THE FEDERAL COMMON LAW OF NATIONS

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INTRODUCTION

There is an ongoing debate among courts and scholars regarding the proper role of customary international law in U.S. courts.¹ Two diametrically opposed approaches have emerged as the leading contenders. The “modern” position asserts that federal and state courts should recognize and enforce all forms of customary international law as supreme federal law whether or not the political branches have incorporated it through constitutional lawmaking processes.² Proponents of this position maintain that courts should recognize customary international law as federal common law, and treat it as both preemptive of state law and sufficient to establish federal “arising under” jurisdiction.³ The “revisionist” position, by contrast, asserts that customary international law generally refers to law “that results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁴ Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987).


³. See Filartiga v. Pena-Irala, 630 F.2d 876, 886–87 (2d Cir. 1980) (stating that “[t]he law of nations forms an integral part of the common law, and . . . became a part of the common law of the United States upon the adoption of the Constitution” and that “[f]ederal jurisdiction over cases involving international law is clear”). Proponents of the modern position argue that customary international law qualifies as “Law[] of the United States” for purposes of the Supremacy and Arising Under Clauses. See Louis Henkin, International Law as Law in the United States, 82
international law is federal law only to the extent that the political branches have properly incorporated it; otherwise, it may operate as state law if a state has incorporated it.\textsuperscript{4} A few scholars reject both the modern and revisionist positions in favor of a third approach: Courts should treat customary international law as neither federal nor state law, but rather as a source of nonbinding transnational law.\textsuperscript{5}

No consensus has emerged from this impressive body of scholarship.\textsuperscript{6} Critics of the modern position such as Curtis Bradley and Jack Goldsmith maintain that it “is in tension with basic notions of American representative democracy” because “[w]hen a federal court applies [customary international law] as federal common law, it is not applying law generated by U.S. lawmaking processes.”\textsuperscript{7} As an historical matter, these critics contend that the modern position disregards the fact that before the Supreme Court decided \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{8} in 1938, customary international law was not regarded as federal law, but as a species of non-preemptive “general law.”\textsuperscript{9} \textit{Erie}, they say, banished general law from federal courts and established that state law applies “[e]xcept in matters governed by the Federal Constitution or by acts of Congress.”\textsuperscript{10}

In response, critics of the revisionist position argue that it fails to take account of the Constitution’s assignment of foreign relations authority to the federal government rather than the states. In their view, the revisionist position contravenes the Constitution’s basic allocation of foreign affairs power by


\textsuperscript{5} See Michael D. Ramsey, The Constitution’s Text in Foreign Affairs 342–61 (2007) (recognizing that the law of nations is enforceable in federal courts as a rule of decision if it “does not displace otherwise-constitutional state or federal law”); Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int’l L. 365, 369–70 (2002) (arguing customary international law is neither state nor federal law, but “general” law that “would remain available for both state and federal courts to apply in appropriate cases as determined by traditional principles of the conflict of laws”); see also Arthur M. Weisburd, The Executive Branch and International Law, 41 Vand. L. Rev. 1205, 1251 (1988) (contending American courts cannot force the President to comply with international law); Arthur M. Weisburd, State Courts, Federal Courts, and International Cases, 20 Yale J. Int’l L. 1, 48–49 (1995) (analogizing customary international law to “the law of a foreign sovereign,” only applicable in “American courts in appropriate cases”).

\textsuperscript{6} For an insightful evaluation of the modern and revisionist positions, see Young, supra note 5, at 372–463.

\textsuperscript{7} Bradley & Goldsmith, supra note 4, at 857.

\textsuperscript{8} 304 U.S. 64 (1938).

\textsuperscript{9} See Young, supra note 5, at 393 (explaining that “virtually all participants in the customary law debate agree” that customary international law had the status of general law before \textit{Erie}).

\textsuperscript{10} \textit{Erie}, 304 U.S. at 78.
allowing states to determine the force and effect of customary international law in the United States.\textsuperscript{11} In addition, they contend that the revisionist position disregards a long line of statements, stretching back to the founding, by federal judges and public officials that the customary law of nations\textsuperscript{12} (today known as “customary international law”) is “part of the law of the land.”\textsuperscript{13} Critics of the revisionist position argue that these public actors necessarily understood the law of nations to be preemptive of state law (or even federal statutes) and sufficient to generate Article III arising under jurisdiction.\textsuperscript{14} In light of the vast gap between these competing claims and critiques, the debate over the place of customary international law in the American federal system has reached something of a stalemate.

A key reason for this impasse is that both positions rely on, but are also in tension with, historical practice. To the extent historical practice informs the treatment of customary international law in the American system today, an accurate understanding of that practice is essential. Scholars on either side look to the founding and early judicial precedent to answer whether, as a matter of original understanding, courts have authority to take the lead over the political branches in adopting customary international law as the supreme law of the United States.\textsuperscript{15} The historical accounts are largely anachronistic, however, recasting history in a post-	extit{Erie} mold. The Founders and early officials of the Union did not engage the (modern) question whether federal courts have Article III power to adopt the law of nations as preemptive, jurisdiction-triggering federal common law. Rather, they addressed how adherence to certain aspects of the law of nations was necessary to preserve peace with foreign nations and to uphold the allocation of foreign affairs powers established by Articles I and II. It is not our purpose here to settle all aspects of how customary international law interacts with the federal system; rather, we intend to describe the role that the law of nations actually has played in the federal system throughout American history. In context, historical

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

\textsuperscript{12} See infra notes 52–71 and accompanying text (describing the various branches of the “law of nations”).


\textsuperscript{15} Compare, e.g., Jordan J. Paust, International Law as Law of the United States 7–8 (2003) (arguing that early practice demonstrates understanding that courts may enforce customary international law as preemptive federal law), and Koh, supra note 2, at 1825 (same), with Bradley & Goldsmith, supra note 4, at 822–26 (arguing that early practice demonstrates understanding that courts did not enforce customary international law as preemptive federal law).
practice does not evince a principle that all of the law of nations necessarily functioned as preemptive federal law. Nor does it evince a principle that rules derived from the law of nations never functioned as preemptive federal law. Instead, historical practice demonstrates that courts have applied certain principles derived from the law of nations as a means of upholding the Constitution’s allocation of foreign affairs powers to Congress and the President—in particular, the powers to recognize foreign nations and make war.

The Constitution confers upon the political branches of the federal government extensive powers to recognize foreign nations, conduct the foreign affairs of the United States, and make war and peace. At the same time, it disables the states from exercising those same powers. The Constitution also authorizes federal jurisdiction over several categories of cases implicating the law of nations. The Founders allocated these powers between the federal and state governments and among the branches of the federal government in light of their understandings of—and their desire to comply with—the law of nations as it existed at the time. In the late eighteenth century, a foundational principle of the law of nations was that each nation should reciprocally respect certain “perfect rights” of every other nation to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty. Perfect rights were so fundamental that interference with them provided just cause for war. Thus, adherence to rules designed to uphold perfect rights was essential to maintaining international peace. When the founders allocated authority to the federal political branches over foreign relations and jurisdiction to the federal judiciary over cases likely to implicate the law of nations, they established complementary, not conflicting, powers. The Constitution provides no explicit instruction that courts should apply the law of nations. Nonetheless, in the early decades of the republic, the Supreme Court came to realize that the Constitution’s allocation of foreign affairs powers required courts to adhere to rules designed to implement perfect rights, and that any decision to deviate from such rules was a question of policy for the political branches. This pattern has largely continued to this day.

This Article proceeds as follows. Part I begins by discussing the relationship between municipal law (the law of a particular sovereign) and the law of nations in English practice at the founding. Eighteenth century English courts and treatise writers described the law of nations, as their American counterparts eventually would, as “part of the law of the land.” English writers did not, however, understand it generally to stand in a “supreme” or preemptive position over municipal law. Rather, the law of nations was part of

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17. See id.
20. Id. at lxii–lxiii.
English law to the extent that English municipal law incorporated it, and Parliament remained free to alter the law of the land. Blackstone prominently described judicial enforcement of the law of nations as sustaining, not limiting, municipal sovereignty, especially in foreign affairs.

In the United States, the founders naturally thought about the relationship between the law of nations and municipal law as it existed in England. It would have been a radical innovation for the United States Constitution to empower courts to elevate wholesale the law of nations to the status of “the supreme Law of the Land,” directly limiting either Congress or the states in their regulation of municipal affairs. Rather, a reasonable, late eighteenth century lawyer familiar with the Constitution would have understood the Supremacy and Arising Under Clauses to concern only federal municipal law—i.e., the “Constitution,” “Laws,” and “Treaties” of the United States. At the same time, prominent members of the founding generation appreciated that judicial enforcement of the law of nations was necessary to sustain foreign relations powers the Constitution allocated to the federal government, especially the powers to recognize foreign nations and make war. They understood that when the political branches recognized a foreign nation, the United States agreed to respect that nation’s perfect rights under the law of nations. They also understood that federal political power over war and peace would be effective only if states and courts did not embroil the United States in war by violating these aspects of the law of nations. To that end, Article III authorized federal jurisdiction over cases implicating the law of state-state relations would further federal political branch authority over foreign relations. It would take a couple of decades, however, before the Court would clearly identify the separation of powers as the basis of its authority to enforce certain principles derived from the law of nations, especially the law of state-state relations, would often supply rules of decision. Such jurisdiction was designed to preserve the authority of the political branches to regulate foreign affairs and prevent states from taking action that would give other nations just cause for war against the United States.

Part II describes how, after ratification, executive and judicial officials understood the Constitution to require application of certain default rules designed to uphold the perfect rights of foreign nations. It was clear at the founding that federal court jurisdiction over cases implicating the law of state-state relations would further federal political branch authority over foreign relations. It would take a couple of decades, however, before the Court would clearly identify the separation of powers as the basis of its authority to enforce certain principles derived from the law of nations as the law of the land. Given the Constitution’s allocation of foreign affairs and war powers, the Court came to recognize that the political branches, rather than the judiciary, should make the decision whether to risk provoking conflict with foreign nations by interfering with their traditional sovereign rights. The issue whether states remained free to pursue their own path in such cases did not come before the Court in the Union’s early years. To the extent, however, that the Court understood Articles I and II to require courts to apply certain rules derived from the law of nations, it established a constitutional rationale for overriding contrary state law under the Supremacy Clause.
Part III explains how federal courts have applied principles derived from the law of nations to uphold the Constitution’s allocation of powers in several important and well-known cases throughout American history. For example, scholars often read Banco Nacional de Cuba v. Sabbatino as establishing that federal courts should apply modern principles of customary international law as federal law. In reality, the decision reflects adherence to the separation of powers principles recognized by the Marshall Court, under which courts uphold the perfect rights of foreign sovereigns as a means of preserving political branch authority to recognize foreign states and determine when to engage in hostilities. The Sabbatino Court applied the act of state doctrine—a rule respecting Cuba’s traditional perfect right to territorial sovereignty—rather than a modern rule that would have compromised foreign territorial sovereignty. In the process, the Court carried on a centuries-old tradition of upholding perfect rights under the law of nations as a means of respecting the constitutional prerogatives of the political branches. It is tempting simply to characterize the Court’s practice as “federal common law”—judicially-crafted “rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands.” This characterization, however, is a misnomer. The Court has enforced perfect rights to implement the Constitution’s textual and structural commands that the federal political branches retain control over the conduct of foreign affairs. Thus, properly understood, rules designed to uphold perfect rights have applied in U.S. courts throughout American history not by virtue of any Article III power to fashion federal common law, but only as necessary to preserve and implement the political branches’ distinct Article I and Article II powers to recognize foreign nations, conduct foreign relations, and decide momentous questions of war and peace.

I. The Law of Nations and the Constitution

This Part explains how and why the Constitution, as originally framed, authorized federal judicial enforcement of certain aspects of the law of nations. The law of nations had several branches, and the framers extended federal jurisdiction to cases likely to involve them for various reasons. The framers authorized federal jurisdiction over, for example, the law merchant in diversity cases to enable Congress to protect interstate and foreign commerce by providing a federal judicial forum. The framers authorized federal jurisdiction over cases likely to implicate the law of state-state relations, on the other hand,

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22. 376 U.S. 398.

23. See, e.g., Goodman & Jinks, supra note 2, at 490–97 (1997) (interpreting “Sabbatino and its progeny [as] strong evidence that CIL should be federal common law in many, if not all, cases involving acts of foreign governments”); Koh, supra note 2, at 1835 (arguing “that even after Erie and Sabbatino, federal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law”).

as a mechanism for sustaining the Article I and II powers of the political branches to recognize foreign nations and make important decisions regarding war and peace. It is this branch of the law of nations with which this article is primarily concerned. Articles I and II of the Constitution, we explain, can only be understood in light of certain background principles of the law of nations. Many prominent founders understood judicial adherence to these principles to be necessary to uphold the Constitution’s allocation of power to the political branches over foreign relations.

To understand the place the law of nations occupied in the original constitutional design, it is crucial to first appreciate the place the law of nations occupied in the late eighteenth century English legal system. The law of nations did not apply of its own force; it was part of English law only to the extent that English municipal law incorporated it. Nor was it supreme law in England. Parliament retained ultimate sovereign authority to make supreme law. Moreover, William Blackstone described core principles of the law of nations not as displacing sovereign prerogatives but as sustaining them.

When the framers designed the Constitution, the most natural way for them to think about the law of nations was the way they understood it to operate in England. The Constitution they drafted plainly reflected certain English practices. First, the Supremacy Clause described the “supreme” law of the land to include only three sources of federal municipal law, namely, the “Constitution,” “Laws,” and “Treaties” of the United States. Second, the Constitution assigned authority over key prerogatives in foreign affairs to federal political authorities. Third, Article III authorized federal courts to exercise jurisdiction over several categories of cases likely to implicate the law of nations—law that, if enforced, would preserve the prerogatives of the political branches in foreign relations.

Although the founders understood that federal court jurisdiction over cases implicating the law of nations would serve to uphold such prerogatives, they did not clearly specify how the law of nations would relate to federal and state municipal law. Some assumed that federal courts, like their English counterparts, had authority to incorporate the law of nations into a federal municipal common law. The Supreme Court, however, ultimately rejected any such power in 1812. This did not mean that the law of nations had no place in federal court. Rather, the Court came to understand the Article I and II powers of recognition and war to require judicial application of certain background principles of the law of nations as a means of sustaining those powers.

A. English Practice

To understand how a reasonable eighteenth century lawyer, knowledgeable of the Constitution, would have understood the law of nations to relate to municipal law in the new federal system, it is necessary to appreciate how the law of nations related to English municipal law. Many of

25. U.S. Const. art. VI, cl. 2.
those who framed the Constitution, effectuated its ratification, and expounded its meaning were lawyers, trained in English legal traditions.

This section explains the relationship between the law of nations and municipal law in England in the late eighteenth century. Prominent eighteenth century English judges and treatise writers described the law of nations as “part of the law of the land” in England; they did not mean by this description, however, that the law of nations was supreme over English municipal law. Principles of the law of nations applied in common law courts because the common law adopted them; certain principles of the law of nations also applied in English courts of civil jurisdiction—for example, admiralty courts—because the common law authorized those courts to apply them. As incorporated into English law, the law of nations was not generally understood even to be capable of preempting English municipal law. English judges and other writers described the common law as either permitting reasonable local deviations from various forms of the law of nations, or operating in a separate jurisdictional sphere from the law of nations. There was, however, one aspect of the law of nations that at least raised the specter of preemption to English writers: the core reciprocal rights that nations enjoyed under the law of state-state relations. English judges and other writers ultimately rejected the idea that even this law could preempt municipal law in light of parliamentary sovereignty. It was this aspect of the law of nations that the Supreme Court would come to enforce as a means of upholding the allocation of powers established by Articles I and II. This limited constitutional incorporation of the law of nations prevented states and courts from usurping foreign relations powers assigned to the political branches.

English writers clearly distinguished municipal law from the law of nations. Subsection I.A.1 describes the distinctions they drew, and subsection I.A.2 explains how the two bodies of law related to each other as judicial rules of decision. This history demonstrates that unlike municipal law, the law of nations was not considered a source of supreme English law. It also illuminates, however, why at least some founders seemed to assume that the Constitution incorporated certain core reciprocal rights of nations as supreme federal law.

1. Defining Municipal Law and the Law of Nations
   a. Municipal Law.—William Blackstone defined “municipal” law in his well known Commentaries on the Laws of England as “the rule by which particular districts, communities, or nations are governed.”26 In “common speech,” the expression “municipal law . . . applied to any one state or nation, which is governed by the same laws and customs.”27 Significantly, the phrase “law of the land” was synonymous with “municipal” law; Blackstone used the two phrases interchangeably.28 Either phrase denoted a rule ‘prescribed by the

26. 1 William Blackstone Commentaries *44.
27. Id.
28. See, e.g., id. at *54, *69, *75, *83 (using phrase “law of the land” to refer to municipal
supreme power in a state."\textsuperscript{29}

English writers identified two forms of municipal law, written and unwritten.\textsuperscript{30} The unwritten law was common law—the customary law of the land. "General customs," Blackstone explained, are "the universal rule of the whole kingdom, and form the common law, in its . . . usual signification," governing such matters as trusts and estates, property, contracts, rules of construction, civil injuries, and crime.\textsuperscript{31} The common law also governed the jurisdiction and modes of proceeding of English courts—both common law courts, which decided cases according to the "law of the land,"\textsuperscript{33} and courts that applied other sources of law, such as the courts of admiralty and maritime jurisdiction,\textsuperscript{34} the ecclesiastical courts,\textsuperscript{35} and the universities.\textsuperscript{36} The duty to
determine the content of the law of the land rested with the judges of the
several courts of Westminster. They professed to determine this law from
prior judicial records or, where no judicial decision established the point,
from established custom. Judges and other legal writers routinely referred to
this common law as “the law of the land.”

Particular local customs existed alongside the general customary law of

between private laws of the college, administered by the “visitor” and not appealable to the courts
of law, and “the law of the land, the violation of which “this Court will take notice thereof,
notwithstanding the visitor; and then the proper way to put it into execution is by the writ of
mandamus”).

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

Court furnish me with the law of the land”); see generally 1 Blackstone, supra note 26, at *69
(“And indeed these judicial decisions are the principal and most authoritative evidence, that can
be given, of the existence of such a custom as shall form a part of the common law.”).

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

40. See, e.g., Moore v. Foster, (1792) 80 Eng. Rep. 43, 44 (K.B.) (“[B]y the common law of the
land, the misusage and mis-carrying of a commissioner of the business is not punishable”);
land every copyholder may make a lease for a year without forfeiture.”); Massey v. Rice,
(1775) 98 Eng. Rep. 1122, 1124 (K.B.) (Mansfield, J.) (“By the settled law of the land, men by
deeds may fetter their estates: but tenant in tail when of age may un fetter them, observing a
ce rtain form.”); R v. Thorp, (1741) 90 Eng. Rep. 824, 824 (K.B.) (“And now it was objected in
arrest of judgment, that the matter for which the defendants were convicted was not a crime
defendant pleaded . . . that by the law of the land there is no survivorship between joint
as used in statute, “is generally understood, [as] the heir by the general law of the land”); Mitchell
v. Neale, (1755) 28 Eng. Rep. 433, 433 (Ch.) (“This general custom of copyhold may be called
the law of the land.”); Kruger v. Wilcox, (1755) 27 Eng. Rep. 168, 168 (Ch.) (“Such is the law of the
land as to retainers in other cases.”); Jordan v. Foley, (1725) 25 Eng. Rep. 199, 199 (Ch.)
(“[T]he husband is only chargeable for what is sued for and recovered in the life of the wife; this
is the clear law of the land, and unalterable but by Act of Parliament.”); Herne and Herne, (1741)
27 Eng. Rep. 707, 708 (Ch.) (explaining that “the general Law of the Land” governed certain
matters of maintenance); Welles v. Trahern, (1740) 125 Eng. Rep. 1147, 1150 (C.P.) (“Besides, it
is certain that the university do not judge according to the common law but according to the civil
law; so that if this conusance be allowed men’s properties are to be tried without a jury and by a
different law from the law of the land.”). Courts also described the prerogative of the Crown as
(C.P.) (“The prerogative of the Crown is incorporated with the law of the land. . . . The King, by
his prerogative, hath a right to sue in what Court he pleases, and to imprison his debtor in the
goal for the county or liberty where he is arrested.”).
the land. Courts did not regard the general customary law of the land as necessarily “preemptive” of conflicting local customs. To the contrary, courts enforced local customs that derogated from the common law of the land. In 1741, for example, in *Herne and Herne*, the Court of Chancery explained that “by the general Law of the Land, a Father is a Judge of the Merit of his Children, and has a Right to dispose of his Property at his Death in such Manner as he shall think fit. But by the Custom of London . . . [he] has not this Power . . . .”

