on courts and states alike. Likewise, the political branches' exclusive powers to make and engage in war, issue reprisals, and make rules governing captures were reasonably understood to require courts and states to respect traditional principles of the law of nations in order to avoid usurping such powers. Under these circumstances, the principle that the law of nations is binding only if domestic law incorporates it does not refute, but actually affirms, that courts and states must apply traditional principles of the law of nations when necessary to uphold the Constitution's allocation of powers.

### *C. The Limits of the Allocation of Powers Approach*

In a recent article, Professor Carlos Vázquez characterizes the allocation of powers approach we have identified in prior work as “thoroughly convincing,”<sup>468</sup> but suggests that we “fail to appreciate the full implications of [our] own argument.”<sup>469</sup> In his view, our “structural argument actually provides substantial support for most of the modern position.”<sup>470</sup> As an initial matter, he believes that labeling customary international law as federal common law “is unhelpful and potentially misleading.”<sup>471</sup> He prefers simply to inquire whether “customary international law (or some subset thereof) [has attained] the status of preemptive federal law.”<sup>472</sup> According to Vázquez, “[t]he basic case for the modern position relies on an inference from the constitutional structure very similar to the one advanced by Bellia and Clark: Violations of customary international law risk retaliation against the nation as a whole.”<sup>473</sup> Even if such violations no longer risk triggering the use of military force, he argues that they “can be expected to produce international friction and an unfriendly attitude toward the United States on the part of injured or otherwise offended nations, which in turn can be

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<sup>468</sup> Vázquez, *supra* note 12, at 1502.

<sup>469</sup> *Id.* at 1617.

<sup>470</sup> *Id.* at 1503.

<sup>471</sup> *Id.* at 1509.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* at 1501.

expected to complicate the federal government's efforts to achieve the nation's foreign relations goals."<sup>474</sup> In this regard, Vázquez believes that the approach we have identified "has obvious affinities to the much-maligned dormant foreign affairs rationale of *Zschernig v. Miller*."<sup>475</sup>

Vázquez seeks to define the allocation of powers approach at a higher level of generality than the level suggested by the specific powers assigned to the political branches by Articles I and II. At this higher level of generality, he believes that "the international law of human rights implicates the structural reasons for according preemptive force to customary international law no less than the older topics covered by customary international law do."<sup>476</sup> According to Vázquez, "[a] nation's obligations under the international law of human rights are obligations *toward other states*, not just toward individuals."<sup>477</sup> This means that "the United States' violation of these norms is as likely to produce international friction—and thus to complicate the nation's pursuit of foreign relations goals—as its violation of other norms of customary international law."<sup>478</sup> Given this premise, Vázquez suggests that a U.S. state's violations of its citizens' international human rights would be preempted by the Constitution's allocation of foreign affairs power to the federal government.<sup>479</sup>

Although a broad dormant foreign affairs preemption of the kind suggested by *Zschernig* might lead to displacement of state law in such cases, the allocation of powers approach we have suggested does not support this conclusion. Our understanding of historical practice and Supreme Court precedent (read in light of such practice) suggests that courts apply traditional principles of the law of nations preemptively when necessary to uphold a specific Article I or II power assigned to the federal political branches. For ex-

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<sup>474</sup> Id. at 1517.

<sup>475</sup> Id. at 1602–03.

<sup>476</sup> Id. at 1623–24.

<sup>477</sup> Id. at 1624.

<sup>478</sup> Id.

<sup>479</sup> Id. at 1623–24. Professor Vázquez suggests that only international norms meeting a heightened standard of clarity and acceptance would count as preemptive federal law. Id. at 1624. Thus, he thinks "it is very likely that the human rights norms that would preempt State law would largely duplicate prohibitions imposed on the States by the Constitution." Id. at 1625.

ample, in *Belmont* and *Pink*, the Supreme Court held that the President's power to recognize the Soviet Union preempted state law to the extent that state law denied the effect of recognition—a specific power committed to the political branches by the Constitution.<sup>480</sup> Respect for territorial sovereignty is a traditional incident of recognition. The Court upheld the President's exercise of the recognition power by applying the act of state doctrine to shield Soviet confiscations from invalidation under state law. Likewise, both diplomatic immunity and head of state immunity can be understood as incidents of recognition and thus binding in state and federal courts alike.

Fairly read in light of background principles of the law of nations, the Constitution's conferral of recognition power on the political branches incorporates these traditional incidents of recognition. When the Constitution was adopted, recognized sovereigns enjoyed these traditional rights in their interactions with other nations. Modern norms of customary international human rights law, however, attempt to regulate the internal conduct of nations toward their own citizens. To conclude that courts must find such norms binding on U.S. states or foreign nations under the allocation of powers approach would require showing that adherence to such norms is necessary to uphold a specific constitutional power assigned to the political branches. Adherence to such norms, however, does not appear necessary to uphold any specific Article I or II power of the political branches.

The war, capture, and reprisal powers appear to have little relevance to the application of modern norms of customary international law to U.S. states. Historically, how states treated their own citizens was not a matter governed by the law of nations and did not give another nation just cause for war. Thus, the recognition power appears to be the only plausible candidate for applying modern norms of international law to a U.S. state, but this power also seems ill-suited to the task. When the Constitution was adopted, U.S. recognition of other nations did not imply that either nation would refrain from treating its own citizens in particular ways. To the contrary, at the time, nations claimed (and respected

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<sup>480</sup> See supra notes 332–368 and accompanying text.

other nations') complete sovereignty within their respective territories.

