

The Constitution and the Law of Nations

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Under the original understanding of the Constitution, customary international law features in the U.S. legal system as general law. It is not law of the United States within the meaning of Articles III or VI of the Constitution, and so does not serve as a basis for federal question jurisdiction or override contrary state law. Under the original understanding, the Constitution does not confer the protections of the international law of state-state relations on either foreign states or governments that have been recognized as such by federal political actors. Congress may confer those protections by statute, but in the absence of statute or treaty, they rest on general law. The Constitution's text indicates that the laws of the United States referred to in Articles III and VI consist entirely of federal statutes. The Federal Convention's drafting process indicates that members of the convention had that understanding of the text they produced. That process also indicates that the drafters probably understood the laws referred to by the Take Care Clause of Article II to consist of federal statutes. Prominent figures in the ratification debates treated Articles III and VI as using the term "laws of the United States" to refer to statutes. The First Congress drafted the Judiciary Act of 1789 on the assumption that the laws of the United States referred to in Articles III and VI were federal statutes. During the 1793 prosecution of Gideon Henfield for non-statutory criminal violations of the United States' neutrality, a number of leading figures took the position that the federal courts could entertain prosecutions under unwritten law. It is unlikely, however, that any of them meant to assert that the law of nations was law of the United States within the meaning of Articles III or VI.

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INTRODUCTION

In 1776, the United States assumed among the powers of the earth the separate and independent station to which the laws of nature and nature’s God entitled them. As one of the powers participating in the European state system, which at that point reached all over the globe, the new sovereign also participated in a legal system distinct from its own. Questions soon arose concerning the interaction between those legal systems. When the Federal Convention met in 1787, the status of the United States in the international political and legal system was an important item on the agenda. As a result, several provisions of the Constitution look to the interaction between the law of nations and the new legal system the convention proposed. Congress was given the power to define and punish

offenses against the law of nations,¹ and treaties already made, as well as those yet to be made, were declared the supreme law of the land, overriding anything to the contrary in the law of any state.²

Although the Constitution to some extent addresses the relations between the American and international legal systems, those charged with implementing it quickly learned that it does not explicitly resolve all important questions in that connection. Doubt and debate have continued to this day. An important recent addition to that debate, *The Law of Nations and the United States Constitution*, provides an occasion to address one of the Constitution's basic questions: what is the status of customary international law in the legal system it creates?³ The book sets out a novel answer to that question, and this Article undertakes to evaluate that answer and provide its own.

Perhaps a sign of the difficulties this topic raises is that the meaning of that question is not itself clear. The legal system the Constitution creates might be the one contemplated by its text, structure, and history. It also might be the current American legal system, which reflects many decades of practice and in particular the doctrines of the courts. This Article is mainly concerned with the former and discusses the latter briefly.

Part I discusses Professors Bellia and Clark's important contribution to this ongoing debate. It questions one of their central claims: that the international law of state-state relations enters this country's legal system through the powers of the federal political branches.⁴

Part II then enters into the ongoing debate over the status of the law of nations as law of the United States under Articles III and VI of the Constitution. I join with those who believe that the laws of the United States referred to in those provisions consist entirely of federal statutes. At the time of the Framing, the law of nations had the status of general law—legal norms that were not the law of any one sovereign and that courts applied in default of local law provided by the sovereign with jurisdiction. After discussing the Constitution's text, the Article works through the drafting of Articles III and VI by the Federal Convention, arguing that the drafting process strongly indicates that those involved believed that the laws of the United States referred to in those provisions were exclusively federal statutes. The drafting also supports a distinct but related conclusion that is important to the role of international law in the Constitution: the laws referred to in Article II's requirement that the President take care that the laws be faithfully executed do not include any unwritten law, and probably are confined to statutes. Part II also reviews statements by important participants in the ratification debates, showing that they assumed that the laws referred to in Articles III and VI were statutes. It then shows that the same assumption underlies Congress's first

1. U.S. CONST. art. I, § 8.

2. *Id.* art. VI.

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

4. *See id.* at xix.

major step to implement both of those constitutional provisions: the Judiciary Act of 1789. Part II concludes by considering a number of important statements in 1793 concerning federal prosecution for non-statutory crimes. Those statements do not endorse, and often undercut, the thesis that the law of nations is law of the United States under the Constitution.

Part III deals briefly with the status of the law of nations given current practices and doctrines. I suggest that Bellia and Clark are mainly concerned with that question, and that their claims concerning the law of state-state relations are designed to explain contemporary practice and doctrine in a way that is more consistent with the original meaning than the explanation according to which the law of nations simply is unwritten federal law for constitutional purposes. Part III offers another way to accomplish that goal: the structure of the Constitution might be read to imply that, in default of congressional legislation, state and federal courts should follow a choice of law rule that looks to the law of state-state relations where it applies, and that state courts should follow the precedents of the Supreme Court of the United States as to that body of law, even though it is not binding on them under the Supremacy Clause.

I. THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION

This Part first briefly sketches the two main contemporary positions concerning the status of the law of nations under the Constitution. It then turns to Bellia and Clark's proposed reading, which is distinct from the other two, and assesses it with respect to the text and early practice.

A. THE CURRENT DEBATE OVER THE CONSTITUTIONAL STATUS OF THE LAW OF NATIONS

Contemporary scholarship about the place of the law of nations in the Constitution as originally understood features two main positions. According to one, the law of nations is law of the United States for purposes of the Constitution. The text twice refers to "the laws of the United States."⁵ Under Article III, the judicial power extends to cases and controversies arising under those laws, along with the Constitution and treaties of the United States.⁶ Under Article VI, the Constitution, laws of the United States made in pursuance thereof, and treaties made or which shall be made under the authority of the United States are the supreme law of the land—anything in state laws or constitutions to the contrary notwithstanding.⁷ Some proponents of the view that the law of nations is the law of the United States in the constitutional sense maintain that it is such under both Articles III and VI.⁸ Others, like Professor William Dodge, a participant in this

5. U.S. CONST. art. III, art. VI.

6. *See id.* art. III.

7. *See id.* art. VI.

8. *See, e.g.,* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–60 (1984) (arguing that international law is part of the federal common law and as such is the law of the United States under Articles III and VI).

Symposium, conclude that the law of nations is part of the laws of the United States under Article III but not Article VI.⁹

According to the other main contemporary account, laws of the United States under the Constitution consist entirely of federal statutes.¹⁰ The Constitution, according to this view, was drafted on the assumption that the law of nations would enter the American legal system not through congressional enactment but through the unwritten, general law.¹¹ The law of nations might provide the content of state law, it might provide the content of general common or customary law, and it might itself be general common or customary law.

As those formulations suggest, the concept of general law is central to the second contemporary understanding of the Constitution and the law of nations. Today's thinking about general law is founded on the academic work of Judge William Fletcher, who recovered the concept for the post-*Erie* world.¹² As he explains, general law was a body of legal rules that was not distinctively the law of any one sovereign.¹³ Maritime law and the law merchant were leading examples of general law when the Constitution was adopted.¹⁴ The courts of seafaring nations undertook to apply a single body of law governing maritime commerce and maritime warfare, in particular the law of prize. They also undertook to apply a uniform body of commercial law: the law merchant.¹⁵ Particular sovereigns could depart from those general default rules, either through legislation or through judicial identification of and reliance on local practices that deviated from it. If they did not, the general law would apply.¹⁶

B. THE LAW OF NATIONS AND THE POWERS OF THE POLITICAL BRANCHES

According to Bellia and Clark, neither of those positions is correct, because different components of the law of nations as it existed in 1787 enter into the American legal system in different ways. The law merchant and the law maritime were originally general law.¹⁷ Today, the general-law component of the law merchant has largely been eliminated through the localization of commercial law, while the Supreme Court has decided that admiralty and maritime law are law of

9. See William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 703–05 (2002) (contrasting Article III, which refers simply to “Laws of the United States,” and Article VI, which refers to “Laws of the United States . . . made in pursuance” of the Constitution).

10. See, e.g., Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 604 (2002) (arguing that the First Congress drafted the first Judiciary Act on the assumption that the laws of the United States are exclusively statutes).

11. See BELLIA & CLARK, *supra* note 3, at xiv (discussing this intermediate position).

12. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

13. *Id.* at 1517.

14. *Id.*

15. *Id.* at 1518.

16. *Id.* at 1517–18.

17. See BELLIA & CLARK, *supra* note 3, at 6–9 (explaining law merchant and the law of the sea are part of general, not municipal, law).

the United States for purposes of Articles III and VI of the Constitution.¹⁸

Their distinctive claim is that the third component of the law of nations known in 1787, the law of state-state relations, is binding on the States of the Union and state and federal courts, although the federal political branches may depart from it in exercises of their constitutional powers.¹⁹ They do not argue that the law of state-state relations is law of the United States under Article III or VI. Rather, they say that recognized foreign sovereigns enjoy the protections of international law because the political branches have recognized them.²⁰ They find additional support for that conclusion in the powers of the federal political branches that enable Congress and the President to respond to adverse conduct by other states.²¹ The Constitution's allocation of those powers means that the courts may not make such responses on their own, and so must apply the law of friendly international relations unless the political branches decide otherwise.²² The binding force of the law of state-state relations thus arises not because that body of law is itself supreme or part of the law of the United States, but because of the Constitution's grants of power to Congress and the President.

Although there is much to be said for this thesis, I do not agree with it as an interpretation of the Constitution's text in its historical context. There is no recognition power. The Constitution does not confer a power to recognize the existence of foreign states and governments, and therefore no legal effects can result from recognition.

Rather than conferring a recognition power as such, the Constitution provides for at least three ways in which the political branches make decisions that reflect a judgment that some foreign state exists or that some institution is its government. First, the President is charged with receiving ambassadors.²³ Second, the President appoints ambassadors and other public ministers with the advice and consent of the Senate.²⁴ Third, the President makes treaties with the advice and consent of two-thirds of the Senate.²⁵

Each of those three functions involves a judgment as to whether a foreign state or government exists as a matter of international law. Although the President's

18. *See id.* at 35–39 (pointing out that general commercial law has been localized and is treated by the Supreme Court as state law); *id.* at 131 (showing Supreme Court treats admiralty law as federal common law).

19. *See id.* at 56–57.

20. “The Constitution vested the federal political branches with exclusive power over the traditional means of recognizing foreign sovereigns.” *Id.* at 53. “Once 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.” *Id.* They derive that conclusion not from reasoning about the law of the United States, but from the Constitution: “Any judicial or state action that violated another nation’s rights . . . would have violated the Constitution by contradicting the political branches’ exercise of their recognition powers.” *Id.* at 57.

21. *See id.* at 57–67.

22. *Id.* at 41–42.

23. U.S. CONST. art. II, § 3.

24. *Id.* art. II, § 2.

25. *Id.*

role in receiving ambassadors is formulated as a duty and not a power, to perform that duty he must decide whether a person claiming to be a foreign state's representative has been sent by the government of an actual foreign state. That judgment can be delicate, because the existence of states and the identities of their governments can be subjects of intense controversy. The existence of the United States itself had been a matter of controversy to the point of world war shortly before the Constitution was adopted. The same judgment is also involved in the decision whether to appoint an ambassador or make a treaty. Ambassadors are sent to the governments of sovereign states with which the United States makes treaties.²⁶

Because different actors perform functions that rest on the question whether a foreign state or government exists, different answers are possible. The President might decide to receive an ambassador from a putative state that a majority of the Senate believes has not achieved sovereignty under international law, and to which the Senate therefore will not confirm an ambassador. Or the President and a majority of the Senate might agree that a putative state is sovereign while a large enough minority in the Senate blocks a treaty on the grounds that treaties may be made only with sovereigns and the putative state is not one under international law.

Thus, no single political actor is exclusively charged with determining whether a putative foreign state exists or whether an organization is its government. As a result, the Constitution does not provide a means by which the political branches can conclusively decide whether to recognize a foreign state or government. That arrangement contrasts with the Constitution's treatment of another basic foreign-relations decision: declaration of war. The Constitution allocates the decision whether to take the United States from peace to war exclusively to Congress.²⁷ If the Constitution attached important consequences to recognition, as Professors Bellia and Clark contend, it would provide a uniform answer to the question whether a foreign state exists and whether an organization is its government. It does not.

The President's decision to receive an ambassador does have legal consequences, but it does not amount to recognition and does not bring the law of nations into the U.S. legal system. Rather, reception has consequences under existing law, just as attaining the age of majority does. Reception by the President confers a status on the individual: that of an accredited foreign diplomat. Accredited foreign diplomats are protected by the law of nations, and lawyers at the time of the Framing contemplated that American courts would provide those protections.

Although the Constitution does not confer a recognition power, it certainly gives Congress powers that may be used to respond to unfriendly acts by foreign states. Not only may Congress declare war, it may grant letters of marque and

26. See BELLIA & CLARK, *supra* note 3, at 56–57.

27. See U.S. CONST. art. I, § 8.

reprisal.²⁸ Using its power over foreign commerce, it may impose embargoes or other economic sanctions, as they are called today.

Congress thus has substantial control over the legal environment of U.S. foreign relations, including relations with countries that are not altogether favorable in their conduct toward the United States. The courts apply the rules that constitute that environment but do not make them. According to Bellia and Clark, the obligation of the courts to apply the laws that govern relations between sovereigns that are at peace and amity derives from the constitutional powers of Congress and the President to move away from peaceful and amicable relations.²⁹ The courts' obligation to apply the law governing foreign relations, however, derives from their more general obligation to apply the law. That duty no more comes from Congress's power to declare war than it comes from Congress's power to amend the Internal Revenue Code, which the courts must apply as it stands. The contrast between legislative and judicial power certainly helps illuminate the proper operations of the latter, but particular powers of the legislature do not figure in the conclusion that courts decide cases according to the law.