Examples of local customs that governed as rules of decision in derogation of the general customary law abound. Judges explained that whether a proven local custom contrary to the general law of the land would govern as the rule of decision depended on whether the local custom was “reasonable.”

In addition to customary municipal law, general and local, there was written municipal law. The “*legis scriptae*, the written laws of the kingdom,” as Blackstone described them, were “statutes, acts, or edicts, made by the king’s majesty, by and with the advice and consent of the lords spiritual and

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41. (1741) 27 Eng. Rep. 707, 708 (Ch.).
42. See, e.g., Fenn v. Mariott, (1743) 125 Eng. Rep. 1252, 1252 (C.P.) (“But we thought the present case not at all parallel to that; because that depends on the general law of the land in respect to customary estates, but this on the particular custom of the manor.”); *Mitchel*, 28 Eng. Rep. at 433 (“This general custom of copyhold may be called the law of the land; yet in several instances that general law is broke in upon. (Note: Every custom which departs from the common law must be construed strictly and ought not to be enlarged beyond the usage.)” (citation omitted)); R v. Inhabitants of Minchin-Hampton, (1762) 97 Eng. Rep. 847, 848 (K.B.) (“Beech is certainly not timber by the general law of the land: yet it may be timber by the particular custom of the place . . . .”); Steel v. Houghton, (1788) 126 Eng. Rep. 32, 33–34 (C.P.) (“[s]uch a general right . . . must be by the common law of the land; and though . . . in certain places there may be particular regulations of its exercise by custom, that will not derogate from the general right . . . which will . . . prevail, unless a custom is shewn to the contrary.”); Robinson v. Bland, (1760) 96 Eng. Rep. 129, 131 (K.B.) (argument of counsel, Blackstone) (“Courts have admitted local customs and particular usages to prevail in derogation of the common law.”); cf. Birch v. Blagrove, (1755) 27 Eng. Rep. 176, 176 (Ch.) (“[W]hether it be in fraud of the local law of London, or general law of the land, is the same thing.”); R v. Inhabitants of Sheffield, (1787) 100 Eng. Rep. 58, 61 (K.B.) (“[B]y the general law of the land the parish [is] bound to repair all highways lying within it, unless by prescription they can throw the onus on particular persons . . . when that is the case, it is [an] exception to the general rule.”); 1 Blackstone, supra note 26, at *75 (“[These customs] are all contrary to the general law of the land, and are good only by special custom, though those of London are also confirmed by act of parliament”).
43. For instance, Lord Mansfield stated that “[t]he only question” regarding whether a local custom governed as a rule of decision was “whether this be a reasonable custom or not.” Butter v. Heathby, (1766) 97 Eng. Rep. 1154, 1156 (K.B.). In 1743, the Court of Common Pleas determined that a particular custom of a manor was “good”: “It was insisted that such custom was unreasonable, and that in the present case it was unjust . . . . But to this we answered that we thought it neither unreasonable nor unjust.” Fenn v. Mariott, (1743) 125 Eng. Rep. 1252, 1252 (C.P.); see also *Mitchel*, 28 Eng. Rep. at 434 (“In several manors there are unreasonable customs, though not so unreasonable as that the law will set them aside.”). If a local custom was to govern in derogation of the common law, courts, according to some decisions, should construe the custom “strictly” and not “enlarge” it “beyond the usage.” See id. at 433 (“Every custom which departs from the common law must be construed strictly . . . and ought not to be enlarged beyond the usage.”).
temporal, and commons in parliament assembled.” 44 English courts referred to the written laws of the kingdom, as they did to the common law, as the “law of the land.” 45 Where an act of Parliament was not clearly in derogation of the general common law, courts would interpret the act to comport with the common law. 46 On the other hand, parliamentary supremacy—ultimately recognized by Blackstone and others—required courts to apply acts of Parliament in preference to the common law in cases of irreconcilable conflict. 47

The written laws stood in a different relationship to local customs than the general common law did: Judges did not recognize local customs in derogation of Acts of Parliament as rules of decision (unlike local customs in conflict with the common law). If a party asserted that a local custom or private arrangement governed rather than an Act of Parliament, a court would not ask whether the local custom or arrangement was “reasonable”; it would ask merely whether it was repugnant to the statute. If it was, local custom did not govern in the action before the court. 48 Moreover, courts of Westminster required that acts of Parliament receive uniform constructions across localities. As Justice Nash Grose explained in King v. Hogg in 1787, a statute, as a “universal law,” may not “receive different constructions in different towns. It is the general law of the land that this kind of property should be rated; and we cannot explain the law differently by the usage of this or that particular place.” 49

b. The Law of Nations.—Unlike municipal law, the law of nations was not understood to be the law of a single nation. According to Blackstone, the law of nations “cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues and agreements between these several communities.” 50 Emmerich de Vattel, whose treatise The Law of Nations was well known among late eighteenth century lawyers in England and America, 51 described the law of nations in terms of the

44. 1 Blackstone, supra note 26, at *85.
45. For example, in Biggs v. Lawrence, Justice Francis Buller disallowed recovery on a contract made “directly against the statute laws of this country,” a contract that offended “against the law of the land.” (1789) 100 Eng. Rep. 673, 675 (K.B.).
46. See 1 Blackstone, supra note 26, at *89 (describing this principle).
47. See id. (“Where the common law and a statute differ, the common law gives place to the statute.”).
48. See, e.g., Nevesley v. Webster, (1755) 96 Eng. Rep. 980, 981 (K.B.) (“The first question is, whether this by-law by in itself good? 2d. If so, whether it is not repugnant to the law of the land: the Statute of 22 Hen. 8.”)(1755).
50. 1 Blackstone, supra note 26, at *43.
51. See Edwin D. Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26, 35 (1952) (explaining that this treatise and the writings of Grotius, Pufendorf, and Burlamaqui “were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century”); see also 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) (explaining that “[d]uring the founding period
“necessary” and the “voluntary.” A “necessary” law of nations was “a sacred law which nations and sovereigns are bound to respect and follow in all their actions”; a “voluntary” law of nations was “a rule which the general welfare and safety oblige them to admit in their transactions with each other.”

Vattel stated that “the very object of the society of nations” is to promote both “the happiness and perfection of all” and “the peaceable enjoyment of that liberty which [each nation] inherits from nature.” Accordingly, “nature has established a perfect equality of rights between independent nations,” to further these goals. This equality and independence obliged nations to respect certain “perfect rights” that each held against the others. A “perfect” right, as defined by general principles of law, was a right that the holder could carry into execution without legal restraint. An imperfect (or inchoate) right, on the other hand, was one that the law somehow restrained the holder from carrying into execution. Accordingly, when one nation violated the perfect rights of another, the other had just cause for waging war to compel the corresponding duty. Other treatise writers recognized this principle, as did English admiralty courts, which frequently applied the law of nations in their prize jurisdiction. Early American jurists, including John Marshall, took for granted the concept of perfect rights. Supreme Court justices relied upon the

and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law.”); Douglas J. Sylvester, International Law As Sword Or Shield? Early American Foreign Policy and the Law Of Nations, 32 N.Y.U. J. Int'l L. & Pol. 1, 67 (1999) (explaining that in American judicial decisions, “in all, in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel”).

52. Vattel, supra note 19, at *xv.
53. Id. at *lxi (emphasis omitted).
54. Id. at *149; see also id. at *lxiii (describing equality of nations).
55. See 1 Thomas Rutherford, Institutes of Natural Law Being the Substance of a Course of Lectures on Grotius De Jure Belli et Pacis 30 (1754) (“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 of the imperfect sort.”).
56. Vattel, supra note 19, at *xii.
57. See Georg Friedrich Martens, Summary of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe 273 (1795) (“Nothing short of the violation of a perfect right . . . can justify the undertaking of war . . . [but] every such violation . . . justifies the injured party in resorting to arms.”).
58. See, e.g., The President, (1804) 165 Eng. Rep. 775, 776 (Adm.) (stating that the American Government has a “perfect right” to “confer the privileges of American navigation on vessels occupied by their Consuls in foreign states”); The Der Mohr, (1082) 165 Eng. Rep. 624, 625 (Adm.) (stating that a neutral vessel “had a perfect right to carry” a cargo, “provided it was not attended with any circumstances of ill faith, or unneutral conduct”); The Rebecca, (1799) 165 Eng. Rep. 253, 253 n.(b) (noting “The ‘Wilhelmina,’ Carlson, 23d July 1799,” in which the court determined “[t]he Dane has a perfect right, in time of profound peace, to trade between Holland and France . . and there is no ground upon which any of its advantages can be withheld from him in time of war”); The Maria, (1799) 165 Eng. Rep. 199 (Adm.) (explaining that in a lawful “state of war and conflict . . . one party has a perfect right to attack by force”).
59. See, e.g., The Nereide, 13 U.S. (9 Cranch) 388, 426 (1815) (Marshall, C.J.) (“A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to
concept, explicitly and implicitly, in several prominent early cases implicating the law of nations, as the next Part will explain.

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

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

All of these rights that Vattel described under the rubric “law of nations” transport his goods in a belligerent vessel.”); Hannay v. Eve, 7 U.S. (3 Cranch) 242, 247 (1806) (Marshall, C.J.) (describing Congress as “having a perfect right, in a state of open war, to tempt the navigation of enemy-vessels to bring them into American ports”).

60. Vattel, supra note 19, at *154.
61. Id. at *155.
62. Id.
63. Id.
64. Id. at *166.
65. Id. at *169.
66. Id. at *126.
67. Id. at *452.
68. Id. at *453.
69. Id. at *464.
related to reciprocity between and among nations. Some English writers and judges used the phrase “the law of nations” to denote not only such rules of state-state relations, but also certain transnational rules of private conduct, including the law merchant and the private law maritime.\(^\text{70}\) These various branches of the law of nations did not describe strict mutually exclusive categories; nonetheless, the categories were, and remain, helpful.\(^\text{71}\)

2. **Municipal Law and the Law of Nations as Rules of Decision.**—English courts and treatise writers explained that the common law (a form of municipal law) adopted the law of nations, rendering it “part of the law of the land.” In adopting the law of nations, however, English courts did not understand the common law to make the law of nations “supreme” over municipal law. To do so would have contradicted important assumptions of the English legal system, including: (a) the adaptability of the common law (and by incorporation aspects of the law of nations) to local circumstances, (b) the distinct spheres in which the common law and the law maritime operated as rules of decision, (c) the sovereignty of Parliament, and (d) the manner in which judicial enforcement of the law of nations upheld, rather than limited, prerogatives of the Crown in foreign relations.

The relationship between the law of nations and municipal law as rules of decision in English courts in the late eighteenth century was complex. Notable English judges and treatise writers introduced the idea that the law of nations was “part of” the laws of England in the eighteenth century. In 1764, Lord Mansfield explained that in 1736 “Lord Talbot declared a clear opinion—‘That the law of nations, in its full extent, was part of the law of England.’”\(^\text{72}\) Blackstone too described the law of nations as part of the law of the land; for


\(^{71}\) As Blackstone described it: 
[In mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too, in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

him, adoption of the law of nations by the common law was necessary to render its judicial application politically legitimate. "[S]ince in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of [its] jurisdiction) is here adopted in [its] full extent by the common law, and is held to be a part of the law of the land." 73  This adoption enabled England to "be a part of the civilized world." 74

To deem the law of nations “part of the law of the land” was not to define its relationship to other parts of the “law of the land.” To appreciate this multifaceted relationship, one must differentiate the various branches of the law of nations that English writers identified. The late eighteenth century English lawyer would not have understood the law merchant or private law maritime to provide rules of decision that could conflict with English national or local municipal law, let alone preempt it. The lawyer might have better grasped the concept that the law of state-state relations could provide a rule of decision in conflict with municipal law, generating a supremacy question. Still, judges and treatise writers rejected the idea that any source of law, including the law of state-state relations, could override clear municipal law as a rule of decision.

a. The Law of Nations’ Adaptability.—Certain aspects of the law of nations, such as the law merchant, were inherently subject to local deviations and thus conceptually incapable of preempting municipal law. English courts and writers commonly referred to the law merchant as “part of” English law. Blackstone described the law merchant as “part of the law of England, which decides the causes of merchants by the general rules which obtain in commercial countries.” 75  Such references did not indicate that the law merchant was superior to or preemptive of contrary laws of the land. Rather, if an Act of Parliament specified a legal relationship in conflict with the common law, it was to be given deference over the law merchant. 76

73. 4 Blackstone, supra note 26, at *67. For a discussion of how the law of nations applied in English courts in the eighteenth century only to the extent that English law had adopted it, see Philip Hamburger, Law and Judicial Duty __ (forthcoming Nov. 2008).

74. 4 Blackstone, supra note 26, at *67. David Armitage has argued that in light of when Triquet and Buvot were reported in relevant part, Blackstone’s Commentaries provide the first instance of the doctrine that the law of nations is part of English law appearing in print. David Armitage, Parliament and International Law in the Eighteenth Century, in Parliaments, Nations and Identities in Britain and Ireland, 1660–1850, at 169, 174 (Julian Hoppitt ed., 2003).

75. 1 Blackstone, supra note 26, at *273. One effect of courts’ deeming the law merchant “part” of the “common law” or the “law of England” was that they could take judicial notice of it, just as they took judicial notice of the common law. See Edie v. East India Co., (1761) 97 Eng. Rep. 797, 802 (K.B.) (Foster, J.) (“This custom of merchants is the general law of the kingdom, part of the common law; and therefore ought not to have been left to the jury, after it has been already settled by judicial determinations.”); id. at 803 (“The custom of merchants is part of the law of England; and Courts of Law must take notice of it, as such.”); Hodges v. Steward, (1691) 91 Eng. Rep. 117, 117 (K.B.) (“[T]he Court is to take notice of the law of merchants as part of the law of England.”); Meggadow v. Holt, (1691) 88 Eng. Rep. 1134, 1134 (K.B.) (“[T]he law of merchants is jus gentium, and part of the common law; and therefore we ought to take notice of it, when set forth in pleading.”).
law, of which the law merchant was a part, the Act of Parliament controlled.\textsuperscript{76} Moreover, just as courts applied local customs that derogated from the common law in certain circumstances,\textsuperscript{77} they also applied local usages that supplanted or supplemented the law merchant.\textsuperscript{78}

Along these lines, certain judges in America applied the law merchant only where it did not conflict with the positive municipal law.\textsuperscript{79} In the first two decades following ratification, American courts recognized that local usages could govern as rules of decision notwithstanding a conflict with the general law merchant, and that the general law merchant itself varied from nation to nation.\textsuperscript{80} The Supreme Court based its well-known 1842 decision in \textit{Swift v. Tyson} upon the same premise.\textsuperscript{81} In short, at the time of the founding,

\textsuperscript{76} See 1 Blackstone, supra note 26, at *89 (“Where the common law and a statute differ, the common law gives place to the statute.”); id. at *75 n.15 (“Merchants ought to take their law from the courts, and not the courts from merchants: and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress.”).

\textsuperscript{77} See supra notes 41–43 and accompanying text (describing practice).

\textsuperscript{78} See generally Timothy Cunningham, The Law of Bills of Exchange, Promissory Notes, Bank-Notes, and Insurances 77–100 (1760) (listing examples of special or local customs that operated in conjunction with, or contrary to, principles of the law merchant). For example, local customs governed usances. See, e.g., Meggadow v. Holt, (1796) 88 Eng. Rep. 1134, 1135 (K.B.) (“[I]t is not necessary to shew the custom of merchants, but it is necessary to shew how the usance shall be intended, because it varies as places do’’); Buckley v. Cambell, (1706) 88 Eng. Rep. 917, 917 (Q.B.) (explaining, regarding the time of usances, that “he would take notice of the custom of merchants here, but not that at Amsterdam or Venice, &c.” for “[i]n such case, you must set forth the custom in your declaration”). Local custom also governed, in certain instances, whether infants could bind themselves by accepting bills of exchange. See, e.g., Williams v. Harrison, (1795) 91 Eng. Rep. 774, 774 (K.B.) (recognizing local custom in London that infant may bind himself as apprentice by accepting bill of exchange, notwithstanding that the “custom of merchants [which holds otherwise] is part of the law of the land”).

\textsuperscript{79} See, e.g., Odlin v. Ins. Co. of Pa., 18 F. Cas. 583, 584 (C.C. Pa. 1808) (No. 10,433) (Washington, J.) (“These regulations [the custom of merchants] are read in the British and American courts, and have frequently furnished rules of decision, where the positive law of the country, or former decisions upon the point, had not prescribed a different one.”); Walden v. Leroy, 2 Cai. 263, 265 (N.Y. Sup. Ct. 1805) (Kent, C.J.) (“The Law Merchant is, however, the general law of commercial nations; and, where our own positive institutions and decisions are silent, it is to be expounded by having recourse to the usages of other nations.”).

\textsuperscript{80} See, e.g., Fenwick v. Sears’s Adm’rs, 5 U.S. (1 Cranch) 259, 270 (1803) (“[T]he custom of merchants in the United States differs in some respects from the custom of merchants in England.”); Brown v. Barry, 3 U.S. (3 Dall.) 365, 368 (1797) (“I say the custom of merchants in this country; for the custom of merchants somewhat varies in different countries, in order to accommodate itself to particular courses of business, or other local circumstances.”); Thurston v. Koch, 4 U.S. (4 Dall.) 348, 351 (C.C.D. Pa. 1800) (Paterson, J.) (“It is, however, evident, that the law merchant varies in different nations, and even in the same nation at different times. The course of trade, local circumstances, commercial interests, and national policy, induce to some variation of the rule.”); Snyder v. Findley, 1 N.J.L. 78, 79 (N.J. 1791) (“[A]s to negligence, the custom of merchants settles it in Great Britain; there is, however, no such custom here.”); Fleming v. McClure, 3 S.C.L. (1 Brev.) 428 (1804) (“The law merchant, as it obtains in England, is, generally speaking, the law of this country. Some exceptions have been made, and some more may be made, which convenience and necessity have directed, and may hereafter suggest.”).

\textsuperscript{81} 41 U.S. (16 Pet.) 1 (1842). In \textit{Swift}, the Court expressly acknowledged the non-preemptive nature of the general commercial law. The Court justified its famous rejection of a
the notion that the law merchant—though part of the law of the land—generally preempted contrary national law or local usage would have been curious, at best, to those knowledgeable of English law.

b. The Law of Nations’ Sphere of Operation. —Moreover, English law incorporated certain parts of the law of nations—namely the law maritime—to operate independently of, not preemptively over, municipal law. The common law defined the jurisdiction of admiralty courts in England, and “the lawes of the Realme” allowed them to apply the law maritime to disputes within their jurisdiction. Admiralty and maritime law was “divisible into two great branches, one embracing captures, and questions of prize, arising jure belli; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations.” English courts understood the “law of the sea” (the law maritime) to stand in juxtaposition to the “law of the land” (municipal law) as a governing rule of decision—the result of a long-standing rivalry between common law and admiralty courts in England. The law of nations governed maritime actions and other actions arising upon the sea that municipal law did not govern. Indeed, the courts of admiralty had jurisdiction only over cases that the law maritime governed. The “tidewater” doctrine—that admiralty jurisdiction extended no further inland than tidal waters—reflected and demarcated the respective jurisdictions of common law and

New York judicial determination of a question of general commercial law on the ground “that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law.” Id. at 12. Had a New York statute or usage (a “local” statute or usage) deviated from the law merchant, that statute or usage would have controlled, and the Court would have deferred to New York courts’ understanding of it. Cf. Clark, Federal Common Law, supra note 70, at 1276–92 (arguing that Swift was defensible at the time it was decided).

82. See supra notes 34 and 34 and accompanying text.
83. 2 Coke, supra note 34, at 51.
86. Coke explained that:

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

4 Coke, supra note 34, at 134; see also 1 Bacon, supra note 32, at 623 (“That all Contracts, Pleas and Quarrels, and other Things done within the Bodies of Counties by Land or Water, and of Wreck, the Admiral shall have no Conuissance, but they shall be tried, &c, by the Law of the Land . . . .”); 1 Sir John Comyns, A Digest of the Laws of England 275 (1780) (“[T]he Court of Admiralty has no Jurisdiction in any Cause which arises upon Land, or within any County.”); 2 A General Treatise of Naval Trade and Commerce 422–23 (1738) (“All Maritime Causes, or Causes arising wholly upon the Sea, out of the Jurisdiction of any Country, this Court [of Admiralty] hath Power to determine; but a Judgment of a Thing done upon Land, is void . . . .”).
If a court of admiralty attempted to exercise jurisdiction over a case that municipal law governed, the law courts of Westminster (courts that administered the municipal law of the land) would issue a writ of prohibition removing the case to the common law courts.\(^88\) Just as courts of admiralty lacked jurisdiction over cases that municipal law governed, the common law courts lacked jurisdiction over cases that maritime law governed.\(^89\) Accordingly, an appeal from the Court of Admiralty would run not to the courts of Westminster but to judge delegates who were appointed by commission out of Chancery.\(^90\) Thus, the law maritime operated not in preference to municipal law but in its own separate sphere.

c. *The Sovereignty of Parliament.*—Preempting municipal law with the law of nations also would have undermined the sovereignty of Parliament. The prospect of preemption arose with respect to the law of state-state relations. Unlike with the law merchant, it was possible at least to conceptualize conflict between the law of state-state relations and municipal law. The law of state-state relations had a complicated relationship to municipal law. In some respects, the two bodies of law stood in juxtaposition to one another. For instance, the law of prize—a branch of admiralty that implicated state-state relations—provided a rule of decision in courts of admiralty, which lacked jurisdiction to apply municipal law governing actions arising upon land.\(^91\)

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\(^87\) Cf. The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825) (following English practice of limiting admiralty jurisdiction over maritime contracts to “cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide”); Clark, Federal Common Law, supra note 70, at 1341–42 (describing tidewater doctrine and its initial acceptance and ultimate rejection by Supreme Court).

