

ARTICLES

Customary International Law, Change, and the Constitution

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Customary international law has changed in many ways since ratification of the U.S. Constitution. This Article considers the implications of those changes for customary international law's role under the Constitution. In particular, it challenges the claims made in a new book, The Law of Nations and the United States Constitution, that U.S. courts must respect the "traditional rights" of foreign nations under the law of nations and may not apply the modern customary international law of human rights. This Article argues that the book is inconsistent in its approach to changes in customary international law, embracing some but rejecting others. This Article also shows that a full account of the changes in customary international law undercuts the book's two constitutional arguments.

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INTRODUCTION

Ensuring that the United States could meet its obligations under the law of nations was a central concern for the Framers of the U.S. Constitution.¹ The Constitution’s text addresses the law of nations directly in some places.² For example, it gives Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”³ It provides that the federal judicial power “shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties.”⁴ And it provides that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”⁵ Other provisions in the Constitution address the law of nations implicitly or were drafted and ratified against the background of particular understandings about how international law worked.⁶

Much has changed since 1789. The United States has grown from a small band of colonies on the far side of the Atlantic Ocean to a world superpower with interests and commitments that touch every part of the globe. International law has also changed.⁷ Treaties have overtaken customary international law as the

1. See generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010) (arguing that the Constitution was designed to ensure that the United States would comply with the law of nations).

2. See generally MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007).

3. U.S. CONST. art. I, § 8, cl. 10. The Framers understood the phrase “law of nations” to include both customary international law and treaties. See generally Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015). For further discussion, see *infra* notes 71–81 and accompanying text.

4. U.S. CONST. art. III, § 2, cl. 1.

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

6. See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 12–33 (2006) (discussing constitutional provisions that expressly or implicitly refer to international law).

7. For a survey of the U.S. Supreme Court’s treatment of international law, see INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011). In the concluding essay, the editors write: “Although different doctrinal changes occurred at different times, there are few aspects of the Supreme Court’s international law doctrine that remain the same in the twenty-first century as they were 200 years ago.” David L. Sloss,

principal form of international law.⁸ Customary international law has abandoned natural law in favor of state practice.⁹ Some subjects like the law merchant have disappeared from customary international law altogether, while others like international human rights have emerged.¹⁰ Even the methods of enforcing international law have changed, with war now prohibited as an instrument of national policy.¹¹

This Article examines the implications of such changes for the role of customary international law under the U.S. Constitution. In particular, it challenges the argument of Professors Anthony Bellia and Bradford Clark in *The Law of Nations and the United States Constitution* that U.S. courts may not enforce international human rights law.¹² According to the authors, the status of customary international law in U.S. courts “depends on the kind of international obligation at issue.”¹³ Courts are constitutionally required to enforce customary international law that grants rights to foreign nations—like head of state immunity—as a function of the recognition power that the Constitution assigns exclusively to the political branches of the federal government.¹⁴ Indeed, courts are constitutionally required to respect not only nations’ rights under modern customary international law, but also “the traditional rights of recognized foreign nations.”¹⁵ By contrast, courts are constitutionally prohibited from enforcing international human rights law against foreign nations because the Constitution’s exclusive allocation of war powers to the political branches of the federal government requires courts “to refrain from attempting to hold foreign nations accountable for their violations of the law of nations.”¹⁶

Bellia and Clark find precedent for treating different rules of customary international law differently in the law of nations that existed at the Founding. As they describe it, the seventeenth-century law of nations “consisted of three major branches: the law merchant, the law of state-state relations, and the law maritime,”¹⁷ and the Founders “designed the Constitution to interact with each

Michael D. Ramsey & William S. Dodge, *Continuity and Change over Two Centuries*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra*, at 589.

8. See generally Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, in CUSTOMER'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 172 (Curtis A. Bradley ed., 2016).

9. See *infra* Section II.A.

10. See *infra* Section II.B.

11. See generally OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017) (describing the outlawing of war under international law and its impact on other rules of international law).

12. ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* (2017).

13. *Id.* at xv.

14. *Id.* at 198 (“[T]he Constitution itself—through the recognition power and its exercise—requires courts to give immunity to the heads of state recognized by the political branches.”).

15. *Id.* at 41; see also *id.* at 220 (arguing that U.S. courts may not “curtail the traditional rights of such [recognized] nations even if customary international law now does so”).

16. *Id.* at 41.

17. *Id.* at xv.

traditional branch of the law of nations in distinct and specific ways.”¹⁸ International human rights law, which the authors call “modern customary international law,” is “different from the three traditional branches of the law of nations” in that “it governs how nations treat their own citizens within their own territory.”¹⁹ For Bellia and Clark, this difference carries two implications. First, “the status of modern customary international law in U.S. courts cannot be determined simply by analogy to the status of any of the traditional branches of the law of nations in U.S. courts.”²⁰ Second, modern customary international law cannot be enforced against foreign states at all because it “runs counter to the core premises of the law of state-state relations that [the Founders] took for granted when they drafted and adopted the Constitution.”²¹

The fact that customary international law has changed since ratification of the Constitution is central to Bellia and Clark’s argument: U.S. courts may not enforce international human rights law because it is so different from the law of nations at the Founding.²² But the authors are inconsistent in how they treat changes in customary international law, embracing some and rejecting others.²³ The authors also give an incomplete account of how customary international law has changed over the past two centuries. A fuller account undermines their constitutional arguments against enforcing international human rights law in U.S. courts.²⁴

This Article proceeds in three parts. Part I considers different ways to disaggregate customary international law’s role under the U.S. Constitution. It begins by discussing the constitutional texts relevant to different constitutional actors—Congress, the President, the federal courts, and the states. It then turns to Bellia and Clark’s argument that the question should instead be disaggregated based on the subject matter of the customary international law rule. Finally, it suggests that the differences the Framers recognized in the obligatory force of different law of nations rules turned not on the subject matter of the rule but on the theoretical foundation of the rule—specifically, whether the rule rested on natural law or state practice.

Part II describes the significant ways in which customary international law has changed since ratification of the Constitution. First, its theoretical foundations changed. Customary international law went from having essentially two kinds of rules—one based on natural law and binding without consent, and the other based on state practice and binding through individual consent—to having one kind of rule based on state practice and binding through general consent. Second, the subject matters of customary international law changed, as some subjects disappeared

18. *Id.* at 17–18.

19. *Id.* at 135.

20. *Id.* at 148.

21. *Id.* at 135–36.

22. *See supra* notes 17–21 and accompanying text.

23. *See infra* Section III.A.

24. *See infra* Section III.B.

and others emerged. Third, even within the subject matters that persisted, the rules of customary international law changed, particularly the rules governing jurisdiction and sovereign immunity. And fourth, the means of enforcing customary international law changed, as nations renounced war as an instrument of national policy. Part II concludes by noting that changes in customary international law would not have surprised the Framers, who understood that the law of nations evolves.

Part III examines the implications of these changes for Bellia and Clark's argument against enforcing international human rights law in U.S. courts. First, Part III challenges their argument on grounds of consistency, noting that the authors accept some changes in customary international law while rejecting others. The distinctions that the authors draw among different kinds of customary international law cannot be justified either by the original understanding of the Founders or by modern customary international law. Next, Part III turns to the authors' constitutional arguments based on the recognition power and the assignment of war powers, showing how changes in customary international law undermine both arguments. The recognition power does not forbid the enforcement of international human rights law because recognition entitles a foreign nation to rights under customary international law as it exists today, not as it existed two centuries ago. And whatever significance the Constitution's assignment of war powers to the political branches of the federal government once had for this question has been lost because nations no longer enforce customary international law by going to war. Finally, Part III rebuts the authors' argument that the act of state doctrine represents a constitutional recognition of the "traditional rights" of foreign nations.

I. DISAGGREGATING THE QUESTIONS

For the past few decades, the debate over the status of customary international law in the U.S. legal system has been dominated by two competing positions: (1) that customary international law should always be treated as federal law; and (2) that customary international law should never be treated as federal law.²⁵ In 1987, the *Restatement (Third) of the Foreign Relations Law of the United States* took the position that customary international law is "law of the United States," meaning it is supreme over state law, falls within the judicial power of the federal courts, and binds the President.²⁶ A decade later, Professors Curtis Bradley and Jack Goldsmith challenged the *Restatement's* view, which they called "the modern position."²⁷ They claimed that customary international law "is not a source of

25. For the authors' discussion of the debate, see BELLIA & CLARK, *supra* note 12, at 149–88.

26. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1), (2) & cmt. c (AM. LAW INST. 1987). The *Restatement Third* acknowledged that an act of Congress might supersede a rule of customary international law as law of the United States. *Id.* § 115(1)(a).

27. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997).

federal law,” which means that it does not establish federal question jurisdiction or bind the President or the states.²⁸

Other scholars tried to disaggregate the question, noting that customary international law’s relationships to the federal courts, the President, and the states are governed by different constitutional texts that might yield different answers.²⁹ Bellia and Clark also seek to disaggregate the status of customary international law under the Constitution, but in a different way. They argue that the status of customary international law depends on the kind of customary international law rules being invoked.³⁰

This Part considers the possibility of disaggregation in general. It begins by examining briefly the different constitutional texts that may be relevant to customary international law’s status and a few of the historical arguments that bear on the meanings of those texts. It then turns to Bellia and Clark’s argument that different branches of the law of nations carried different degrees of obligation. Finally, it suggests that differences in the obligatory force of particular rules at the Founding turned not on which branch of the law of nations a rule belonged to, but rather on whether the rule was based on natural law or state practice.

A. DIFFERENT CONSTITUTIONAL TEXTS

One way to disaggregate the question is to note that different constitutional texts bear on customary international law’s relationships to Congress, the President, the federal courts, and the states. As Professor Michael Ramsey has written, “[o]ther things being equal, we should hesitate to ignore distinct phrasing in similar textual provisions.”³¹

Article I of the Constitution expressly gives Congress authority “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”³² It also gives Congress general legislative powers over areas that were covered by the law merchant, the law maritime, and the law of state-state relations, including the power “[t]o regulate Commerce with foreign Nations”³³ and “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”³⁴ The text of Article I does not directly address whether Congress may exercise its legislative authority in ways that violate customary international law. One case decided before ratification of the Constitution stated that “[t]he municipal laws of a country cannot

28. *Id.* at 870.