The text and structure thus do not support the claim that the law of state-state relations enters the American legal system via the powers of Congress and the President. Nor do early historical understandings support that conclusion. Bellia and Clark do not identify statements from the early period that recognition by the political branches was a necessary condition for a state or government to enjoy the protections thereof.

Indications to the contrary can be found. For example, in *The Federalist No. 82*, Hamilton as Publius explained that Article III would not exclude the state courts from jurisdiction over the cases to which it extended the federal judicial power.³⁰ Congress might make federal jurisdiction exclusive, but unless it did so, jurisdiction would be concurrent.³¹ He deduced that conclusion "from the nature of judiciary power, and from the general genius of the system."³² Every government's judiciary, Hamilton argued, decides cases between parties within its jurisdiction, even if those cases "are relative to the laws of the most distant part of the globe. Those of Japan not less than of New-York may furnish the objects of legal discussion to our courts."³³ To apply the law of a country in a case is to recognize that country's sovereignty. Hamilton was describing the operation of the new Constitution, and contemplated that under it New York courts would continue to apply the law of Japan when appropriate. He did not say that the courts would only do so once there was an officially recognized Japan, which, as far as the

28. *Id.*

29. "[T]he 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." BELLIA & CLARK, *supra* note 3, at 41.

30. THE FEDERALIST NO. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

31. *Id.*

32. *Id.*

33. *Id.*

courts were concerned, would not be until the political branches of the national government recognized it. The United States would not have diplomatic relations with Japan until the middle of the 19th century. Until then, if Bellia and Clark are correct, state and federal courts should have denied that its Emperor was a sovereign. That would have surprised Hamilton.

In the early decades under the Constitution, the courts applied the law of state-state relations because it was law. They understood that Congress could change the legal relations between this country and others, and could do so in response to unfriendly acts by foreign sovereigns, but did not derive their obligation to apply the law from Congress's power to change it. For example, in *The Schooner Exchange v. McFaddon*, Chief Justice Marshall deduced the rule of immunity for foreign armed vessels from principles governing the relations among sovereigns.³⁴ His reasoning was about sovereigns in general, and said nothing about the allocation of power among the parts of the U.S. federal government. Chief Justice Marshall invoked "the unanimous consent of nations" but said nothing about this country in particular.³⁵ Sovereign immunity was a "principle of public law."³⁶ A sovereign acting within its territorial jurisdiction might depart from the principle of immunity, but a court should not conclude that it had done so on slight evidence.³⁷ A grant to the courts of jurisdiction in general terms was not enough to show that the United States had opted to depart from the standard practice of states.³⁸ Courts apply rules until the competent authority changes them. Their obligation to apply the rules does not derive from the fact that the legislature can change them.

As for the government's argument in *The Schooner Exchange* that courts should not engage in unfriendly acts and that wrongs are matters for diplomatic and not legal discussion, "the argument [of the Court] has already been drawn to a length, which forbids a particular examination of these points."³⁹ The Court thus said that it was not addressing the argument that Bellia and Clark endorse.⁴⁰

34. 11 U.S. (7 Cranch) 116, 147 (1812).

35. *Id.* at 144.

36. *Id.* at 145.

37. *Id.* at 146.

38. *Id.*

39. *Id.* The argument Chief Justice Marshall declined to consider in depth was based on:

[T]he general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention.

Id.

40. Bellia and Clark say that a judicial decision contrary to the immunities of foreign sovereigns "would have usurped the exclusive authority of the political branches to take action that could have provoked armed conflict with France." BELLIA & CLARK, *supra* note 3, at 82. That may be true, but the Court did not rely on that factor. Along the same lines, they say that:

In keeping with the Constitution's assignment of the reprisal and war powers to Congress, Marshall found "great weight" in the argument "that the sovereign power of the nation is

Nor did the Chief Justice mention that the United States had “recognized” France or indicate that the rights of foreign sovereigns were reserved for recognized foreign sovereigns.⁴¹ The qualifier “recognized” does not appear in *The Schooner Exchange*. John Marshall probably believed that Japan was a real country just as Alexander Hamilton did, even though it had exchanged no diplomats and made no treaty with the United States.

Bellia and Clark’s theory of the incorporation of the law of state-state relations into American law is difficult to square with the text, structure, and history of the Constitution and with early judicial decisions. As discussed more below, I doubt they actually endorse it as a matter of textual meaning or original understanding. Rather, it appears they think their theory is the best way to reconcile the Constitution with subsequent practice, and in particular with the Supreme Court’s treatment of the law of state-state relations as binding on state and federal courts without regard to contrary state law.

II. THE LAW OF NATIONS AS GENERAL LAW OR LAW OF THE UNITED STATES UNDER ARTICLES III AND VI

This Part defends the position that the “laws of the United States” referred to in Articles III and VI are federal statutes, and the legal system created by the Constitution includes general law, which in turn may incorporate, reflect, or include the law of nations. As general law and not law of the United States, the law of nations does not support federal-question jurisdiction under Article III and does not displace contrary state law under Article VI.⁴²

This Part begins with the text, explaining why “laws of the United States” in Articles III and VI most likely means federal statutes. It then shows that in a number of crucial situations, important participants in the Framing and ratification had that understanding of the words. First, the Federal Convention’s drafting process strongly supports the conclusion that the delegates believed that “laws of the United States” meant statutes to be adopted by the legislature their proposal

alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, {and} that they are for diplomatic, rather than legal discussion.”

Id. (footnote omitted). After the words “great weight,” Marshall’s opinion continues, “and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.” *The Schooner Exchange*, 11 U.S. at 146. The Court did not endorse that argument, but rather declined to address it. *See id.*

41. Bellia and Clark suggest that recognition played a role in the Court’s reasoning. For example, they explain the Court’s willingness to exercise jurisdiction on the grounds that “the United States’ recognition of France did not itself bar judicial review of the legality of the capture.” BELLIA & CLARK, *supra* note 3, at 80. Recognition may figure in their explanation of the Court’s decision, but it did not figure in the Chief Justice’s opinion.

42. On this point I agree with Professor Stewart Jay, a leading scholar of the original understanding of the place of unwritten law in the legal system created by the Constitution. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 831–33 (1989) (explaining that the law of nations was seen as general law and so applicable in federal court, but was not considered law of the United States under Articles III or VI).

would establish. As I explain, the drafting process also casts light on a question concerning the law of nations and the Constitution distinct from that law's place under Articles III and VI. The evolution of the Convention's texts suggests that its members believed that the laws that Article II requires the President faithfully to execute are federal statutes. The understandings formed by participants in the drafting process, who were focusing carefully on the text they were preparing, provide powerful evidence about the meaning of the words involved to sophisticated users of the language at the time of the Framing.

After discussing the drafting process, this Part will turn to a brief treatment of the ratification debates, showing that leading proponents of the Constitution believed that the laws of the United States consist solely of federal statutes and therefore have no unwritten component. This discussion will not be in enough depth to support the conclusion that most participants in the ratification process shared that understanding. The point is more limited but still important: that this reading of the text was natural enough for James Madison, Alexander Hamilton, and John Marshall to adopt it without indicating any hesitation. This evidence is enough to refute the claim that the laws of the United States were generally understood to have an unwritten component, including, for example, the customary law of nations.

The discussion then takes up Congress's first major step to implement Articles III and VI: the Judiciary Act of 1789. A careful reading of the Act's text shows that its drafters believed that the laws of the United States referred to in the Constitution were only federal statutes.

In 1793, members of the Washington Administration and the federal courts faced a practical question concerning the status of the unwritten law of nations in the new legal system under the Constitution. In response to the wars of the French Revolution, the federal executive prosecuted Gideon Henfield for conduct inconsistent with the United States' status as a neutral under international law.⁴³ No federal statute expressly made Henfield's service on a French privateer a crime, and the prosecution relied in part on the unwritten law of nations.⁴⁴ The *Henfield* case was the product of a considered policy of non-statutory prosecutions designed to ensure compliance by the United States with its neutral status. Several important legal figures made statements in connection with that prosecution that bear on the status of the law of nations. I will argue that while those statements show belief in an unwritten law of crimes, they do not show belief that it was law of the United States under the Constitution as opposed to part of the general law.

A. THE LAWS OF THE UNITED STATES, UNWRITTEN LAW, AND THE TEXT

The Constitution's text strongly indicates that "laws of the United States" in Articles III and VI means federal statutes. The Constitution never uses the word

43. *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

44. *Id.* at 1112, 1115.

“statute,” but it does repeatedly call the output of Congress’s legislative process “laws.” It does so most notably in Article I, Section 7: a bill passed by the House and Senate, “before it become a Law,” is to be presented to the President.⁴⁵ If he returns it with his objections, and it is repassed by two-thirds of both houses, “it shall become a Law.”⁴⁶ If he neither signs nor returns it after ten days, Sundays excepted, “the Same shall be a Law,” unless Congress by adjournment prevents its return, in which case “it shall not be a Law.”⁴⁷ Every time, Article I, Section 7 says “a Law,” as in a singular enactment, not just “law,” as in a binding legal norm.

Consistent with the usage that Congress acts by adopting laws, the Constitution routinely confers on it authority to act in that mode. Congress directs how to conduct the census “by Law,”⁴⁸ alters the States’ rules about congressional elections “by Law,”⁴⁹ and appointed a day other than the first Monday in December for its annual session “by Law.”⁵⁰ The Necessary and Proper Clause gives Congress authority to enact “all Laws” necessary and proper to carry its powers and other constitutional powers into execution.⁵¹ Reference to congressional action by law is found not only in grants of power to Congress, but also in an important restriction on the Executive: no money is to be drawn from the Treasury “but in Consequence of Appropriations made by Law.”⁵²

Regardless whether “laws of the United States” in Article III refers only to acts of Congress, Article VI confers supremacy only on the Constitution, treaties, and statutes. It provides that “this Constitution, and the Laws of the United States which shall be made in Pursuance thereof,” along with treaties made under the authority of the United States, are “the supreme Law of the Land.”⁵³ The Constitution sets out a process by which acts of Congress are made pursuant to it, but no process by which any unwritten norm is. Moreover, as Professor Ramsey points out elsewhere in this Symposium, the common law and the law of nations already existed when the Constitution was adopted, but Article VI deliberately looks only to the future in referring to laws.⁵⁴ It refers to laws which *shall* be made, in contrast to treaties “made or which shall be made,” under the authority of the United States.⁵⁵ Article VI conferred supremacy on existing and future treaties, but only future laws. By that it means statutes.

45. U.S. CONST. art. I, § 7.

46. *Id.*

47. *Id.*

48. *Id.* art. I, § 2.

49. *Id.* art. I, § 4.

50. *Id.*

51. *Id.* art. I, § 8.

52. *Id.* art. I, § 9.

53. *Id.* art. VI, § 2.

54. See Michael D. Ramsey, *The Constitution’s Text and Customary International Law*, 106 GEO. L.J. 1747, 1754–55 (2018).

55. U.S. CONST. art. VI, § 2.

B. THE UNDERSTANDING OF THE TEXT AS REFLECTED IN THE DRAFTING PROCESS OF
THE FEDERAL CONVENTION

This section reviews the evolution of the Constitution's text at the Federal Convention. That evolution strongly suggests that the delegates understood "laws of the United States" in Articles III and VI to refer exclusively to federal statutes.

The drafting process also bears on a related question concerning the status of the law of nations in the Constitution: whether it is among "the Laws" that Article II enjoins the President faithfully to execute.⁵⁶ Although that question is not the central focus of this Article, it is closely connected to that focus. The argument that the Federal Convention designed Articles III and VI to include the law of nations rests on the premise that the Convention decided to take very strong steps to ensure the United States would comply with its commitments under international law.⁵⁷ This premise also supports the conclusion that the Take Care Clause requires the President to implement the United States' international legal obligations. Because the drafting process indicates that the Take Care Clause was not understood to operate as to international law, it also suggests that the Framers' commitment to ensuring compliance with the law of nations was limited, even though it was quite real. The textual evolution of Articles III and VI is, as I will explain, bound up with that of the Take Care Clause, so an inquiry into the drafting of the former appropriately includes an inquiry into the drafting of the latter. The status of international law under the Take Care Clause is also of independent significance, and so worth exploring for its own sake.

Through May, June, and most of July, the Convention debated and adopted resolutions describing the contents of a proposed constitution, resolutions that were not themselves proposals for the document's actual text. On July 26, the Convention referred its proceedings up to that point to a five-member Committee of Detail, chaired by John Rutledge of South Carolina.⁵⁸ That Committee presented a printed draft constitution on August 6, and the Convention began to discuss it on that day.⁵⁹ After debating and amending that draft, the Convention appointed a five-member Committee of Style on September 8 "to revise the style of and arrange the articles" that the Convention had agreed to.⁶⁰ The Committee

56. *Id.* art. II, § 3.

57. The Convention's concern that the United States comply with international law is a leading theme of an important article by two other participants in this Symposium. 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).

58. On July 23, the Convention voted to refer its proceedings to a committee "for the purpose of reporting a Constitution conformably to" its proceedings up to that point. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1911). The Committee consisted of John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson. *Id.* at 97. On July 26, the Convention voted to refer its proceedings following that vote to the same Committee and then to adjourn until August 6. *Id.* at 117–18.

59. *Id.* at 176.

60. *Id.* at 547. The Committee consisted of William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King. *Id.*

of Style delivered its printed draft on September 12, and on September 17, that draft as amended was adopted by the Convention as its proposed constitution.⁶¹

The drafts reported by both Committees had a clause that was subsequently deleted but that is especially relevant here because of both its subject matter and its wording. Each draft had a clause setting out the enacting style of federal statutes. The Committee of Detail's version prescribed the enacting style of "laws of the United States,"⁶² whereas the Committee of Style's version prescribed such a rule for "the laws."⁶³ A provision that governs enacting style for a legislature concerns the acts of that legislature and nothing else. Those two provisions thus unequivocally referred only to federal statutes. They therefore demonstrate that the Convention could understand both "the laws of the United States" and "the laws" to refer exclusively to acts of Congress. The enacting-style clauses are also part of the context for the forerunners of Articles III and VI, and of the Take Care Clause, that appeared in the two committees' reports. As I will explain, as part of that context the enacting-style provisions strengthen the inference that Articles III and VI use "laws of the United States" to refer to federal statutes and the Take Care Clause uses "laws" to refer to federal statutes.