\(^88\) See 1 Comyns, supra note 86, at 276 (“So, upon Motion, after a Suggestion, that the Suit in the Admiralty is for a Matter out of their Jurisdiction, and after Oyer of the Libel, and Day given to the Party, a Prohibition goes.”); see also 1 Bacon, supra note 32, at 558 (explaining that admiralty and ecclesiastical courts are also “not Courts of Record, but derive their Authority from the Crown, and are subject to the Controul of the King’s Temporal Courts, when they exceed their Jurisdiction.”); see, e.g., Spanish Ambassador v. Buntish, (1615) 80 Eng. Rep. 1156, 1157 (K.B.) (explaining that there was “just cause for a prohibition” because the admiral exceeded his jurisdiction over matters arising on the high seas).

\(^89\) See 3 Blackstone, supra note 26, at *68 (“The maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of reach of the common law, are only the court of admiralty, and [its] courts of appeal.”); Thomas Parker, The Laws of Shipping and Insurance 268 (1775) (same).

\(^90\) 3 Blackstone, supra note 26, at *68 (“From the sentences of the admiralty judge an appeal always lay, in ordinary course, to the king in chancery . . . . [b]ut upon appeal made to the chancery, the sentence definitive of the delegates appointed by the commission shall be final.”); 4 Coke, supra note 34, at 134 (“And if an erroneous sentence be given in that court, no writ of error, but an appeale before certain delegates so lye, as it appeareth by the statute of 8 Eliz. reginæ, cap. 5. which proveth that it is no court of record.”); 1 Comyns, supra note 86, at 279 (“If there be an Appeal from a Sentence in the Court of Admiralty, it may be to the King in Chancery, who thereupon makes a Commission to Delegates.”).

\(^91\) As Blackstone described it:

[I]n case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by
In other respects, however, the law of state-state relations could furnish a rule of decision in the courts of Westminster, and conflict between such law and municipal law was at least conceivable. For example, the law of nations provided public ministers with certain privileges and immunities in English courts. Lord Mansfield suggested in 1764 that an Act of Parliament could not change these privileges. In *Heathfield v. Chilton*, he remarked that the statute in question “did not intend to alter, *nor can alter* the law of nations” insofar as the law of nations recognizes privileges in foreign ministers.  

In evaluating this statement, it is important to distinguish the content of the law of nations (which reflects the practice of many nations) from the obligation of a municipal court to follow the law of nations if an enactment of its sovereign provides otherwise. In *Chilton*, Mansfield read an Act of Parliament to comport with the law of nations, and remarked that an act of Parliament cannot alter the law of nations itself. This is, of course, true in the sense that the law of nations was not made by any single nation, but constituted the practice of many nations. Mansfield did not purport to address, however, what rule of decision a court should apply if faced with an irreconcilable conflict between the law of nations and an act of Parliament. Indeed, English judges rarely considered how courts should resolve such conflicts, should any arise, in the late eighteenth and early nineteenth centuries. Courts assumed that Parliament sought to act in concert with the law of nations, and refused to speculate about potential conflicts. A series of opinions by Sir William Scott for the High Court of Admiralty illustrates this judicial attitude.

First, since an admiralty court lacked jurisdiction over questions of municipal law, it also lacked any opportunity to resolve conflicts that might exist between the law of nations and municipal law. In *The Maria*, Scott explained that the duty of a prize court was not to administer municipal law, but “to administer with indifference that justice which the law of nations holds out without distinction to independent states. . . . The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality.” In 1807, in *The Recovery*, the captors of an American vessel taken at Bombay argued that the vessel was engaged in a trade that, though legal under the law of nations, was illegal under the English Navigation Laws. A question arose in the case whether the Navigation Laws applied to the capture at issue. Rather than virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it.

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3 Blackstone, supra note 26, at *69; see also Parker, supra note 89, at 269 (“[T]his being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it.”).


93. See supra notes 83–90 and accompanying text (describing this practice).


resolve this question, the court declined to exercise jurisdiction over it because it was a question of “municipal jurisprudence”: “[T]his is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain,” and it thus administers “the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence.”96 Because different courts administered different bodies of law, they had fewer occasions to resolve conflicts between those bodies than if they regularly administered them all.

Second, even when courts had authority to administer rules of both sources of law, they strained to find constructions of municipal law that did not derogate the law of nations.97 Scott’s 1811 opinion in The Fox,98 a case involving an asserted conflict between Orders in Council and the law of nations, illustrates this practice. The case addressed the following question: “What would be the duty of the Court under Orders in Council that were repugnant to the law of nations?”99 Scott began by observing “that this Court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government.”100 “At the same time,” he continued, “it is strictly true, that by the constitution of this country, the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this Court.”101 A judicial practice operated to avoid conflict between “[t]hese two propositions, that the Court is bound to administer the law of nations, and that it is bound to enforce the King’s Orders in Council”: specifically, that “these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law.”102

Scott would not indulge the hypothetical question of what rule of decision a court should apply if the written law of England plainly did not conform to the law of nations in a given case. “[T]his Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot without extreme indecency, presume that any such emergency will happen.”103 Indeed, Scott likened his response to this question to what he presumed would be the response of common law courts to whether they should enforce an Act of Parliament that contradicted “principles of natural reason and justice.”104 This “is a question which I presume they would not entertain a

96. Id. at 958.
97. Since the law of nations was part of the common law, this practice comported with English courts’ practice of construing municipal acts to not derogate the common law. See supra note 46 and accompanying text (describing practice).
100. Id.
101. Id.
102. Id.
103. Id. at 1122.
104. Id. at 1121.
priori, because they will not entertain a priori the supposition that any such will arise.”

This passage illustrates how, by the late eighteenth century, jurists and treatise writers had come to read narrowly the famous dictum of Sir Edward Coke in \textit{Dr. Bonham’s Case}. The statute at issue in \textit{Dr. Bonham’s Case} prohibited the unlicensed practice of medicine and authorized doctors to determine whether someone had violated it. Bonham argued that the court should not apply the statute to him because it allowed a judgment by biased parties in violation of fundamental law of the land. Coke agreed, explaining that in certain instances “the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.” Coke proceeded to interpret the statute as inapplicable to Bonham. In 1614, Lord Hobart, who succeeded Coke as Chief Justice of Common Pleas, advanced the position in \textit{Day v. Savadge} that “an Act of Parliament, made against natural equity, as to make a man a judge in his own cause, is void in itself, for \textit{jura naturae sunt immutabilia}, and they are \textit{leges legum}.” Legal historians have debated whether Coke meant to suggest in \textit{Dr. Bonham’s Case} that judges could nullify Acts of Parliament that violated natural reason and justice, or simply that judges should read statutes, where possible, not to derogate the common law. Similarly, scholars have considered whether Chief Justice Hobart asserted a mere rule of construction or a broader power of nullification.

In the late eighteenth and early nineteenth centuries, the sentiments of Scott—that, with the triumph of parliamentary sovereignty, a judge should not entertain the supposition that an act of Parliament contradicted natural reason and justice—prevailed over the suggestion that judges could nullify acts of Parliament in light of natural reason or justice. Blackstone rejected Coke’s dictum in \textit{Dr. Bonham’s Case}, explaining that were Parliament to pass a statute allowing a man to “try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no,” even though such a law would be regarded as

105. Id. at 1122.
107. Id. at ____.
108. Id. at 652.
110. See, e.g., Theodore F.T. Plucknett, \textit{Bonham’s Case} and Judicial Review, 40 Harv. L. Rev. 30, 31 (1926) (arguing Coke’s “idea of a fundamental law which limited Crown and Parliament” reached “its final expression in . . . \textit{Dr. Bonham’s Case}”).
111. See, e.g., Samuel Thorne, \textit{Dr. Bonham’s Case}, 54 Law Q. Rev. 543, 544–45 (1938) (arguing decision was merely one of especially strict statutory construction).
unreasonable.\footnote{113} Blackstone also rejected a broad reading of Lord Hobart’s statement in \textit{Day}: “With deference to these high authorities, I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state.”\footnote{114} Even as he believed that human laws contrary to the law of nature were invalid, he thought it was not the province of courts to set aside acts of Parliament that judges viewed as contrary to natural law.\footnote{115}

It is true that Vattel identified a “natural” or “necessary” law of nations, “obligatory on the conscience” of a nation.\footnote{116} It was not established in late eighteenth century English practice, however, that judges should apply even a law of this order as a rule of decision if it stood in conflict with municipal regulations, particularly an act of Parliament. To the contrary, the weight of authority and opinion suggested that clear directives of written municipal law were “supreme” rules of decision in English courts. Courts avoided resolving what rule of decision would operate if written municipal law stood in conflict with the law of nations (or the common law more generally) by presuming that such conflict did not exist. In short, the triumph of Parliamentary sovereignty extinguished any contention that the law of nations as such was supreme over conflicting municipal law.

At the same time, however, it is significant that writers such as Blackstone and Scott acknowledged that certain principles of state-state relations, unlike the law merchant, could conflict in theory with municipal law, generating supremacy questions. In England, Parliamentary sovereignty answered the supremacy question. In the United States, with the system of dual municipal sovereignty that the Constitution created, the answer would not come so easily—at least regarding the relationship between the law of state-state relations and state municipal law. Lawyers trained in English law would have understood judicial enforcement of the law of state-state relations to sustain national political authority over foreign relations. As this Part will explain, in the United States, the threat to national political authority over foreign relations came not only from courts but also from the states.

\footnote{113} 1 Blackstone, supra note 26, at *91.
\footnote{114} Id. at *41 n.3. Indeed, by the late eighteenth century, many English judges had moved away from “equitably” interpreting statutes to conform to principles of natural reason and justice and toward interpreting them simply in light of legislative intent, however appropriately discerned. Anthony J. Bellia, Jr., State Courts and the Interpretation of Federal Statutes, 59 Vand. L. Rev. 1501, 1512–15 (2006).
\footnote{115} 1 Blackstone, supra note 26, at *41 & n.8. For thorough discussions of how English writers maintained at once that laws contradicting natural reason are void but that judges had no authority to nullify an act of Parliament on any grounds, see Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy 71–73, 111–12, 122–24, 181–82, 194–95 (1999).
\footnote{116} Vattel, supra note 52, at *lxvi.
d. The Law of Nations and Prerogatives in Foreign Relations.—In England, judicial enforcement of core principles of the law of state-state relations was understood to uphold, not supplant, “prerogatives of the Crown” in foreign relations.\footnote{117} In his Commentaries, Blackstone explained why judicial enforcement of certain principles of the law of nations was necessary to implement them. He noted the general criminal prohibition in English law against violating the law of nations to make his point. Specifically, Blackstone noted that the municipal laws of England subjected to punishment “any subject committing acts of hostility upon any nation in league with the king” and characterized such conduct as “a very great offence against the law of nations.”\footnote{118} The reason why English law provided this criminal penalty, Blackstone explained, was to sustain the Crown’s prerogatives in foreign relations against acts that would undermine them.\footnote{119}

Blackstone enumerated several particular prerogatives of the Crown in foreign affairs; for almost all of them, he explained how judicial enforcement of specific law of nations principles sustained them. First, “[t]he king . . . has the sole power of sending embassadors to foreign states, and receiving embassadors at home.”\footnote{120} In describing this power, Blackstone explained that “[t]he rights, the powers, the duties, and the privileges of embassadors are determined by the law of nature and nations, and not by any municipal constitutions.”\footnote{121} Blackstone recognized that “writers on the law of nations” disputed the extent of certain ambassadorial rights, such as immunity from prosecution, but noted that English law afforded them broad protection.\footnote{122} To sustain the authority of the Crown to determine foreign relations, “the security of embassadors is of more importance than the punishment of particular crime.”\footnote{123}

Next, Blackstone stated that “[i]t is . . . the king’s prerogative to make treaties, leagues, and alliances with sovereign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power.”\footnote{124} Furthermore, “[u]pon the same principle the king has also the sole prerogative of making war and peace.”\footnote{125} Under the law of nations, Blackstone explained, “the right of making war, which by nature subsisted in every individual, is given up by all private persons who enter into society, and is vested in the sovereign power: and this right is given up . . . by the entire body of people, that are under the dominion of a sovereign.”\footnote{126} “It
would be extremely improper,” Blackstone reasoned, “that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.”

If England were to give another nation cause for war by waging hostilities against that nation, it would be the decision of the Crown as sole holder of the prerogative to make war. For the same reason, the prerogative to issue letters of marque and reprisal, as well as to grant safe conducts, rested with the Crown.

Notably, the principles of the law of nations that Blackstone identified as necessary to maintain “the principal prerogatives of the king respecting this nation’s intercourse with foreign nations” reflected what Vattel and other prominent writers described as perfect rights of nations. Blackstone recognized, as did Vattel, that in response to hostilities against it or a violation of certain rights of its representatives, a nation could consider itself justified in waging war.

To sustain the Crown’s control over foreign relations, English law enforced principles of the law of nations prohibiting private hostilities and respecting the rights of ambassadors, including through its criminal law. Enforcement of the law of nations in this context did not preempt English law or otherwise limit municipal authority; to the contrary, it operated to preserve it.

In the late eighteenth century, no one would have characterized the law of nations as limiting sovereign English authority through preemption of national law. Rather, writers like Blackstone understood judicial enforcement of the law of state-state relations to respect, not limit, English sovereign authority. When the American founders vested core foreign relations powers in the federal political branches, it would have been natural for them to understand that federal judicial enforcement of the law of state-state relations would likewise uphold, rather than preempt, those powers. The founders sought to ensure that states not thwart national prerogatives in foreign affairs as they had under the Articles of Confederation. A key question for a system with dual municipal sovereignty was how to prevent states from violating the perfect rights of nations, thereby leaving vital matters of war and peace to federal authorities.

127. Id.
128. Id. at *258–60.
129. Id. at *261.
130. See supra notes 52–69 and accompanying text (explaining how Vattel described violation of perfect rights of nations to provide just cause for war).
131. 1 Blackstone, supra note 26, at *258 (recognizing that an individual, by waging hostilities, could generate a state of war with another nation).
132. Id. at *252-54.
B. The United States Constitution

There is little evidence to suggest a wholesale departure from prevailing English practice upon ratification of the U.S. Constitution. To the contrary, through a series of precise provisions, the Constitution empowered the federal government to exercise powers that were familiar prerogatives of the English Crown in foreign relations, including recognition of foreign nations and control over war and peace. Specifically, it implemented recognition and preserved peace by preventing and remedying certain violations of the law of nations. In addition to giving Congress and the President specific powers, the Constitution authorized federal court jurisdiction to hear and decide cases most likely to involve the law of nations. As the following subsections explain, the Constitution conferred this jurisdiction to protect the power of the federal political branches to recognize foreign states, comply with the law of nations, and conduct foreign relations in accordance with the Constitution’s allocation of powers. Article III thus reflects the Founders’ understanding that judicial respect for perfect rights under the law of nations would support this allocation of authority.

One of the primary reasons that the Framers drafted a new constitution was the growing sense that the existing confederation was inadequate to enable the United States to ensure compliance with its obligations under treaties and the law of nations. The Founders perceived this situation to be fraught with danger. The first defect Edmund Randolph pointed out when he opened the Federal Convention was the confederation’s inability to prevent other countries from waging war against the United States as a consequence of state violations of the law of nations. Similarly, in urging ratification, John Jay stressed that it “is of high importance to the peace of America that she observe the laws of nations” and that “this will be more perfectly and punctually done by one national government than it could be . . . by thirteen separate States.”

Historically, the most established principles of the law of nations sought to respect nations’ territorial sovereignty, equal rights on the high seas, and representative agents operating in other nations. Nations considered the violation of these principles hostile actions justifying war. When the political branches recognized a foreign state, they signified that the United States intended to respect that state’s perfect rights under the law of nations. Federal court jurisdiction over cases likely to implicate these principles would prevent state courts from undermining the United States’ foreign policy by disregarding them. It would take a couple of decades before the Court would clearly articulate the precise basis of its authority to enforce certain principles derived from the law of nations as the law of the land. At the time of the Founding, however, it was clear that federal jurisdiction over cases implicating the law of nations would further federal political branch authority over foreign

relations.

1. Foreign Relations Powers of the Federal Political Branches.—The Constitution is structured to enable the federal government to conduct foreign relations and ensure compliance with the law of nations. Article II provides that “The executive Power shall be vested in a President of the United States of America;”\(^{135}\) that “The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;”\(^{136}\) that “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties;”\(^{137}\) that “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls;”\(^{138}\) and that “he shall receive Ambassadors and other public Ministers.”\(^{139}\) The power to send and receive ambassadors enabled the new federal government, on behalf of the United States, to recognize foreign nations as equal and independent sovereigns entitled to the perfect rights described by Vattel.\(^{140}\)

In addition, Article I gives Congress power to “regulate Commerce with foreign Nations;”\(^{141}\) “establish an uniform Rule of Naturalization;”\(^{142}\) regulate the value “of foreign Coin;”\(^{143}\) “constitute Tribunals inferior to the supreme Court;”\(^{144}\) “define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations;”\(^{145}\) “declare War, grant Letters

\(^{135}\) U.S. Const. art. II, § 1, cl. 1.
\(^{136}\) Id. art. II, § 2, cl. 1.
\(^{137}\) Id. art. II, § 2, cl. 2.
\(^{138}\) Id.
\(^{139}\) Id. art. II, § 3.

140. Although today we often equate recognition of foreign states with the President’s power to receive ambassadors, the Founders arguably understood the act of sending ambassadors as an equal, if not more important, step in the process. See Adler, supra note 51, at 137, 146–49. The constitutional design supports this conclusion because it gives the President unilateral power to receive ambassadors, U.S. Const. art. II, § 3, but requires Senate approval to send ambassadors, id. art. II, § 2, cl. 2. In addition to sending and receiving ambassadors, the President and the Senate arguably trigger recognition of a foreign state or government by making a treaty, and Congress arguably triggers recognition by appropriating money to pay the expenses and salary of an ambassador to a country seeking recognition. See Julius Goebel, Jr., The Recognition Policy of the United States 131–33 (1915) (recounting debate over recognition of Spain and congressional resolutions regarding foreign ministers sent to South America). Once the United States recognized a foreign nation—by whatever means—the United States would risk giving that nation just cause for war if it failed, as a whole, to respect the perfect rights of that nation.