29. *See, e.g.,* RAMSEY, *supra* note 2, at 346–55 (discussing the status of customary international law under the Supremacy Clause of Article VI); *id.* at 355–60 (discussing the authority of federal courts to apply customary international law under Article III); *id.* at 363–67 (discussing the authority of the President to violate customary international law under Article II).

30. *See* BELLIA & CLARK, *supra* note 12, at xv (“To answer these questions, it is necessary to disaggregate the different historical categories of international law and then determine how each has interacted with the U.S. constitutional scheme.”).

31. RAMSEY, *supra* note 2, at 364.

32. U.S. CONST. art. I, § 8, cl. 10.

33. *Id.* art. I, § 8, cl. 3.

34. *Id.* art. I, § 8, cl. 11.

change the law of nations, so as to bind the subjects of another nation,"³⁵ but an early consensus emerged that Congress could supersede customary international law as a rule of decision in U.S. courts if it clearly expressed its intent to do so.³⁶

Although Congress had the constitutional power to violate customary international law, the original understanding was that the President did not. Article II expressly requires the President to "take Care that the Laws be faithfully executed."³⁷ This reference to "the Laws" in the Take Care Clause seems broader than the references to "the Laws of the United States"³⁸ in Article III and to laws "which shall be made in Pursuance" of the Constitution³⁹ in the Supremacy Clause of Article VI.⁴⁰ The Framers understood the Take Care Clause to include the law of nations,⁴¹ and the Marshall Court held that the President could not authorize the confiscation of enemy property in violation of the law of nations without an act of Congress.⁴²

Article III provided that the federal judicial power would extend to many categories of cases in which law-of-nations questions were likely to arise, including "all Cases affecting Ambassadors, other public Ministers and Consuls," "all Cases of admiralty and maritime Jurisdiction," and controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."⁴³ More generally, Article III extended the federal judicial power to all cases "arising under this Constitution, the Laws of the United States, and Treaties made, or

35. *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 4 (Fed. Ct. App. 1781).

36. *See, e.g., The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). I have argued that conflicting statements about legislative authority to supersede a rule of the law of nations may be explained in part by whether the rule in question was part of the voluntary or the customary law of nations, see William S. Dodge, *Customary International Law, Congress and the Courts: Origins of the Later-In-Time Rule*, in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531, 534 (Pieter H.F. Bekker et al. eds., 2010), a distinction explained below, see *infra* notes 71–81 and accompanying text. The proposition that Congress could supersede a treaty developed separately, and somewhat later. *See, e.g., John T. Parry, Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 *FORDHAM INT'L L.J.* 1209, 1304–16 (2009); Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 *AM. J. INT'L L.* 313, 313–23 (2001).

37. U.S. CONST. art. II, § 3.

38. *Id.* art. III, § 2, cl. 1.

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

40. *See* RAMSEY, *supra* note 2, at 364 (discussing "[t]he non-parallel structure of Article II").

41. *See, e.g., Alexander Hamilton, Pacificus No. 1* (June 29, 1793), reprinted in 15 *THE PAPERS OF ALEXANDER HAMILTON* 33, 40 (Harold C. Syrett ed., 1969) ("The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws."); James Madison, "*Helvidius*" Number 2 (Aug. 31, 1793), reprinted in 15 *THE PAPERS OF JAMES MADISON* 80, 86 (Thomas A. Mason et al. eds., 1985) (agreeing that the Take Care Clause bound the President faithfully to execute the law of nations).

42. *See Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814) ("It is proper for the consideration of the legislature, not of the executive or judiciary."); *see also id.* at 153 (Story, J., dissenting) (noting that the President "cannot lawfully transcend the rules of warfare established among civilized nations").

43. U.S. CONST. art. III, § 2, cl. 1–2.

which shall be made, under their Authority.”⁴⁴ Unlike the corresponding phrase in the Supremacy Clause, Article III’s reference to “Laws of the United States” is not textually limited to laws made in pursuance of the Constitution, and there is substantial evidence that the Founders understood the phrase used in Article III to include the law of nations.⁴⁵ Of course, Article III is not self-executing with respect to lower federal courts, and Congress must grant them jurisdiction by statute before they can hear a case authorized by Article III. The First Congress gave the lower federal courts jurisdiction over some cases arising under the law of nations.⁴⁶ But Congress did not pass a general federal question statute until 1875, and the Supreme Court has suggested that this statute does not reach cases arising under customary international law.⁴⁷

Article VI makes federal law supreme over state law:

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.⁴⁸

The phrase “which shall be made in Pursuance thereof”—not found in Article II or III—seems to preclude a textual argument that the Supremacy Clause’s reference to the laws of the United States includes customary international law.⁴⁹ But there is an originalist argument for the supremacy of customary international law based on the structure of the federal system. Alexander Hamilton made just such an argument that the law of nations bound the states in *Rutgers v. Waddington* before there was a U.S. Constitution or a Supremacy Clause.⁵⁰ The court in *Rutgers* found “very great force” in the argument, reasoning that “to abrogate or

44. *Id.* art. III, § 2, cl. 1.

45. *See, e.g.*, THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (“Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense . . .”). For a fuller account of the historical evidence, see William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 701–11 (2002).

46. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789) (granting jurisdiction over “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States”). This provision, known as the Alien Tort Statute, is codified today at 28 U.S.C. § 1350 (2012).

47. *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004) (“[The Alien Tort Statute] was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.”). To be clear, the meaning of the word “laws” in 28 U.S.C. § 1331 (2012), granting federal question jurisdiction, is a different question from the meaning of the word “laws” in Article III. As the Supreme Court has observed, “Art. III ‘arising under’ jurisdiction is broader than federal-question jurisdiction under § 1331.” *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983).

48. U.S. CONST. art. VI, cl. 2.

49. *See* RAMSEY, *supra* note 2, at 348–50.

50. *See* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 368–73 (Julius Goebel Jr. ed., 1964).

alter any one of the known laws or usages of nations, by the authority of a single state, must be contrary to the very nature of the confederacy.”⁵¹

Professors Bellia and Clark are not particularly interested in disaggregating the constitutional questions based on these different texts. They spend a number of pages discussing whether the President can violate customary international law without congressional authorization⁵² but ultimately decline to take a position.⁵³ They assume, without engaging the contrary evidence, that Article III’s grant of arising-under jurisdiction does not extend to cases arising under the law of nations.⁵⁴ The authors do make a structural argument for the supremacy of customary international law over state law, but only with respect to the law of state-state relations and without reference to the text of the Supremacy Clause.⁵⁵ Their project is to distinguish the role of customary international law under the Constitution based not on the identity of the constitutional actor, but rather on the subject matter of the customary international law rule.

B. DIFFERENT SUBJECT MATTERS

Bellia and Clark would disaggregate the question of customary international law’s status under the U.S. Constitution according to the subject matter of the customary international law rule.⁵⁶ They rely on William Blackstone’s *Commentaries on the Law of England*⁵⁷ for the proposition that “the law of nations encompassed three distinct branches—the law merchant, the law of state-state relations, and the law maritime.”⁵⁸ They explain that the law merchant was subject to local variation, while the law of state-state relations had to be observed

51. *Rutgers v. Waddington* (N.Y.C. Mayor’s Ct. 1784), reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 50, at 392, 405–06.

52. See BELLIA & CLARK, *supra* note 12, at 232–43.

53. See *id.* at 243 (“It is beyond the scope of this book to ascertain with precision the respective powers of Congress and the President over war and foreign relations.”).

54. See *id.* at 67–71 (stating that the Arising Under Clause applies only to treaties and discussing other grants of jurisdiction over cases and controversies that might raise issues under the unwritten law of nations). For discussion of the contrary evidence, see Dodge, *supra* note 45, at 701–11.

55. See BELLIA & CLARK, *supra* note 12, at 268 (“[T]he Constitution’s exclusive allocation of recognition, reprisal, capture, and war powers to the federal political branches requires courts to uphold the rights of foreign nations under the law of state-state relations, even in the face of contrary state law.”).

56. See *id.* at xv (“[I]t is necessary to disaggregate the different historical categories of international law and then determine how each has interacted with the U.S. constitutional scheme.”).

57. Blackstone’s treatise was one of the two books that most influenced the Framers’ view of the law of nations, the other being Emmerich de Vattel’s *The Law of Nations*. See David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 7, at 8 (“Two works in particular framed the early American view of the law of nations: Emmerich de Vattel’s *The Law of Nations* and William Blackstone’s *Commentaries on the Laws of England*.”). Vattel taught the Framers about the nature and content of the law of nations, and Blackstone explained how it fit into their domestic legal system. See *id.* at 8–9 (discussing the respective influences of Blackstone and Vattel).