The Committee of Detail's draft conferred supreme status on treaties and "Acts of the Legislature of the United States made in pursuance of" the Constitution.⁶⁴ That supremacy provision did not mention the Constitution itself. The Committee of Detail's draft gave a supreme court jurisdiction over "cases arising under laws passed by the Legislature of the United States" and several other categories of cases, but did not mention treaties or the Constitution itself.⁶⁵ Neither the supremacy or jurisdiction provisions made any reference to the common law, the law of nations, or any other form of unwritten law. The draft's take-care provision instructed the President to "take care that the laws of the United States be duly and faithfully executed."⁶⁶ Had the Committee of Detail's words carried over to Articles III and VI, they would have unequivocally referred to federal statutes and not to the common law or the law of nations. Had the Committee's enacting-style clause and its version of the Take Care Clause been adopted, the inference would have been strong but not conclusive that the latter referred only to federal statutes. The Constitution's enacting-style provision would have used "the laws of the United States" in that narrow sense, so that any

61. *Id.* at 582.

62. *Id.* at 180 ("The enacting stile of the laws of the United States shall be, 'Be it enacted by the Senate and Representatives in Congress assembled.'").

63. *Id.* at 593 ("The enacting stile of the laws shall be, 'Be it enacted by the senators and representatives in Congress assembled.'").

64. *Id.* at 183 ("The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or Laws of the several States to the contrary notwithstanding.").

65. *Id.* at 186.

66. *Id.* at 185.

other meaning for those words in the take-care provision would have been too confusing to attribute to careful drafters.

A crucial question is therefore whether the changes in wording that produced Articles III and VI and the Take Care Clause, and the elimination of the enacting-style provision, were understood as transforming the substance of the provisions involved, and if so, how. I will argue that delegates who were attending to these questions did not think any such change in meaning had taken place.

The relevant process of development from the Committee of Detail's draft began on August 23 with an amendment to the Committee's proposed text regarding supremacy. The Committee's chairman, John Rutledge, moved that the supremacy provision be amended both to include the Constitution and to substitute "Laws of the United States made in pursuance thereof" for "acts of the legislature of the United States" made in pursuance of the Constitution.⁶⁷ The amendment was adopted; according to Madison's notes there was no opposition.⁶⁸ Madison's report, if correct, is unsurprising. The Constitution purports to bind state and federal governments, and so assumes its own supremacy; including it in the clause simply reiterated and clarified an important point. The change in wording with respect to statutes was not a change in substance because it did not change the clause's legal effect. Whatever laws of the United States in general may be, laws of the United States made in pursuance of the Constitution are statutes.⁶⁹

The Supremacy Clause in the Constitution refers only to laws made pursuant to the Constitution, and so only to statutes. Its meaning did not change from the Committee of Detail's proposal. Determining whether the Framers thought they were changing the provision that became the arising-under language in Article III requires closer attention. Four days after the Convention modified the Committee of Detail's supremacy provision, William Samuel Johnson of Connecticut moved that the Constitution be added to the laws passed by the legislature of the United States in the arising-under component of federal court jurisdiction.⁷⁰ The motion was adopted; again, Madison reported that there was no opposition.⁷¹ John Rutledge then moved that "passed by the Legislature" be struck out between "laws" and "of the United States," and that "treaties made or which shall be made under their authority" be added to that provision.⁷² Both motions were adopted without opposition according to Madison, whose notes say that the change was made "conformably to a preceding amendment in another place."⁷³ As amended, the provision gave jurisdiction over cases arising under the Constitution, the laws

67. *Id.* at 169, 381.

68. *Id.* at 389.

69. On August 25, the supremacy provision was further amended to clarify that it applied to then-existing treaties and those made later under the new Constitution. *Id.* at 409, 417. On Madison's motion, the Convention inserted "or which shall be made" after "all treaties made." *Id.*

70. *Id.* at 423, 430.

71. *Id.*

72. *Id.* at 423–24, 431.

73. *Id.*

of the United States, and treaties made or which shall be made under the authority of the United States.

Rutledge's amendment to what became the federal-question provision of Article III is central to the role of the law of nations in the U.S. legal system. Under the report of the Committee that he chaired, the federal courts would have had no jurisdiction derived from the common law or the law of nations. Rutledge's amendment substituted the laws of the United States for laws passed by the federal legislature, raising the possibility that the former concept is broader than the latter. If Rutledge believed that it was, then his proposal regarding what became Article III was designed to change it in an important way. Under this hypothesis, Rutledge wanted the federal courts to have jurisdiction over cases involving some body of legal norms that included both federal statutes and other components, perhaps the common law or the law of nations. That body of legal norms, whatever it was, constituted laws of the United States in a sense broader than just acts of the federal legislature.

The phrase Rutledge used to accomplish that goal, however, is readily understood to mean federal statutes alone. It was used in that sense in the enacting-style provision of his committee's draft.⁷⁴ Rutledge had also recently proposed using those words in the supremacy provision, which applied only to federal statutes even if that phrase by itself did not.⁷⁵ If he was seeking to alter the content of the jurisdiction provision, Rutledge undertook to make an important change but used language that was, at best, ill-adapted to his purpose. The hypothesis that Rutledge wanted to change the jurisdiction provision also calls for a reason Rutledge wanted to make that change to his own committee's proposal, and an explanation as to why no one else from the Committee of Detail objected, assuming Madison was correct on that point. If Rutledge wanted to change the substance of the provision with those words, Madison misunderstood him by thinking the amendment was merely a conforming change, but did so understandably: the alteration of phrasing was so ill-suited to changing the sense that such a purpose easily could have been missed. Madison's understanding that the latest amendment was a conforming change to match the revised supremacy provision was quite reasonable.⁷⁶ If Rutledge thought that the laws of the United States were not limited to federal statutes, he bungled badly the task he set for himself. The hypothesis that the chairman of the Committee of Detail drafted so ineptly is not credible. Therefore, neither is the hypothesis that he believed the laws of the United States included more than federal statutes.

A much more credible hypothesis is that Rutledge undertook to do just what the Committee of Style soon would be appointed to do: smooth out the text without changing its content. If Rutledge believed that "laws of the United States" meant federal statutes, the draft his committee prepared had a stylistic infelicity

74. *See id.* at 180.

75. *See supra* note 67 and accompanying text. Whatever laws of the United States are, the only laws of the United States made pursuant to the Constitution are statutes.

76. *See supra* note 73 and accompanying text.

that did not affect either its content or its clarity. That draft used the phrase “laws of the United States” in the enacting-style and take-care provisions.⁷⁷ It used “acts of the legislature” in its supremacy provision and “laws passed by the legislature” in describing the courts’ jurisdiction.⁷⁸ Not only did the draft use three different phrases with the same meaning in those four provisions, but it also referred to the federal legislative body as the legislature and elsewhere as Congress.⁷⁹ If Rutledge thought that “laws of the United States” meant federal statutes, his proposed amendments moved the text toward consistent usage with respect both to those statutes and the body that made them. Moreover, if that is how Rutledge understood that crucial phrase, then Madison correctly understood Rutledge’s motion on August 27: it conformed the federal jurisdiction provision to the supremacy provision.

That conclusion about John Rutledge’s understanding of “laws of the United States” also holds for other members of the Convention who were paying attention to the evolving text. Anyone who understood laws of the United States to be a broader category than federal statutes would have regarded the change to the arising-under jurisdiction provision to be substantive. Delegates with that understanding and that substantive preference would have decided to support a change that they saw used language that was unclear on the point they wanted to make. It is hard to see why any delegate would have wished to do that, which suggests that no delegate had that combination of textual understanding and substantive preference.

After those amendments were made by the Convention itself, the Committee of Style made parallel changes to the enacting-style and take-care provisions, replacing “laws of the United States” with “laws” in each.⁸⁰ Having rearranged the text into the now-familiar articles of the Constitution, the Committee put the arising-under language the Convention had adopted in Article III⁸¹ and the supremacy language in Article VI.⁸² Both referred to the laws of the United States.⁸³

The Committee of Style delivered its printed draft on Wednesday, September 12, less than a week before the Convention would adjourn on September 17.⁸⁴ At some point during that time, the enacting-style clause was stricken out.⁸⁵ By eliminating that provision, the Convention changed the context of another clause in an important way: the phrase “the laws” in the Take Care Clause is not now read in

77. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 180, 185.

78. *Id.* at 183, 186.

79. *Id.* at 177, 181.

80. *Id.* at 593, 600.

81. *Id.* at 600.

82. *Id.* at 603.

83. U.S. CONST. art. III; *id.* art. VI.

84. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 582.

85. The Constitution as engrossed contains no such clause. Farrand included its removal on a list of four amendments that are not mentioned in the Journal or any delegate’s notes but that he compiled from the copies of the printed Committee of Style draft of Washington, Baldwin, and Brearly. *Id.* at 633 n.15.

light of the same words in an enacting-style provision, because the Constitution has no such provision. Both the Committee of Detail's draft and that of the Committee of Style had enacting-style and take-care provisions that used the same words, the former using "the laws of the United States" and the latter using "the laws."⁸⁶ The presence of the enacting-style clause in both committees' drafts is important in determining what the committees' members thought their texts meant, whatever the bearing of that question on the meaning of the Constitution itself may be.

The Committee of Detail's draft used "laws of the United States" unequivocally to refer to federal statutes in its enacting-style clause; legislatures enact statutes, not unwritten law. The Committee of Detail's take-care provision also used those words.⁸⁷ That parallelism suggests, though it does not prove, that the Committee's members understood the phrase to have the same meaning in the two clauses, so that both of them referred to statutes. In light of British constitutional history, the Committee of Detail would have had good reason to be concerned specifically with presidential execution of statutes. A standard explanation of the Take Care Clause is that it negates any claim that the President may suspend the operation of federal laws or dispense individuals from compliance with them.⁸⁸ English monarchs claimed a power to dispense individuals specifically from the operation of statutes, not from the common law.⁸⁹ Although some exercises of that authority were uncontroversial because they fixed outmoded or badly drafted statutes,⁹⁰ King James II set off a firestorm of protest, and apprehension of popish tyranny, when he dispensed Catholics from the statutes barring them from the church, army, and government.⁹¹ Once James had fled and been replaced on the throne by his daughter Mary II and nephew William III, Parliament declared that James had endeavored to "subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom."⁹² It listed first that he did so "by assuming and exercising a Power of dispensing and suspending" of laws and the execution of laws without consent of Parliament.⁹³ An assertion of legislative supremacy relative to the executive—more precisely, the supremacy of statutory law relative to the executive—would have been quite familiar to the

86. See *supra* notes 62–63 and accompanying text.

87. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 171.

88. For example, in 1806 Justice William Paterson, who had served on the New Jersey delegation to the Federal Convention, addressed the Take Care Clause on circuit. In a Neutrality Act prosecution, the defendant suggested that the executive had condoned his acts of hostility against Spain. *United States v. Smith*, 27 F. Cas. 1192, 1201 (C.C.D.N.Y. 1806) (No. 16,342). Justice Paterson responded that the statute conferred no power to suspend it, and that the Constitution, far from giving the President such power, imposes on him the duty to take care that the laws be faithfully executed. *Id.* at 1229.

89. See Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUDS. 434, 435 (1977) ("[T]he king could offer no exceptions to common law; he could dispense only with such law as he had had a part in making, statute or enacted law.").

90. See *id.* at 437–38.

91. *Id.* at 439–40.

92. *Id.* at 440 (quoting the Declaration of Right).

93. *Id.*

Federal Convention. It is thus entirely possible that the Committee of Detail's parallel use of "laws of the United States" in the enacting-style and take-care clauses reflected the understanding that they both referred exclusively to federal statutes and a decision that those provisions should both be about acts of Congress.

After the Committee of Style's parallel changes to the parallel language of those clauses, they both referred to "the laws" and not "the laws of the United States." Once again, the enacting-style clause referred exclusively to statutes. The continued use of the same words suggests that the Committee of Style understood them to have the same meaning in its own draft. The Committee also had reason to think that the same meaning should appear in both: just as the legislature of the United States enacts laws of the United States, so the President of the United States executes the laws of the United States. The Committee's members, and other Convention delegates who were following the text's modifications, thus may well have thought that the Committee of Style's take-care provision referred exclusively to federal statutes.

They may well also have believed that a take-care provision so limited was all they needed. To include the Constitution would have been to state explicitly a point that is, in any event, necessarily implicit. Of course the Constitution bound the President, as it bound all officials, federal and state. If the Constitution did not bind the President without a take-care provision, there was no point to putting a take-care provision in it. Given that the Constitution does bind the President, there is no need to repeat that the President must carry it out when it calls on him to do so. Statutes presented a distinct question, however. King James had claimed constitutional power to dispense statutes.⁹⁴ A main way in which the Convention was departing from the Articles of Confederation was by creating an executive that was independent of the legislature in important ways. Although the United States in Congress Assembled performed executive functions, under the Constitution those functions were mainly assigned to a chief executive who was neither chosen nor readily removable by the legislature. Although the government's subordination to the Constitution went without saying, the form of executive subordination to the legislature found in a duty to carry out statutes may not have.

There is also good reason to doubt that the Committee of Style believed that the laws referred to in their take-care provision included treaties. While the Stuart monarchs remained a byword for bad government, executive implementation of treaties may not have been on the delegates' minds. The delegates most likely mainly had in mind state legislatures' refusals to comply with treaties during the 1780s.⁹⁵ The drafting history supports the conclusion that the take-care provision of the Committee of Style's draft was not understood to refer to treaties.

94. *See supra* note 89.