141. U.S. Const. art. I, § 8, cl. 3.
142. Id. art. I, § 8, cl. 4.
143. Id. art. I, § 8, cl. 5.
144. Id. art. I, § 8, cl. 9.
145. Id. art. I, § 8, cl. 10. For an insightful analysis of this power, see J. Andrew Kent, Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations, 85 Tex. L. Rev. 843 (2007) (arguing clause authorizes regulation of individuals whose conduct violates international law, and authorizes punishment of foreign and domestic states for violations of international law).
of Marque and Reprisal, and make Rules concerning captures on Land and Water;” 146 “raise and support Armies;” 147 “provide and maintain a Navy;” 148 “provide for calling forth the Militia to . . . repel Invasions;” 149 “provide for organizing, arming, and disciplining, the Militia;” 150 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.” 151

At the same time, Article I specifically restricts the states’ ability to conduct their own foreign relations, ensuring they do not exercise powers assigned to the federal government. Section 10 provides in absolute terms that “No State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal.” 152 It also states that:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. 153

Taken together, these provisions assign several specific powers concerning foreign relations to the political branches of the federal government; notably, they apportion all of the foreign relations powers that Blackstone identified as Crown prerogatives 154 between the President, the Senate, and Congress as a whole. The Constitution disables states from exercising these powers in pursuit of their own foreign relations. 155 In addition, the Constitution enables the federal government to override state law by a variety of means—by exercising its express constitutional powers, by

146. U.S. Const. art. I, § 8, cl. 11.
147. Id. art. I, § 8, cl. 12.
148. Id. art. I, § 8, cl. 13.
149. Id. art. I, § 8, cl. 15.
150. Id. art. I, § 8, cl. 16.
151. Id. art. I, § 8, cl. 18.
152. Id. art. I, § 10, cl. 1.
153. Id. art. I, § 10, cl. 3.
154. Supra notes 118–128 and accompanying text.
155. Although Article I, § 10 disables the states in key respects from conducting their own foreign policy, it does contain several omissions. For example, it does not prohibit the states from sending and receiving ambassadors. Nonetheless, the Founders understood that some federal powers necessarily imply exclusivity. See The Federalist No. 32, at 200 (Alexander Hamilton) (Jacob Cooke ed., 1961) (explaining Constitution conferred exclusive federal power and alienated state sovereignty “where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant”); The Federalist No. 82, at 553–54 (Alexander Hamilton) (Jacob Cooke ed., 1961) (stating that “where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible,” such authority is “exclusively delegated to the federal head”). Because the Founders understood that the “Union will undoubtedly be answerable to foreign powers for the conduct of its members,” The Federalist No. 80, at 536 (Alexander Hamilton) (Jacob Cooke ed., 1961), permitting states to send and receive ambassadors “would necessarily undermine the foreign relations of the United States as a whole,” Clark, Federal Common Law, supra note 70, at 1298.
making a “Treaty” or by enacting a “Law.” All of these methods rest on “the supreme Law of the Land” and thus override contrary state law.\textsuperscript{156} Addressing one of the flaws that Randolph saw in the Articles of Confederation, the Constitution requires state legislators and executive officials (as well as state judges) to take an oath “to support this Constitution” and its hierarchy of authorities.\textsuperscript{157}

2. \textit{Foreign Relations and the Judicial Branch.}—The Constitution also uses state and federal judiciaries to uphold the political branches’ conduct of foreign relations. It provides two limited judicial mechanisms to uphold federal political authority when federal and state law, or federal and state actors, come into conflict: (1) the Supremacy and Arising Under Clauses provide for judicial enforcement of the supreme law of the land—i.e. the Constitution, laws, and treaties of the United States, and (2) Article III authorizes federal court jurisdiction over categories of cases likely to implicate various branches of the law of nations. This section explains these two mechanisms and their limits.

a. \textit{The Supremacy of Federal Enactments.}—The Founders of the Constitution adopted the Supremacy and Arising Under Clauses of the Constitution to prevent states from undermining the proper enforcement of enacted federal laws. Accordingly, they designated the “Constitution,” “Laws,” and “Treaties” as supreme municipal law in the states, binding on state judges and enforceable in federal courts. Unlike other provisions of the Constitution,\textsuperscript{158} these provisions make no reference to the customary law of nations, and participants in ratification debates did not understand them to incorporate such law per se. At the same time, members of the founding generation would have understood certain perfect rights to be integral to political branch recognition of foreign nations—and thus would have assumed judicial respect for those rights to follow upon a federal municipal act of recognition.

The Supremacy Clause provides:

\begin{quote}
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
\end{quote}

In parallel language, the Arising Under Clause of Article III provides: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this

\begin{itemize}
\item \textsuperscript{156} U.S. Const. art. VI, cl. 2 (defining “the supreme Law of the Land” and stating that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).
\item \textsuperscript{157} Id. art. VI, cl. 3.
\item \textsuperscript{158} See, e.g., id. art. I, § 8, cl. 10 (granting Congress power “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).
\item \textsuperscript{159} Id. art. VI, cl. 2.
\end{itemize}
Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”160 As explained, scholars adhering to the “modern” position have asserted that the customary law of nations constitutes part of the “Laws of the United States” within the meaning of these clauses. Accordingly, in their view, it qualifies as “the supreme Law of the Land” and provides a predicate for federal court arising under jurisdiction.161 Scholars adhering to the “revisionist” position have refuted this assertion, arguing that the text and structure of the Constitution demonstrate that “Laws of the United States” in the Supremacy and Arising Under Clauses refers solely to acts of Congress.162 The framing and ratification of these clauses lend support to the argument that “Laws” meant acts of Congress, not the customary law of nations.163

The delegates to the Federal Convention of 1787 considered several means by which to ensure the supremacy of national prerogatives against the states. Among the most debated means was a congressional negative of state laws contravening national prerogatives,164 which Madison deemed “essential to the efficacy & security of the Genl. Govt.”165 The Convention, however, following debate on the negative, ultimately rejected it.166 Immediately thereafter, Luther Martin proposed a supremacy provision as an alternative:

”[T]he Legislative acts of the U. S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U. S., shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or

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160. Id. art. III, § 2, cl. 1.
161. See supra note 3 and accompanying text.
162. See supra note 4 and accompanying text.


164. The “Virginia Plan,” as put forth by Edmund Randolph on May 29, 1787, provided at least three such mechanisms. First, it would have empowered the national legislature “to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.” 1 Farrand’s Records, supra note 133, at 21. Second, it would have empowered the national legislature “to call forth the force of the Union” against states that violated the articles of the plan. Id. Third, it provided for a national judiciary comprising “inferior tribunals” and a “supreme tribunal” with jurisdiction over several classes of cases, including those involving “the national peace and harmony.” Id.
165. 2 id. at 27.
166. Id. at 27–28.
their Citizens and inhabitants—and that the Judicaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.”

The Convention unanimously adopted this proposal to bind state judiciaries to national “acts” and “treaties” as “the supreme law of the respective States.” Against the backdrop of English practice, it was natural to designate written enacted laws as “supreme” because, unlike general customary laws, they were not subject to local deviations.

The Convention next considered what role a national judiciary should play in maintaining the supremacy of enacted federal laws. It ultimately adopted a resolution proposed by Madison to extend jurisdiction to “cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.”

It appears that Madison specified the arising under category to ensure, after the defeat of the negative, that Congress could enable federal courts to apply acts of Congress as rules of decision as a means of upholding their supremacy over contrary state law.

In further proceedings, the Convention conformed the language of the Supremacy Clause to that of the Arising Under Clause, strengthening both provisions as interlocking means of ensuring the supremacy of federal law.

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

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

168. 3 id. at 286-87.

169. See supra notes 48–49 and accompanying text (describing this understanding in English practice).

170. 2 Farrand’s Records, supra note 133, at 38–39.

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

It unanimously extended the Supremacy Clause to encompass not only national laws and treaties, but the Constitution itself. Soon thereafter it extended federal court jurisdiction beyond cases arising under “laws” passed by the national legislature to capture also cases arising under “this Constitution” and under “treaties made or which shall be made” under the authority of the United States. Through this process, as James Liebman and William Ryan have explained, the Framers devised a “judicial review device” to replace “federal legislative review of state laws for consistency with national law.”

In short, evidence from the framing and ratification of the Arising Under and Supremacy Clauses suggests that the Founders understood these clauses to be concerned solely with the enforcement of laws of the United States made under the authority of the United States—the “Constitution,” “Laws,” and “Treaties”—by domestic political actors according to distinct sets of procedures found in the Constitution. The Founders would have understood, of course, that the federal political branches could trigger the clauses by incorporating aspects of the law of nations into federal laws and treaties. Moreover, as the next section will explain, members of the founding generation would come—as occasions arose for providing fuller explanations of constitutional powers—to describe the Constitution itself as requiring courts to respect certain rights of the foreign nations that the political branches had recognized. These perfect rights were derived from the law of nations. Absent such constitutional mandate or political branch incorporation, however, the law of nations, by itself, did not trigger either the Supremacy or Arising Under Clauses.

b. Enforcement of the Law of Nations.—Because the Arising Under Clause did not cover all cases involving the law of nations, the Constitution provided an alternative mechanism to ensure the proper application of the

173. 2 Farrand’s Records, supra note 164, at 381–82, 389, 394–95, 409.
174. Id. at 430.
175. Id. at 431.
176. Liebman & Ryan, supra note 163, at 733. The ratification debates reflect this understanding of the Arising Under and Supremacy Clauses. Participants described arising under jurisdiction as encompassing cases in which a law made under the authority of the United States provided a determinative rule of decision. See Bel lia, Origins, supra note 163, at 306–12. Likewise, participants justified arising under jurisdiction as a means of ensuring impartial enforcement of federal enactments and promoting their uniform interpretation. See id. at 312–16.
177. See U.S. Const. art. VII (specifying procedures for initial “Establishment of this Constitution”); id. art. V (establishing procedures for amending “this Constitution”); id. art. I, § 7, cl. 2 (prescribing procedures for transforming Bill into Law); id. art. II, § 2, cl. 2 (setting forth procedures for making Treaties); see also Clark, Separation of Powers, supra note 163, at 1331 (“Both the specificity of, and the purposeful variations among, the procedures prescribed by the Constitution for adopting the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ suggest exclusivity.”).
broader law of nations—giving federal courts jurisdiction over categories of cases in which the various branches of the law of nations were likely to apply. Certain Framers favored going further and giving federal courts jurisdiction over all cases arising under the law of nations.179 The Convention, however, chose instead to extend the judicial power to several types of cases in which the law of nations was likely to apply. Prominent Framers strenuously argued for federal jurisdiction over categories of cases implicating the law of nations (particularly the law of state-state relations) in order to prevent state courts from generating foreign conflict by disregarding such law.

Proponents of the Constitution emphasized that the United States must observe the law of nations in order to obtain a place of respect among other nations.180 Indeed, the states’ inability to treat British creditors fairly (as required by the Treaty of Peace) or to protect foreign ambassadors (as required by the law of nations) stood among the events that precipitated the Federal Convention.181 When Edmund Randolph opened the Convention, one of the first points he made was that the confederation was powerless to counteract a state that “acts against a foreign power contrary to the laws of nations or violates a treaty.”182 Both Randolph and Madison expressed concern that states, by disregarding the law of nations, would lead the confederation into armed conflict. Madison opposed Paterson’s “New Jersey Plan” in part because the federal court jurisdiction it provided was insufficient to “prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars”—”among the greatest of national calamities.”183

179. An outline of the Pinckney Plan found among the Wilson papers proposed establishing “a federal judicial Court” with appellate jurisdiction over “all Causes wherein Questions shall arise . . . on the Law of Nations.” 2 The Records of the Federal Convention, supra note 164, at 136. Similarly, another document in Wilson’s hand proposed giving the federal judiciary authority to hear appeals in all cases that may arise “on the Law of Nations, or general commercial or marine Laws.” 2 The Records of the Federal Convention, supra note 164, at 157 (emphasis omitted).
180. See infra note 293 and accompanying text.
181. See generally
182. 1 Farrand’s Records, supra note 133, at 24. According to Randolph:
If a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the confederation] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war. If the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender. . . . None of the judges in the several States [are] under the obligation of an oath to support the confederation, in which view this writing will be made to yield to State constitutions.
Id. at 24–25.
183. Id. at 316; see also A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution, (Oct. 10, 1787), in 2 The Complete Anti-Federalist 86, 88 (Herbert J. Storing ed., 1981) (asserting that “the law of nations is unprovided with sanctions in many cases, which deeply affect public dignity and public justice” and predicting that the confederation might be “doomed to be plunged into war, from its wretched impotency to check offences against this law”). In the Virginia ratifying convention, Madison also argued that the failure of states to
Article III plainly contemplates federal court jurisdiction over several categories of cases likely to involve branches of the law of nations well known to the Framers. In drafting Article III, they not only relied on the Arising Under Clause (encompassing the Constitution, laws, and treaties), but also specifically delineated additional categories of cases likely to involve the national peace and harmony. It is significant that the Framers included these categories as distinct heads of jurisdiction separate and apart from the arising under grant. The Arising Under Clause and the Supremacy Clause were inextricably linked to the proposition that enacted federal law was “supreme” law that all courts, federal and state, must strive to enforce properly and construe uniformly. Accordingly, the Framers delineated cases involving “national peace and harmony” as distinct from cases arising under the three enacted forms of the supreme law of the land. As finalized and ratified, Article III extends the federal judicial power

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

Although several officials would come to describe the law of nations as part of the law of the land, as English writers had described it, the structure of Article III confirms that they did not understand such law to be “the supreme Law of the Land” of its own force any more than their English counterparts did. Nor did they believe it to be law “made in pursuance” of the Constitution. The law of nations, in other words, took on the status of the supreme law of the land only when incorporated by the “Constitution,” “Laws,” or “Treaties” of the United States.

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

honor the law of nations was negatively affecting commercial intercourse. See 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter Elliot’s Debates] (“We well know, sir, that foreigners cannot get justice done them in these courts [of the states], and this has prevented many wealthy gentlemen from trading or residing among us.”).

184. See supra notes 173–174 and accompanying text.
186. For additional historical and structural reasons why the Founders would not have understood the common law and the law of nations to be “made in pursuance” of the Constitution, see Clark, Procedural Safeguards, supra note 172, at 1685–87.
“cases arising under the laws and Constitution of the United States.” 188 Congress had created two Superior Courts in the territory of Florida and given them exclusive jurisdiction in “all cases arising under the laws and Constitution of the United States.” 189 One party claimed that the exercise of admiralty jurisdiction by the inferior territorial court was inconsistent with the Superior Court’s exclusive jurisdiction. The Supreme Court rejected this argument, concluding that a case in admiralty is not necessarily a case arising under the laws and Constitution of the United States.

Marshall began by reciting that Article III extends the judicial power to three distinct classes of cases: “‘to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.’” 190 According to Marshall, these categories are not interchangeable:

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise. 191

In short, Canter leaves no doubt that the Supreme Court did not understand cases of admiralty and maritime jurisdiction—involving an important branch of the law of nations—to be categorically cases arising under “the Laws of the United States” within the meaning of Article III. 192

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188. Id. at 545.
189. Id. at 543.
190. Id. at 545 (quoting U.S. Const. art. III, § 2).
191. Id. at 545.
192. Four years earlier, Chief Justice Marshall, writing for the Court, similarly implied that general principles of law were not “Laws of the United States” under which a case could arise for purposes of Article III jurisdiction. Osborn v. United States, 22 U.S. (9 Wheat.) 738, 819 (1824). The Court addressed whether a case brought by the Bank of the United States arose under the act of Congress establishing the Bank and defining its capacities when the outcome of the case turned on general principles of equity. Marshall framed the jurisdictional question as whether the fact that “general principles of the law” were involved in the case along with federal law rendered the case not one “arising under” federal law. Id. at 819–21. Osborn held that so long as a federal law “forms an ingredient” of the original cause, “it is in the power of Congress to give [inferior federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it.” Id. at 823. This holding necessarily implied that, absent a federal law forming an “ingredient” of the original cause, the operation of general law in the case would be insufficient to establish constitutional arising under jurisdiction.
Other jurisdictional categories were also likely to entail application of the law of nations. Most important, the law of state-state relations could provide rules of decision not only in admiralty, but also in ambassadorial and alienage cases. In *The Federalist*, Hamilton explained why federal jurisdiction in cases involving state-state relations was necessary to “the peace of the confederacy.” This jurisdiction rests on a plain proposition, that the peace of the whole ought not to be left at the disposal of a part. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversity of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

With respect to maritime disputes in particular, Hamilton observed that even “[t]he most bigotted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary cognizance of maritime causes.” These cases, he explained, “so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.” He was referring here primarily to prize cases. In defending Article III’s inclusion of “Cases of admiralty and maritime Jurisdiction,” Hamilton observed that “[t]he most important part of them are by the present Confederation submitted to federal jurisdiction.” Here, Hamilton was referring to the fact that the Articles of Confederation gave the national judiciary jurisdiction over “the trial of piracies and felonies committed on the high seas; and . . . appeals in all cases of captures.”

For Hamilton, federal jurisdiction was appropriate not just because the law of nations might govern, but because state courts might offend foreign nations by disregarding or misapplying such law. This argument applied beyond cases implicating perfect rights and the law of state-state relations. For example, in “Controversies . . . between Citizens of different States” and
between Citizens of a State and foreign Citizens, the law merchant, or general commercial law, would often furnish the rule of decision, as *Swift v. Tyson* famously recognized. 200 Likewise, the law maritime would typically govern in private maritime cases. 201 The Founders recognized that jurisdiction over such cases was necessary to encourage interstate and international trade and commerce. 202 Indeed, Hamilton went further and argued that jurisdiction was necessary even over cases within these categories “which may stand merely on the footing of the municipal law” rather than “arising upon treaties and the law of nations.” 203 Federal jurisdiction was necessary in all cases, Hamilton explained, because “an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*” could, “if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations.” 204 Hamilton thus justified federal court jurisdiction in these cases on the ground that federal courts were more likely than state courts to refrain from sanctioning aggression upon the sovereignty of foreign nations and thereby keep the United States out of foreign conflict.

In *The Federalist*, Jay likewise declared it to be “of high importance to the peace of America that she observe the law of nations toward all these powers.” 205 He emphasized the importance of federal court jurisdiction over cases implicating the law of nations to avoid local deviations from its principles:

> [U]nder the national government, treaties and articles of treaties, as well as the law of nations, will always be expounded in one sense and executed in the same manner,—whereas, adjudications on the same points and questions, in thirteen states, or in three or four confederacies, will not always accord or be consistent. 206

The primary way that the Constitution furthered respect for the law of nations was to authorize federal court jurisdiction over cases likely to implicate it, and to enable Congress to make such jurisdiction exclusive if necessary. “The wisdom of . . . committing such questions to the jurisdiction and judgment of
courts appointed by, and responsible only to one national government,” Jay observed, “cannot be too much commended.” 207

As Chief Justice of the United States, Jay provided a similar account of federal court jurisdiction in Chisholm v. Georgia. 208 He explained that before the Constitution was ratified

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

These were among the evils against which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation. 209

On this view, the Supremacy Clause, Arising Under Clause, and the other Article III jurisdictional grants worked together to uphold the prerogatives of the national political branches in matters of national concern.

c. Limitations of the Judicial Mechanisms.—It is worth noting, however, a crucial limitation of these mechanisms: Since they existed to uphold political branch authority, Congress retained authority to define the extent to which their exercise by courts was necessary. The Constitution specified the creation of “one Supreme Court,” but left it to Congress to decide whether to create “inferior Courts” and to specify their jurisdiction. 210 Congress, of course, created lower federal courts in 1789, but did not vest them with original jurisdiction over cases arising under the Constitution, Laws, and Treaties of the United States. 211 In addition, although Congress authorized jurisdiction in diversity suits between foreign citizens and state citizens, it imposed a $500 amount in controversy requirement. 212 This forced most existing British creditors to sue in state court where they were unlikely to

207. Id.
208. 2 U.S. (2 Dall.) 419 (1793).
209. Id. at 474 (emphasis omitted).
211. In 1801 the outgoing Federalist Congress for the first time gave federal courts original “cognizance . . . of all cases in law or equity, arising under the constitution and laws of the United States,” Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, but the Jeffersonian Republican Congress repealed that grant in 1802 (along with other measures outgoing Federalists had enacted to strengthen the Federalist judiciary), see Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132. Congress did not again confer jurisdiction on federal courts to hear cases arising under federal law until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.
212. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.
They could raise their rights under the Treaty of Peace in those proceedings, but federal judicial recourse could only be had through appeal by writ of error in the Supreme Court.

In at least two areas, however, Congress carefully structured federal jurisdiction to enable federal courts to prevent state violations of the law of nations in the first instance. First, Section 13 of the Judiciary Act of 1789 gave the Supreme Court exclusive "jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations." In addition, a year later Congress used its power to define and punish offenses against the law of nations to establish that, upon conviction, those who prosecute, solicit, or execute any writ or process against "any ambassador or other public minister of any foreign prince or state . . . shall be deemed violators of the law of nations, and disturbers of the public repose, and imprisoned not exceeding three years." These statutes had their intended effect: There do not appear to have been any suits successfully prosecuted against ambassadors or other public ministers since their enactment.

Second, Section 9 of the Judiciary Act gave lower federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Significantly, this provision was understood to give federal courts exclusive jurisdiction over prize cases—a category of cases governed by the law of nations and liable to provoke a war if handled improperly. Congress's treatment of prize cases and cases against ambassadors shows that it had multiple tools at its disposal to ensure compliance with the law of nations. In the Judiciary Act,

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214. § 25, 1 Stat. at 85–86.

215. § 13, 1 Stat. at 80.


218. § 9, 1 Stat. at 77.

219. See Jennings v. Carson, 13 F. Cas. 540, 542–43 (D. Pa. 1792) (No. 7281) (explaining that prize cases were regarded as “civil causes of admiralty and maritime jurisdiction” and thus fell within the federal courts’ “exclusive original cognizance” under Judiciary Act); see also Clark, Federal Common Law, supra note 70, at 1350–53 (examining federal courts’ admiralty jurisdiction under Judiciary Act).