58. BELLIA & CLARK, *supra* note 12, at 3. Although Blackstone did refer to the “law merchant” and “maritime law,” see 4 WILLIAM BLACKSTONE, COMMENTARIES *67 (referring to “law merchant”); 1 *id.* at *84 (referring to “maritime . . . law[.]”), the “law of state-state relations” is Bellia and Clark’s own phrase, used to cover topics like the rights of ambassadors and safe-conducts.

to prevent other nations from declaring war.⁵⁹ The law maritime was a combination of these rules, governing activities at sea and enforced by admiralty courts.⁶⁰

In describing the law of nations, however, Blackstone marks no difference in the obligatory force of the rules in each branch.⁶¹ To the contrary, Blackstone declares that “the law of nations . . . is here adopted *in [its] full extent* by the common law, and is held to be a part of the law of the land.”⁶² Without distinguishing among subject matters, Blackstone further states that:

[T]hose acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.⁶³

As examples immediately following this passage, Blackstone lists “mercantile questions,” “marine causes,” and “disputes relating to prizes”—in other words, he refers to the law merchant and law maritime, rather than to the law of state-state relations.⁶⁴

To explain that local law could vary the law merchant and law maritime, Bellia and Clark search elsewhere in Blackstone. With respect to the law maritime, they rely on Blackstone’s statement that the law applied in admiralty is “derived from principles of ‘civil law’ and ‘other marine laws’—‘the whole being connected, altered, and amended by acts of parliament and common usage.’”⁶⁵ In the context of the entire passage, however, this statement seems intended to show that acts of parliament had sufficiently Anglicized the civil law to make it applicable in English courts, not to show that parliament could change the law maritime.⁶⁶

With respect to the law merchant, Bellia and Clark rely on Blackstone’s statement that “[w]here the common law and a statute differ, the common law gives place to the statute.”⁶⁷ But here Blackstone is discussing the common law generally, rather than the common law adopting the law of nations. If Blackstone meant this passage to apply to the latter, it would be in tension with his discussion of the law of nations in which he says that acts of Parliament are merely declaratory.⁶⁸ Even if the passage on which Bellia and Clark rely does apply to the

59. See BELLIA & CLARK, *supra* note 12, at 7–8.

60. See *id.* at 9.

61. 4 BLACKSTONE, *supra* note 58, at *66–67.

62. *Id.* at *67 (emphasis added).

63. *Id.*

64. *Id.*

65. BELLIA & CLARK, *supra* note 12, at 117 (quoting 3 BLACKSTONE, *supra* note 58, at *108).

66. See 3 BLACKSTONE, *supra* note 58, at *108.

67. 1 *id.* at *89. In their book, Bellia and Clark do not cite this passage directly. Rather, they cite an article of their own, which in turn cites this passage from Blackstone. BELLIA & CLARK, *supra* note 12, at 23 n.11 (citing Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 21 n.80 (2009) (citing 1 BLACKSTONE, *supra* note 58, at *89)).

68. See 4 BLACKSTONE, *supra* note 58, at *67; see also *supra* note 63 and accompanying text.

common law adopting the law of nations, it provides no basis for distinguishing the law merchant from other branches of the law of nations, for the passage makes no such distinction.

It seems clear that early Americans did indeed distinguish between rules of the law of nations that could be varied by legislation and rules that could not. However, that distinction turned not on the branch of the law of nations to which the rule belonged, but on whether the rule derived from natural law or from state practice.⁶⁹ It was not Blackstone who provided the basis for this distinction, but the Founders' other favorite source with respect to the law of nations—Emmerich de Vattel.⁷⁰

C. DIFFERENT THEORETICAL FOUNDATIONS

Although Blackstone did not distinguish the force given to different rules of the law of nations, Vattel did. Vattel divided the law of nations into four categories: (1) the necessary; (2) the voluntary; (3) the conventional; and (4) the customary.⁷¹ The necessary and the voluntary law of nations were each based on natural law.⁷² The necessary law of nations arose from the direct application of natural law to nation-states; its rules were absolutely binding, but only on the conscience of the sovereign.⁷³ The voluntary law of nations arose from natural law mediated through a principle of sovereign equality; it created externally binding obligations that could be enforced by resort to war, if need be.⁷⁴ This voluntary law of nations was not voluntary in the modern sense. Vattel explained:

[W]hat we call the voluntary Law of Nations consists in the rules of conduct, of external law, to which the natural law obliges Nations to consent; so that we rightly presume their consent, without seeking any record of it; for even if they had not given their consent, the Law of Nature supplies it, and gives it for them. Nations are not free in this matter to consent or not; the Nation which would refuse to consent would violate the common rights of all Nations.⁷⁵

In contrast to the necessary and voluntary law of nations, the conventional and customary law of nations were based not on natural law but on state practice manifesting consent. The conventional law of nations consisted of treaties, which were based on express consent and bound “only the contracting parties.”⁷⁶ The customary law of nations consisted of rules “consecrated by long usage and

69. See *infra* notes 83–94 and accompanying text.

70. See *supra* note 57.

71. See generally EMMERICH DE VATTEL, *THE LAW OF NATIONS* (James Brown Scott ed., Charles G. Fenwick trans., 1916) (1758).

72. *Id.*, preface, at 11a (“The *necessary* Law of Nations and the *voluntary* law have therefore both been established by nature, but each in its own way. . .”).

73. *Id.*, intro., §§ 7–9, at 4–5.

74. *Id.*, intro., §§ 21–22, 28, at 7–9.

75. *Id.*, bk. III, § 192, at 306.

76. *Id.*, intro., § 24, at 8.

observed by Nations as a sort of law.”⁷⁷ It was based on “tacit consent” and bound “only those Nations which have adopted it.”⁷⁸ In each case, the consent on which these rules rested was the *individual* consent of the particular nation.⁷⁹ Treaties bound “only the contracting parties,”⁸⁰ and nations were bound to the customary law of nations only “so long as they have not expressly declared their unwillingness to follow it any longer.”⁸¹

Vattel’s categories provided the lens through which early Americans viewed the obligatory force of particular rules found in the law of nations.⁸² In *Ware v. Hylton*, for example, Justice Chase wrote:

The law of nations may be considered of three kinds, to wit, *general, conventional, or customary*. The *first* is *universal*, or established by the general consent of mankind, and binds *all nations*. The *second* is founded on *express* consent, and is not universal, and only binds those nations that have assented to it. The *third* is founded on *TACIT* consent; and is only obligatory on those nations, who have adopted it.⁸³

Chase held that the rule against confiscating debts owed to enemy subjects “was not binding on the state of *Virginia*, because [it was] founded *on custom only*.”⁸⁴ Justice Iredell similarly expressed “considerable doubt” that the rule was binding on American states, “admitting the principle to prevail by custom only.”⁸⁵ Although the Framers frequently referred to Vattel’s categories,⁸⁶ it would be wrong to conclude that they had fully thought through the relationship between the law of nations and their own domestic law, or that each of them read Vattel in exactly the same way.⁸⁷ Nevertheless, as the opinions in *Ware* show, Vattel provided a basis for distinguishing rules with either more or less obligatory force.

77. *Id.*, intro., § 25, at 8.

78. *Id.*

79. Today, by contrast, customary international law today rests on the general consent of the community of nations. See *infra* notes 113–18 and accompanying text.

80. VATTEL, *supra* note 71, intro., § 24, at 8.

81. *Id.*, intro., § 26, at 9; see also Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 216–18 (2010) (discussing Vattel’s view that nations could withdraw from rules of the customary law of nations).

82. On Vattel’s influence more generally, see Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395, 406–10 (1913).

83. 3 U.S. (3 Dall.) 199, 227 (1796) (opinion of Chase, J.). Chase omitted the necessary law of nations, which was not externally binding, and referred to the voluntary law of nations as the general law of nations.

84. *Id.*

85. *Id.* at 263 (opinion of Iredell, J.). The Supreme Court nevertheless struck down Virginia’s confiscation statute because it conflicted with the 1783 peace treaty with Great Britain, binding on Virginia under the Supremacy Clause of the Constitution. See *id.* at 235–37, 245 (opinion of Chase, J.).

86. See Cleveland & Dodge, *supra* note 3, at 2213–14 (citing additional references to Vattel’s categories by Alexander Hamilton and Thomas Jefferson).

87. For further discussion of the different understandings of the Justices in *Ware*, see Dodge, *supra* note 36, at 539–41.

Most, but not all, of the rules belonging to what Bellia and Clark call the law of state-state relations were considered voluntary rather than customary under Vattel's system.⁸⁸ To reiterate, this means that these rules were binding irrespective of a nation's consent and were not subject to the right of withdrawal countries enjoyed with respect to the customary law of nations.⁸⁹ But some state-state rules fell into the customary category. This was true, for instance, of the rule against confiscating debts owed to enemy subjects at issue in *Ware v. Hylton*.⁹⁰ It was also true of the rule allowing enemy subjects time to withdraw their personal property before it was confiscated, which came before the Supreme Court two decades later in *Brown v. United States*.⁹¹

Some of the rules that Bellia and Clark assign to the branch of maritime law were also voluntary rather than customary, like the rights of neutral ships under the law of prize.⁹² Early American courts treated such rules as non-derogable.⁹³ Vattel did not discuss the rules of maritime law concerning private rights, nor did he discuss the law merchant. But because these rules were founded on customs and usages rather than natural law, early Americans would have placed them under the heading of the customary law of nations.⁹⁴

Bellia and Clark are therefore correct that different rules of the eighteenth-century law of nations were understood to have different degrees of obligatory force.⁹⁵ But such differences did not turn on their subject matter—on whether they belonged to the law merchant, the law of state-state relations, or the law maritime. Rather, they turned on the theoretical foundation of the particular rules—that is, on whether the rule was part of the voluntary law of nations based on natural law or the customary law of nations based on state practice. The law merchant tended to be customary law. The law of state-state relations tended, with some exceptions, to be voluntary law. And the law maritime was a mixture of both, with voluntary

88. See generally William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169, 174–75 (2010) (giving examples from the law of nations governing the rights of ambassadors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1748673 [<https://perma.cc/4J96-M25F>].

89. See *supra* notes 74–75 and accompanying text.

90. See *supra* notes 84–85 and accompanying text. Vattel stated that sovereigns had a right to confiscate debts but that they had been “less rigorous” in asserting this right, which he expected to “become the general custom.” VATTEL, *supra* note 71, bk. III, § 77, at 260.

91. 12 U.S. (8 Cranch) 110 (1814); see also VATTEL, *supra* note 71, bk. III, § 63, at 256 (stating that a sovereign should allow enemy subjects “a suitable time to withdraw with their property”). In *Brown*, Chief Justice Marshall treated the rule as part of the customary law of nations, stating that “[t]his usage is a guide which the sovereign follows or abandons at his will.” *Brown*, 12 U.S. at 128. He nevertheless struck down the confiscation because the executive had acted without congressional authorization. See *id.* at 129 (“It is proper for the consideration of the legislature, not of the executive or judiciary.”).