95. Professors Golove and Hulsebosch discuss this problem in depth. As they explain, states' refusal to comply with treaties was an embarrassment to American diplomats in Europe under the

In addition to the enacting-style and take-care provisions, the Committee of Style's draft included federal question and supremacy provisions reflecting the Convention's changes to the Committee of Detail's text.⁹⁶ Both of those separated the laws of the United States from treaties, and both their drafting history and the context of the Constitution of the United States implied that "the laws" referred to in the enacting-style and take-care clauses were those of the United States. The Committee of Style thus could not expect that "the laws" would be taken to include treaties in its take-care provision, which implies that they did not use those words to do so. Including treaties in the take-care provision also likely would have taken the Committee beyond its charge, which was to revise and arrange the articles that the Convention had agreed to. The Committee of Detail's draft take-care provision referred to the laws of the United States and as discussed above almost certainly meant statutes alone.

While "the laws" in the Committee of Style's take-care provision would have been poorly designed if it included treaties, it would have been an especially poor way to include any unwritten component like the customary law of nations (and also would have taken the Committee beyond its assignment). The Committee's supremacy provision made the Constitution, laws of the United States, and treaties the supreme "law" of the land. The word "laws" in the take-care provision, if it did not mean federal statutes, might thus mean all three forms of law enacted through a process set out in the Constitution, the committee likely having believed that the laws of the United States were statutes. The customary law of nations is not one of those forms of law enacted through a process set out in the U.S. Constitution. Under those circumstances, if the members of the Committee of Detail had wanted to bind the President to the law of nations, they likely would have done so explicitly. That they did not is evidence that they had no such objective, and that they understood the language they used to be limited to distinctively American federal law, if not to federal statutes.

The Take Care Clause in the Constitution as ultimately adopted, however, may not have the meaning its drafters expected it to, for a reason that shows how the meaning of legal texts can depart from their drafters' understandings. One reason to think that the members of the Committee of Style believed that "the laws" in their take-care provision meant statutes is that the same words in their enacting-style provision could only mean statutes. Late in the drafting process, the enacting-style provision was deleted.⁹⁷ That move changed the context of the Constitution's Take Care Clause in a way that the members of the Federal Convention may not have anticipated: the document had lost an indicator, provided by the presumption of consistent usage, of a limited meaning

Confederation. See Golove & Hulsebosch, *supra* note 57, at 955–59 (discussing the disruption of American diplomacy by states' non-compliance with treaties).

96. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58, at 600, 603.

97. See *supra* notes 85–86 and accompanying text.

for the Take Care Clause.⁹⁸ The presumption of consistent usage is only a presumption, but it is a perfectly good one. As I have discussed, the Convention moved to consistent usage in Articles III and VI, and the Committee of Style did so by replacing all references to the legislature with references to Congress. A reader of the Take Care Clause—for example, at a ratifying convention—thus might reasonably attribute to its authors a meaning they did not have in mind.

The drafting history confirms that the Federal Convention's members understood "the laws of the United States" to consist of federal statutes and confirms especially strongly that they understood the supremacy provision to confer supreme law status only on three forms of written federal enactment. It further indicates, though less strongly, that the drafters believed that the laws referred to in the Take Care Clause, like those that had been referred to in the deleted enacting-style clause, were also statutes. The conclusion that laws of the United States are statutes is also consistent with the most natural reading of the text without regard to its development by its drafters.

The Federal Convention's work with those provisions will be of interest to interpreters who believe that the subjective understandings of the Convention's members are significant in themselves. It will also be of great interest to those who believe that only the text itself is authoritative, especially those who believe that the original meaning alone is authoritative. The Convention's decisions about word choice are especially strong evidence about original meaning. Many of its members were highly sophisticated lawyers. Three members of the Committee of Detail would later serve on the Supreme Court of the United States, two as Chief Justice.⁹⁹ The Committee of Style included Alexander Hamilton, a leading member of the early national bar, and William Samuel Johnson of Connecticut, a former judge.¹⁰⁰ The Convention's members had to focus on the words they chose as the means to accomplish their substantive goals. They could be confident that if the Constitution ultimately became law, those words would be law. They could not be confident that those substantive goals

98. The Convention had reason to remove the enacting-style provision that was separate from any light it cast on the meaning of other parts of the draft. The enacting-style clause was mere clutter: the formulaic opening of statutes has no substantive effect, and removing the clause thus made the Constitution more concise without sacrificing any important interest. If the clause's potential influence on the meaning of other parts of the draft was a problem, the most natural solution was to eliminate any confusion by redrafting the other parts. Eliminating the enacting-style clause because of its potential role as evidence of meaning would have been an inferior solution to any such problem. It is conceivable that the delegates were concerned that the enacting-style clause created a false impression of the meaning of other provisions, such as the Take Care Clause, but were unable to clarify the other provisions to their satisfaction and so simply eliminated the drafting style clause. The Convention Journal does not show any unsuccessful attempt to change the Take Care Clause, but it appears to be incomplete for the Convention's last few days. *See generally* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 58. Although the more complex hypothesis cannot be ruled out, the simpler one, resting on the superfluity of the enacting-style clause, provides a perfectly adequate explanation of the Convention's decision.

99. Future Chief Justices John Rutledge and Oliver Ellsworth, and future Justice James Wilson, were members of the Committee of Detail. *See supra* note 58.

100. *See supra* note 60.

would be treated as binding or even relevant. Words carefully chosen by drafters skilled in their use are an invaluable source of information about original meaning.

C. "LAWS OF THE UNITED STATES" IN THE RATIFICATION DEBATES

During the debate over ratification, leading proponents of the Constitution assumed that the laws of the United States it referred to were federal statutes. Alexander Hamilton, James Madison, and John Marshall shared that assumption. Their views show that the reading of Articles III and VI defended here was a reasonable one for sophisticated readers of the Constitution, and disprove the hypothesis that the laws of the United States were universally assumed to include unwritten law. I will also discuss a statement by John Jay in *The Federalist* that is sometimes taken as treating the law of nations as law of the United States under Article III. As I will explain, Jay in fact did not imply that the law of nations fell into that constitutional category.

Writing as Publius, Hamilton implied that the laws of the United States referred to by the Supremacy Clause included only federal statutes. He did so by stressing that the supremacy of federal law was limited by the principle of enumerated federal power. In *Federalist No. 27*, he wrote that "the laws of the confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land."¹⁰¹ The Constitution enumerates the powers of Congress, not the objects of the common law or the law of nations.¹⁰² If Hamilton believed that the laws of the United States in the Supremacy Clause included anything other than federal statutes, the qualifier about enumerated and legitimate objects was at best misleading. To be more clear, he should have qualified the qualifier, explaining that statutes would be supreme law only if pursuant to the enumerated objects of federal power, but the other laws of the United States would be supreme simpliciter.

Discussing the Supremacy Clause in *Federalist No. 33*, Hamilton relied on the Clause's own qualifier, "which shall be made in Pursuance" of the Constitution.¹⁰³ Although supremacy for federal law was desirable, he wrote, "it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land."¹⁰⁴ Although acts of Congress are made in pursuance of the Constitution, unwritten norms like the customary law of nations are not. Hamilton again sought to reassure his readers that supremacy was limited by the principle of enumerated federal power. That principle applies to acts of Congress, not the law of nations. Hamilton assumed that the Supremacy Clause extended to the former, not the latter.

101. THE FEDERALIST NO. 27, *supra* note 30, at 174 (Alexander Hamilton).

102. U.S. CONST. art. I, § 8.

103. *Id.* art. IV.

104. THE FEDERALIST NO. 33, *supra* note 30, at 207 (Alexander Hamilton).

Madison similarly connected federal supremacy and enumerated power, without referring to Article VI explicitly. In *Federalist No. 39*, he explained that the new system was partly federal and partly national.¹⁰⁵ With respect to the extent of its powers, he explained, the new government combined the two principles: “The idea of a national Government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things, so far as they are objects of lawful Government.”¹⁰⁶ That arrangement, a “consolidated” government, differed from a community “united for particular purposes,” with power “vested partly in the general, and partly in the municipal Legislatures.”¹⁰⁷ The Constitution fell into the latter category, Madison maintained, because the government it created “cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”¹⁰⁸ Like Hamilton, Madison understood federal supremacy to be limited by the principle of enumerated federal power. If the common law or the law of nations was law of the United States under Article VI, federal supremacy was not in fact so limited, because neither of those bodies of law results from an exercise of granted legislative authority by Congress. Madison too thus equated the laws of the United States in Article VI with federal statutes.

Hamilton’s discussion of Article III in *Federalist No. 80* shows that he understood the laws of the United States to be statutes.¹⁰⁹ He began that paper by listing five categories of cases to which federal jurisdiction ought to extend.¹¹⁰ The first two were “all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation,” and “those which concern the execution of the provisions expressly contained in the articles of union.”¹¹¹ The first category included federal statutes, which are passed pursuant to Congress’s enumerated powers, and not unwritten law, which is not. Hamilton’s use of the constitutional phrase “laws of the United States” indicates, albeit not conclusively, that he equated that term with statutes; in adding the qualifier about pursuance of constitutional power, he did not indicate that he was going on to describe only a subset of the laws of the United States.

After setting out the five categories, Hamilton worked through Article III, showing how its jurisdictional grants met the desiderata he listed.¹¹² Article III’s extension of the judicial power to “all cases in law and equity *arising under the constitution and the laws of the United States*,” he wrote, “corresponds to the two first classes of causes which have been enumerated as proper for the jurisdiction

105. THE FEDERALIST NO. 39, *supra* note 30, at 256 (James Madison).

106. *Id.*

107. *Id.*

108. *Id.*

109. THE FEDERALIST NO. 80, *supra* note 30, at 534 (Alexander Hamilton).

110. *Id.*

111. *Id.*

112. *Id.* at 539.

of the United States.”¹¹³ Those classes included only federal statutes and the Constitution itself. He then put treaties in the fourth class he had set out,¹¹⁴ cases “which involve the PEACE of the CONFEDERACY.”¹¹⁵ Had the “laws of the United States” in Article III included the law of nations, it would also have fallen into the fourth class; however, Hamilton did not list it there.

Perhaps Hamilton had not reflected carefully on the status of the law of nations, and would have regarded it as part of the laws of the United States had he done so. That is conceivable but unlikely. Not only was Hamilton thoroughly familiar with the law of nations, but in *Federalist No. 80* he discussed one of its requirements in connection with Article III. The Union, he explained, would be accountable to other countries for “the denial or perversion of justice by the sentences of courts,” which was “classed among the just causes of war.”¹¹⁶ That is why, he explained, Article III had the diversity jurisdiction.¹¹⁷ The author of *Federalist No. 80* had reflected carefully on the place of the law of nations in the new jurisdictional system, and did not assign it to the laws of the United States. His view at that point was likely that the laws of the United States referred to in Article III were only federal statutes, because he believed the laws of the United States referred to in Article VI were.

Defending federal supremacy in *The Federalist*, Hamilton and Madison relied on the assumption that the laws of the United States are federal statutes, pointing out that supremacy was limited to legitimate exercises of Congress’s enumerated powers. In the Virginia ratifying convention, John Marshall is reported to have made the same assumption, and relied on the same principle, in discussing both Articles III and VI.¹¹⁸ Marshall responded to an opponent of ratification, apparently George Mason, who had objected to the federal courts’ cognizance of cases under the Constitution and laws of the United States. The opponent, according to Marshall, “says, that the laws of the United States being paramount to the laws of particular States, there is no case but what this will extend to.”¹¹⁹ The objection thus involved the Constitution and laws both as sources of jurisdiction under Article III and supreme law under Article VI.

Marshall responded by invoking the principle of enumerated federal power: “Has the Government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard They would declare it

113. *Id.*

114. *Id.* at 540.

115. *Id.* at 534.

116. *Id.* at 536.

117. *Id.*

118. See *The Virginia Convention 2-27 June 1788 (Continued)*, in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1412, 1431 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

119. *Id.*

void.”¹²⁰ The common law and the law of nations are not limited by the Constitution’s enumeration of powers, but federal statutes are. Marshall’s reliance on limited congressional power in turn relied on an equation of laws of the United States with acts of Congress. It may be that he had simply not considered the possibility that some laws of the United States were unwritten and that he would have retracted his argument had he thought about the issue. About ten years later, however, in the midst of the contest over federal common law, Marshall told St. George Tucker that no Federalist believed the Constitution made the common law the law of the United States.¹²¹

A passage from *Federalist No. 3*, written by future Chief Justice John Jay, is sometimes thought to imply that in his view the Article III judicial power extended to all cases arising under the law of nations.¹²² Jay wrote,

under the national Government, treaties and articles of treaties, as well as the law of nations, will always be expounded in one sense, and executed in the same manner—whereas adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent¹²³

By saying that under the national government the law of nations would always be expounded in one sense, did Jay imply that the law of nations would always be expounded by the national government because the federal courts had a grant of jurisdiction that extended to all such cases?

Jay almost certainly did not take that position in that paper. *Federalist No. 3* is about the foreign-relations imperative of union.¹²⁴ Jay asserted the superiority of a single government, compared to thirteen or three or four, in dealing with foreign countries and with issues that concerned them like the law of nations. *Federalist No. 3* says nothing about Article III or its heads of jurisdiction. Jay’s point was not that national courts would always expound the law of nations. His point was that when they expounded the law of nations, their exposition would be uniform because they were a single court system. He relied, not on the categories of cases included in the Article III jurisdiction, but on the contrast between one judicial system and several.¹²⁵ Nor was comprehensive jurisdiction over cases involving the law of nations necessary for the federal courts to perform the function that Jay

120. *Id.*

121. *Infra* note 181.