220. See Clark, Federal Common Law, supra note 70, at 1334–37 (arguing “it was essential to the public peace and the amicable relations of nations that prize courts adhere closely to the law of nations” because “a nation was responsible for the actions of its” privateers).
Congress carefully used federal court jurisdiction to prevent state courts from offending the law of nations in ways that posed particular threats to the peace of the United States.

* * *

In sum, the Constitution originally provided limited judicial mechanisms for maintaining federal political authority in foreign relations. The Supremacy Clause obligated state courts to follow enacted federal law and the Arising Under Clause authorized federal judicial enforcement of obligation. Jurisdiction over other cases implicating foreign relations would in turn help avoid foreign conflict not initiated by the national political branches. It was clear to the founders that federal jurisdiction over cases implicating the law of nations would serve to maintain federal authority in foreign affairs. It was not immediately clear, however, how the law of nations related to federal or state municipal law, or the extent to which the Constitution required courts to apply the law of nations in such cases. The next Part describes the initial confusion that surrounded this question and how the Court ultimately would resolve it.

II. EARLY CONSTITUTIONAL PRACTICE

The Constitution does not specify the status of the law of nations in U.S. courts. In England, the common law simply incorporated the law of nations as municipal law. In America, the states received the common law of England, presumptively incorporating the law of nations as part of each state’s law. Whether the national government also received the common law (and therefore the law of nations) was initially contested and not definitively resolved until a few decades after the founding. Beginning in 1812, the Supreme Court recognized that “there can be no common law of the United States”221 (and thus no wholesale incorporation of the law of nations as federal municipal law). Thereafter, federal courts came to apply certain aspects of the law of nations not because they were part of a true federal common law, but because adherence to such law was necessary to implement the Constitution’s allocation of foreign relations powers.

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

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221. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834) (“There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union.”); see United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32–33 (1812) (rejecting federal common law crimes).
heads of state), the Supreme Court enforced perfect rights derived from the law of nations for reasons that would seem to bind state and federal courts alike. Specifically, the Court read the political branches’ Article I and II powers over foreign relations—especially the recognition and war powers—to require judicial enforcement of perfect rights. It is not uncommon for the Court to read constitutional provisions in light of background principles of the common law or law of nations against which they were drafted, and the foreign relations powers are no exception. Understood in historical context and in light of the Constitution’s allocation of foreign affairs powers, the law of nations supplied courts with a narrow, yet crucial set of default rules. If followed, such rules would prevent both the judiciary and the states from usurping the federal political branches’ exclusive constitutional prerogatives to recognize foreign nations, to manage questions of war and peace, and to decide on behalf of the nation whether, when, and how to risk war by departing from such rules.

A. The Common Law in the Early Federal Republic

After declaring independence, “eleven of the original thirteen colonies immediately adopted ‘receiving statutes’ expressly incorporating the common law as state law.”222 The twelfth state, New Jersey, received the common law by including a similar provision in its Constitution of 1776.223 Connecticut did not adopt a written constitution until 1818, but its judiciary incorporated the common law into its unwritten constitution “so far as it corresponds with our circumstances and situation.”224 Thus, prior to ratification of the Constitution, state courts applied the various branches of the law of nations as part of the common law or, as they often put it, as part of the law of the land.

For example, in a famous Pennsylvania case predating the Constitution, the defendant was indicted at common law for assaulting and threatening the Consul General of France “in violation of the law of nations, against the peace and dignity of the United States and the Commonwealth of Pennsylvania.”225 Chief Justice M’Kean described the case as one “of first impression in the United States” that “must be determined on the principles of the law of nations, which form a part of the municipal law of Pennsylvania.”226 The jury convicted the defendant and the Chief Justice reiterated that the law of nations, “in its full extent, is part of the law of this State, and is to be collected from the

224. 1 Zephaniah Swift, A System of the Laws of the State of Connecticut 1 (Windham, John Byrne Pub. 1795); see also id. (“A common law peculiar to ourselves, resulting from our local circumstances, has been established by the decision of our courts; but has never been committed to writing.”).
226. Id. at 114.
practice of different Nations, and the authority of writers.”

The sentence—“more than two years imprisonment” and a fine—was chosen not only to punish the offender, but also “to deter others from the commission of the like crime, preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world.” After ratification, state courts continued to apply the law of nations as part of their municipal common law.

The question quickly arose after ratification whether the United States could also prosecute individuals for committing common law crimes. The Judiciary Act of 1789 gave federal courts exclusive jurisdiction of crimes and offenses “cognizable under the authority of the United States.” For two decades following ratification, public officials in the United States debated whether federal courts had jurisdiction to define and punish common law offenses against the United States in the absence of further congressional action. In other words, they debated whether the United States had a municipal common law of crimes that incorporated, among other things, certain offenses against the law of nations.

To understand contemporaneous opinions of early executive branch officials and judges, one must appreciate their initial assumption that the United States—like the states—had received the common law and thus could prosecute and punish common law crimes, including offenses against the law of nations. Under English law, criminal penalties and private remedies were matters of municipal governance. It was on the assumption that the United States had received a municipal common law of crime that public officials discussed how violations of the law of nations constituted judicially cognizable offenses against the United States.

227. Id. at 116 (emphases omitted).
228. Id. at 118.
229. Id. at 117.
230. See, e.g., Brown v. Union Ins. Co. at New-London, 4 Day 179, 186–87 (Conn. 1810) (Swift, J.) (“[O]ur adoption of the marine law, ha[s] established principles decisive of this question,” and “[t]he same consequences must result from our having adopted the law of merchants.” (emphases omitted)); Pearsall v. Dwight, 2 Mass. 84, 88, 1 Tyng 84, 89 (1806) (“This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law.”); Desebats v. Berquier, 1 Binn. 336, 345 (Pa. 1808) (Tilghman, C.J.) (“[W]e have always been sensible of the importance of paying a high regard to the law of nations. It is considered as incorporated with, and forming a part of, our common law.”).
231. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (providing district court jurisdiction); id. § 11, 1 Stat. at 83 (providing circuit court jurisdiction).
233. At the time of the founding, penal laws—including common law criminal offenses—were conceived to be local rather than general laws. See Anthony J. Bellia, Jr., Congressional Power and State Court Jurisdiction, 94 Geo. L.J. 949, 959–65 (2006) [hereinafter Bellia, Congressional Power] (discussing application of early penal law).
234. See Bellia, Congressional Power, supra note 233, at 955—56; supra notes 32–36 and accompanying text.
For example, in 1792, Attorney General Edmund Randolph considered whether the arrest of a public minister’s domestic servant was punishable as a common law offense. Randolph addressed whether the arrest was punishable under either the Crimes Act of 1790 or the common law as a violation of the law of nations. He began his opinion by explaining that “[t]he law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.” Immediately thereafter, Randolph emphasized the importance of respecting foreign sovereignty through the law of nations: “[W]ith regard to foreigners, every change [that a nation makes to the law of nations] is at the peril of the nation which makes it.” Randolph recognized, however, that Congress could by statute supersede what otherwise would be the common law’s incorporation of the law of nations. And regarding the case at hand,—”that of arresting a domestic”—Randolph stated that “Congress appear to have excluded every resort to the law of nations.” Accordingly, the minister could challenge the arrest by appealing “to the federal act alone.”

Randolph’s assumption that a violation of the law of nations was punishable under federal common law was soon tested. A crucial issue facing the new nation was its stance in the war between England and France. Following the French Revolution, President Washington submitted a series of questions to his cabinet, including the following: (1) “Shall a minister from the Republic of France be received,” and (2) “If received shall it be absolutely or with qualifications, and if with qualifications, of what kind.” Jefferson urged full recognition, while Hamilton urged reception with reservations. Although Washington received the French envoy Edmond Charles Genet (known as Citizen Genet) without reservation, he soon issued his famous

238. Id.
239. Id. at 28.
240. Id. In his opinion, Randolph considered not only the legality of the arrest, but the legality of the entry into the house to serve the execution. Randolph explained that if the act of Congress criminalized the arrest, the act of entering would be “absorbed in the arrest.” In that case, the federal courts could entertain a prosecution, as they “are open to all cases cognizable under the authority of the United States.” If, on the other hand, the act of Congress did not criminalize the arrest, the arrest would be punishable, “if at all, under the law of nations, as being left untouched by the municipal act.” Were this the case, “the mere going into the house and executing a precept will probably sustain a prosecution; but, at best, it would be esteemed sumnum jus” (a matter of extreme right that, if enforced, would produce injustice). Id.
241. 12 The Writings of George Washington 280 (Ford ed.). Washington also asked: “Are the United States obliged by good faith to consider the treaties heretofore made with France as applying to the present situation of the parties? May they either renounce them or hold them suspended till the government of France shall be established?” Id.
Neutrality Proclamation in an attempt to keep the United States at peace.\footnote{243} The effect of the Proclamation was to renounce any suggestions of alliance between the United States and France under preexisting treaties.\footnote{244} In other words, the United States sought to maintain friendly relations with two nations it now recognized as equal and independent states under the law of nations.\footnote{245}

The Neutrality Proclamation declared that the United States would punish citizens who committed, aided, or abetted hostilities against any of the warring powers. Although Congress had enacted no applicable statute, the President issued “instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall . . . violate the law of nations with respect to the powers at war.”\footnote{246} The Proclamation relied on three assumptions: The United States had received the common law, the common law incorporated the law of nations, and federal prosecutors and judges were free to enforce such law through criminal prosecutions without congressional authorization.

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

The true nature & design of such an act is—to make known to the powers at War and to the Citizens of the Country, whose Government does the Act that such country is in the condition of a Nation at Peace with the belligerent parties, and under no obligation of Treaty, to become an associate in the war with either of them; . . . and as a consequence of this state of things, to give warning to all within its jurisdiction to abstain from acts that shall contravene those duties, under the penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention.\footnote{247}

The Proclamation, he concluded, “informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the Infractors of them.”\footnote{248}

\footnote{244} See Goebel, supra note 242, at 112.
\footnote{245} At the time, nations were understood to have a perfect right to remain neutral. See Vattel, supra note 52, at *333 (“When a war breaks out between two nations, all other states . . . are free to remain neut[ral].”). Nations had to be vigilant, however, about maintaining neutrality, which required “a strict impartiality towards the belligerent powers.” Id. at *332. Should a nation “favour one of the parties [at war] to the prejudice of the other, she cannot complain of being treated by him as an adherent and confederate of his enemy.” Id.
\footnote{248} Id. at 43. The Jay Treaty soon gave Hamilton another occasion to examine the law of nations. Defense No. XX of his “Camillus” essays defended Article 10, which prohibited the United States or Britain from confiscating or sequestrating the debts, money, or security of the
Secretary of State Thomas Jefferson similarly explained to the French Minister that the United States, to preserve its neutrality, had a right under the law of nations to prohibit France from arming vessels in the United States to use against England.\textsuperscript{249} He indicated that a domestic vessel armed against nations with which the United States was at peace would offend the law of nations. Accordingly, Jefferson described such vessels as “marked in their very equipment with offence to the laws of the land, of which the law of nations makes an integral part.”\textsuperscript{250} Here, Jefferson referred to the law of nations as the law of the land in the same manner as Randolph had.

In the summer of 1793, Chief Justice Jay more thoroughly explained the theory behind prosecutions based on the law of nations. In charging the grand jury in Richmond, Virginia, he explained that the circuit court had “cognizance only of offences against the laws of the United States,” and that “[t]he Constitution, the statutes of Congress, the laws of nations, and treaties constitutionally made compose the laws of the United States.”\textsuperscript{251} In directing the grand jurors to return indictments for common law crimes against the United States premised upon offenses under the law of nations, Jay stated that their obligation to do so derived in part from the deference courts and individuals owe Congress in foreign affairs. He explained that “the laws of reason and nature” directed independent governments “to abstain from violence, to abstain from interfering in their respective domestic government and arrangements, [and] to abstain from causing quarrels and dissensions.”\textsuperscript{252}

Because of the “respect” that “nations owe to each other,” Jay charged, “[i]f in this district you should find any persons engaged in fitting out privateers or enlisting men to serve against either of the belligerent powers, and in other


\textsuperscript{250} Id.


\textsuperscript{252} Jay, Public Papers, supra note 251, at 481.
respects violating the laws of neutrality, you will present them.”253 In Jay’s view, the Constitution’s allocation of powers required individuals, courts, and grand jurors to respect the rights of foreign sovereigns and leave retaliatory action to the political branches:

Of national violations of our neutrality our government only can take cognizance. Questions of peace and war and reprisals and the like do not belong to courts of justice, nor to individual citizens, nor to associations of any kind, and for this plain reason: because the people of the United States have been pleased to commit them to Congress.254

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

Such measures involve a variety of political considerations, such, for instances, as these: Is it advisable immediately to declare war? Would it be more prudent first to remonstrate, or demand reparation, or direct reprisals? Are we ready for war? Would it be wise to risk it at this juncture, or postpone running that risk until we can be better prepared for it? These and a variety of similar considerations ought to precede and govern the decision of those who annul violated treaties, order reprisals, or declare war.255

“Until war is constitutionally declared,” Jay concluded, “the nation and all its members must observe and preserve peace, and do the duties incident to a state of peace.”256 Thus, “[a]s judges and grand jurors, the merits of those political questions are without our province.”257

Justice James Wilson delivered a similar charge to the federal grand jury in Pennsylvania that indicted Gideon Henfield for agreeing to serve as the captain of a French privateer tasked with attacking British ships.258 Wilson instructed that “the common law” had been “received in America,” that “the law of nations” to “its full extent is adopted by her,” and that “infractions of that law form a part of her code of criminal jurisprudence.”259 He further stated that “a citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country.”260

253. Id. at 482–83.
254. Id. at 483—84; see also Henfield’s Case, 11 F. Cas. 1099, 1101–1103 (C.C. D. Pa. 1793) (No. 6360) (Charge of Jay, C.J. to grand jury in Richmond, Virginia) (describing “laws of nations” as part of “law of the United States,” and explaining that “they who commit, aid, or abet hostilities against . . . powers [relative to whom the United States are in a state of neutrality] . . . offend against the laws of the United States, and ought to be punished”).
256. Id. at 485.
257. Id.
258. Henfield’s Case, 11 F. Cas. at ___.
259. Id. at 1106–07 (quoting Blackstone’s Commentaries).
260. Id. at 1108.
counsel protested the lack of congressional authorization for the prosecution. In charging the petit jury, Justice Wilson (on behalf of himself, Justice Iredell, and Judge Peters) rejected this suggestion:

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

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

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

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261. Id. at 1120.

262. Currie, supra note 246, at 15 & n.63.

263. 4 Annals of Cong. 11 (1793).

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

265. Id. (prohibiting U.S. citizens within U.S. from accepting commission under foreign army or navy).

266. See, e.g., United States v. Ravara, 27 F. Cas. 714 (C.C.D. Pa. 1794) (No. 16,122a) (convicting defendant for sending threatening letters, behavior that was treasonous in England and indictable under common law); United States v. Smith, 27 F. Cas. 1147 (C.C.D. Mass. 1792) (No. 16,323) (convicting defendant for common law contempt for counterfeiting bank bills).

267. 2 U.S. (2 Dall.) 384, 28 F. Cas. 774 (C.C.D. Pa. 1798).

268. Id. at 391.

269. Id. (arguing that “the very powers that are granted [to the central government] cannot take effect until they are exercised through the medium of a law”).

270. Id. at 393.
criminal, or to pronounce a sentence on conviction.”

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

James Madison led the Republican attack and raised two powerful objections to the idea that the Constitution incorporated the common law. First, he specifically denied that the common law was adopted by the Constitution because the consequence would be that “the authority of Congress [would be] co-extensive with the objects of common law.” That conclusion would mean that Congress’s power would be “no longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever.” Second, Madison argued that federal incorporation of the common law “would confer on the judicial department a discretion little short of a legislative power.” He explained that such incorporation would “present an immense field for judicial discretion” because it would require federal courts “to decide what parts of the common law would, and what would not, be properly applicable to the circumstances of the

271. Id. at 394.
272. Ch. 74, § 2, 1 Stat. 596, 596 (1798).
274. William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 149 (1995) (quoting Letter from Oliver Ellsworth to Timothy Pickering (Dec. 12, 1798)); see also H.R. Rep. No. 5-110, in 1 American State Papers: Miscellaneous 181 (1799) (resolving to not repeal Alien and Sedition Acts); 9 Annals of Cong. 2989 (1799) (“[T]he act in question cannot be unconstitutional, because it makes nothing penal that was not penal before, and gives no new powers to the court, but is merely declaratory of the common law.”).
276. Id. at 382.
277. Id. at 380.
278. Id.; see also 9 Annals of Cong. 3012 (1799) (statement of Rep. Nicholas) (“The nature of the [common] law of England makes it impossible that it should have been adopted in the lump into such a Government as this is; because it was a complete system for the management of all the affairs of a country.”).
In his view, giving federal judges this degree of discretion “over the law would, in fact, erect them into legislators.” 281

The debate subsided in 1801 with Thomas Jefferson’s election as President and the expiration of the Sedition Act. 282 In 1806, however, federal prosecutors charged two Federalist editors with common law seditious libel. The case reached the Supreme Court in 1812, and the Court rejected federal common law crimes. 283 Because both the Attorney General and the defendant’s counsel declined to argue the case, Justice Johnson issued a brief opinion on behalf of the Court. 284 He framed the question as “whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases.” 285 Undoubtedly referring to the debate surrounding the Sedition Act, Johnson stated that the question had long been “settled in public opinion.” 286 Before a federal court may exercise jurisdiction in such a case, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.” 287

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

280. Id. at 381.
281. Id. Thomas Jefferson was even more emphatic:
Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been . . . solitary, unconsequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the [United States], without the adoption of their legislature, and so infinitely beyond their power to adopt.
284. Id. at 32.
285. Id.
286. Id.
287. Id. at 34. For further discussion of the judiciary’s initial embrace—and ultimate rejection—of federal common law crimes, see Clark, Separation of Powers, supra note 163, at 1404–12. Sitting as a Circuit Justice, Justice Story tried to distinguish Hudson & Goodwin in a case involving prosecution of an individual for forcibly rescuing a prize—an offense against the law of nations. See United States v. Coolidge, 25 F. Cas. 619 (C.C.D. Mass. 1813) (No. 14,857). A majority of the Supreme Court, however, declined “to review their former decision in [Hudson and Goodwin], or draw it into doubt.” United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816).
nations. Federal courts did not apply these rights (if they ever had) on the assumption that the law of nations or the common law constituted part of “the Laws of the United States,” but because upholding such rights served to implement the Constitution’s allocation of powers.

B. Applying the Law of Nations to Uphold the Constitution’s Allocation of Foreign Affairs Power

In the nation’s first decades, the Supreme Court and other federal courts applied principles of the law of nations as rules of decision in dozens of cases. In many cases, courts applied the law merchant or the law maritime to resolve private commercial disputes. These courts did not purport to apply these branches of the law of nations as either state law or as preemptive federal law; they simply applied them without attributing them to any particular sovereign.

The Supreme Court, however, from the first years of the Republic, attached special significance to judicial enforcement of the law of state-state relations in certain contexts. At first glance, the law of state-state relations appears to have operated in the same way as other branches of the law of nations, such as the law merchant or private law maritime. Cases involving the law of state-state relations were all decided well before Congress gave inferior federal courts arising under jurisdiction in 1875. Moreover, none were brought within the Supreme Court’s appellate arising under jurisdiction over state law cases denying enforcement of a federal right; all originated in federal courts under other heads of jurisdiction. Most of the cases in which federal courts invoked the law of nations as a rule of decision fell within the federal courts’ jurisdiction over admiralty and maritime cases, which the Marshall Court expressly held did not automatically trigger arising under jurisdiction.

Nonetheless, judges and other public officials considered adherence to the law of state-state relations uniquely important to the peace and dignity of the United States. In 1793, Secretary of State Thomas Jefferson sent a letter to Chief Justice John Jay and the other justices of the Supreme Court seeking...
advice on twenty-nine questions about the obligations of the United States under treaties and the state-state relations branch of the law of nations. Jefferson recognized that violations of treaties and the law of nations could both embroil the United States in foreign conflict and diminish its standing with other nations; he claimed that opinions from the Court on these questions would “secure us against errors dangerous to the peace of the U.S. and their authority ensure the respect of all parties.” The administration recognized that courts had only limited opportunities to adjudicate such questions, which “are often presented under circumstances which do not give a cognizance of them to the tribunals of the country,” either because such tribunals lacked jurisdiction or the laws afforded no judicially cognizable remedy. Chief Justice Jay famously declined to answer the questions Jefferson posed, reciting “strong arguments against the propriety of our extra-judicially deciding the questions.” Nonetheless, Jay continued to recognize that adherence to the law of nations was crucial “to the preservation of the rights, peace, and dignity of the United States.” In subsequent years, in the course of adjudication, the Court would confront several of the questions that Jefferson had posed.