92. See VATTEL, *supra* note 71, bk. III, § 109, at 269 (observing that “the Law of Nature . . . has its fixed principles, and can give us rules on this subject [of neutrality] as on others”).

93. See, e.g., *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 4 (Fed. Ct. App. 1781) (“The municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation. . . .”).

94. See VATTEL, *supra* note 71, intro., § 25, at 8 (noting that “rules and customs, consecrated by long usage and observed by Nations as a sort of law, constitute the *customary Law of Nations*”).

95. See generally BELLIA & CLARK, *supra* note 12.

law rules prevailing on the prize side and customary law rules prevailing on the instance side.⁹⁶ The fact that the force of each rule flowed not from its subject matter but from its place in Vattel's framework is a problem for Bellia and Clark's argument, because Vattel's framework was abandoned and replaced with a very different theory of customary international law over the course of the nineteenth century.⁹⁷

II. THE PROBLEM OF CHANGE

Since ratification of the U.S. Constitution, customary international law has changed in myriad ways. First, the theoretical foundations of customary international law have changed. During the nineteenth century, Americans abandoned Vattel's categories and adopted a new, positivist view of customary international law based on state practice and common consent. Second, the subjects covered by customary international law have changed. Subjects like the law merchant became domesticated and were no longer considered part of customary international law, while new subjects like human rights emerged. Third, even among the subjects that persisted, the rules of customary international law changed. Most significantly for present purposes, the idea that a nation had absolute and exclusive jurisdiction within its own territory eroded, as new rules of jurisdiction and sovereign immunity developed. Fourth, the means by which nations enforced their rights under customary international law changed, with nations turning to international tribunals and countermeasures instead of war. Such changes present significant challenges for anyone seeking to recapture the precise relationship between customary international law and the Constitution at the Founding. But, as section II.E shows, the Framers themselves understood that customary international law evolves.

A. CHANGING THEORETICAL FOUNDATIONS

The most significant changes in the American theoretical understanding of customary international law since ratification of the Constitution occurred during the nineteenth century. At the start of that century, Vattel's categories organized American thinking about customary international law: voluntary rules based on natural law were binding without consent, whereas customary rules based on state practice were subject to individual consent. By the end of the nineteenth century, these categories had vanished. All customary international law was based on state practice and general consent. This positivist understanding of customary international law continues today.⁹⁸

96. See *id.* at 17 (explaining that “admiralty courts sat as both ‘instance courts’—to hear private maritime disputes—and ‘prize courts’—to adjudicate the legality of captures on the high seas”).

97. See *infra* Section II.A.

98. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW. INST. 1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”). For discussion of *jus cogens* norms, see *infra* notes 119–21 and accompanying text.

During the nineteenth century, both treatise writers and courts abandoned Vattel's theoretical framework. In the first edition of his influential treatise, Henry Wheaton adopted Vattel's categories of the voluntary, conventional, and customary law of nations,⁹⁹ and listed among the sources of international law "[t]he rules of conduct which ought to be observed between nations, as deduced by reason from the nature of the society existing among independent states."¹⁰⁰ But Wheaton later became openly critical of Vattel's voluntary law of nations and omitted natural law from his list of sources.¹⁰¹ Although some treatise writers continued to emphasize natural law as the basis for customary international law,¹⁰² most joined Wheaton in rejecting natural law and embracing state practice. Richard Wildman asserted that "[t]he law of nature forms no part of international law,"¹⁰³ and William Hall stated that moral obligations could become legally binding only if "received as positive law by the body of states."¹⁰⁴

For Vattel, rules based only on state practice (the customary law of nations) were subject to withdrawal by individual states. As Wheaton became more positivist, he seems to have adopted this default view for all customary international law rules.¹⁰⁵ But other nineteenth-century writers broke with Vattel by arguing that rules based on state practice could become universally binding through the general consent of nations. Wildman seems to have been the first to articulate such a view in 1849: "As the custom of a people forms part of their municipal law, and is binding upon all, so the custom of nations is binding upon each. . . ."¹⁰⁶ Other positivists similarly asserted that customary international law rules became binding based on "general consent."¹⁰⁷ As John Westlake summarized: "[I]t is not necessary to show that the state in question has assented to the rule. . . . It is enough to

99. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* pt. 1, ch. 1, § 13, at 47–48 (Phila., Carey, Lea & Blanchard 1836).

100. *Id.* § 14, at 48.

101. These shifts are reflected in two posthumous editions of Wheaton's treatise, based on changes made before his death. See HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* pt. 1, ch. 1, §§ 9, 12, at 13, 22 (William Beach Lawrence ed., Boston, Little, Brown & Co., 6th ed. 1855) (1836) [hereinafter WHEATON, *ELEMENTS* (1855)]; HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* pt. 1, ch. 1, §§ 9, 15, at 14–15, 23–29 (Richard Henry Dana, Jr. ed., Boston, Little, Brown & Co., 8th ed. 1866) (1836) [hereinafter WHEATON, *ELEMENTS* (1866)]. For further discussion of Wheaton's evolving views, see Dodge, *supra* note 88, at 180–82.

102. See, e.g., 1 ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 56 (Phila., T. & J.W. Johnson 1854) ("The Primary Source . . . of International Jurisprudence is Divine Law.").

103. 1 RICHARD WILDMAN, *INSTITUTES OF INTERNATIONAL LAW* 2 (London, William Benning & Co. 1849).

104. WILLIAM EDWARD HALL, *INTERNATIONAL LAW* 4 (London, Clarendon Press 1880).

105. See WHEATON, *ELEMENTS* (1855), *supra* note 101, § 5, at 6; WHEATON, *ELEMENTS* (1866), *supra* note 101, § 5, at 8; see also Dodge, *supra* note 88, at 181–82 (discussing Wheaton's views).

106. WILDMAN, *supra* note 103, at 29–30. Wildman included an exception for nations that objected to a custom before it had been generally adopted, see *id.*, similar to the persistent objector rule in customary international law today. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102 cmt. d (AM. LAW. INST. 1987) ("[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.").

107. HALL, *supra* note 104, at 4.

show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule.”¹⁰⁸

Over the course of the nineteenth century, courts in the United States similarly abandoned Vattel’s framework, embracing state practice and general consent as the basis for customary international law. U.S. courts continued looking to Vattel for the content of customary international law rules but generally ignored his categories.¹⁰⁹ In *The Nereide*, for example, Chief Justice Marshall quoted Vattel for the proposition that “things belonging to neutral persons which happen to be in an enemy’s country, or on board an enemy’s ships, are to be distinguished from those which belong to the enemy.”¹¹⁰ Yet Marshall also asserted, without reference to whether the rules respecting neutrals were voluntary or customary, that Congress could alter the law of nations.¹¹¹ In 1839, Chief Justice Taney used Vattel’s phrase “voluntary law of nations” to refer not to binding rules of international law but to discretionary acts of comity.¹¹²

Although the Supreme Court sometimes mixed natural-law and positive-law idioms when discussing customary international law,¹¹³ by the late nineteenth century, positivism had prevailed. In *The Scotia*, the Court looked to the practice of over thirty different nations to determine a rule of maritime law.¹¹⁴ “Like all the laws of nations,” the Court explained, the law of the sea “rests upon the common consent of civilized communities. It is of force, not because it was prescribed

108. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 78 (Littleton, Cambridge Univ. Press 1894); see also H.W. HALLECK, INTERNATIONAL LAW § 9 (New York, D. Van Nostrand 1861) (arguing that Vattel’s view “that the customary law of nations may be varied or abandoned at pleasure” cannot be applied to law “founded on general usage or implied consent”); 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 12, at 18 (1905) (“[N]o State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations.”). For further discussion, see Dodge, *supra* note 88, at 182–84.

109. An exception is Justice Story’s opinion on circuit in *The La Jeune Eugenie*, which echoed Vattel’s voluntary, customary, and conventional categories in articulating the sources of international law. See *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (“Now the law of nations may be deduced, first, from the general principles of right and justice . . . ; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states.”).

110. *The Nereide*, 13 U.S. (9 Cranch) 388, 425 (1815) (quoting VATTEL, *supra* note 71, bk. III, § 75, at 259 (“[P]roperty belonging to neutrals, which is found in enemy territory or upon enemy vessels, is to be distinguished from enemy property.”)).

111. See *id.* at 423 (“Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.”).

112. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (“The comity thus extended to other nations . . . contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong; that Courts of justice have continually acted upon it, as a part of the voluntary law of nations.”).

113. See, e.g., *The Prize Cases*, 67 U.S. 635, 670 (1863) (“The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world.”). For a discussion of nineteenth-century cases, see David J. Bederman, *Customary International Law in the Supreme Court, 1861–1900*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 7, at 92–100.

114. See *The Scotia*, 81 U.S. (14 Wall.) 170, 186–87 (1871).

by any superior power, but because it has been generally accepted as a rule of conduct."¹¹⁵ At the dawn of the twentieth century, the Supreme Court declared in *The Paquete Habana* that, to determine the rules of customary international law, "resort must be had to the customs and usages of civilized nations."¹¹⁶ Its review of state practice led the Court to conclude that, "by the general consent of the civilized nations of the world," coastal fishing boats were exempt from capture as prizes of war.¹¹⁷

Thus, by the end of the nineteenth century, the United States no longer recognized two categories of customary international law, one based on natural law and binding without consent and the other based on state practice and binding through individual consent. There was now just one category of customary international law, based on state practice and binding through general consent.¹¹⁸

Another shift occurred during the course of the twentieth century, when states recognized a category of peremptory, or *jus cogens*, norms from which no derogation is permitted.¹¹⁹ *Jus cogens* norms "prevail over and invalidate international agreements and other rules of international law in conflict with them" and may be modified "only by a subsequent norm of international law having the same character."¹²⁰ A norm gains *jus cogens* status by being "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."¹²¹ In other words, although *jus cogens* norms are hierarchically superior to other rules of customary international law, they develop through the same process of general consent.