122. THE FEDERALIST NO. 3, *supra* note 30, at 15 (John Jay).

123. *Id.*

124. Jay explained that he would consider the Constitution “as it respects security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*, as from the dangers of the *like kind* arising from domestic causes.” *Id.* at 14. As to the latter, he said that wars “will always be found to be in proportion to the number and weight of the causes, whether *real* or *pretended*, which *provoke* or *invite* them.” *Id.* For that reason, in assessing the Constitution, it was important to inquire “whether so many *just* causes of war are likely to be given by *United America*, as by *disunited America*.” *Id.*

125. *Id.* at 15.

said a single judicial system should. If the federal courts could decide all the cases involving the law of nations that mattered in foreign relations, and would do so uniformly, they would achieve the goal Jay said they should. Jay's example of a possible source of friction with foreign countries was maritime commerce,¹²⁶ although Jay did not mention it, Article III extends the federal judicial power to all admiralty and maritime cases.¹²⁷

D. THE LAWS OF THE UNITED STATES, THE LAW OF NATIONS, AND THE JUDICIARY ACT OF 1789

In the ratification debates, Hamilton, Madison, Marshall, and Jay were expounding a constitution yet to be adopted. Once it was ratified and the First Congress convened in 1789, the Senate set about implementing Articles III and VI by drafting legislation to create a federal judiciary, one function of which would be to maintain the supremacy of federal law. That foundational statute was drafted on the assumption that the laws of the United States under Articles III and VI consisted solely of federal statutes.

Central to Congress's design in the first Judiciary Act, and central to constitutional law and politics throughout the Antebellum Period, was section 25.¹²⁸ Section 25 gave the Supreme Court appellate jurisdiction over the state courts with respect to cases and issues in cases that it described in depth.¹²⁹ It used the appellate jurisdiction created by Article III to enforce the supremacy of federal law under Article VI. Its text illuminates the First Congress's understanding of the relationship between the laws of the United States referred to in the Constitution and federal statutes.

Section 25 gave the Supreme Court jurisdiction by writ of error over cases in state courts in which the following had happened: (1) the validity of "a treaty or *statute* of, or an authority exercised under the United States" was called in question, and the decision was against validity; (2) the validity of "a statute of, or an authority exercised under any State" was drawn into question on the grounds of repugnance "to the constitution, treaties or *laws of the United States*," and the decision was in favor of validity; and (3) there was a question concerning "the construction of any clause of the constitution, or of a treaty, or *statute* of, or commission held under the United States, and the decision [was] against the title, right, privilege or exemption" claimed thereunder.¹³⁰ The section then provided that the only errors assigned or regarded as a ground of decision should be those that immediately respected "the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."¹³¹

126. *Id.*

127. U.S. CONST. art. III, § 2.

128. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (1789).

129. *Id.*

130. *Id.* at 85–86 (emphases added).

131. *Id.* at 86–87.

The description of the cases the Supreme Court was to review shows that the drafters equated the laws of the United States with statutes. Two of the three categories of cases referred to the Constitution, treaties, and statutes, not the laws of the United States. On the assumption that the drafters thought that “laws” meant “statutes,” the variation is easy to explain. “Statutes” is a more precise word, and is used except when the drafters have good reason to employ the very words of the Constitution. In the second clause they did—that provision enforces federal supremacy relative to state law, and so uses the Supremacy Clause’s words.

If the variation in wording reflected a variation in sense, however, and the drafters believed that the law of nations was law of the United States, their policy choice is inexplicable. Suppose for example that the United States had entered into a treaty providing that it would recognize the validity of sovereign acts of the other country taken in the other’s territory. If a party in a state court relied on a foreign expropriation as a ground of title and the state court rejected the claim, the Supreme Court would have jurisdiction. The party would have set up a title or right under a clause of a treaty and the decision would have gone against the title or right. But if a party relied on the unwritten law of nations for the proposition that foreign expropriations must be respected, and the state court had rejected the party’s claim to title, the Supreme Court would not have had jurisdiction. Even if the unwritten law of nations is somehow part of the laws of the United States, it is not the Constitution, or a treaty, or a statute, and so was not covered by the Judiciary Act. The exclusion of the law of nations from the third category makes sense if the laws of the United States consist entirely of statutes. If they do, then a provision that uses the Article III jurisdiction to enforce the supremacy of federal law under Article VI has no place for the unwritten law of nations. But if the laws of the United States include the law of nations, then the drafters treated written and unwritten international law differently in the third category for no reason. Section 25 makes sense if and only if its drafters believed that the laws of the United States in Articles III and VI included federal statutes alone.

The same is true of another well-known part of that Act, section 34. It instructs the federal courts, in suits at common law, to treat the laws of the several states as “rules of decision . . . in cases where they apply.”¹³² That rule applied “except where the constitution, treaties or statutes of the United States shall otherwise require or provide.”¹³³ Again, the Act used “statutes” rather than “laws.” If the laws of the United States had an unwritten component, Section 34 called for a truly strange result. In suits at law, federal courts applying that provision would follow state law when it applied and conflicted with unwritten federal law. Section 34 would instruct them to follow state law, and the exception would not apply, being limited to written enactments.¹³⁴ State courts, by contrast, would apply unwritten federal law in preference to conflicting state law pursuant to the

132. *Id.* § 34, 1 Stat. 92.

133. *Id.*

134. *Id.*

Supremacy Clause. If a state court failed to do so in an action at law, the Supreme Court of the United States would have jurisdiction under Section 25; the Court then would be instructed to treat the state law as a rule of decision by Section 34, and so would affirm. If the laws of the United States under Article VI have an unwritten component, then when that component conflicted with state law, state courts would apply federal law and federal courts would apply conflicting state law. Section 34 makes sense if and only if its drafters believed that the laws of the United States in Article VI included federal statutes alone.

E. UNWRITTEN LAW AND THE PROSECUTION OF GIDEON HENFIELD

When it drafted the Judiciary Act of 1789, Congress implemented the Constitution with general rules that would apply in a wide range of situations. In 1793, the federal Executive and the courts faced a more concrete problem that involved the status of the unwritten law of nations in the new legal system created by the Constitution. A number of leading figures addressed that concrete problem in ways that bore on the more abstract issue of interest here: whether the unwritten law of nations was law of the United States for purposes of Articles III and VI or was instead general law. This section discusses the foreign relations crisis the country faced and the criminal prosecution that ensued, explains that the possibility that the law of nations could supply general law applicable in a criminal prosecution was well understood at the time, and then works through the main statements made in connection with non-statutory prosecutions as they bear on the status of unwritten international law in the constitutional system. Although those statements frequently reflect the assumption that the federal courts could under certain circumstances entertain criminal prosecutions based on the law of nations and no substantive federal statute, they do not reflect the assumption that the unwritten law of nations was law of the United States under Articles III or VI.

1. The Neutrality Crisis and Neutrality Prosecutions

In 1793, the young American republic found itself caught in a contest among the great powers of Europe. The War of the First Coalition pitted revolutionary France against Great Britain, the Habsburg Empire, Prussia, and the United Netherlands, among others.¹³⁵ After much discussion among his principal advisors, President Washington on April 22, 1793, issued a proclamation stating that the United States was neutral and admonishing American citizens to take no action contrary to their country's status.¹³⁶

As was common in eighteenth century warfare, privateering was an important part of the hostilities. In April 1793, Gideon Henfield, an American sailor from Salem, Massachusetts, enrolled in the crew of a French privateer, the *Citoyen*

135. See George Washington, *Proclamations* (April 22, 1793), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 156–57 (James D. Richardson ed., N.Y., Bureau of Nat'l Literature, Inc. 1896).

136. *Id.*

Genet.¹³⁷ On May 3, the *Citoyen Genet* captured a British merchant vessel, the *William*; Henfield was appointed prize captain and sailed the *William* to Philadelphia, where the French consul declared it lawful prize.¹³⁸ The British minister to the United States, George Hammond, maintained that service by Americans on French vessels breached the country's neutrality.¹³⁹ In response, Secretary of State Thomas Jefferson said that his government condemned the actions of any U.S. citizen who engaged in hostilities with any of the belligerents and that the United States would use all means provided by law to punish the offenders.¹⁴⁰

Although the Washington Administration had undertaken to punish privateers like Henfield, it could not do so under any federal statute, because at that point no act of Congress forbade breaches of neutrality. Congress passed a Neutrality Act the following year,¹⁴¹ but no such statute was in force when the *Citoyen Genet* captured the *William*. In an opinion to Secretary Jefferson, Attorney General Edmund Randolph advised that Henfield could be prosecuted even though he had not violated any statute.¹⁴² Henfield was "punishable . . . because treaties are the Supreme law of the land; and by treaties with three of the powers at war with France, it is stipulated, that there shall be a peace between their subjects, and the citizens of the United States."¹⁴³ Randolph continued, "He is indictable at the common Law; because his conduct comes within the description of disturbing the Peace of the United States."¹⁴⁴ Randolph did not mention the law of nations.

The Federal Circuit Court for the District of Pennsylvania convened a special grand jury in July 1793, and Justice James Wilson, sitting on circuit, charged the grand jury that Henfield could be indicted in the absence of a statute.¹⁴⁵ The grand jury returned an indictment drafted by William Rawle, U.S. District Attorney for the district of Pennsylvania, with the assistance of Attorney General Randolph and Secretary of the Treasury Alexander Hamilton.¹⁴⁶ Trial began on July 26, 1793, with Justices James Wilson and James Iredell and District Judge Richard Peters of the District of Pennsylvania constituting the Circuit Court.¹⁴⁷ In

137. See WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 47 (2006).

138. *Id.* at 48–49.

139. *Id.* at 50–51.

140. Letter from Thomas Jefferson to George Hammond (May 15, 1793), in 26 *THE PAPERS OF THOMAS JEFFERSON* 38–39 (John Catanzariti et al. eds., 1995).

141. See An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, ch. 50, 1 Stat. 381 (1794) (criminalizing various breaches of neutrality by American citizens).

142. Edmund Randolph's Opinion on the Case of Gideon Henfield (May 30, 1793), in 26 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 140, at 145, 145–46.

143. *Id.* at 145.

144. *Id.* at 146.

145. James Wilson's Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (July 22, 1793), in 2 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 414 (Maeva Marcus et al. eds., 1988).

146. CASTO, *supra* note 137, at 94. The indictment, discussed in more depth below, appears in *Henfield's Case*, 11 F. Cas. 1099, 1109–15 (C.C.D. Pa. 1793) (No. 6360).

147. CASTO, *supra* note 137, at 94.

instructions drafted by Justice Wilson, the judges charged the jury that Henfield could be convicted in the absence of a statute.¹⁴⁸ After substantial deliberation, the jury delivered a general verdict of not guilty.¹⁴⁹

2. Non-Statutory Criminal Prosecution Under General Law at the Time of *Henfield*

As discussed in more depth below, in connection with prosecutions for violations of American neutrality, a substantial number of leading figures at the time of the Framing, including several delegates to the Federal Convention, took the position that the federal courts could punish non-statutory crimes that rested on the customary law of nations. To endorse punishment of non-statutory crimes resting on the customary law of nations was not, however, to endorse the claim that the law of nations is law of the United States for purposes of the Constitution.

Endorsement of non-statutory federal prosecution resting on the law of nations does not imply that the law of nations is law of the United States within the meaning of Articles III and VI, because such prosecution can be justified on the theory that the law of nations was general law, applicable by federal courts that had jurisdiction on grounds other than the presence of law of the United States. That possibility was well known to sophisticated lawyers in the Framing era. John Marshall adopted that theory of non-statutory criminal proceedings in 1800, during the bitter controversy over the common law as law of the United States.¹⁵⁰ In a letter to Virginia judge and legal scholar St. George Tucker, Marshall defended a non-statutory prosecution.¹⁵¹ That prosecution had come before Chief Justice Oliver Ellsworth on circuit in *Williams' Case*.¹⁵² Ellsworth approved the prosecution of Williams for a non-statutory offense of taking British and American vessels as prize.¹⁵³ According to Marshall, by seizing British vessels Williams had violated the treaty with Great Britain, and by seizing American vessels he had committed an offense against the United States on the high seas.¹⁵⁴ Jurisdiction arose under the constitutional treaty-based and admiralty jurisdictions, and the common law “came in incidentally as part of the law of a case of which the court had complete & exclusive possession.”¹⁵⁵

148. *Henfield's Case*, 11 F. Cas. at 1119–20.

149. See CASTO, *supra* note 137, at 97.

150. See Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231 app. A at 1326–28 (1985) [hereinafter Jay, *Origins: Part Two*] (reproducing a November 27, 1800 letter from John Marshall to St. George Tucker). That article and its first part, Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985), provide a comprehensive treatment of the Framing-era controversy over the federal common law.

151. Jay, *Origins: Part Two*, *supra* note 150, at 1327.

152. 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708).

153. See *id.* at 1330.

154. Jay, *Origins: Part Two*, *supra* note 150, at 1327.

155. *Id.*

Several years later, with Marshall as Chief Justice, his Court rejected the possibility of non-statutory federal criminal prosecution.¹⁵⁶ Alluding to the political contest of the 1790s, the Court took the position in *United States v. Hudson & Goodwin* that the federal courts could punish crimes only with statutory authorization.¹⁵⁷ Justice Story in *United States v. Coolidge* urged the Court to reconsider that blanket condemnation of non-statutory crimes in federal court, but the Court did not do so.¹⁵⁸

In an 1824 treatise on federal jurisdiction and the common law, Peter Du Ponceau, a leading member of the Philadelphia bar in the early national period, took an approach to common law prosecutions in federal court similar to Marshall's.¹⁵⁹ Du Ponceau was no stranger to the issue: in 1793, he was one of Henfield's counsel.¹⁶⁰ Du Ponceau distinguished between jurisdiction in federal court *from* the common law, which he denied, and jurisdiction *of* the common law, which he affirmed.¹⁶¹ By that distinction, Du Ponceau meant that when a

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

157. *Id.* Justice Johnson's opinion alluded to the great controversy in the 1790s: "Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion." *Id.* at 32. While reserving the question of the extent of Congress's implied powers to protect the federal government, Justice Johnson said that Congress must act before the courts could: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34. Justice Johnson stated that he spoke for a majority of the Court. *Id.* at 33. The fact that the majority did not speak through the Chief Justice in an important constitutional case suggests that he was not part of that majority.