Significantly, it was primarily in cases involving the law of state-state relations that federal courts declared the law of nations to be “part of the law of the land.” Justices were aware that disregard of certain principles of the law of nations—the so-called perfect rights of sovereigns—could trigger bilateral foreign conflict. From the first years of union, justices explained how respecting perfect rights under the law of nations served to prevent courts from engaging the United States in bilateral foreign conflict. Indeed, when faced with competing principles of the law of nations as rules of decisions, justices gave preference to principles that avoided conflict over those that might generate conflict. In the wartime prize cases of the 1810s, the Court began expressly tying the application of the law of nations to the Constitution’s allocation of powers. The Court justified application of certain principles on the ground that, under the separation of powers, the political branches had exclusive authority to take action—such as disregard of perfect rights under the law of nations—that could embroil the United States in foreign conflict. Linking the law of nations to the Constitution’s allocation of powers coincided with two developments: First, the Court rejected the theory that the United States had received the common law (and by incorporation the law of nations) as its own municipal law; and, second, the United States had more experience

295. Id.
296. Id.
298. Letter from Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 Jay, Public Papers, supra note 251, at 488.
299. Id. at 489.
with foreign conflict—conflict that could necessitate political branch decisions to act contrary to the law of nations. The Court enforced perfect rights to avoid generating foreign conflict, recognizing, however, that the political branches were free to make law in derogation of the law of nations, and such law would bind courts as the supreme law of the land.

Whether principles of the law of nations preempted contrary state law was not debated during these early decades: Congress gave federal courts exclusive jurisdiction over cases most likely to involve the law of state-state relations, and these cases did not involve conflicting state law. In certain cases, however, the Court applied law of nations principles for the stated reason that the Constitution’s allocation of powers required it. These cases all involved law of nations principles that Blackstone deemed essential to upholding national prerogatives in foreign affairs,\(^\text{300}\) prerogatives that the Founders apportioned between Congress and the President. By reasoning that the constitutional allocation of powers required it to adhere to certain principles of the law of nations, the Court laid the groundwork for its future holding that such principles apply in both state and federal court, and even in the face of conflicting state law.

Interpreting the Constitution in light of background principles known to the founders is nothing new. Such principles provide crucial context. Accordingly, the Court has interpreted many provisions of the Constitution to incorporate aspects of the common law or law of nations. The Court has read the Fourth Amendment’s prohibition on unreasonable searches and seizures, for instance, to incorporate common law rights it meant to protect.\(^\text{301}\) The extension of federal judicial power in Article III to “Cases, in Law and Equity,” is incomprehensible without reference to understandings of law and equity that subsisted in English law.\(^\text{302}\) The power of Congress to “grant Letters of Marque and Reprisal” exclusive of states is likewise meaningless without reference to what such letters were understood to be under the law of nations.\(^\text{303}\)

The same analysis applies, for present purposes, to Articles I and II. The powers to send and “receive ambassadors”—and thereby recognize foreign

\(^300\) See supra Part I.A.2.d.


\(^302\) See, e.g., Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (explaining that the Article III “[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies’”). The Seventh Amendment provides another example along these lines. See Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830) (explaining that “[t]he phrase ‘common law’ in the Seventh Amendment ‘is used on contradistinction to equity, and admiralty, and maritime jurisprudence’

\(^303\) See, e.g., Barron v. City of Baltimore, 32 U.S. 243, 249 (1833) (Marshall, C.J.) (explaining that for a state “[t]o grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress.”)
nations—are sensible only with reference to the perfect rights that nations afforded one another under the law of nations. Likewise, the powers to “declare war” and conclude peace are sensible only with reference to the customary respect for the perfect rights of nations in peacetime because disregard of such rights gave nations just cause for war. As Blackstone explained regarding English practice, judicial respect for perfect rights served to sustain the sovereign prerogatives of political authorities to determine such questions of foreign relations.

This section explains how federal courts—in particular, the Supreme Court—employed the law of nations from ratification through the War of 1812 to respect perfect rights and, correspondingly, to preserve the constitutional prerogatives of the federal political branches to recognize foreign nations and determine when the United States should risk conflict with such nations.

1. The Law of Nations and Avoiding Bilateral Foreign Conflict.—In the years immediately following ratification, the Supreme Court (or individual Justices) described how judicial failure to abide by certain principles of the law of nations in a given case would disrespect the perfect rights of another nation. In 1795, *Talbot v. Jansen* considered whether Ballard, a United States citizen, and Talbot, an alleged French citizen, had lawfully captured the Magdalena, a Dutch vessel owned by citizens of the Netherlands. The evidence showed Ballard actually made the capture, but that Talbot had outfitted Ballard’s vessel with the necessary guns. The Court refused to sanction the capture of a neutral vessel as violating rights of neutrality and use of the seas, a capture that if sanctioned would provide just cause for war against the United States. Writing in seriatim, Justice Paterson found the capture, if made by Ballard alone, to be “altogether unjustifiable” because it was of a vessel of a country “at peace” with the United States. The question, therefore, was whether Talbot could detain the vessel pursuant to a French commission. Justice Paterson explained that under the law of nations Talbot, though French, could not use United States vessels to capture ships of nations “friendly” with the United States: “The principle deducible from the law of nations, is plain;—you shall not make use of our neutral arm, to capture vessels of your enemies, but of our friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded.”

Justice Iredell similarly explained that unauthorized acts of hostility against a foreign nation violate the law of nations: “[N]o hostilities of any

304. 3 U.S. (3 Dall.) 133 (1795).
305. Id. at 155, 157 (Paterson, J.).
306. Id. at 123—25; id. at 154–57 (Paterson, J.); see also Vattel, supra note 19, at *126, *336–37 (describing rights of neutrality and use of the seas as perfect rights).
308. 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 (Cushing, J.) (emphasis omitted).
kind, except in necessary self-defence, can lawfully be practised by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority.”

Indeed, he continued, “[e]ven in the case of one enemy against another enemy . . . there is no colour of justification for any offensive hostile act, unless it be authorised by some act of the government giving the public constitutional sanction to it.”

Like Paterson, Iredell noted that to sanction this capture because it was made under pretense of a French commission would be “insulting to the French Republic, which, from a regard to its own honour and a principle of justice, would undoubtedly disdain all piratical assistance.” In an oft-cited passage, 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.”

This statement is consistent with the circuit court opinion that Iredell joined two years earlier in *Henfield’s Case*, defending the common law prosecution of an American citizen for breaching the United States’ neutrality in violation of the law of nations.

At the time, Iredell and others simply assumed that the common law (including the law of nations) applied in the United States and supplied federal courts with jurisdiction over, and rules of decision to govern, common law crimes.

In another 1795 case, *United States v. Peters*, the Supreme Court applied a rule of the law of nations respecting a foreign nation’s territorial sovereignty instead of a competing rule of the law of nations that, in operation, would have undermined its territorial sovereignty.

The question was whether a United States district court could hear a libel for damages against a French vessel, the Cassius, at port in Philadelphia. James Yard, a Philadelphia merchant, charged in his libel that the Cassius, commissioned by France to cruise against enemy ships, had violated the law of nations by capturing his vessel on the high seas and taking it to France for adjudication.

Recall that just two years earlier President Washington recognized the new French government and sought to maintain friendly relations with France.

The Court issued a writ of prohibition divesting the American court of jurisdiction, the exercise of which would violate the law of nations:

> [B]y the laws of nations, the vessels of war of belligerent powers, duly by them authorized, to cruize against their enemies, and to make

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309. Id. at 160 (Iredell, J.).
310. Id. at 160–61.
311. Id. at 159 (emphasis omitted).
312. Id. at 161. Chief Justice Rutledge agreed with his colleagues that the capture violated the law of nations, but saw fit to justify the Court’s admiralty “jurisdiction of the cause.” Id. at 169 (Rutledge, C.J.).
313. See supra notes 259–265 and accompanying text.
314. 3 U.S. (3 Dall.) 121 (1795).
315. Id. at 130–31.
316. See supra notes 241–250 and accompanying text.
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.\textsuperscript{317}

The Court described Yard’s libel as “contriving and intending to disturb
the peace and harmony subsisting between the United States and the French
Republic.”\textsuperscript{318} Indeed, it characterized the district court proceedings as “in
contempt of the government of the United States, against the laws of nations,
and the treaties subsisting between the United States and the French Republic,
and against the laws and customs of the United States.”\textsuperscript{319} Thus, rather than
proceed to determine whether France had violated neutral rights by capturing
the Cassius, the Court determined that the law of nations required it to respect
territorial sovereignty by leaving this question exclusively to the courts of the
capturing country.\textsuperscript{320}

This case presents an early, clear example of the Supreme Court enforcing
the perfect rights of a recognized foreign sovereign and preventing the federal
courts from embroiling the United States in foreign conflict. The aggrieved
party was free to seek redress from the political branches, which could
decide—in the exercise of their foreign relations powers—what action, if any,
the United States should take on his behalf. Under the Constitution, however,

\footnotesize{317. Id.; 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”). Indeed, courts generally respected the territorial sovereignty of foreign courts by
giving faith and credit to their ordinary judgments. See Vattel, supra note 52, at *166 (describing
respect that courts of one sovereign owe to judgments rendered by courts of another). That said,
courts did not respect the judgments of foreign courts acting beyond their territorial sovereignty.
This “conflict of laws” rule—derived from deeply held notions of territorial sovereignty and
equality—was well established. See id. at *165–66 (recognizing absolute connection between
sovereign’s authority and its territory, and arguing foreign sovereign must respect judgment
against its subjects in other jurisdiction); see also infra notes 337–350 and accompanying text.
Along these lines, the Court also refused to acknowledge the legitimacy of tribunals that foreign
nations established within the territorial jurisdiction of the United States. In Glass v. The Sloop
Betsey, the Court addressed two questions: first, whether United States district courts possessed
the full powers of admiralty courts and, second, “whether any foreign nation had a right, without
the positive stipulations of a treaty, to establish in this country, an admiralty jurisdiction for
taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its
enemies.” 3 U.S. (3 Dall.) 6, 15 (1794). After holding that district courts do possess the full
powers of admiralty, the Court held that “no foreign power can of right institute, or erect, any
court of judicature of any kind, within the jurisdiction of the United States, but such only as may
be warranted by, and be in pursuance of treaties.” Id. at 16 (emphasis omitted).
318. Peters, 3 U.S. (3 Dall.) at 130 (emphasis omitted).
319. Id. at 131 (emphasis omitted).
320. Id. at 130. See also Vattel, supra note 52, at *155–69 (describing obligation to respect
perfects rights of others to govern within their own domains).}
the judiciary was powerless to take the lead by disregarding sovereign rights under the law of nations and thereby risking foreign conflict.

2. Acts of Congress and the Law of Nations.—In *Talbot* and *Peters*, the Court enforced the law of nations in ways that avoided offending the sovereign rights of other nations. The Court was cautious about offending such rights even when interpreting acts of Congress. When a statute did not clearly invade the sovereign rights of another nation, the Court read it to respect those rights, and thereby protected the United States from conflicts that Congress had not plainly authorized. When Congress clearly intended to take action that risked foreign conflict, however, the Court enforced congressional directives as written.

a. Interpreting Unclear Acts of Congress to Respect Perfect Rights.—The famous 1804 case, *Murray v. Schooner Charming Betsy*, 321 exemplifies the Court’s practice of interpreting unclear congressional directives to respect perfect rights recognized under the law of nations. 322 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. 323 In *Charming Betsy*, the Court held that this Act did not authorize seizure of an American-built vessel that an American captain sold at a Dutch Island to an American-born Danish burgher, who proceeded to carry the vessel for trade to a French island. 324 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.” 325 He determined that the Act did not plainly express such an intent. “If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed.” 326 By applying this canon of construction, Marshall ensured that Congress, rather than the Court, would determine whether the United States should risk foreign conflict by interfering with perfect rights under the law of nations to engage in neutral commerce. 327 Unless and until Congress clearly manifested its intent to interfere with such rights, the Court would not risk imputing to Congress such a major foreign policy decision.

321. 6 U.S. (2 Cranch) 64 (1804).
322. For an earlier example, see *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 29–32 (1801).
323. Federal Non-intercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801).
325. Id. at 118.
326. Id. at 119 (emphasis omitted).
327. See Vattel, supra note 52, at *336–37 (recognizing perfect right of neutral nation to engage in neutral trade).
b. **Applying Clear Congressional Directives Derogating the Law of Nations.**—When, however, Congress enacted clear laws generating or risking conflict, the Court recognized a duty on its part to enforce such directives notwithstanding their deviation from background rules of the law of nations. For example, in *Bas v. Tingy*, the Court applied a federal statute regulating salvage rights in ships or goods “retaken from the enemy.” One question presented was whether France, with whom the United States was engaged in the “Quasi-War,” was an “enemy” under the statute. Justice Chase observed that “[t]here are four acts, authorised by our government, that are demonstrative of a state of war.” After enumerating these acts, he explained that “[t]his suspension of the law of nations, this right of capture and recapture, can only be authorised by an act of the government, which is, in itself, an act of hostility.” Chase went on to enforce the congressional directive, as did each of the other Justices.

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

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

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328. 4 U.S. (4 Dall.) 37 (1800).
331. Id. at 43 (recounting authorization to resist attempted search by French vessel, capture any vessel attempting to compel search, recapture seized American vessel, and capture any armed French vessel).
332. Id. at 44.
333. Id.
334. 13 U.S. (9 Cranch) 244 (1815).
335. Id. at 279–80 (argument of counsel).
336. Id. at 287 (Story, J.). Conversely, of course, Congress could grant greater protection to foreign sovereign interests than the law of nations provided. See, e.g., *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 428 (1814) (explaining that “[t]he right of capture is entirely derived from the law” and “[i]t is a limited right, which is subject to all the restraints which the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed”).
Rose v. Himely\footnote{337. 8 U.S. (4 Cranch) 241 (1808).} illustrates the Court’s emerging practice of linking respect for the rights of foreign sovereigns to the Constitution’s allocation of powers. A French privateer captured cargo in international waters that the original owner had shipped from the French colony of Santo Domingo.\footnote{338. Id. at 241–42.} The privateer took the cargo to Cuba and sold it to a purchaser who, in turn, brought it to South Carolina. The original owner filed a libel there to recover his goods. While this action was pending, a tribunal sitting in Santo Domingo pronounced a sentence of condemnation, and the purchaser defended his title on this basis.\footnote{339. Id.} The question before the Court was whether U.S. courts must give effect to the foreign judgment.

Before answering this question, the Court deemed it necessary to consider “the relative situation of St. Domingo and France.”\footnote{340. Id. at 272.} It was important to the Court, as a preliminary matter, to identify the sovereign whose rights were at issue: The question of whether the United States had recognized a breakaway territory as a sovereign nation was analytically antecedent to the question whether the Court must uphold its rights under the law of nations. Santo Domingo had been a colony of France and had declared its independence. At the time of suit, however, “France still asserted her claim of sovereignty, and had employed a military force in support of that claim.”\footnote{341. Id.} Invoking Vattel, the purchaser argued that Santo Domingo, “having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact.”\footnote{342. Id.} The Court rejected this argument on the ground that it is for the government rather than its courts to decide whether and when to recognize a colony as a sovereign nation:

But the language of [Vattel] is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as subsisting.\footnote{343. Id. at 274.}

The reason for this rule is that judicial recognition of Santo Domingo as an independent nation—while France still claimed sovereignty—would be regarded by France as a violation of “that exclusive dominion which every nation possesses within its own territory.”\footnote{344. Id. at 274.} Accordingly, decisions regarding when and how to recognize Santo Domingo, like the original decision to
recognize France, must be made by the political branches rather than the courts. In a subsequent case, Marshall elaborated the separation of powers rationale underlying this conclusion:

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

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

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

345. “No doctrine [was] better established,” according to Justice Story, than that sovereigns have exclusive authority to recognize new states that emerge from revolutions. Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 324 (1818). “[U]ntil such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.” Id.
347. Rose, 8 U.S. (4 Cranch) at 276 (“If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive.”).
348. Id.
349. Id.
350. Id.
351. 11 U.S. (7 Cranch) 116 (1812).
352. See supra notes 283–287 and accompanying text.
353. The Schooner Exchange, 11 U.S. (7 Cranch) at 117.
354. Id.
vessel [of another country], found within the waters of the United States.”\textsuperscript{355} The Court answered “no,” finding it to be a “principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.”\textsuperscript{356}

Significantly, the opinion made clear that this immunity was a consequence of the Constitution’s allocation of foreign relations powers. The exemption for foreign war ships in the United States, like diplomatic immunity, could not derive its “validity from an external source” because the “jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”\textsuperscript{357} Thus, it “must be traced up to the consent of the nation itself”\textsuperscript{358} in conformity with “those principles of national and municipal law by which it ought to be regulated.”\textsuperscript{359} In this case, the Court suggested that the United States’ consent could be implied from the practice of nations and could be destroyed only by “the sovereign power of the nation.”\textsuperscript{360}

This “sovereign power” rested with the political branches, not the courts.\textsuperscript{361} This meant that war ships were immune from judicial process, unless and until the political branches decided otherwise. Chief Justice Marshall acknowledged that, “[w]ithout doubt, the sovereign of the place is capable of destroying” the immunity suggested by the law of nations.\textsuperscript{362} “He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals.”\textsuperscript{363} The first method involves the use of military force, and the second involves the exercise of legislative power. In no case, however, could the nation’s courts disregard the implied immunity of foreign war ships on their own.

Marshall went even further. To ensure that the political branches, not the courts, make the decision to risk foreign conflict by invading the rights of foreign sovereigns, the opinion imposed a clear statement rule similar to the one employed in \textit{Charming Betsy}: “But until such power [to destroy implied immunity] be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.”\textsuperscript{364} That the decision rested on the separation of powers draws additional support from Marshall’s suggestion “that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to

\begin{footnotes}
\item[355] Id. at 135.
\item[356] Id. at 145–46.
\item[357] Id. at 136.
\item[358] Id.
\item[359] Id. at 135–36.
\item[360] Id. at 146.
\item[361] Id. at ___.
\item[362] Id. at 146.
\item[363] Id.
\item[364] Id.
\end{footnotes}
which such wrongs give birth are rather questions of policy than of law, [and] that they are for diplomatic, rather than legal discussion.”

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

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

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

366. See supra notes 314—319 and accompanying text (describing Peters).

367. The Schooner Exchange did, however, describe the immunity that it accorded foreign warships as analogous to the immunity of foreign ministers, 11 U.S. ___ 91, 7 Cranch 116, 145—46, a perfect right in Vattel’s lexicon. Vattel, supra note 52, at *452–64. Nonetheless, Vattel did not explicitly describe the former immunity as a perfect right.

368. The Court explained that interference with a sovereign’s public armed ship, like interference with a public minister, “cannot take place, without affecting his power and his
“[i]f the courts of the United States should exercise such a jurisdiction it will amount to a judicial declaration of war.” Thus, an essential part of the Court’s rationale for following the practice of nations in *The Schooner Exchange* was that the Constitution assigns responsibility to the political branches, not the courts, to determine whether the United States should take action likely to provoke war with another nation.

The War of 1812 generated a flurry of significant prize cases in the Supreme Court. The Act of Congress declaring war against Great Britain authorized the President to issue commissions to privateers to cruise against British vessels and goods. In a subsequent act, Congress required any American vessel leaving the United States for a foreign port to give a bond with security that it would not trade with enemies of the United States.

In the next few years, the Supreme Court resolved the legality of several captures made by privateers pursuant to the declaration of war and presidential commissions. It enforced the congressional directive of conflict, but respected the prerogatives of Congress to limit the degree of conflict by carrying the directive no further than Congress had clearly provided in light of the background principles of the law of nations against which Congress had legislated.

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369. *Id.* at 126.

370. Because the Court’s decision rested on the Constitution’s allocation of powers, *The Schooner Exchange* suggests that states—like federal courts—are precluded from denying immunity to French warships. In addition to implicating federal war powers, failure to uphold immunity arguably would have undermined the United States’ recognition of France. As the Court explained in another case, the judiciary must respect the sovereign rights of a foreign state because “[t]o him all the departments of government make but one sovereignty.” *The Santissima Trinidad, 20 U.S. (7 Wheat.)* 283, 299 (1822). Under this theory, a violation of such rights by either the federal judiciary or the states would usurp powers assigned to the political branches. See Clark, *Federal Common Law*, supra note 70, at 1300–06, 1308–09, 1319 (explaining that application of the law of nations is sometimes necessary to preserve the constitutional authority of the federal political branches to conduct foreign relations).