B. CHANGING SUBJECT MATTERS

Just as the theoretical foundations of customary international law have changed since ratification of the Constitution, so too have the subjects of customary international law. Three examples may serve as illustrations.

115. *Id.* at 187.

116. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

117. *Id.* at 708.

118. A state is not bound by a rule in this category if it has persistently objected to the rule during its formation, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (AM. LAW INST. 1987), or if the rule has been superseded by "special custom," *id.* § 102 cmt. e, or by an international agreement, *id.* § 102 cmt. j. For discussion of *jus cogens* norms, see *infra* notes 119–21 and accompanying text.

119. See generally Jochen A. Frowein, *Ius Cogens*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2013).

120. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (AM. LAW INST. 1987); see also Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

121. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Many norms of international human rights law are *jus cogens* norms. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (AM. LAW INST. 1987) ("Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are. . ."); see also *infra* note 197 and accompanying text.

First, as Bellia and Clark note, the law merchant was domesticated and ceased to be a subject of customary international law.¹²² In the United States, the law merchant came to be governed by state law. As the Supreme Court famously declared in *Erie*, “Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.”¹²³ Today, treaties govern some aspects of commercial law.¹²⁴ But no one considers it a subject of customary international law.

Second, much of the law maritime was domesticated or fell out of use. In *Southern Pacific Co. v. Jensen*, the Supreme Court federalized the maritime equivalent of the law merchant in the interests of uniformity.¹²⁵ In so doing, the Court stopped treating the law maritime as part of the law of nations and started treating it simply as federal common law.¹²⁶ Other subjects of the law maritime remained part of customary international law but became practically irrelevant. As Ramsey explains, “pirates, privateers, and prizes largely disappeared as professional navies took over the conduct of high-seas warfare.”¹²⁷

Third, human rights became a principal concern of customary international law after the Second World War.¹²⁸ Today, customary international law prohibits states from engaging in genocide; slavery or the slave trade; the murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment; prolonged arbitrary detention; systematic racial discrimination; and consistent

122. See BELLIA & CLARK, *supra* note 12, at 35 (“[S]tates . . . began to describe the law merchant as the local law of particular sovereigns, not as transnational law over which they exercised independent judgment.”); see also Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2353 (1991) (“Gradually, components of the law of nations—the laws maritime and merchant, for example—were domesticated into America’s ‘general common law.’”).

123. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

124. See, e.g., United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988).

125. 244 U.S. 205, 215–16 (1917); see also BELLIA & CLARK, *supra* note 12, at 128 (noting that the *Jensen* Court “declar[ed] general maritime law to be a form of supreme federal law”).

126. See Michael D. Ramsey, *Customary International Law in the Supreme Court, 1901–1945*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 7, at 237 (“*Jensen* was fundamentally not a case about the international practices of nations, but about the (supposed) need for uniform liability rules throughout the United States.”).

127. *Id.* at 235. In the 1856 Declaration of Paris, every major naval power except the United States abolished privateering, though the United States adhered to the declaration only as a matter of policy. Congress abolished prize money for naval officers in 1899 after the Spanish-American War. See Act of Mar. 3, 1899, ch. 413, 30 Stat. 1004, 1007 (1899). The law of piracy, on the other hand, has made a limited comeback in recent years. See, e.g., *United States v. Dire*, 680 F.3d 446, 466–69 (4th Cir. 2012) (applying modern customary international law of piracy in prosecution of Somali pirates).

128. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. VII, intro. note (AM. LAW. INST. 1987) (“The contemporary international law of human rights has developed largely since the Second World War.”). As Professor Jenny Martinez has shown, the nineteenth century antislavery movement was an important forerunner of modern human rights law. See generally Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550 (2008).

patterns of gross violations of internationally recognized human rights.¹²⁹ Bellia and Clark argue that international human rights law contradicts the law of state-state relations at the Founding, which “gave recognized nations a perfect right to govern their own citizens within their own territory.”¹³⁰ Part III considers this argument in greater detail, but it may be useful to consider first how the law of state-state relations itself has changed since the Founding.

C. CHANGING RULES

Even when a particular subject has continued as part of customary international law since ratification of the Constitution, the rules of customary international law governing that subject have often changed. Many of the important rules in what Bellia and Clark call the law of state-state relations, for instance, have changed significantly over the last two centuries.

Writing in 1758, Vattel considered each nation to have exclusive jurisdiction over its own territory. He wrote that a nation’s ownership of its territory was “full and absolute” and “exclude[d] any right on the part of outsiders.”¹³¹ Exclusive ownership, he said, gave “a Nation *jurisdiction* over the territory which belongs to it.”¹³² It was the right of that nation “to enforce justice throughout the territory subject to it, to take cognizance of crimes committed therein, and of the differences arising between the citizens.”¹³³ This exclusive jurisdiction extended even to cases “in which foreigners [were] involved,” and their own sovereigns had no right to intervene unless justice was denied, proper procedure was not been observed, or foreigners were discriminated against.¹³⁴ What was true with respect to a nation’s territory was doubly true with respect to its own subjects: “No foreign State may inquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct, nor force him to make any change in his administration.”¹³⁵ If a sovereign “burden[ed] his subjects with taxes or treat[ed] them with severity it [wa]s for the Nation to take action; no foreign State [wa]s called on to amend his conduct and to force him to follow a wiser and juster course.”¹³⁶

Americans embraced these views of sovereignty and exclusive jurisdiction, as illustrated in Chief Justice Marshall’s opinion in *The Schooner Exchange v.*

129. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW. INST. 1987). The International Court of Justice has recognized the “rules concerning the basic rights of the human person” as rules of customary international law. *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, ¶ 34 (Feb. 5); *see also* *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 I.C.J. 15, 23 (May 28) (noting that “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”).

130. BELLIA & CLARK, *supra* note 12, at 139.

131. VATTEL, *supra* note 71, bk. II, § 79, at 138.

132. *Id.*, bk. II, § 84, at 139.

133. *Id.*

134. *Id.*

135. *Id.*, bk. II, § 55, at 131.

136. *Id.*

McFaddon, a case involving a French warship's immunity from suit.¹³⁷ Marshall began by repeating the principle of exclusive territorial jurisdiction: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."¹³⁸ Yet one nation could still grant immunity to the sovereign of another. Reflecting Vattel's principle of sovereign equality, Marshall explained: "One sovereign being in no respect amenable to another; . . . can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station . . . will be extended to him."¹³⁹ Notwithstanding the United States' exclusive jurisdiction within its own territory, the Supreme Court held that the French warship was immune from suit in U.S. courts.¹⁴⁰

The customary international law rules governing jurisdiction and sovereign immunity have each changed significantly over the last two centuries. Even in the early nineteenth century, jurisdiction was not strictly territorial. The Supreme Court recognized exceptions allowing a nation to regulate its own citizens abroad¹⁴¹ and to punish universally condemned crimes like piracy.¹⁴² As the nineteenth century progressed, the customary international law of jurisdiction evolved to permit nations to regulate conduct abroad that caused harm within their own borders.¹⁴³ In the twentieth century, customary international law recognized other bases of jurisdiction, and today nations may regulate extraterritorially so long as they have "a genuine connection" with what they seek to regulate.¹⁴⁴ Under modern customary international law, the jurisdiction of a nation within its own territory is no longer exclusive and absolute.¹⁴⁵

137. 11 U.S. (7 Cranch) 116 (1812).

138. *Id.* at 136.

139. *Id.* at 137.

140. *Id.* at 146–47.

141. *See* *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.").

142. *See* *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820) ("[Pirates] are proper objects for the penal code of all nations.").

143. *See* John B. Moore, U.S. Dep't of State, *Report on Extraterritorial Crime and The Cutting Case* 23 (1887), reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 202, at 244 (1906) ("The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries."); *see also* OPPENHEIM, *supra* note 108, § 147, at 196 ("Many States claim jurisdiction and threaten punishments for certain acts committed by a foreigner in foreign countries.").

144. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 407 (AM. LAW INST. forthcoming 2018); *see also id.* §§ 408–13 (discussing jurisdiction based on territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction under customary international law).

145. *See id.* § 407 cmt. d ("Concurrent prescriptive jurisdiction is common under international law."); *see also* S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30–31 (Sept. 7) (describing "concurrent jurisdiction" as "only natural"). Customary international law remains strictly territorial today only with respect to jurisdiction to enforce. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(b) (AM. LAW INST. forthcoming 2018) ("Under customary international law[,] . . . a state may not exercise jurisdiction to enforce in the territory of another state without the consent of the other state.").

The customary international law rules governing sovereign immunity have also changed significantly since ratification of the Constitution. U.S. courts considered the immunity of foreign states to be “virtually absolute” well into the twentieth century.¹⁴⁶ In 1952, however, the Department of State adopted the “restrictive theory of sovereign immunity” in what has come to be known as the Tate Letter.¹⁴⁷ Under the restrictive theory, “the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).”¹⁴⁸ Today, a majority of states appear to have adopted the restrictive theory.¹⁴⁹ The International Court of Justice (ICJ) has noted that many states today distinguish between *acta jure imperii* and *acta jure gestionis*.¹⁵⁰ But the ICJ has adopted an even more cautious approach to sovereign immunity under customary international law, insisting on state practice and *opinio juris* supporting immunity with respect to the specific acts at issue,¹⁵¹ even when those acts constitute *acta jure imperii*.¹⁵² It is true that the ICJ has rejected the idea of a human rights exception to sovereign immunity once immunity has been established.¹⁵³ But in defining the scope of immunity under customary international law in the first instance, the ICJ has not recognized anything like the virtually absolute immunity that existed in the late eighteenth century.

In short, within the law of state-state relations, customary international law continues to govern questions of jurisdiction and state immunity. But the rules are quite different from those that existed when the U.S. Constitution was ratified. Today, states do not enjoy exclusive jurisdiction within their own territory nor absolute immunity from suit in the courts of other states.

146. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *see, e.g., Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 576 (1926) (holding that foreign sovereign immunity applied to merchant ships as well as warships).

147. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULL. 984 (1952).

148. *Id.*

149. *See Pierre-Hugues Verdier & Erik Voeten, How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUDS. Q. 209, 214 (2015) (reporting that 75 out of 118 countries surveyed have adopted the restrictive theory of sovereign immunity).

150. *See Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 99, ¶ 59 (Feb. 3) (“[T]he Court notes that many States . . . now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*.”).

151. *See id.* ¶¶ 65–77 (examining state practice and *opinio juris* supporting immunity from suit based on the acts of armed forces during armed combat). The approach in *Jurisdictional Immunities* is consistent with the ICJ's approach to determining customary international law more generally. *See, e.g., North Sea Continental Shelf (Germ. v. Den.; Germ. v. Neth.)*, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).

152. *See Jurisdictional Immunities*, 2012 I.C.J. ¶ 60 (“The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii*.”).

153. *See id.* ¶¶ 92–97 (rejecting a *jus cogens* exception).

D. CHANGING ENFORCEMENT

In the eighteenth century, nations could enforce their rights under international law by resort to war. Vattel wrote that “[t]he right to use force, or to make war, is given to Nations only for their defense and for the maintenance of their rights.”¹⁵⁴ Blackstone noted that when states violated the law of nations “recourse can only be had to war[,] . . . neither state having any superior jurisdiction to resort to upon earth for justice.”¹⁵⁵ War manifestos from the eighteenth century show that nations frequently cited violations of treaties and the law of nations as reasons for declaring war.¹⁵⁶ The Framers of the U.S. Constitution were well aware of this fact. As John Jay wrote in *The Federalist No. 3*, “either designed or accidental violations of treaties and of the laws of nations afford *just* causes of war.”¹⁵⁷

But during the twentieth century, as Professors Oona Hathaway and Scott Shapiro have recently recounted, the nations of the world renounced war as an instrument of national policy, first in the Kellogg-Briand Pact¹⁵⁸ and then in the United Nations Charter.¹⁵⁹ This simple but profound development in international law led to other changes—in the law of neutrality, the permissibility of sanctions, and the development of international human rights.¹⁶⁰ It also created what Hathaway and Shapiro describe as a seeming paradox: “international law prohibits states from using force to enforce international law.”¹⁶¹

In the twenty-first century, disputes under international law are often resolved by international tribunals, of which the ICJ is just one.¹⁶² Today, international law is also enforced through countermeasures. One party’s breach of a treaty “entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”¹⁶³ Violations of rights under

154. VATTEL, *supra* note 71, bk. III, § 26, at 243; *see also id.*, bk. III, § 51, at 130 (“When the injury has been done the same right of self-protection authorizes the injured party to seek full redress and to use force to obtain it, if necessary.”); BELLIA & CLARK, *supra* note 12, at 47 (“Vattel recognized that violation of any of these perfect rights—to send and receive ambassadors, exercise territorial sovereignty, exercise treaty rights, and enjoy neutral use of the high seas—gave the aggrieved nation just cause for war.”).

155. 4 BLACKSTONE, *supra* note 58, at *68; *see also* HATHAWAY & SHAPIRO, *supra* note 11, at 71 (“In the Old World Order, any legitimate cause of action was a just cause for war. Wars were legal disputes that were fought on the battlefield because they could not be resolved in a court.”).

156. A recent survey of 358 war manifestos between 1491 and 1945 shows that 49.7% cited treaty violations and 35.5% cited violations of the law of nations as just causes for war. *See* Oona A. Hathaway et al., *War Manifestos*, 85 U. CHI. L. REV. (forthcoming 2018) (manuscript at 55, 59). During the eighteenth century, both percentages were above 40%. *See id.* (manuscript at 55, 60).

157. THE FEDERALIST NO. 3, at 44 (John Jay) (Clinton Rossiter ed., 1961).

158. HATHAWAY & SHAPIRO, *supra* note 11, at 126–30.

159. *Id.* at 202–14; *see* U.N. Charter art. 2, ¶4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

160. HATHAWAY & SHAPIRO, *supra* note 11, at 304.

161. *Id.* at 370 (emphasis omitted).

162. *See* Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 (describing ICJ jurisdiction).

163. Vienna Convention on the Law of Treaties art. 60(1), May 23, 1969, 1155 U.N.T.S. 331.

customary international law also entitle the injured state to take countermeasures.¹⁶⁴ Such countermeasures “must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question,”¹⁶⁵ and countermeasures may not include “the threat or use of force.”¹⁶⁶ In short, the enforcement of international law in the twenty-first century looks nothing like it did in the eighteenth century. Violations of international law no longer give nations just cause for war.

E. THE ORIGINAL UNDERSTANDING OF CHANGE

The Framers of the U.S. Constitution understood that the law of nations changes. In 1796, Justice Wilson wrote in *Ware v. Hylton*, “When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”¹⁶⁷ Justices Chase and Iredell likewise referred in *Ware* to “the modern law of nations.”¹⁶⁸

Vattel’s customary law of nations could evolve through changes in state practice. Writing to Thomas Pinckney in 1793, Thomas Jefferson noted that the law of nations had “been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized Nation.”¹⁶⁹ As Justice Story would later observe, “[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.”¹⁷⁰

But the Framers also understood that the voluntary law of nations could evolve, even though it was based on natural law, as the result of changes in political reasoning or religion. Charging a grand jury in 1794, Justice Iredell noted that the law of nations had recently been expounded “with a spirit of freedom and enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning.”¹⁷¹ A generation later, Chancellor Kent acknowledged that “[t]he law of nations, so far as it is founded

164. Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 49–54, Report of the Int’l Law Comm’n on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 129–39 (2001) [hereinafter Draft Articles on State Responsibility].

165. *Id.* art. 51.

166. *Id.* art. 50(1)(a).

167. 3 U.S. (3 Dall.) 199, 281 (1796) (opinion of Wilson, J.) (second emphasis added).

168. *Id.* at 224, 229 (opinion of Chase, J.); *accord id.* at 269 (opinion of Iredell, J.) (referring to “the most modern notions” of “the law of nations”); *see also* *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) (Marshall, C.J.) (referring to the “modern law of nations”); *id.* at 139, 145, 147 (Story, J., dissenting) (same); *The Commercen*, 14 U.S. (1 Wheat.) 382, 387 (1816) (Story, J.) (same).

169. Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), in 7 *THE WORKS OF THOMAS JEFFERSON* 312, 314 (Paul Leicester Ford ed., 1904).

170. *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.).

171. Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *VAND. L. REV.* 819, 824 (1989) [hereinafter Charge to the Grand Jury of Justice James Iredell] (internal quotation marks omitted).

on the principles of natural law, is equally binding in every age, and upon all mankind.”¹⁷² But Kent went on to observe that “the Christian nations” of Europe and America, guided “by the brighter light, the more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves.”¹⁷³ These nations no longer followed the “barbarous and deplorable” practices of the ancients, who “considered foreign persons and property as lawful prize” and regarded piracy “as an honourable employment.”¹⁷⁴ “The law of nations, as understood by the European world, and by us,” Kent wrote, “is the offspring of modern times.”¹⁷⁵

The Framers could only draft the U.S. Constitution to interact with the law of nations that they knew. But the Framers knew that the law of nations would change. Just as they did not feel bound by the practices of Ancient Greece and Rome, the Framers would have expected their posterity to follow customary international law “in its modern state.”¹⁷⁶

III. IMPLICATIONS FOR INTERNATIONAL HUMAN RIGHTS IN U.S. COURTS

The significant changes that have occurred in customary international law since ratification of the U.S. Constitution raise important questions about the constitutional role of customary international law today.¹⁷⁷ The questions, which are not unique to international law, are essentially ones of translation.¹⁷⁸ This Part considers Bellia and Clark’s attempt at translation in light of the changes in customary international law described above. In particular, it examines their argument that U.S. courts may not apply international human rights law.

As recounted above, Bellia and Clark’s basic argument is that international human rights law, which they call “modern customary international law,”¹⁷⁹ is just too different from the law of nations with which the Founders were familiar.¹⁸⁰ “Modern customary international law,” they write, “did not exist at the Founding. Indeed, the founders could not have anticipated its development, as it runs counter to the core premises of the law of state-state relations that they took for granted when they drafted and adopted the Constitution.”¹⁸¹

This Part challenges Bellia and Clark’s argument in three ways. First, it challenges their argument on grounds of consistency. Customary international law

172. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 3 (New York, O. Halsted 1826).

173. *Id.*

174. *Id.* at 4.

175. *Id.*

176. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (opinion of Wilson, J.).

177. Full consideration of those questions is beyond the scope of this Article. For some of the author’s preliminary views, see William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 17 WILLAMETTE J. INT’L L. & DISP. RESOL. 21, 31–46 (2009).

178. See generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

179. BELLIA & CLARK, *supra* note 12, at 135.

180. See *supra* notes 17–21 and accompanying text.

181. BELLIA & CLARK, *supra* note 12, at 135–36.

has changed in many ways since ratification of the Constitution. The authors embrace some developments in customary international law—including some changes in the law of state-state relations—while rejecting the application of international human rights law in U.S. courts. But the distinctions they draw cannot be justified by reference to the original understanding of Framers, who saw all rules of the law of nations as potentially subject to change. Nor can the Bellia and Clark's distinctions be justified by reference to customary international law today, for Vattel's categories of rules with more and less obligatory force have been abandoned. To the extent that customary international law recognizes such distinctions today, it is the rules of international human rights law that have greater force.

Second, this Part shows that changes in customary international law have undercut the Bellia and Clark's two constitutional arguments, based on the recognition power and on the assignment of war powers.¹⁸² The recognition of foreign nations entitles those nations to rights under customary international law as it exists today, not as it existed two hundred years ago. And the assignment of war powers to the political branches of the federal government provides little support for the authors' claims in an age when nations no longer enforce customary international law by going to war.