158. 14 U.S. (1 Wheat.) 415 (1816). Although *Hudson & Goodwin* was an action for libel, *Coolidge* involved conduct at sea that implicated the law of prize, *id.* at 415, and hence may have come within the Article III admiralty jurisdiction. In the Supreme Court, the Attorney General apparently conceded that the prosecution could not be sustained in light of *Hudson & Goodwin*. *Id.* at 415–16. Justice Story, from the bench, said that he did not take the question raised by *Coolidge* to be settled by *Hudson & Goodwin*, while Justice Johnson said that it was so settled. *Id.* at 416. Justice Washington said that he was prepared to hear argument on the point, as did Justice Livingston; the latter stated that until the point was reargued, *Hudson & Goodwin* must be taken as the governing law. *Id.* Justice Johnson's opinion for the Court, in its entirety, was as follows:

Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the attorney-general has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision in the case of the *United States v. Hudson and Goodwin*, or draw it into doubt. They will, therefore, certify an opinion to the circuit court in conformity with that decision.

Id. at 416–17.

159. See generally Peter S. Du Ponceau, Provost, Law Acad. of Phila., Address to the Students of the Law Acad. of Phila., at the Close of the Academical Year (Apr. 22, 1824), in *A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES* (Phila., Abraham Small 1824).

160. CASTO, *supra* note 137, at 94–95.

161. The federal courts, Du Ponceau explained, had no "jurisdiction derived from the common law," Du Ponceau, *supra* note 159, at 19, because as creatures of the Constitution they "cannot have or exercise any powers but what they derive from or through it." *Id.* at 20. That did not mean, however, that they could never take cognizance of an offense that was made so only by the common law. *Id.* Combining those claims, he said, "Because the Courts have not jurisdiction *from* the common law, it does not follow that they have not jurisdiction *of* the common law." *Id.* In the United States, as opposed

federal court had jurisdiction on some grounds other than the common law itself, it could apply that system of jurisprudence. Du Ponceau argued that application of the unwritten law of crimes was proper in a case like *Coolidge*, which involved acts on the high seas and so arose under the admiralty jurisdiction.¹⁶²

Theories like Marshall's and Du Ponceau's took advantage of an easily missed feature of federal statutory criminal jurisdiction under the Judiciary Act of 1789. The criminal jurisdiction conferred on the circuit courts, like the one before which Henfield was tried, was not based on federal statutes or federal law. Rather, it gave jurisdiction over crimes "cognizable under the authority of the United States."¹⁶³ Acts like Henfield's, which took place on the high seas and within the territorial waters of the United States, were within the Article III admiralty jurisdiction and so cognizable under the authority of the United States, provided that a federal court that otherwise had jurisdiction could punish a violation of unwritten criminal law.

In 1793, the theory that Marshall and Du Ponceau would later support was a viable account of the operation of the Article III judicial power and the statutory provisions governing criminal jurisdiction. Thus, the Washington Administration's decision to prosecute Henfield for a non-statutory crime does not imply that anyone in the administration thought that the common law, or the customary law of nations, was law of the United States in a constitutional sense. The possibility of federal prosecution under the general law of crimes also means that statements endorsing prosecution under the customary law of nations, or under the common law which incorporated the law of nations, must be read carefully. They do not necessarily mean that the speaker believed that the common law, or the law of nations, was law of the United States under Articles III or VI.

3. Statements in Connection with Non-Statutory Neutrality Prosecutions

With the distinction between prosecution under unwritten law and regarding unwritten law as law of the United States under the Constitution in mind, below I consider the most important executive and judicial statements concerning neutrality prosecution and, in particular, *Henfield*.

to England, the common law was "a system of jurisprudence," *id.* at x, not "the source of power or jurisdiction, but the means or instrument through which it is exercised." *Id.* at xi.

162. *Id.* at 9–10. Du Ponceau explained that although the law of admiralty was often called part of the common law, it was not so strictly speaking. *Id.* at 11. Admiralty and common law shared the feature of being unwritten, so the question was properly whether a federal court could punish a non-statutory crime. *Id.* at 12.

Du Ponceau also approved non-statutory prosecutions specifically under the law of nations and discussed *Henfield*, noting that "[o]n the trial of this cause, I was concerned for the defendant." *Id.* at 4 n.*. He strongly endorsed application of the law of nations by federal courts and called the law of nations "the common law of the civilized world," without asserting that it was the law of the United States under the Constitution. *Id.* at 3 n.*. Had he believed that the law of nations had that status, he almost certainly would have said so, as it would have made his argument much easier.

163. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78–79 (1789).

a. Attorney General Randolph's Opinion and Secretary of State Jefferson's Communications

The decision to prosecute Henfield for a non-statutory crime was based on an opinion Attorney General Edmund Randolph provided to Secretary of State Jefferson.¹⁶⁴ Randolph opined that Henfield was “punishable; because treaties are the Supreme law of the land” and the United States had treaties with three of the powers at war with France stipulating “that there shall be a peace between their subjects, and the citizens of the United States.”¹⁶⁵ He then wrote that Henfield was “indictable at the common Law; because his conduct comes within the description of disturbing the Peace of the United States.”¹⁶⁶ Randolph ascribed supremacy to treaties but not the common law, and nowhere indicated that the latter was the law of the United States.

By saying Henfield was punishable under the treaties and indictable at common law, Randolph may have meant that the treaties provided a rule of conduct and were the source of jurisdiction in federal court, and that the common law would identify a crime the treaty violation fell under: breach of the peace.¹⁶⁷ If that was his thinking, he had no reason to say that the common law was law of the United States under the Constitution. It is also possible he regarded breach of the peace as a crime distinct from violation of the treaties. If so, federal admiralty

164. See *supra* note 142 and accompanying text.

165. Edmund Randolph's Opinion on the Case of Gideon Henfield, *supra* note 142, at 145.

166. *Id.* at 146.

167. That is how Randolph said he remembered his 1793 opinion in 1800, during the controversy over federal common law and, in particular, federal common law criminal prosecutions. Randolph wrote James Madison that his 1793 opinion did “not bring up the common law, as the law of the U.S; because the treaty created the offence, and the common law only annexed the mode of prosecution and penalty; whereas the common law, as the law of the U.S. would *create* offences.” Memorandum from Edmund Randolph (Dec. 1799), in 17 THE PAPERS OF JAMES MADISON 283, 284 (David B. Mattern et al. eds., 1991). Randolph's memorandum to Madison also said the common law involved in *Henfield* was that of Pennsylvania, made applicable by the Judiciary Act (in section 34, though he did not cite a section). *Id.* Randolph's explanation is consistent with his earlier opinion, provided that Henfield's offense was committed within the boundaries of Pennsylvania, as he said in 1800 that it was. *Id.* His account in 1800 is harder to square with the indictment, some counts of which alleged offenses against the peace of the United States without mentioning the treaties and some of which alleged conduct on the high seas. *Infra* note 187.

Randolph's likely involvement in drafting the indictment does not mean he had the last word on its contents. In 1793, U.S. district attorneys were not supervised by the Attorney General the way U.S. Attorneys are today. Neither Randolph nor Secretary of the Treasury Alexander Hamilton, who apparently also assisted in drafting the indictment, was District Attorney Rawle's superior. The report of *Henfield* includes a draft of the indictment in Randolph's handwriting. *Henfield's Case*, 11 F. Cas. 1099, 1115 n.3 (C.C.D. Pa. 1793) (No. 6360). That draft itself relied on treaties; Randolph added a note: “I would lay, too, a general trespass on the high seas, without reference to allies or treaties.” *Id.* While trespass on the high seas would not rest on the law of Pennsylvania, it would be within the admiralty jurisdiction, and alleging it would by no means imply that the common law or the law of nations was law of the United States under the Constitution. In 1800, addressing Madison, Randolph was at pains to disclaim the view that the common law was law of the United States. That opinion, “even if it were fixed on the attorney general, (which it cannot be) was abominably wrong.” Memorandum from Edmund Randolph, *supra*, at 285.

jurisdiction was available, and he once again had no reason to assert that any unwritten law was law of the United States.

The text and structure of Randolph's opinion indicate that he did not think either the common law or the law of nations was law of the United States under the Constitution. His discussion of treaties noted their status under the Supremacy Clause, although his discussion of the common law attributed to it no such place in the Constitution's legal system.¹⁶⁸ If he thought that breach of the peace was a separate offense from violation of the treaties, which he possibly did not, then he did not attribute supreme status to the common law that identified that crime. That treatment contrasts with his invocation of that status for treaties.¹⁶⁹ Supremacy was important as a matter of both rhetoric and substance; the courts' obligation to apply supreme law was beyond doubt. If he thought the law of nations was law of the United States but that the common law in general was not, and supported prosecution independently of the treaties, then his discussion of the common law is especially hard to explain. If that is what he thought, he not only passed up a strong argument based on law supreme under Article VI, but substituted for it a weaker argument based on law that was not. Randolph's opinion does not assert, and cuts against the inference that he believed, that either the common law or the law of nations was law of the United States under the Constitution.

Although Randolph's 1793 opinion did not invoke the unwritten law of nations, Secretary of State Jefferson said several times that the law of nations was part of "the law of the land" in connection with the *Henfield* prosecution and legal enforcement of neutrality more generally.¹⁷⁰ In a letter to Randolph on May 8, 1793, he wrote that the judges, having notice of Washington's Neutrality Proclamation, "will perceive that the occurrence of a foreign war has brought into activity the laws of neutrality, as a part of the law of the land."¹⁷¹ In a June 5, 1793 letter to French Ambassador Edmond Genet, Jefferson said that vessels unlawfully armed in U.S. ports were "marked in their very equipment with offence to the laws of the land, of which the law of nations makes an integral part."¹⁷²

Although there is no reason to believe that Jefferson had carefully thought through the place of unwritten law in the American legal system, he did not assert that it was law of the United States under the Constitution. He did assert that the law of nations was part of the law of the land, and the law of nations was in large part unwritten. Other statements indicate that, although Jefferson at that point believed in unwritten criminal law that federal courts could enforce, he probably

168. Memorandum from Edmund Randolph, *supra* note 167, at 284.

169. *Id.*

170. Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON 691, 692 (John Catanzariti et al. eds., 1995).

171. *Id.*

172. Letter from Thomas Jefferson to Edmond Charles Genet (June 5, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 140, at 195, 196.

did not believe it was specifically law of the United States in a constitutional sense. Two other letters to Genet in June of 1793 support that conclusion. On June 17, 1793, Jefferson wrote Genet: “For our citizens then, to commit murders and depredations on the members of nations at peace with us, to combine to do it, appeared to the Executive, and to those whom they consulted, as much against the laws of the land, as to murder or rob, or combine to murder or rob it’s own citizens”¹⁷³ Jefferson assimilated violations of neutrality to ordinary murder as against the laws of the land. Unless he thought there was a federal law that criminalized murder in general, by the laws of the land he meant legal norms applicable in American courts.

In a second letter to Genet that day, Jefferson again said that the federal courts would decide according to the law of nations, while at the same time suggesting that it was not supreme under the Constitution.¹⁷⁴ Responding to Genet’s complaints about a judicial seizure of a French prize brought into American ports, Jefferson said the rule of decision in the case “will be, not the municipal laws of the United States but the law of nations, and the law maritime, as admitted and practised in all civilized countries.”¹⁷⁵ If Jefferson was thinking about the possible status of the law of nations under Article VI, it is hard to explain his distinction between the law of nations and the municipal law of the United States, which would include the laws of the United States in the Supremacy Clause. Yet if he thought the law of nations was the law of the land because of Article VI, that provision should have been on his mind. To be sure, Jefferson was the foreign minister of a militarily weak country communicating with the ambassador of a great power; he had reason to emphasize that the courts would apply universally accepted rules, not that nation’s own peculiar law. But if he was thinking that those universally accepted rules were part of the municipal law by force of the Constitution, saying so would have reinforced his point that the courts were required to apply them.

Randolph and Jefferson believed that the federal courts could apply unwritten criminal law. Neither asserted that any unwritten law was law of the United States under the Constitution, and there is reason to believe that neither embraced that conclusion.

b. Justice Wilson’s Grand Jury Charge in Henfield

Henfield was indicted in Pennsylvania by a grand jury that Justice Wilson charged. Wilson told the grand jurors that a U.S. citizen who takes part in hostilities while the country is neutral and without official authority “violates thereby his Duty and the Laws of his Country.”¹⁷⁶ Wilson’s explanation for that

173. Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 140, at 297, 300. In late 18th century written American English, the possessive of “it” was often written as “it’s,” which today is used as a contraction of “it is.”

174. *Id.* at 301.

175. *Id.*

176. James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania, *supra* note 145, at 420.

conclusion was that the common law was received in America.¹⁷⁷ When a question arises before the common law “which properly ought to be resolved by the Law of Nations,” then “by that Law . . . will [the common law] decide the Question,” because the law of nations “in its full Extent, is adopted by” the common law.¹⁷⁸ Although Wilson described the common law as having been received in America, and stated that the common law would look to the law of nations, he never said either one was law of the United States. The phrase “laws of the United States” does not appear in his manuscript of the grand jury charge. Wilson did once invoke federal supremacy: “Under our national Constitution, Treaties compose a Portion of the public and supreme Law of the Land . . .”¹⁷⁹

In a charge to a grand jury, Wilson had no reason to discuss the jurisdiction of his court as opposed to the substantive law, and thus no reason to address the status of unwritten law under Article III. His charge does indicate that he believed that federal courts could punish non-statutory crimes. If he believed the Circuit Court had jurisdiction over Henfield’s case under the treaty-based and admiralty jurisdictions, his reliance on the law of nations through the common law did not imply he thought either of them to be law of the United States under the Constitution. His invocation of supremacy for treaties but not the law of nations indicates that he did not think the Supremacy Clause included the latter. Once again, constitutional supremacy is a strong point in favor of applying a source of law, and one he is likely to have relied on when he could.