373. For example, *The Rapid* considered whether Congress had authorized capture of an American vessel engaged in trade with the enemy. *12 U.S. (8 Cranch) 155 (1814).* Because the vessel qualified as belligerent under background principles of the law of nations, the Court found the capture to be lawful. *Id.* at 163. Based on these principles, the Court proceeded to decide in several other 1814 cases whether vessels captured by commissioned American privateers were belligerent (and thus liable to lawful capture) under the law of nations. See *The Grotius, 12 U.S. (8 Cranch) 456, 460 (1814).* (finding case to differ “in no material respect from that of the *Joseph*”); *The Joseph, 12 U.S. (8 Cranch) 451, 455–56 (1814).* (upholding capture under *The Rapid* and *The Alexander* and explaining that captures may be made on high seas or within territorial limits of the United States); *The Hiram, 12 U.S. (8 Cranch) 444, 451 (1814).* (“Upon the whole, the Court is of opinion that there is no substantial difference between this case and that of the *Julia . . . .*”); *The St. Lawrence, 12 U.S. (8 Cranch) 434, 444 (1814).* (“The St. Lawrence was certainly guilty of trading with the enemy; and, being taken on her way from one of [h]is ports to the United States, she is liable, on that ground, to be confiscated as prizes of war . . . .”); *The Sally, 12 U.S. (8 Cranch) 382, 383 (1814).* (“This case cannot be distinguished from that of [The]
One of the most important decisions from this period is *Brown v. United States.* It provides an interesting contrast to *The Schooner Exchange* insofar as *Brown* held unlawful a confiscation of enemy property—that the law of nations permitted—on the ground that Congress had not authorized it. The Court considered whether the U.S. Attorney for the District of Massachusetts could lawfully confiscate British property (550 tons of pine timber scheduled to be shipped from the United States to Great Britain) found within the United States at the commencement of hostilities between the United States and Britain. Apparently without the President’s knowledge or consent, the U.S. Attorney filed a libel to condemn the timber as enemy property.

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.” That the United States had power to confiscate the property, however, was insufficient to sustain the confiscation. Congress had to exercise that power to make it lawful. Since Congress had not done so, Marshall concluded that judicial condemnation of the property would usurp political authority vested by the Constitution in Congress.

Marshall expressly rejected the argument that the principle of the law of nations that subjects enemy property to confiscation “constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power.” War “is not an absolute confiscation of this property, but simply confers the right of confiscation” upon the sovereign. Rather, the law of nations’ allowance that a nation may confiscate enemy property during war is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

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*Rapid.*); The Venus, 12 U.S. (8 Cranch) 253, 297–99 (1814) (determining whether property of American citizens who had settled in Great Britain, captured by American privateer, should be condemned as lawful prize); The Aurora, 12 U.S. (8 Cranch) 203, 219–20 (1814) (finding *The Julia* to control); The Julia, 12 U.S. (8 Cranch) 181, 190 (1814) (holding that use of enemy’s license or protection on voyage to neutral country subjects vessel and goods to lawful capture); The Alexander, 12 U.S. (8 Cranch) 169, 179 (1814) (“The principles settled in the case of the Rapid decides this cause so far as respects the character of the Alexander and her cargo.”).

374. 12 U.S. (8 Cranch) 110 (1814).
375. Id. at 121–23.
376. Id. at 121–22.
377. Id. at 122.
378. Id. at ___.
379. Id. at 128.
380. Id. at 123.
The rule is, in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political consideration which may continually vary.\footnote{381} 

Under the Constitution, Marshall continued, it rests with Congress, not courts, to make the sovereign determination whether the United States should confiscate enemy property during war. “\textit{[F]rom the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law . . . .}”\footnote{382} “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.”\footnote{383} Thus, “until that will shall be expressed, no power of condemnation can exist in the Court.”\footnote{384}

Finally, Marshall determined that Congress’s declaration of war did not, in itself, “authorize proceedings against the persons or property of the enemy found, at the time, within the territory.”\footnote{385} Contrasting the confiscation of enemy property found within the United States with that captured on the high seas, he noted how the declaration of war specifically authorized the President to commission privateers and make general reprisals against British vessels and goods.\footnote{386} This seizure, however, was not made by a commissioned privateer, nor had the U.S. Attorney acted “under the authority of letters of marque and reprisal.”\footnote{387} Indeed, Marshall specifically found that the U.S. Attorney did not make the seizure “under any instructions from the president of the United States.”\footnote{388} Accordingly, since “the power of confiscating enemy property is in the legislature, and . . . the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war,” the courts were without authority to issue a sentence of condemnation.\footnote{389}

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\footnote{381. Id. at 128.} \footnote{382. Id. at 123.} \footnote{383. Id. at 129.} \footnote{384. Id. at 123.} \footnote{385. Id. at 126.} \footnote{386. Id. at 127.} \footnote{387. Id.} \footnote{388. Id. at 121–22. Marshall suggests here that the declaration of war may have empowered the President to formally authorize seizures through letters of marque and reprisal or some other form of instruction, but not U.S. Attorneys acting without a formal instruction from the President.} \footnote{389. Id. at 129. In effect, since the declaration of war did not plainly authorize a U.S. Attorney to confiscate enemy property found in the United States in these circumstances, the Court applied a clear statement rule akin to that of \textit{The Charming Betsy}, supra notes 321–327 and accompanying text, to avoid foreign conflict that Congress had not expressly authorized. In dissent, Justice Story disagreed with Chief Justice Marshall’s conclusion that the Declaration of War had not authorized the confiscation. Justice Story first explained that he found the confiscation of enemy property found within the United States to be lawful under the law of nations. Id. at 139—45 (Story, J., dissenting). “The next question is, whether congress (for with
Fairly read, Brown rests exclusively on a principle of domestic separation of powers—namely, that the political branches must determine the extent to which the United States will engage in—or escalate—hostilities with foreign nations. In Brown, unlike prior cases, the law of nations was not integral to the constitutional analysis. The Schooner Exchange, for example, reserved to Congress the power to create or escalate bilateral foreign conflict by authorizing an act that the law of nations prohibited (disregard of foreign warship immunity). Brown, however, reserved to Congress the power to create or escalate foreign conflict by engaging in an act that the law of nations permitted (confiscation of enemy property). In the former case, the Court preserved congressional authority through judicial enforcement of a principle of the law of nations; in the latter, it preserved congressional authority by declining to exercise a sovereign prerogative under the law of nations. In both cases, the Court sought to uphold the Constitution’s allocation of powers by preserving a foreign relations power that it believed rested exclusively with Congress.

Lastly, in 1815, the Court resolved one of the most famous War of 1812 capture cases, The Nereide, by reference to perfect rights and separation of powers. The question presented was whether it was lawful for a commissioned United States privateer to capture goods belonging to a neutral (a Spaniard) that the privateer found on an enemy (English) vessel. According to the Court, “a neutral has a perfect right to transport his goods in a belligerent vessel.” Although “[b]elligerents have a full and perfect right to capture enemy goods, and articles going to their enemy,” the law of nations rendered neutral goods exempt from capture. The captors nonetheless argued, among other things, that since “Spain . . . would subject American property, under similar circumstances, to confiscation, . . . the property, claimed by Spanish
subjects in this case, ought to be condemned as prize of war.” Chief Justice Marshall, writing for the Court, emphatically rejected this argument on the ground that it was not the judiciary’s place to decide whether or how to retaliate against a foreign government for its breach of the law of nations:

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

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

Ironically, scholars have cited this passage as evidence that federal courts should take the lead over the political branches in enforcing principles of the law of nations as jurisdiction-creating, preemptive federal law. The language cannot bear the weight of this argument. In context, Marshall was observing that federal courts must adhere to perfect rights under the law of nations in order to preserve the constitutional prerogatives of the political branches and avoid creating conflict with other nations. Indeed, Marshall proceeded in just this fashion in The Nereide. He described as a “universally recognized . . . rule of the law of nations” that “a neutral may lawfully put his goods on board a belligerent ship, for conveyance on the ocean.” By upholding this principle and restoring captured goods to their Spanish owner absent congressional direction to the contrary, the Court respected Spain’s neutral rights and refrained from generating bilateral foreign conflict that the political branches had not sanctioned.

395. The Nereide, 13 U.S. at 265, 9 Cranch at 422.
396. Id. at 262–63, 9 Cranch at 422–23.
397. Id. at 263, 9 Cranch at 423.
398. See Koh, supra note 2, at 1825 n.8, 1827—28 (“It seems unlikely that the Chief Justice would have understood the Supreme Court to be ‘bound by the law of nations’ had that law merely represented the law of the several states.”); Stephens, supra note 14, at 394–95 & n.8 (“[I]f international law is part of federal law, it is the law of the land, binding on the states pursuant to the supremacy clause; and state courts are bound to follow federal court decisions as to its meaning.”).
399. Id. at 264, 9 Cranch at 425. This rule is “founded on the plain and simple principle, that the property of a friend remains his property, wherever it may be found.” Id.
* * *

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

This structural inference was grounded in background assumptions about the relationship between political prerogatives in foreign affairs and rights of sovereignty that the law of nations recognized. In almost all cases in which the Court applied the law of nations to uphold separation of powers, it invoked a law of nations principle that Vattel described as a “perfect right”—the violation of which gave a sovereign just cause for war. In the English system, Blackstone described judicial enforcement of such rights as essential to sustaining the prerogatives of the Crown in foreign relations, lest a court give another nation grounds for waging war against England. It is evident that the Marshall Court likewise considered judicial enforcement of perfect rights as essential to sustaining the constitutional prerogatives of the political branches in foreign affairs.

None of these cases expressly involved a preemption question; in each, the federal court exercised exclusive jurisdiction, and state law did not purport to provide a conflicting rule of decision. Moreover, none involved a question of arising under jurisdiction. But insofar as the separation of powers supplied a rule of decision in these cases, there are implications for preemption and arising under jurisdiction. The Constitution, as the “supreme law of the Land,” is preemptive of conflicting state law, and presumably would have governed as the rule of decision had these cases been brought in state court or had they involved conflicting state law. It is beyond the scope of this Article to catalogue those principles of the law of nations that the Founders would have deemed essential to upholding the constitutional allocation of powers. Suffice to say that each case in which the Court applied the law of nations to uphold separation of powers involved what was understood at the time to be a right

400. Even in the earlier cases of the 1790s, when the Court applied principles of the law of nations to keep the United States out of conflict without expressly referencing separation of powers, the Court did so by respecting the perfect rights of sovereigns.
whose violation could lead to war. By respecting such rights, the Court avoided giving nations reason to wage hostilities against the United States, sustaining the powers of the political branches to determine whether and to what extent the United States should be at war or peace. In theory, the constitutional rule of decision upon which certain of these cases turned could have served as a predicate for arising under jurisdiction (had Congress authorized it). It is important to bear in mind that many, if not most, cases falling under other heads of Article III jurisdiction, including those likely to implicate the law of nations, would not have involved this kind of determinative constitutional rule of decision. Thus, the Arising Under Clause would not subsume the other categories of Article III jurisdiction, but there would be some overlap—a common and unremarkable phenomenon.

III. A STRUCTURAL FEDERAL COMMON LAW OF NATIONS

Some contemporary scholars have characterized customary international law as federal common law because federal courts appear to “make” its rules, which state courts are bound to follow even in the face of contrary state law. In reality, the Supreme Court has not considered itself free to adopt or abandon these rules at will. Rather, as this Part explains, the Court has applied the traditional perfect rights of nations (or their modern counterparts) as a way of upholding the Constitution’s allocation of powers over foreign relations. In other words, the Court’s application of these rules does not rest on an interpretation of its own lawmaking powers under Article III, but on its interpretation of Congress’s and the President’s powers under Articles I and II. From this perspective, it follows that states must adhere to these rules not because they are supreme in and of themselves, but because they implement the Constitution’s assignment of foreign affairs power to the federal political branches and denial of such power to the states. As in the eighteenth and

401. Countless cases that fell within non-arising under Article III jurisdiction and in which the law of nations could provide a rule of decision in federal court would not have involved separation of powers. Cases involving the law merchant and private law maritime would not generally involve separation of powers, see supra notes 288–289 and accompanying text, nor necessarily would cases involving envoys, see Vattel, supra note 52, at *461 (“They are not public ministers, and consequently not under the protection of the law of nations.”), or foreigners, see Vattel, supra note 52, at *172–73 (“[F]oreigners who commit faults are to be punished according to the laws of the country,” and “disputes that may arise . . . between a foreigner and a citizen, are to be determined . . . according to the laws of the place.”), to name just two examples.

402. That some cases would qualify for federal jurisdiction under both the Arising Under Clause and another head of Article III jurisdiction was an unavoidable (and unremarkable) feature of delineating categories of cases in which federal court jurisdiction would serve the purposes of Union. For example, it is unremarkable that cases between citizens of different states might fall under both diversity and arising under jurisdiction if governed by, for instance, a federal statute; or that cases to which the United States is a party might fall under both U.S.-party-based and arising under jurisdiction if governed by, say, the Constitution. It would have been impossible for the Framers to devise mutually exclusive categories of federal jurisdiction and there is no apparent reason why they would have attempted to do so.
nineteenth centuries, adherence to such rules serves to implement recognition and preserve amicable bilateral relations between the United States and other nations, leaving to the political branches the often complex policy questions of whether, how, and when to depart from such rules.

This Part describes how, after the early decades of the Republic and across changing eras of American legal thought, the Court has continued to enforce the perfect rights of nations as a means of upholding key separation of powers principles. Viewing judicial adherence to such rights as a means of implementing the Constitution’s allocation of powers provides a persuasive constitutional basis for the Court’s most important decisions from the founding to the present.

A. The Ensuing History

Throughout the eighteenth and nineteenth centuries, the Court continued to employ principles of the law of nations as it had in the first two decades. The most famous cases implicating various branches of the law of nations exemplify this practice. The Court continued both to apply much of the law of nations without considering its source, and to apply traditional rules of state-state relations in ways that upheld federal separation of powers.

First—continuing well beyond the first decades of union—federal courts applied the law of nations in countless cases over which they had jurisdiction without pausing to consider its source. Two situations in which such law was frequently applied were diversity cases and cases of admiralty and maritime jurisdiction involving private rights. In neither type of case did courts generally regard the law of nations as constituting part of “the Laws of the United States” within the meaning of either Article III’s arising under jurisdiction or Article VI’s Supremacy Clause. In this respect, these judges were in accord with the Framers.403

For example, in the nineteenth century, the Supreme Court did not consider the law merchant—a branch of the law of nations—to be part of the “Laws of the United States” within the meaning of the Supremacy Clause. Swift v. Tyson applied the law merchant to resolve a commercial dispute between citizens from different states.404 Neither federal nor state courts considered the other’s decisions on questions of general law to be binding in subsequent cases.405 In Swift itself, of course, the Court declared that even assuming “the doctrine to be fully settled in New York,” it was necessary for the Court “to express [its] own opinion of the true result of the commercial

403. See supra Part I.B.
404. 41 U.S. (16 Pet.) 1 (1842). Of course, jurisdiction in cases applying the Swift doctrine was based on diversity of citizenship rather than federal question jurisdiction.
405. See Fletcher, supra note 70, at 1538–54 (describing cases). When the Supreme Court began “federalizing” aspects of general law in the late nineteenth and early twentieth centuries, some state courts came to describe Supreme Court determinations of general federal law as binding. See Bellia, Federal Common law, supra note 289, at 897–900.
Shortly thereafter, New York’s highest court was urged to follow “the opinion of Mr. Justice Story in the recent case of Swift v. Tyson,” but the court declined the invitation and described the Supreme Court as a “tribunal, whose decisions are not of paramount authority” on questions of general law. If the law merchant had been considered part of the “the Laws of the United States,” then New York courts would not have been free to disregard Swift and their decisions would have provided a basis for Supreme Court review. In fact, as the Erie Court later explained, the federal courts’ inability to bind state courts is what “made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court.”

Moreover, Swift expressly acknowledged, as English courts long had, that general commercial law did not supplant local variations and usages. In the pre-Erie era, federal courts with jurisdiction (whether based on admiralty, diversity, or some other category) simply followed the law of nations in cases where it applied and typically saw no need to explain the precise source of such law.

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

After reviewing the practice of nations (including the United States), the Court explained in a famous passage that it would follow such law in the

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409. See supra note 81 and accompanying text.
410. See supra Part II.B.
411. 175 U.S. 677 (1900).
412. Id. at ___.
413. Id. at 686.
414. Id.
415. Among other things, the Court pointed to early American adherence to that rule in its treaties of 1785, 1799, and 1828 with Prussia. Although noting that England had failed to follow the rule “during the wars of the French Revolution,” id. at 691, the Court stressed that “[i]n the
absence of any “controlling executive or legislative act or judicial decision” to the contrary. According to the Court:

International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves particularly well acquainted with the subjects of which they treat.\(^{416}\)

After reviewing the works of jurists and commentators in some detail, the Court was convinced that “it is an established rule of international law, founded on considerations of humanity . . . [and] mutual convenience . . . that coast fishing vessels . . . are exempt from capture as prize of war.”\(^{417}\)

Although the Court spent many pages demonstrating the existence and contours of this rule, it offered only a single sentence directly addressing why the rule applied to this case: “This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.”\(^{418}\) The Court’s failure to provide further elaboration has rendered the Court’s rationale notoriously unclear. Considered in the context of the precedent upon which it relied and its discussion of executive power, however, the opinion seems to fit comfortably with the separation of powers framework established by earlier decisions.

First, the Court analogized the case to Brown v. United States. 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.”\(^{419}\) This statement suggests that—as in Brown—courts should defer to the political branches (including by following rules of the law of nations analogous to perfect rights) in deciding whether the United States should engage in conduct that foreign nations would regard as hostile and contrary to the practice of nations. Although the modern immunity of fishing boats was not one of Vattel’s perfect rights, it serves the same purpose by establishing a basic rule of conduct between states whose violation could lead to war or, more precisely, escalation of an existing war. Under our Constitution, Congress, and perhaps the President, might decide to subject fishing boats to confiscation. But the

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\(^{416}\) Id. at 700.

\(^{417}\) Id. at 708.

\(^{418}\) Id.

\(^{419}\) Id. at 711 (quoting Brown v. United States, 12 U.S. 110 (1814)).
decision to do so would be a major foreign policy decision likely to expand or prolong hostilities with Spain and lead it to retaliate in some way. As the Court recognized in *Brown*, Congress rather than the courts should control the decision to escalate hostilities, even in the context of a declared war: “Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written.”420

*The Paquete Habana*’s reliance on *Brown* comports with its subsequent discussion of executive power. Proponents of treating international law as federal common law have long puzzled over the Court’s repeated suggestions that the President could override customary international law.421 If international law truly is a part of federal law, then how could the President alone instruct the judiciary to disregard such law? The Court’s position is less puzzling once one realizes that, under *Brown* and other nineteenth century prize cases like *The Schooner Exchange*, rules derived from the law of nations did not apply of their own force, but instead as default rules necessary to preserve the Constitution’s assignment of foreign relations powers. From this perspective, in the absence of political branch authorization, the judiciary could depart from rules whose violation would trigger or escalate a war only by usurping powers assigned to Congress and the President. On the other hand, the presence of a “controlling executive act” taken by the President pursuant to his foreign relations powers or congressional mandate,422 could authorize—or indeed require—courts to depart from rules derived from the law of nations. For example, the President might decide to withdraw our ambassador, expel Spain’s ambassador, or otherwise limit recognition during the war. Alternatively, Congress might authorize the President, in prosecuting the war, to capture fishing vessels otherwise exempt from capture under the law of nations. It is not our purpose here to delineate the respective powers of the political branches in foreign relations. Suffice it to say that the most reasonable reading of the *Paquete Habana*, considered as a whole and in historical context, is that the Court applied a rule of the law of nations analogous to a perfect right in order to preserve for the political branches the decision to escalate hostilities beyond what they already had authorized.

**B. Erie and the Rise of Legal Positivism**

Although separation of powers provided a rationale for upholding perfect rights and their modern counterparts in cases like *The Schooner Exchange* and *The Paquete Habana*, it had less obvious relevance to other branches of the law of nations, such as the law merchant. As explained, nineteenth century

federal and state courts applied the law merchant as a form of general law without deciding whether such law was state or federal. *Swift v. Tyson*423 is perhaps the most famous example. The allocation of powers rationale we identify did not require courts to apply private customary international law such as the law merchant or the law maritime. Such law did not define the attributes of state sovereignty under international law, and failure to adhere to such law did not give nations just cause for war. To the contrary, U.S. states and foreign nations voluntarily chose to apply private customary international law as a mutually beneficial means of promoting interstate and international commerce. International law did not require nations to apply such law. Rather, voluntary adherence to private customary international law served the same ends as its modern counterparts, such as the Uniform Commercial Code and analogous international agreements.