Third, this Part rebuts Bellia and Clark's reliance on the act of state doctrine.¹⁸³ Contrary to their suggestion, the act of state doctrine is not a constitutional recognition of the traditional rights of foreign sovereigns—it is a modern doctrine of international comity. It therefore offers little support for their thesis, and none from the perspective of originalism.

A. CONSISTENCY IN THE FACE OF CHANGE

Bellia and Clark's attitude toward changes in customary international law appears inconsistent. Section II.B noted that some subjects have fallen out of customary international law, while others have emerged. The authors raise no objection to the former.¹⁸⁴ But the authors do object to the latter, arguing that U.S. courts may not apply international human rights law against foreign nations, the United States, or U.S. states.

Even within the law of state-state relations, Bellia and Clark accept some changes while rejecting others. They describe without complaint the U.S. decision to adopt the restrictive theory of foreign sovereign immunity in 1952.¹⁸⁵ They also discuss with approval *The Paquete Habana*,¹⁸⁶ a case in which the Supreme Court recognized a new rule of customary international law prohibiting

182. *See id.* at 41.

183. *See id.* at 97–112, 173–76, 202–05, 219–21.

184. For example, they do not take issue with the notion that the law merchant fell out of customary international law by 1938, when “state courts no longer exercised independent judgment to ascertain the content of multi-jurisdictional customary law in commercial cases.” *Id.* at 35.

185. *Id.* at 195–96. For a discussion of the restrictive theory, see *supra* notes 147–52 and accompanying text.

186. 175 U.S. 677 (1900).

the capture of coastal fishing vessels as prizes of war and enforced that rule against the federal government.¹⁸⁷ Yet when it comes to human rights litigation, Bellia and Clark argue that U.S. courts may not “curtail the traditional rights of [foreign] nations even if customary international law now does so.”¹⁸⁸

Bellia and Clark base their rejection of international human rights law in U.S. courts on the expectations of the Framers. Specifically, they argue that “the founders could not have anticipated its development, as it runs counter to the core premises of the law of state-state relations that they took for granted when they drafted and adopted the Constitution.”¹⁸⁹ But the authors provide no evidence that the Framers viewed the law of state-state relations as uniquely immune from change. Indeed, as section II.E has shown, the opposite is true. The “barbarous and deplorable” practices that Christian nations had rejected in the laws of war were part of the law of state-state relations.¹⁹⁰ The law of neutrality that Justice Iredell told a grand jury had recently been expounded “with a spirit of freedom and enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning” was part of the law of state-state relations.¹⁹¹ And the “modern” rule against confiscating the debts of enemy subjects to which Justices Chase, Iredell, and Wilson referred in *Ware v. Hylton* was part of the law of state-state relations.¹⁹² As this Article has noted, the Framers understood some rules of the law of nations as being binding without consent and other rules as being subject to an individual right of withdrawal.¹⁹³ But the Framers understood rules in both categories as being subject to change.¹⁹⁴

Modern customary international law also offers no support for the distinctions that Bellia and Clark wish to draw. The Framers would have considered the law of state-state relations more binding than the law merchant because most rules of state-state relations were part of the *voluntary* law of nations, whereas the rules of the law merchant were part of the *customary* law of nations.¹⁹⁵ But Vattel’s distinction between the voluntary and the customary law of nations collapsed during the nineteenth century.¹⁹⁶ Modern customary international law gives no special status to the law of state-state relations on the questions of jurisdiction and sovereign immunity that are central to Bellia and Clark’s claim. To the extent that

187. BELLIA & CLARK, *supra* note 12, at 218–21; *see also id.* at 91–94 (discussing *The Paquete Habana*). For further discussion of *The Paquete Habana*, see William S. Dodge, *The Paquete Habana: Customary International Law as Part of Our Law*, in INTERNATIONAL LAW STORIES 175 (John E. Noyes et al. eds., 2007).

188. BELLIA & CLARK, *supra* note 12, at 220.

189. *Id.* at 135–36.

190. 1 KENT, *supra* note 172, at 4; *see supra* notes 172–75 and accompanying text.

191. Charge to the Grand Jury of Justice James Iredell, *supra* note 171, at 824; *see supra* note 171 and accompanying text.

192. 3 U.S. (3 Dall.) 199, 229 (1796) (opinion of Chase, J.); *id.* at 269 (opinion of Iredell, J.); *id.* at 281 (opinion of Wilson, J.); *see also supra* notes 167–68 and accompanying text.

193. *See supra* Section I.C.

194. *See supra* Section II.E.

195. *See supra* notes 99–104 and accompanying text.

196. *See supra* Section II.A.

customary international law today distinguishes rules with different binding force, it is international human rights law that is considered more binding, with many of its norms recognized as non-derogable, *jus cogens* norms.¹⁹⁷

In sum, Bellia and Clark are not consistent in the face of change. They embrace some changes in customary international law while rejecting others. And the distinctions they draw find no support either in the views of the Framers or in modern customary international law.¹⁹⁸

B. CHANGE AND THE CONSTITUTION

Bellia and Clark make two constitutional arguments to support their thesis that U.S. courts may not apply international human rights law. First, they argue that “the Constitution’s exclusive allocation of the recognition power to the political branches required courts and states to uphold the traditional rights of recognized foreign nations under the law of state-state relations.”¹⁹⁹ According to Bellia and Clark, applying international human rights law to judge the actions of foreign states denies them their traditional rights and thus “countermand[s] the recognition power of the federal government.”²⁰⁰ Second, they argue that “the Constitution’s exclusive allocation of powers to the political branches to conduct diplomacy, issue reprisals, authorize captures, and declare and make war required courts and states to refrain from attempting to hold foreign nations accountable for their violations of the law of nations.”²⁰¹ Again, according to Bellia and Clark, applying international human rights law to the actions of foreign states interferes with the political branches’ exclusive authority. However, as this section demonstrates, changes in customary international law since ratification of the Constitution undercut both constitutional arguments.

1. Recognition Power

The text of the Constitution does not expressly confer the power to recognize foreign nations. But the Supreme Court has held that such power may be inferred from the Reception Clause of Article II, which authorizes the President to “receive Ambassadors and other public Ministers.”²⁰² As the Supreme Court explained in

197. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (AM. LAW INST. 1987) (“Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are. . .”). To be clear, the *jus cogens* status of many human rights norms does not mean international human rights law must be applied in U.S. courts. But it does show that Bellia and Clark’s claims about which rules of customary international law should be given effect in U.S. courts, and which should not, find no support in modern customary international law.

198. The authors’ reliance on the act of state doctrine is considered below. See *infra* Section III.C.

199. BELLIA & CLARK, *supra* note 12, at 41.

200. *Id.* at 56.

201. *Id.* at 41.

202. U.S. CONST. art. II, § 3; see *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084–85 (2015) (noting that “the Reception Clause provides support, although not sole authority, for the President’s power to recognize other nations”). The *Zivotofsky* Court found further support for the President’s recognition power in Article II’s grant of authority to make treaties and appoint ambassadors. *Id.* at 2085. The Court found it unnecessary to rely on Article II’s Vesting Clause. *Id.* at 2086.

Zivotofsky v. Kerry, “[l]egal consequences follow formal recognition.”²⁰³ For example, the act of state doctrine applies to “the public acts [of] a recognized foreign sovereign power.”²⁰⁴ Recognition gives a foreign nation the right to bring suit in U.S. courts.²⁰⁵ And recognition may influence a foreign nation’s entitlement to immunity from suit in U.S. courts under the Foreign Sovereign Immunities Act (FSIA).²⁰⁶ Bellia and Clark argue that the allocation of recognition powers to the political branches of the federal government “precludes both courts and states from taking it upon themselves to exercise or countermand the recognition power of the federal government.”²⁰⁷

But it is hard to see how permitting human rights suits to proceed in U.S. courts countermands the recognition of a foreign government. First, recognition and liability to suit are two entirely different things. Indeed, under the FSIA, recognized foreign states *are* liable to suit in U.S. courts in a variety of circumstances.²⁰⁸ Second, under the FSIA, foreign states themselves *are* generally immune from human rights claims.²⁰⁹ Third, suits against current or former foreign officials are generally not considered to be suits against a foreign state itself.²¹⁰ To permit human rights suits against foreign officials, or even in rare cases against foreign states themselves, in no way countermands state recognition.

Conceding that recognition and rights are two different things, it may still be true that “[o]nce the political branches recognized a foreign state, U.S. courts and states were bound by that decision to respect the rights that accompanied that status.”²¹¹ But the rights that accompany the status of a recognized foreign nation are the rights recognized by customary international law *today*, not customary

203. *Id.* at 2084.

204. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *see also Zivotofsky*, 135 S. Ct. at 2084 (“The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine.”).

205. *See Sabbatino*, 376 U.S. at 408–09 (holding that privileged of bringing suit extends to nations recognized by the United States and not at war with it); *see also Zivotofsky*, 135 S. Ct. at 2084 (“Recognized sovereigns may sue in United States courts. . .”).

206. *Zivotofsky* states that “[r]ecognized foreign sovereigns . . . may benefit from sovereign immunity when they are sued.” *Zivotofsky*, 135 S. Ct. at 2084. Lower courts, however, have generally applied international law to decide if the defendant is a “foreign state” under the FSIA. *See, e.g., Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123–24 (2d Cir. 2016); *see generally* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 reporters’ note 1 (AM. LAW INST. forthcoming 2018) (discussing cases).

207. BELLIA & CLARK, *supra* note 12, at 56.

208. *See* 28 U.S.C. §§ 1605, 1605A, 1605B, 1607 (2012 & Supp. 2016) (stating exceptions to foreign sovereign immunity).

209. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (holding that plaintiffs could not rely on the Alien Tort Statute in a suit against Argentina because “the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court”). The FSIA contains no general human rights exception, although some human rights claims may be brought under its expropriation exception, 28 U.S.C. § 1605(a)(3) (2012), or its terrorism exceptions, 28 U.S.C. §§ 1605A, 1605B (2012 & Supp. 2016).

210. *See Samantar v. Yousuf*, 560 U.S. 305, 322 (2010) (rejecting argument “that a suit against an official must always be equivalent to a suit against the state”).