Although Wilson probably did not believe that the unwritten law of nations was law of the United States under Articles III and VI, if he did, he derived that conclusion from a more basic premise, and that premise was itself highly controversial. Thus, even if Wilson believed that Articles III and VI included unwritten international law, his view on the subject cannot be said to have been taken for granted on all hands, because of its connection to a hotly contested claim: that the common law in general was law of the United States under Articles III and VI.¹⁸⁰ Wilson’s grand jury charge in *Henfield* treated the law of nations as applicable because it was part of the common law. He thus indicated the two would stand or fall together. If he believed both were law of the United States under Articles III and VI, he embraced a position that cannot be said to have been generally accepted by the Founding generation. In 1800, no less a Federalist than John Marshall denied that any Federalist had ever asserted it.¹⁸¹

177. *See id.* at 416.

178. *Id.* at 417.

179. *Id.* at 415.

180. *See supra* note 150 (noting fierce controversy in the 1790s over the status of the common law under Articles III and VI).

181. John Marshall’s November 1800 letter to St. George Tucker, discussed above, *see supra* note 150 and accompanying text, responded to a pamphlet in which Tucker rejected the claim that the common law was the law of the United States in their federal capacity. *See Jay, Origins: Part*

c. The Indictment in Henfield

After Justice Wilson charged the grand jury, that body found an indictment drafted by U.S. District Attorney William Rawle, who had the assistance of Attorney General Randolph and Secretary of the Treasury Hamilton.¹⁸² The text of that document belies the claim that Rawle treated the law of nations as law of the United States under Article VI.¹⁸³ It is consistent with the theory that a federal court that otherwise had jurisdiction might apply the unwritten law, including the unwritten law of crimes where it implements the law of nations, even though no unwritten law is law of the United States under the Constitution.

The indictment has twelve counts, all involving Henfield's acts as a crew member of a French privateer.¹⁸⁴ Six of the counts are based on treaties: two rely on a treaty establishing peace between the United States and the United Netherlands; two on a treaty establishing peace between the United States and Prussia; and two on the Treaty of Peace with Great Britain that ended the War of the American Revolution and established peace.¹⁸⁵ All three of those states were at war with France, and so to serve on a French privateer was to join in hostilities against them. Each count recites, "whereas, by the constitution ordained and established for the said United States of America it is, among other things, provided, that all treaties made, or which shall be made under the authority of the said United States, shall be the supreme law of the land."¹⁸⁶ The other six counts say that Henfield acted "in violation of the laws of nations" and against the laws and Constitution and the peace and dignity of the United States.¹⁸⁷ None of the counts attributes supremacy to the laws of nations.

Rawle evidently thought it useful to point out the supremacy of treaties. Perhaps he thought jurors might wonder why relations with foreign countries were relevant to their work. Pointing out that treaties are the supreme law of the land provided an explanation, and reminded jurors that they were bound to apply the treaties. No such question of relevance would arise with respect to the Constitution and laws of the United States, which the indictment did not identify

Two, supra note 150, at 1326. Marshall expressed shock that Tucker felt it necessary to refute such nonsense:

The opinion which has been controverted is, that the common law of England has not been adopted as the common law of America by the constitution of the United States. I do not believe one man can be found who maintains the affirmative of this proposition. Neither in public nor in private have I ever heard it advocated, & I am as entirely confident as I can be at anything of the sort, that it never has been advocated.

Id.

182. *See supra* note 146 and accompanying text.

183. *See* Henfield's Case, 11 F. Cas. 1099, 1109–15 (C.C.D. Pa. 1793) (No. 6360).

184. *Id.*

185. *See id.* The first, second, third, seventh, eighth, and ninth counts are each based on a specific treaty. *See id.*

186. *Id.* at 1109–11, 1113–14.

187. *Id.* at 1112, 1115. The fourth, fifth, sixth, tenth, eleventh, and twelfth counts refer to the laws of nations. *See id.*

as supreme when it mentioned them.¹⁸⁸ Possible doubts by jurors concerning the relevance and status of international law thus can explain why, of the three kinds of law mentioned in the Supremacy Clause, only one was identified as supreme when it appeared in the indictment. The customary law of nations is like treaties in that it involves international relations and so may not have seemed relevant to jurors. Had Rawle and the other drafters believed the law of nations was the supreme law of the land, they had good reason, reflected in their treatment of treaties, to call it such. The indictment does not do so.¹⁸⁹

When the indictment says Henfield's acts were against the law of nations, it immediately goes on to say that they were against the Constitution and laws of the United States.¹⁹⁰ It does not say "against the law of nations and therefore against the laws of the United States," or otherwise indicate that one of the categories it mentions—the law of nations—is a subpart of another, the laws of the United States. Rather, it treats those two bodies of norms as parallel to one another. If the drafters saw the law of nations as general law, and not part of the laws of the United States, parallel treatment was appropriate. If not, the indictment's structure on this point is hard to account for, especially if jurors could have been expected to give special regard to the laws of their own country.

The indictment in *Henfield* does not assert that the law of nations is part of the law of the United States in any sense, and certainly not in the sense used by the Constitution. Its drafting is difficult to reconcile with the assumption that Rawle and his collaborators thought that it was.

d. *The Court's Jury Instruction in Henfield*

Henfield was tried before Justices Wilson and Iredell, sitting on circuit, and District Judge Richard Peters.¹⁹¹ Wilson's instruction to the trial jury, which Iredell and Peters joined,¹⁹² did not say that the law of nations was part of the law of the United States. Rather, the instructions indicated that he did not think the

188. *See id.*

189. According to the report, in his argument Rawle described treaties as "the supreme law of the land" and "the positive prohibitory law." *Id.* at 1117. He also reportedly said that "the law of nations is part of the law of the land," citing Blackstone. *Id.* The report does not say that Rawle called the law of nations the supreme law of the land, and Blackstone was not an authority for any proposition about the relationship between the law of nations and the United States Constitution, having died in 1780. Neither was the other source Rawle reportedly cited, *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784), a Pennsylvania case also from before the Constitution. In *De Longchamps*, Chief Justice McKean of Pennsylvania stated that the case "must be determined on the principles of the laws of nations, which form a part of the municipal law of Pennsylvania." *Id.* at 114. Rawle's language and citations, if correctly reported, indicate that he believed that the law of nations, as part of the common law, was the law, but not the supreme law, of the land. That accords with the hypothesis that he believed it to be general law, applicable when a federal court had jurisdiction on some basis other than the law of the United States under Article III.

190. *Henfield's Case*, 11 F. Cas. at 1112, 1115.

191. CASTO, *supra* note 137, at 94.

192. *Henfield's Case*, 11 F. Cas. at 1119.

law of nations was law of the United States, at least under Article VI.¹⁹³ In response to Henfield's counsel's question asking against what law Henfield had offended, the court responded that he had offended against "many and binding laws."¹⁹⁴ By "the law of nations," Henfield, as a U.S. citizen, was obliged to keep the peace with "all nations with whom we are at peace."¹⁹⁵ According to the court, "[t]his is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed."¹⁹⁶ The law of nations existed before Henfield, but the Constitution did not, nor did any laws made pursuant to it. The processes set out in the Constitution, such as the lawmaking process of Article I, Section 7, could not operate until the Constitution itself had gone into effect. The court's description of the law of nations does not fit with the Supremacy Clause.

Justice Wilson was aware of that clause in drafting the instruction, because after saying that Henfield had offended against the law of nations, he described others of the numerous laws Henfield had broken:

There are, also, positive laws, existing previous to the offence committed, and expressly declared to be part of the supreme law of the land. The constitution of the United States has declared that all treaties made, or to be made, under the authority of the United States, shall be part of the supreme law of the land. I will state to you, gentlemen, so much of the several treaties in force between America and any of the powers at war with France, as applies to the present case.¹⁹⁷

He then went through the treaties the indictment relied on, pointing out that each established peace between the United States and the treaty partner.¹⁹⁸ Wilson thought it appropriate to tell the jurors that treaties were the supreme law of the land, but did not say that about the law of nations. If he believed the law of nations had that status, he decided to omit that rhetorically powerful point from a charge that pointed strongly toward conviction.¹⁹⁹

The court's instruction in *Henfield* suggests that Justice Wilson and the other judges believed the law of nations was applicable to the case, but that they did not think it was supreme law under Article VI. That conclusion was correct if they believed that a federal court with admiralty and treaty-based jurisdiction could apply the unwritten law of crimes, which was not law of the United States under the Constitution.

193. I do not mean to suggest that Wilson indicated that the law of nations was law of the United States under Article III. The evidence his charge provides about his thinking bears on the law of nations' status under Article VI and has no implications specifically for Article III.

194. *Henfield's Case*, 11 F. Cas. at 1120.

195. *Id.*

196. *Id.*

197. *Henfield's Case*, 11 F. Cas. at 1120.

198. *See id.*

199. Henfield was acquitted. *See id.* at 1122.

e. Chief Justice Jay's Charge to the Richmond Federal Grand Jury

If the thesis that the law of nations is law of the United States under the Constitution has a single proof text, it is a statement made by Chief Justice John Jay in a May 1793 grand jury charge.²⁰⁰ Jay rode the circuit that included Virginia, and so instructed the grand jury for the circuit court in Richmond. Despite seeming indications to the contrary, he did not adopt the view that the law of nations is law of the United States under Articles III and VI. Rather, a careful reading of his charge indicates he was not prepared to embrace that conclusion.

Chief Justice Jay's handwritten text of his charge to a federal grand jury in Richmond states, "the Laws of the united States admit of being classed under three Heads or Descriptions—1st. all Treaties made under the authority of the united States. 2dly. The Law of Nations—3dly. The Constitution, and Statutes of the united States."²⁰¹ That statement may seem to mean the law of nations is included in Articles III and VI. It does not. If Jay meant "laws of the United States as referred to in Article VI" when he wrote "the Laws of the united States," then he thought that the Constitution in effect read as follows: "This Constitution, and all treaties made under the authority of the United States, the law of nations, the Constitution and statutes of the United States, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." The same goes for Article III. In both, the laws of the United States appear as parallel to, and not as more general than, the Constitution and treaties.²⁰² To presume that Jay was using that phrase in its strict constitutional sense would be to imply that he had forgotten how it is used in the Constitution. By contrast, his grand jury charge makes sense if he was using "Laws of the united States" in a non-technical sense that included the bodies of law that the grand jurors should look to in deciding whether crimes had been committed that should come before a federal court.

After setting out the three heads of the law of the United States, whatever he meant by that phrase, Jay turned to the first head: treaties. He sought to impress their binding force on the grand jurors by explaining that treaties are not like statutes, which one nation can change, but are contracts or bargains with another state which "no Nation can have authority to vacate or modify at Discretion . . . [and] therefore necessarily become the supreme Law of the Land, and so they are very properly declared to be, by the 6th article of the Constitution."²⁰³

200. John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 145, at 380. Jay's grand jury charge is also included in *Henfield's Case*, 11 F. Cas. at 1099–1105, although it was not to the grand jury that indicted Henfield.

201. John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia, *supra* note 200, at 381.

202. See generally U.S. CONST. art. III; *id.* art. IV.

203. John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia, *supra* note 200, at 382. Jay's discussion of treaties indicates he thought the Supremacy Clause declared a principle

From treaties, Jay moved to the law of nations: “Providence has been pleased to place the united States among the Nations of the Earth, and therefore all those Duties as well as Rights, which spring from the Relation of Nation to Nation, have divolved [sic] upon us.”²⁰⁴ He did not say that the law of nations was necessarily the supreme law of the land, or that Article VI made it so or ratified its status as such. He did not say that the law of nations became law of the United States under Article VI because the United States was obliged to comply with it. Jay had just invoked supremacy under “the 6th article” and was well aware of its importance. Indeed, having focused on that provision, Jay may have become more careful in describing the law of nations’ place in the American legal system. Shortly after explaining that, as an independent nation, the United States had rights and duties under international law, he told the grand jury that this country had to be “particularly exact & circumspect[.]” in complying with treaties “and the Laws of Nations, which as has been already remarked, form a very important part of the Laws of our nation.”²⁰⁵ After “Laws of,” Jay had originally written “the united St,” but struck that out in his manuscript and substituted “our nation.”²⁰⁶ Jay thus avoided using the words of the Supremacy Clause. Perhaps, having just specifically relied on that clause, he was being as exact and circumspect as he said his country should be, and wanted to affirm that the law of nations had a place in the domestic legal system without saying that it was law of the United States under the Supremacy Clause.

At the end of the charge, Jay turned to the third head of the laws of the United States: the Constitution and statutes.²⁰⁷ After saying that the former expressed the will of the people, he said of the latter: “The Statutes of the united States constitutionally made derive their obligation from the same Source, and must bind accordingly.”²⁰⁸ As with treaties, though without specifically mentioning Article VI this time, Jay pointed out the constitutionally based authority of statutes.²⁰⁹ He had said nothing like that about the laws of nations.

Jay’s grand jury charge indicates he thought the laws of nations formed part of this country’s legal system and that the grand jurors should act to enforce those laws, but cuts against the inference that he believed they constituted laws of the United States within the meaning of Article VI.²¹⁰

that would apply without it, a principle he apparently thought had applied under the Confederation. *See id.*

204. *Id.*

205. *Id.* Whether the phrase “which as has already been remarked, form a very important part of the Laws of our nation” applied to both treaties and the laws of nations, or just to the laws of nations, is not clear as a matter of grammar, because the plural “form” agrees with both the former and the latter, the latter too being plural.

206. *Id.*

207. *Id.* at 390.

208. *Id.* The “source” Jay referred to was the Constitution.