Given the rise of international human rights law in the second half of the twentieth century, however, one might argue that the United States' recognition of other nations now implicitly promises that the United States and its constituent states will respect the human rights of their own citizens. Reading the recognition power in this way, however, presents several difficulties. At the Founding, recognition dealt exclusively with U.S. interactions with foreign nations, their citizens, and their representatives. Recognition had nothing to do with the United States' treatment of its own citizens. Thus, it would be difficult to conclude that, in ratifying the Constitution's recognition power, the states delegated authority to the federal government to regulate their internal affairs merely by recognizing other nations. In addition, the Constitution's division of authority between the federal government and the states not only limited the substantive powers assigned to the federal government, but also established procedural safeguards of federalism designed to preserve the governance prerogatives of the states.<sup>481</sup> Thus, under the Constitution, the federal government could adopt measures capable of preempting state law only with the participation and assent of the states (in the case of constitutional amendments) or the Senate (in the case of federal laws and treaties).<sup>482</sup> Expanding the meaning of recognition to incorporate international restrictions on the relationship between states and their citizens, however they might develop over time, would undermine both features of the constitutional structure.

Under the Constitution's allocation of powers to the political branches, distinct constitutional difficulties arise from proposals by proponents of the modern position to have U.S. courts enforce international human rights norms to constrain the conduct of foreign nations toward their own citizens. Even if one assumes that U.S. recognition of a foreign nation no longer implies that the United States regards the nation as possessing absolute territorial sovereignty, it does not follow that U.S. courts are now free to punish

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<sup>481</sup> See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 *Tex. L. Rev.* 1321, 1324–25 (2001).

<sup>482</sup> *Id.* at 1339–41.

foreign states or their officials for violating the international human rights of their own citizens. To the contrary, as *Sabbatino*'s strict adherence to the act of state doctrine suggests, the Constitution's specific allocation of powers grants the political branches exclusive power to decide whether, when, and how to obtain satisfaction or retaliate against foreign nations for their violation of international law.

As Chief Justice Marshall explained in *The Nereide*, retaliation against another nation "is a political not a legal measure. It is for the consideration of the government not of its Courts."<sup>483</sup> This assessment was not only in keeping with the Constitution's specific allocation of powers, but also made eminent sense. At the time, unauthorized retaliation by the judiciary would have risked provoking a war. Accordingly, any decision to initiate hostilities with another nation was for the political branches rather than courts or states. Even if judicial retaliation would no longer give affected nations just cause for war, the Court has continued to refrain from usurping the political branches' prerogatives in the conduct of foreign relations. In *Sabbatino*, for instance, the Court observed that judicial "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."<sup>484</sup> In other words, courts (or states) could not take unilateral action to retaliate against a foreign nation for violating customary international law without usurping the constitutional prerogatives of the political branches. Understood in this light, the allocation of recognition, war, capture, and reprisal powers to the political branches in Articles I and II does not require—or even permit—courts to take the lead over the political branches in addressing violations of modern customary international law norms by other nations.

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<sup>483</sup> 13 U.S. (9 Cranch) 388, 422 (1815); see *supra* notes 299–302 and accompanying text.

<sup>484</sup> *Sabbatino*, 376 U.S. at 432.

## CONCLUSION

The Constitution allocates war and other foreign relations powers to the political branches of the federal government. Several of the powers that the Constitution assigns to the political branches cannot be understood—or made fully effective—without reference to the law of nations as understood at the time of the Founding. Such law provided an essential backdrop against which these powers were understood and adopted. The constitutional powers to send and receive ambassadors, to declare war, to grant letters of marque and reprisal, and to make rules governing captures on land and water necessarily draw meaning from, and assume the existence of, certain background principles of the law of nations. The assignment of these powers to—and their exercise by—the political branches may reasonably be understood in historical context to require courts to uphold certain traditional rights of foreign sovereigns under the law of nations. From the Founding to the present, the Supreme Court has upheld such rights in ways that are consistent with this understanding of the specific foreign relations powers assigned to the political branches. Both the modern and the revisionist positions fail to take account of the relationship between the Constitution’s allocation of powers and the law of nations. The modern position anachronistically presupposes that the only way to read Supreme Court precedent applying the law of nations is that such law amounts to federal common law. A better reading of the Court’s decisions—consistent with the original public meaning of the Constitution—is that the judiciary must apply certain traditional principles of the law of nations when necessary to uphold the political branches’ recognition, war, capture, and reprisal powers. From this perspective, judicial application of traditional law of nations principles is a function of the assignment of Article I and Article II powers to the political branches, rather than an exercise of Article III power to make federal common law. The revisionist position, which would have courts apply the law of nations only when adopted by the political branches or the states, overlooks the Constitution’s incorporation of traditional principles of the law of nations in Articles I and II. Understanding traditional principles of the law of nations as constitutional law provides a strong justification for part of the modern position and supplies the positive adoption of such law sought by the revisionist position.