211. BELLIA & CLARK, *supra* note 12, at 53.

international law as it existed two centuries ago. As the ICJ held in the *Jurisdictional Immunities* case, “the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred.”²¹² Customary international law today requires nations to respect human rights, recognizes universal jurisdiction to prescribe violations of fundamental human rights, and has abandoned absolute sovereign immunity.²¹³ Bellia and Clark attempt to avoid the implications of these changes by asserting that “the *Constitution* itself requires respect for the *traditional* rights of recognized foreign sovereigns under the law of state-state relations.”²¹⁴ But they point to nothing in the *Constitution* suggesting that only the law of state-state relations should be frozen in time, or that foreign states should be able to claim the benefit of changes in customary international law that work in their favor but not be subject to changes that limit their rights. As we have seen, the Framers understood that all customary international law rules were subject to change.²¹⁵

2. War Powers

Bellia and Clark’s second constitutional argument is that “the *Constitution*’s allocation of war powers to the political branches” requires “courts and states to respect the rights of recognized nations under the law of state-state relations.”²¹⁶ They point out that in the late eighteenth century, violation of a foreign nation’s “perfect rights” under international law “gave the aggrieved nation just cause for war.”²¹⁷ Thus, they reason, “the founding generation would have understood the *Constitution*’s allocation of war powers to the political branches to preclude U.S. courts and states from taking action—such as violating another nation’s perfect rights—that could trigger a war under established principles of the laws of nations.”²¹⁸

The problem with this argument is that international law today no longer recognizes war as a lawful response to violations of international law.²¹⁹ Even if one assumes that human rights litigation in U.S. courts violates the customary international law rights of other nations (which it does not), there is no chance that another nation would declare war on the United States for hearing such cases. When the United Kingdom and The Netherlands believed that the human rights suit brought against the Anglo-Dutch company Royal Dutch Petroleum violated

212. *Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 99, ¶ 58 (Feb. 3); see also Draft Articles on State Responsibility, *supra* note 164, art. 13 (“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”).

213. See *supra* notes 141–45, 147–52 and accompanying text.

214. BELLIA & CLARK, *supra* note 12, at 170 (second emphasis added).

215. See *supra* Section II.E.

216. BELLIA & CLARK, *supra* note 12, at 57.

217. *Id.* at 47.

218. *Id.* at 61.

219. See *supra* Section II.D. The same goes for letters of marque and reprisal, BELLIA & CLARK, *supra* note 12, at 61–63, and captures on land and water, *id.* at 63–65, both of which have passed into history.

customary international law rules on jurisdiction, they did not threaten military action but rather filed an amicus brief with the U.S. Supreme Court.²²⁰ In short, the changes in the means of enforcing international law described in section II.D have made Bellia and Clark's second constitutional argument obsolete.

C. THE (IR)RELEVANCE OF THE ACT OF STATE DOCTRINE

Unable to find support for freezing the law of state-state relations in the Constitution, Bellia and Clark turn to the act of state doctrine.²²¹ As the Supreme Court described in *Sabbatino*, “[t]he act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”²²²

Bellia and Clark read *Sabbatino* to authorize application of the eighteenth-century law of state-state relations despite the intervening changes in customary international law. They acknowledge that, when *Sabbatino* was decided in 1964, “international law had begun to incorporate limited exceptions to territorial sovereignty,” and that “interference with territorial jurisdiction of another nation was no longer considered, in itself, just cause for war.”²²³ “Nonetheless,” they write, “the *Sabbatino* Court refused to abandon—or even modify—the act of state doctrine. Rather, the Court read the Constitution to require U.S. courts to continue to apply the act of state doctrine categorically in its ‘traditional formulation.’”²²⁴ *Sabbatino* is Bellia and Clark's answer to the inconsistency objection,²²⁵ and they rely on it repeatedly to explain why courts should enforce the traditional law of state-state relations even though customary international law has changed.²²⁶

But Bellia and Clark's reliance on *Sabbatino* undermines, rather than supports, their thesis. First, *Sabbatino* makes clear that the act of state doctrine is *not* based on the traditional law of state-state relations. “We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority,” the Court wrote, “or by some principle of international law.”²²⁷ The law of nations in the eighteenth century, like customary international law today, did not require one nation to enforce another nation's laws. Following the established position in

220. See Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491).

221. See BELLIA & CLARK, *supra* note 12, at 97–112, 173–76, 202–05, 219–21.

222. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

223. BELLIA & CLARK, *supra* note 12, at 105.

224. *Id.*

225. See *supra* Section III.A.

226. See BELLIA & CLARK, *supra* note 12, at 105, 109, 173, 220.

227. *Sabbatino*, 376 U.S. at 421. The Court elaborated on each of these points. See *id.* (“If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it.”); *id.* (“That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly.”).

England, American courts considered this to be a matter of comity, and declined to enforce foreign law when it would cause prejudice to the United States or its citizens.²²⁸ The Supreme Court's first act of state case did not appear until 1897,²²⁹ and the act of state doctrine did not develop into a doctrine separate from sovereign immunity until 1918.²³⁰

Second, *Sabbatino* makes clear that the act of state doctrine is not "compelled by . . . the Constitution."²³¹ The "'constitutional' underpinnings" to which *Sabbatino* referred are separation of powers principles that the Supreme Court used to develop a modern rule of federal common law.²³² In doing so, *Sabbatino* looked not to the eighteenth-century law of nations but to modern customary international law.²³³ Thus, the Court looked to the treatment of expropriations "in international law today."²³⁴ The Court compared the potential impact of court decisions on expropriation claims to the executive branch's modern practice of espousing the claims of U.S. citizens, including "submission to the United Nations" and "the employment of economic and political sanctions."²³⁵ And the Court emphasized "the fluidity of present world conditions."²³⁶ The constitutional underpinnings of the act of state doctrine led the Supreme Court in *Sabbatino* not to adhere to sovereign rights laid down in the eighteenth century, but instead to mold the act of state doctrine in ways that seemed most responsive to modern international politics and modern customary international law.²³⁷

Third, the Supreme Court has subsequently limited *Sabbatino*. In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, the Court emphasized that "[t]he act of state doctrine is not some vague doctrine of abstention but a 'principle of decision'" that simply requires U.S. courts to apply foreign law in certain circumstances.²³⁸ Writing for a unanimous Court, Justice Scalia concluded: "The

228. See, e.g., *Banks v. Greenleaf*, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) ("[B]y the courtesy of nations, to be inferred from their tacit consent, the laws which are executed within the limits of any government are permitted to operate everywhere, provided they do not produce injury to the rights of such other government or its citizens.").

229. See *Underhill v. Hernandez*, 168 U.S. 250 (1897).

230. See *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 (1918) (noting that the act of state doctrine "does not deprive the courts of jurisdiction" but requires that the foreign government's act "must be accepted by our courts as a rule for their decision").

231. *Sabbatino*, 376 U.S. at 427; see also *id.* at 423 ("The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.").

232. *Id.* at 423.

233. See *id.* at 427–28.

234. *Id.* at 428.

235. *Id.* at 431.

236. *Id.* at 434.

237. See *id.* at 427–28 (noting that the act of state doctrine's "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").

238. 493 U.S. 400, 406 (1990). Specifically, the Court held that act of state doctrine applies only when a U.S. court would have "to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)).

act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments.”²³⁹

In short, the act of state doctrine is not a constitutional recognition of the traditional rights of foreign nations. It is a doctrine of international comity, tailored by the Supreme Court to fit modern conditions.²⁴⁰ The fact that Bellia and Clark think it necessary to rely so heavily on a subconstitutional doctrine of international comity reveals that their thesis finds little support in either the Constitution or international law.

CONCLUSION

Any attempt to determine the role of customary international law under the U.S. Constitution must necessarily translate the original understanding into modern terms. Whether or not one believes in an evolving Constitution,²⁴¹ there can be no doubt that customary international law has changed dramatically.²⁴² One might respond to such changes by denying any constitutional role for customary international law unless Congress has incorporated that law into federal legislation.²⁴³ One might also respond by treating all of customary international law as preemptive federal common law.²⁴⁴ Or one might attempt to find an intermediate position.

In *The Law of Nations and the United States Constitution*, Professors Bellia and Clark have articulated an intermediate position under which the constitutional status of customary international law depends on the kind of customary international law at issue. They treat the customary international law of sovereign immunity as preemptive federal law, while they deny the customary international law of human rights any constitutional status unless incorporated in federal legislation.

But such a distinction cannot be supported in either originalist or modern terms. From an originalist perspective, the distinction runs counter to the Framers’ understanding that all rules of the law of nations were subject to change, including the law of state-state relations. From a modern perspective, the distinction is untenable because of multiple changes in customary international law. Today, customary international law recognizes that nations do not have exclusive jurisdiction within their own territories, do not enjoy absolute immunity from suit in the courts of other nations, and may not violate fundamental human rights. Recognition of a

239. *Id.* at 409. Bellia and Clark quote only those passages of *Kirkpatrick* that seem to support *Sabbatino*. See BELLIA & CLARK, *supra* note 12, at 112, 203. They never engage its holding.

240. See generally William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) (discussing a range of international comity doctrines, including the act of state doctrine).

241. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424–28 (2012) (discussing the openness of different constitutional theories to later historical practice).

242. See *supra* Part II.

243. See, e.g., Bradley & Goldsmith, *supra* note 27, at 870.

244. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1), (2) & cmt. c (AM. LAW INST. 1987).

foreign nation entitles that nation to rights under customary international law as it exists today, not the “traditional rights” that it would have enjoyed two hundred years ago. And denying a foreign nation its rights under customary international law is no longer just cause for war. Bellia and Clark’s translation emphasizes one change in customary international law but fails to account for others.

A more promising approach would determine the role of customary international law with respect to each constitutional actor. One might begin with the constitutional texts and historical understandings discussed in section I.A. But one should not end there. These texts and historical understandings must themselves be translated in light of changes in customary international law over the past two centuries. That is a project for another day.