209. *Id.*

210. Well before the neutrality crisis of 1793, Chief Justice Jay had said in a 1790 grand jury charge that the grand jury was to inquire into “offences committed against the Laws of the United Sates in this District, or on the high Seas by Persons now in the District.” John Jay’s Charge to the Grand Jury of the

During the neutrality crisis, a number of leading figures in American law and politics took the position that the federal courts could entertain criminal prosecutions under unwritten legal principles that rested on the law of nations. In the statements reviewed here, none of them attributed that result to the principle that the law of nations, or the common law, was law of the United States under the Constitution. I am aware of no statement that did so. Rather, the statements I have reviewed, which include all the official pronouncements in *Henfield*, cut against the conclusion that their authors regarded the law of nations as law of the United States under Articles III or VI. In that respect, those statements align with the text itself and substantial additional evidence about contemporary understandings of its meaning. The laws of the United States referred to in Articles III and VI are federal statutes and nothing else.

III. RECONCILING THE TEXT WITH PRACTICE AND DOCTRINE

In addition to discussing the status of the law of nations at the time of the Framing in depth, Professors Bellia and Clark examine that topic in relation to contemporary Supreme Court doctrine.²¹¹ They thus raise the question whether their primary claims are about the original understanding or are about today's doctrine and practice, as to which the original understanding is important but not definitive. Like Professor Ramsey in this Symposium, I think that their normative position ultimately is about twenty-first century doctrine and practice.²¹² For example, I doubt they believe the Constitution creates a recognition power the way it creates a pardon power. Rather, they seek to identify a position that captures much of the original meaning while fitting into the basic structure of contemporary American foreign relations law.

As they explain, a "primary goal of the Federal Convention was to draft a constitution that would both prevent individual states from violating the rights of foreign nations in the future and enable the federal government to redress them should they occur."²¹³ Although I agree with Bellia and Clark about the Framers' goal, I do not think they undertook to achieve that goal by requiring that state

Circuit Court for the District of New York (April 12, 1790), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 145, at 25, 29. Jay then went on, "You will recollect that the Laws of Nations make Part of the Laws of this, and of every other civilized Nation," and attributed those laws to "right Reason" and "general Assent and Practice." *Id.* He did not attribute the law of nations to the Constitution or describe it as the supreme law of the land thereunder. Although Jay's charge to the New York grand jury does not contain indications that he did *not* think the law of nations was the law of the United States within the meaning of the Constitution, the only indication it contains that he thought it did is found in the words themselves. As "laws of the United States" did not have to mean the laws of the United States referred to by the Constitution, Jay's use of those words is at most weak evidence that he meant to use them in the Constitution's sense.

211. See, e.g., BELLIA & CLARK, *supra* note 3, at 151–56 (discussing the treatment of the law of nations in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

212. See Ramsey, *supra* note 54, at 1779–88.

213. BELLIA & CLARK, *supra* note 3, at 50. Bellia and Clark maintain that the Framers' principle extended to state courts. They say that "the Constitution's allocation of powers to the political branches . . . required courts and states to uphold the rights of foreign nations under the law of state-state relations." *Id.* at 44. Together, states (including state courts), federal courts, and the federal political branches are the

courts follow the law of state-state relations. Like Bellia and Clark, I do not think that the Constitution makes the law of nations law of the United States. Unlike Bellia and Clark, I do not think the Constitution imposes any requirements on state courts in this regard.²¹⁴ Rather, the Framers' means of ensuring that courts would apply the international law of state-state relations was a combination of jurisdiction in the federal courts, treaty-making power, and Congress's legislative power.

Bellia and Clark seek a reading of the Constitution that will achieve the Framers' goal. In particular, they seek a reading that will exclude state law from cases involving state-state relations and give the Supreme Court of the United States the last word, absent legislation, on the content of unwritten international law on that topic. Such a reading has many virtues. It shows respect for the Framers' decisions, accords with Supreme Court doctrine (but not the Court's explanations of that doctrine), and reaches results that are certainly reasonable from a policy standpoint. Those results probably match what Congress would do if it exercised its power in this field, and for many that will be another reason to reach them. I have argued that for all its virtues, including capturing the expectations of the Framers, Bellia and Clark's reading does not actually match what the Framers did. They did not confer a recognition power, and the powers they did confer do not bring the international law of state-state relations into the American legal system and insulate it from change by the states.

From Bellia and Clark's standpoint, their reading, I think, has another virtue: it adapts the results contemplated by the Framers to changes in the way lawyers and judges think about law. A clue to their goal, and their strategy in reaching it, is that their argument depends on the powers of the political branches. They attribute to those parts of the government a recognition power that brings customary international law into the U.S. legal system, and attribute a similar consequence to the powers the Constitution actually confers on Congress and the President.²¹⁵ I criticized that argument on the grounds that the obligation of the courts to apply the law does not depend on the allocation of particular powers to alter it to particular non-judicial actors. Bellia and Clark's recruitment of the political branches' powers makes more sense if the courts have some claim to be actors with respect to foreign relations, and not just passive appliers of whatever law they find. If the federal courts have such a claim, then exclusive power elsewhere in the federal government can trump it.

Bellia and Clark operate within a jurisprudential framework that many would find in *Erie*.²¹⁶ The Court in that case said that lawyers no longer thought of law

governmental actors contemplated by the Constitution. Whether Bellia and Clark mean to include state courts as states, or as courts, or as both, they do mean to include them.

214. *Id.* (Bellia and Clark maintaining that the Constitution requires that state courts respect the law of state-state relations).

215. See BELLIA & CLARK, *supra* note 3, at 41.

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

without some definite sovereign behind it.²¹⁷ The principle that law must have a definite sovereign behind it may create a problem for customary law in general, because custom is frequently made by private people and then ratified by the government. One solution to that difficulty is to call judicial ratification of, and decision according to, custom the act of a sovereign that makes the custom law. Mere judicial acceptance of custom, however, might not satisfy the principle that law must come from a sovereign. A more straightforward way to accommodate the principle that law must come from a sovereign is to say that the courts make the law, even though this way of describing unwritten law leaves the courts open to the objection that they are applying newly minted principles retroactively.

Custom generated by private people involves too few sovereigns for a strict form of the principle that only sovereigns generate law. The customary law of nations involves an opposite problem: too many sovereigns. The practice of states is the practice of a great many or all states, not any one in particular, and so does not have any one sovereign behind it. And just as purism about sovereign creation of law produces a problem for customary international law in the American legal system, so does the principle called dualism. According to dualism, the international legal system is distinct from the domestic legal system of any state, or at least of states in which the law says that it is distinct from international law.²¹⁸ For the dualist, customary international law that enters a domestic legal system should rest on some act by the domestic sovereign. Here too, a solution is to think of courts as lawmakers, receiving international law into domestic law by a sovereign act that is by hypothesis distinct from the application of law: law cannot be applied unless it exists, and the purist will demand a sovereign act to bring it into existence.

My description of the assumptions Bellia and Clark seek to accommodate is of course incomplete and provisional. I hope this sketch is enough to show that any time American courts today recognize a body of customary law, many lawyers and judges will automatically think that the custom involved has become law because the courts have, in effect, legislated that it is. Quite rightly in my view, however, Bellia and Clark do not want to say that the courts have discretion to receive principles of international law into this country's legal system. Denying that discretion accords with their larger purpose of capturing as much as possible of the Framers' system, and has independent weight as a matter of policy. Many would say that courts should not make foreign policy; Bellia and Clark are probably among them, and I certainly am.²¹⁹

217. *Id.* at 79 (quoting *Black & Yellow Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928)).

218. For a penetrating discussion of dualism and the Constitution, by another contributor to this Symposium, see generally Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999).

219. Also, by relying on grants of power to Congress and the President, Bellia and Clark can turn an important case, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), to their advantage. *Sabbatino* relies on the act of state doctrine, which it derives not from the usage of nations, but from the need for courts to defer to policymaking by Congress and the President. *See id.* at 421–24.

Second-best thinking of this kind, which seeks to accommodate certain contemporary assumptions while staying as close as possible to the original understanding, requires weighing costs and benefits. For that reason, it is hard to say that one second-best thesis is better than another. In devising one, however, I would be reluctant to introduce a power that the Constitution does not confer; that seems to me a substantial cost. I would also be reluctant to abandon the principle that the allocation of powers to change the law does not affect the courts' obligation to follow it. So in response to what I believe to be a second-best proposal by Bellia and Clark, I will offer one that I think is more consistent with the original understanding.

I suggest two principles: first, a structural inference from the Constitution that establishes a default choice of law rule for state and federal courts that they are to apply the international law of state-state relations in cases it purports to govern; second, a structural inference that state courts, like federal courts, are to follow the precedents of the Supreme Court of the United States as to the law of state-state relations even though those precedents are not supreme law under Article VI.

Together those two principles will bind the courts, state and federal, to the law of state-state relations unless Congress decides otherwise, and will put the Supreme Court of the United States in charge of identifying the content of that law, again unless Congress decides otherwise. They will accomplish the goal that Bellia and Clark seek to accomplish. State and federal courts will not invade the privileges of other countries under existing international law without congressional direction. The two principles will also enable the Supreme Court to make that law uniform. A constitutional choice of law rule will mean that any time a state court decides a question under the law of nations, it will have done so pursuant to a constitutional rule, so the case will arise under Article III of the Constitution as the Court now understands that head of jurisdiction.²²⁰ The Supreme Court therefore will have appellate jurisdiction over cases in which state courts apply the law of state-state relations. The law of state-state relations will, however, retain its status as non-federal (and non-state) law, so no violence will be done to the concept of laws of the United States under the Constitution. The status of the law of state-state relations as non-federal law is the reason this proposal includes the requirement that state courts follow the Supreme Court's

220. The arrangement is parallel to the structure concerning the Foreign Sovereign Immunities Act that the Court endorsed in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1982). The *Verlinden* Court concluded that federal jurisdiction over cases against foreign sovereigns was permissible under Article III because Congress had established a substantive rule of sovereign immunity and the question of sovereign immunity would arise at the threshold of any case under the Act, even if the decision ultimately turned on state law. *See id.* at 492–95. Choice of law questions arise at the threshold of all cases, and a state court considering whether to apply the law of state-state relations must resolve one. Its decision will rest on a resolution of that issue, and if the choice of law rule is from the Constitution, it will present a federal question for purposes of the Supreme Court's appellate jurisdiction.

precedents: under current practice, they are usually not required to do so with respect to non-federal law.

I do not think this proposal is consistent with the original meaning of the Constitution, which does not contain such a choice of law rule, nor such a rule of precedent. Among second-best solutions, this one has important advantages. By constituting the United States as a sovereign among sovereigns under international law, and taking foreign-relations powers away from the states, the Constitution makes the law governing sovereign relations a matter of national concern. For a state court to fail to apply that law to a case that it governs would be inconsistent with this country's participation in the international state system. A fundamental feature of the constitutional structure—federal international sovereignty—thus supports a requirement that state courts decide in a way consistent with that sovereignty. As John Jay emphasized in *Federalist No. 3*, uniformity of decision in foreign-relations cases is a leading goal of the Constitution and in particular the structure of government it creates.²²¹ The Supreme Court of the United States can provide that uniformity, whereas state courts cannot. That Court's status as the highest tribunal in the national government, the government that has responsibility for inter-sovereign relations, indicates that it serves as the nation's juridical head as far as relations with other sovereigns are concerned.

This second-best solution thus will achieve important goals. In my view, it will not achieve the important goal of being correct, but that is inherent in second-best proposals. But it has the virtue of leaving intact the principle that all the sources of laws in the federal-question jurisdiction of Article III and in Article VI are texts. As Bellia and Clark stress, the Constitution prizes certain decision-making procedures.²²² Those procedures—constitution-making, constitution-amending, lawmaking, and treaty-making—all produce canonical forms of words. Although I have regularly referred to the customary law of nations and the common law as unwritten, that label does not fully capture the way in which they differ from written law. An oral tradition might enshrine some particular form of words; a custom, by its nature, does not. The dynamism of customary law arises because practice is always subject to new explanations and justifications.²²³

The approach I suggest also retains much of the Constitution's actual operation because it depends on a choice of law rule. The Framers anticipated that courts, state and federal, would apply the law of state-state relations because they

221. See *supra* notes 123–26 and accompanying text.

222. See, e.g., BELLIA & CLARK, *supra* note 3, at 249 (“The Constitution also was designed to safeguard state interests and autonomy simply by requiring the supreme law of the land to be adopted by multiple actors, including in every case the Senate (or the states).”).

223. In their classic discussion of the courts as opposed to legislatures as institutions for responding to changed circumstances, Hart and Sacks explained that the answer to the question, “With respect to this particular matter, is the legislature as an institution a more appropriate agency of settlement than a court?” depended in part on the answer to the question, “Is it desirable that the law in this area should take the form of an enactment rather than of unwritten grounds of decision?” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 341 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

assumed that those courts would apply familiar rules governing choice of law.²²⁴ Choice of law rules are also more modest than full-fledged lawmaking power, and thus to introduce one is to introduce only a modest change in the Constitution's allocation of authority. A choice of law rule attributed to the Constitution is that of a definite sovereign and so should satisfy idolaters of *Erie* who need to find one behind any legal norm. Attributing that choice of law rule to the Constitution also has the advantage, as far as I am concerned, of avoiding attributing any genuine law-making authority to courts, especially federal courts.

By establishing that choice of law rule as a default from which Congress may depart, this approach retains another basic feature of the Constitution, which is ultimate congressional control over the law of state-state relations in this country. Lawyers and legal scholars tend to focus on courts, and in particular on decisions that courts make in the absence of legislation. The main decision the Federal Convention made concerning the implementation of international law in this country, however, was to create a national legislature with extensive power to deal with that topic. That is the main way the Constitution deals with the law of nations.

224. For example, that assumption underlay Hamilton's explanation in *Federalist No. 82* that American courts would under appropriate circumstances look to the law of other sovereigns like Japan. See *supra* notes 32–33 and accompanying text.