From the beginning, the Supreme Court’s approach to private international law was different than its approach to perfect rights under the law of nations. In diversity cases, the Court famously applied general commercial law unless, as required by Section 34 of the Judiciary Act, there were contrary “local statutes” or “long-established local customs having the force of laws.”424 The Court applied the law merchant in these cases not because such law applied of its own force, but because state common law incorporated such law. The *Swift* Court made this point explicitly when it observed “that the courts of New York do not found their decisions, upon any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law.”425 So long as state courts continued to apply general (as opposed to local) law in commercial cases, federal courts sitting in diversity were free to do the same.426 At the same time, of course, states were free to depart from the law merchant, as they eventually did. Unlike a decision to override perfect rights, such a departure did not implicate the Constitution’s allocation of foreign affairs powers.

Federal courts’ adherence to general law in areas now clearly governed by state law, however, did raise distinct constitutional problems. In *Erie Railroad Co. v. Tompkins*, the Court overturned the *Swift* doctrine as “an unconstitutional assumption of powers by the Courts of the United States.”427 States had long since abandoned adherence to the general law merchant in commercial cases,428 and federal courts had expanded the concept of “general

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425. Id.
426. See Clark, Federal Common Law, supra note 70, at 1286—87.
428. See Bradford R. Clark, Erie’s Constitutional Source, 95 Cal. L. Rev. 1289, 1293–94 (2007) [hereinafter Clark, Constitutional Source] (describing how “state courts gradually abandoned reliance on the general law merchant in favor of localized commercial doctrines” and “state legislatures enacted specific statutes to govern commercial doctrines as a matter of local law”).
law” to include historically local areas of law such as torts and even some property rights. According to the Court, the federal courts’ continued application of general law in diversity cases was untenable because, in the absence of enacted federal law, state law provides the rule of decision in federal courts. General law was neither enacted federal law nor state law. Quoting Justice Holmes, the Court endorsed a fundamental tenet of legal positivism that “‘law in the sense in which courts speak of it today does not exist without some definite authority behind it.’” Accordingly, “[e]xcept in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the State.”

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

The post-_Erie_ status of customary international law was soon tested in _Bergman v. De Sieyes_, a diversity case removed to federal court. Bergman,

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

430. _Erie_, 304 U.S. at 79 (quoting _Black & White Taxicab_, 276 U.S. at 533 (Holmes, J., dissenting)).

431. Id. at 78. One of us has recently argued that, properly understood, _Erie_ rests on the negative implication of the Supremacy Clause—that is, state law applies unless preempted by “the supreme Law of the Land.” See Clark, Constitutional Source, supra note 428, at 1306–11 (arguing _Erie_ Court “presuppose[d] that federal courts have no independent lawmaking authority to displace state law”); see also Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 11–12 (1975) (“[Erie] recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.” (citations omitted)).


433. Id.

434. Id.

435. 170 F.2d 360 (2d Cir. 1948).
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.\(^{436}\) De Sieyes asserted diplomatic immunity under traditional principles of international law; at the time, there was no federal statute or treaty conferring such immunity in U.S. courts.\(^{437}\) Thus, the question was whether a federal court, sitting in diversity, should apply state, federal, or international law to this defense. The Second Circuit, through Judge Learned Hand, held that because service occurred while the case was in state court, “the law of New York determines its validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us.”\(^{438}\) 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 transit would be entitled to the same immunity as a diplomat in situ.”\(^{439}\)

To those who saw international law as a form of federal law, “[i]t made no sense that questions of international law should be treated as questions of state rather than federal law; that they could be determined independently, finally and differently by the courts of fifty states . . .; [and] that . . . [such] determinations . . . by state courts were not reviewable by the Supreme Court” as federal questions.\(^{440}\) 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.”\(^{441}\) The court did not even need to reach this question, however, because it found that state law incorporated the customary international law of diplomatic immunity.\(^{442}\)

Bergman raises the constitutional question whether, in the absence of an applicable federal statute or treaty, state law may override the perfect rights of

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\(^{436}\) Id. at 360–61. This case was not one “affecting Ambassadors, other public Ministers and Consuls” within the meaning of Article III because such jurisdiction only applies to ambassadors, ministers, and consuls assigned to the United States by a foreign sovereign. See Ex Parte Gruber, 269 U.S. 302, 303 (1925) (noting that art. III, § 2, cl. 2 “refers to diplomatic and consular representatives accredited to the United States by foreign powers”).


\(^{438}\) 170 F.2d at 361.

\(^{439}\) Id. at 363.

\(^{440}\) Henkin, supra note 3, at 1559; see also id. at 1558 (“So great a Judge as Learned Hand apparently assumed that international law was part of state common law for this purpose and that a federal court in diversity cases had to apply international law as determined by the courts of the state in which it sat.”); Note, International Law—Diplomatic Immunity—Applicability of the Rule of Erie R. Co. v. Tompkins to International Law, 33 Minn. L. Rev. 540, 540 (1948) (noting “disturbing language used by Judge Learned Hand” in Bergman and arguing that international law should be part of federal common law).

\(^{441}\) 170 F.2d at 361.

\(^{442}\) Id.
recognized foreign states traditionally provided by the law of nations. On the one hand, states might retain this power (at least regarding matters within their territory), with the political branches free to supersede unsatisfactory state law by statute or treaty. On the other hand, states might be required to adhere to perfect rights for the same reason that federal courts must: to preserve the Constitution’s allocation of foreign relations power and avoid provoking war. The decision by the President and the Senate to recognize France by exchanging ambassadors implies that the United States—all of them—recognize France as an independent state entitled to exercise all of its perfect rights under the law of nations. One of these rights was the ability to deploy ambassadors with diplomatic immunity, and this right was broad enough to include diplomats in transit. Under these circumstances, exercising state court jurisdiction over France’s ambassador in transit would interfere with France’s perfect rights, fail to effectuate the United States’ recognition of France, and risk serious conflict. Thus, one could readily conclude that the Constitution’s allocation of powers requires state courts—no less than federal courts—to uphold the prerogatives of the political branches by respecting the immunity of ambassadors in transit.

C. Sabbatino and the Emergence of a “Federal Common Law” of Foreign Relations

The Supreme Court could have followed Judge Hand’s approach when it confronted the status of the act of state doctrine several years later in Banco Nacional de Cuba v. Sabbatino.443 Instead, it squarely held that the doctrine’s scope and applicability must be treated as questions of federal law binding in both state and federal courts. Although the Court justified this conclusion in part by pointing to the existence of several “enclaves of federal judge-made law which bind the States,”444 the decision is best understood as a consequence of the Constitution’s allocation of foreign affairs powers to the political branches of the federal government.445 Sabbatino arose out of Cuba’s decision to nationalize sugar companies located in Cuba and owned in part by American citizens. The suit asked the judiciary to decide whether the original owner or the Cuban government was entitled to the proceeds of sugar sold by Cuba.446 The answer turned on the validity of Cuba’s expropriation. The Supreme Court held that Cuba was entitled to the proceeds because, as a matter of federal law, courts may

not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized

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443. 376 U.S. 398 (1964). The act of state doctrine establishes that the courts of one country will not reexamine the acts of a recognized foreign sovereign taken within its own territory. Id. at 401.
444. Id. at 426.
445. Cf. Monaghan, supra note 431, at 3 (identifying examples of “constitutional common law” inspired and authorized by various constitutional provisions, but “subject to amendment, modification, or even reversal by Congress”).
446. Sabbatino, 376 U.S. at 398.
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.\textsuperscript{447}

The Court acknowledged that it might have avoided the question whether the case was governed by state or federal law because “New York has enunciated the act of state doctrine in terms that echo those of federal decisions.”\textsuperscript{448} Nonetheless, it concluded that “the scope of the act of state doctrine must be determined according to federal law.”\textsuperscript{449}

In \textit{Sabbatino}, the Supreme Court held that the Constitution required federal and state courts both to adhere to a rule based on the traditional perfect right of territorial sovereignty (the act of state doctrine),\textsuperscript{450} and to disregard a more recent rule of customary international law curtailing territorial sovereignty (the proffered prohibition against discriminatory, uncompensated takings).\textsuperscript{451} Both aspects of the holding were necessary to uphold the constitutional prerogatives of the political branches to recognize foreign states and maintain amicable bilateral relations. Although commentators often cite \textit{Sabbatino} for the proposition that customary international law itself qualifies as a kind of binding federal law,\textsuperscript{452} the decision clearly refutes this proposition. First, the act of state doctrine did not reflect the current status of customary international law. As the Court observed, “international law does

\begin{itemize}
\item \textsuperscript{447} Id. at 428.
\item \textsuperscript{448} Id. at 424.
\item \textsuperscript{449} Id. at 427. The Court’s requirement that a foreign sovereign government must be “extant and recognized by this country at the time of suit” appears to tie the act of state doctrine to the political branches’ power to send and receive ambassadors. As one of us recently explained: “Recognition acknowledges on behalf of the United States that a foreign state is entitled to all the rights traditionally associated with sovereign states, including sovereignty within its own territory. The act of state doctrine implements recognition by upholding this sovereignty.” Bradford R. Clark, Domesticating Sole Executive Agreements, 93 Va. L. Rev. 1573, 1651 (2007).
\item \textsuperscript{450} Rules like the act of state doctrine have deep roots in traditional notions of territorial sovereignty under the law of nations. See \textit{supra} notes 64-65 and accompanying text. For example, in \textit{The Santissima Trinidad} the Court considered whether U.S. courts must recognize as a public ship a vessel commissioned by the government of Buenos Ayres, even though no bill of sale was produced to support transfer of ownership from the original owner. 20 U.S. (7 Wheat.) 283 (1822). The Court held that a duly authenticated commission “imports absolute verity.” Id. at 336. The Court also spoke in broad terms reminiscent of the act of state doctrine: Nor will the Courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. Id. The Court explained that this “has been the settled practice between nations,” and that it “cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns.” Id.
\item \textsuperscript{451} See \textit{Sabbatino}, 376 U.S. at 429 (citing authorities).
\item \textsuperscript{452} See, e.g., Henkin, supra note 3, at 1559–61 (“\textit{Sabbatino} . . . effectively resolved the issue.”).
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not require the application of the [act of state] doctrine." 453 Rather, “[m]ost of the countries rendering decisions on the subject decline to follow the rule rigidly.” 454 Since Sabbatino did require courts—as a matter of federal law—to apply the doctrine strictly, it gave foreign sovereigns greater protection than they currently enjoyed under customary international law.

Second, the Court concluded “that the act of state doctrine is applicable even if international law has been violated.” 455 As they had in the lower courts, the original owners urged the Court to recognize an exception to the doctrine on the ground that uncompensated takings by foreign sovereigns violate customary international law. 456 The Court rejected this invitation without pausing to determine whether international law in fact prohibited such conduct. In its view, recognition of any such exception—and the judiciary’s consequent enforcement of international law against foreign sovereigns—would contradict deep-seated concepts of territorial sovereignty and interfere with the President’s conduct of foreign relations:

Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect. 457

In other words, the Constitution’s allocation of powers over foreign affairs does not permit either federal or state courts to second guess the acts of a recognized foreign state taken within its own territory even if necessary to enforce a new and emerging norm of customary international law designed to restrict territorial sovereignty. Rather, the Constitution requires courts to leave efforts to enforce such norms—and thus to interfere with the perfect rights of foreign sovereigns—to the political branches. This is why the Court chose to adhere to the act of state doctrine “in its traditional formulation.” 458 That formulation preserves the political branches’ authority to accept or reject Cuba’s territorial sovereignty by “preclud[ing] the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.” 459

453. Sabbatino, 376 U.S. at 421.
454. Id.
455. Id. at 431.
456. Id. at 406–07, 428–30.
457. Id. at 431–32.
458. Id. at 401.
459. Id. (emphasis supplied).
The *Sabbatino* opinion states these conclusions in various ways. It observes that the “text of the Constitution does not require the act of state doctrine” in the sense of “irrevocably removing from the judiciary the capacity to review the validity of foreign acts of state.”\textsuperscript{460} Congress could, in other words, decide to abrogate the doctrine and direct courts to scrutinize disfavored acts of state.\textsuperscript{461} The Court went on to explain, however, that “[t]he act of state doctrine does . . . have ‘constitutional’ underpinnings”\textsuperscript{462} rooted in the allocation of foreign relations powers to the political branches. The doctrine “arises out of the basic relationships between branches of government in a system of separation of powers,”\textsuperscript{463} 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.”\textsuperscript{464} The act of state doctrine reflects the judiciary’s sense “that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole.”\textsuperscript{465} In other words, it reflects “a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community.”\textsuperscript{466} Because the act of state doctrine reflects the Constitution’s allocation of powers to the political branches, the Constitution does not require courts to follow it in all circumstances. When the political branches choose to abrogate the doctrine, the Constitution permits—indeed, requires—courts to reject its application. In the absence of such abrogation, however, “the act of state doctrine is a principle of decision binding on federal and state courts alike,”\textsuperscript{467} and is best understood as “a consequence of domestic separation of powers.”\textsuperscript{468}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 423.
\item Congress took just this course following *Sabbatino*. In 1964, Congress enacted the second Hickenlooper Amendment, which limited the act of state doctrine in cases like *Sabbatino*. Foreign Assistance Act of 1964 (Hickenlooper Amendment), Pub. L. No. 88-633, sec. 301(d)(4), § 620(e)(2), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)). In fact, in *Sabbatino* itself on remand, the judiciary applied the statute retroactively to defeat Cuba’s claim to the proceeds from expropriated sugar. Banco Nacional de Cuba v. Farr, 383 F.2d 166, 178 (2d Cir. 1967).
\item *Sabbatino*, 376 U.S. at 423.
\item Id. at 423.
\item Id. at 427–28.
\item Id. at 423.
\item Id. at 425. For wrongs created by foreign acts of state, the Court suggested that the remedy lies not with the judiciary, but “along the channels of diplomacy” conducted by the executive. Id. at 418 (quoting Shapleigh v. Mier, 299 U.S. 468, 471 (1937)).
\item Id. at 427.
\item W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 404 (1990). This understanding of the act of state doctrine has potential implications for the so-called *Bernstein* exception, under which courts sometimes relax the act of state doctrine at the request of the State Department. See *Bernstein* v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam) (amending ruling of 173 F.2d 71 (2d Cir. 1949) after State Department expressly endorsed American courts passing judgment on acts of former Nazi
\end{enumerate}
\end{footnotesize}
The Supreme Court’s decision to embrace a traditional rule based on perfect rights and reject a modern rule curtailing such rights follows the pattern found in key decisions from the early republic, such as *United States v. Peters* and *The Schooner Exchange v. McFadden*. In these cases, as in *Sabbatino*, the Court upheld perfect rights (or close analogs) to shield the conduct of a recognized foreign sovereign from judicial scrutiny, even though the claimant in both cases argued that the challenged conduct itself violated distinct rights under the law of nations. Although *The Schooner Exchange* tied its holding to the separation of powers, the *Sabbatino* Court offered a more comprehensive constitutional rationale tied to both separation of powers and federalism. *Sabbatino* also highlights an important point about the interaction of perfect rights and the Constitution over time. The Court has been willing to add to, but not subtract from, the list of default rules based on perfect rights. In *The Schooner Exchange* and *The Paquette Habana*, the Court augmented Vattel’s list of perfect rights with later-emerging customs favoring foreign sovereigns—namely, the immunity of foreign war ships and fishing boats. Judicial adherence to these customs upheld the Constitution’s allocation of powers in much the same way as judicial adherence to perfect rights. In *Sabbatino*, however, the Court refused to depart from a traditional rule of territorial sovereignty based on Vattel’s perfect rights, even though the Court acknowledged that the community of nations no longer recognized absolute territorial sovereignty. The Court based this refusal on separation of powers as well. In essence, the Court held that any decision to abandon traditional perfect rights should be made by the political branches not the courts.

By the end of the twentieth century, the United States had codified many rules based on perfect rights under the law of nations. Important examples include the Foreign Sovereign Immunities Act of 1976 (codifying foreign sovereign immunity) and the Diplomatic Relations Act of 1978 (codifying diplomatic immunity). Nonetheless, some rules of this kind remain uncodified. The most prominent example is head of state immunity—a traditional perfect right of sovereigns under the law of nations. As long ago as 1812, Chief Justice Marshall observed that “the whole civilized world”

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469. 3 U.S. (3 Dall.) 121 (1795).
470. 11 U.S. (7 Cranch) 116 (1812).
471. See supra notes 22–24, 455–468 and accompanying text.
recognizes “the exemption of the person of the sovereign from arrest or detention within a foreign territory.” Then, as now, recognizing such immunity in U.S. courts is a matter of constitutional importance, at least with respect to foreign states recognized by the United States. *Sabbatino* teaches that this immunity should be treated as a default rule that state and federal courts must follow in order to preserve the Constitution’s allocation of powers.

**D. Implications and Potential Objections**

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

A narrow view of the historical practice suggests that courts should wait. The Constitution was drafted at a time when this kind of international law did not exist, and thus there is no clear historical or constitutional basis for requiring courts to apply such law as a means of implementing the Constitution’s allocation of powers. More specifically, the political branches’ recognition and war powers are not as directly implicated by the United States’ failure to adhere to modern sovereignty-limiting rules of customary international law.

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

Finally, the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain* neither contradicts our historical account nor definitively resolves the status of customary international law in U.S. courts. In that case, the Court addressed whether the Alien Tort Statute (ATS) authorized a Mexican national to bring a

particular cause of action arising under customary international law in federal court.\footnote{542 U.S. 692, 712 (2004).} Originally enacted as part of the Judiciary Act of 1789, the ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\footnote{28 U.S.C. § 1346(b)(1) (2000).} In \textit{Sosa}, the Court held that this provision is jurisdictional and would have been understood by the First Congress to provide a “limited, implicit sanction” to federal courts to entertain common law claims for a “handful” of international law violations—offenses against ambassadors, violations of safe conducts, and piracy.\footnote{Sosa, 542 U.S. at 712, 720.} Today, the Court explained, “courts should require any claim [under the ATS] based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined a specificity comparable to the features of the 18th-century paradigms” the Court identified.\footnote{Id. at 725.} Although scholars have debated the meaning of this opinion, it does not call into question the practice we have described. First, the \textit{Sosa} Court did not hold that customary international law inherently constitutes a form of preemptive, jurisdiction-creating federal law.\footnote{See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, \textit{Sosa}, Customary International Law, and the Continuing Relevance of \textit{Erie}, 120 Harv. L. Rev. 869, 889–96 (2007) (characterizing \textit{Sosa} as concluding that “although the ATS was not intended to create causes of action related to CIL, it has the effect today of authorizing federal courts to recognize post-\textit{Erie} federal common law causes of action for a limited number of CIL violations”). But cf. William A. Fletcher, International Human Rights Law in American Courts, 93 Va. L. Rev. 653, 672 (2007) (concluding that “part of the customary international law of human rights became federal common law in \textit{Sosa} in 2004”).} Rather, the Court concluded that Congress effected a limited statutory incorporation of the law of nations by enacting the ATS.\footnote{Sosa, 542 U.S. at _____.} Indeed, it appears implicit in the Court’s opinion that, absent the ATS, there would be no colorable basis for the Court to exercise jurisdiction over the claims at issue.\footnote{In the Court’s view, “the interaction between the ATS at the time of its enactment and the ambient law of the era” reveals that the first Congress “meant to underwrite litigation of a narrow set of common law actions derived from the law of nations.” \textit{Sosa}, 542 U.S. at 721. By 1875, when Congress enacted general federal question jurisdiction, the ambient law had changed and there is no indication that Congress meant to authorize courts to hear any additional claims based on the law of nations. See id. at 731 n.19 (“Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law.”).} Had the Court regarded customary international law as federal common law, its careful parsing of the ATS would have been unnecessary in light of the availability of general statutory arising under jurisdiction.\footnote{28 U.S.C. § 1331.} Second, the Court had no occasion to revisit the idea (implicit in opinions like \textit{The Schooner Exchange}, \textit{The Nereide}, and \textit{Sabbatino}) that the Constitution requires courts to enforce certain principles...
derived from the law of nations to uphold the Constitution’s allocation of powers. Rather, the Court’s analysis is simply inapposite to this idea, addressing the distinct question whether the ATS sanctions federal adjudication of a particular alleged violation of the law of nations.483

CONCLUSION

Commentators fundamentally disagree about the status of customary international law in U.S. courts. The modern position is that such law automatically qualifies as supreme, jurisdiction-conferring federal common law. Revisionists claim it does not qualify as federal law, absent incorporation by the political branches. Both positions purport to draw support from the historical treatment of the law of nations in judicial decisions going back to the founding. Both, however, are incomplete because they fail to identify the unique role that perfect rights under the law of nations have played—and continue to play—in upholding the Constitution’s allocation of powers. Courts adhere to rules based on such rights out of deference to the federal political branches, which—unlike the courts—are charged with recognizing foreign states and conducting foreign relations. As the Supreme Court has recognized, both state and federal courts must adhere to such rules—in the absence of contrary instructions from the political branches—in order to prevent the judiciary from usurping the authority of Congress and the President and making important foreign policy decisions on behalf of the nation.

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