The Constitution's Text and Customary International Law

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Modern commentators have advanced various theories of the Constitution's original relationship to the law of nations, ranging from the view that the Constitution fully incorporated the law of nations as U.S. federal law to the opposite view that the law of nations has no status in U.S. domestic law until incorporated by Congress pursuant to its define-and-punish power. This Article defends an intermediate position based on the Constitution's text and historical background. First, it argues that the law of nations was not supreme over state law nor the basis of federal court jurisdiction under the Constitution's original meaning. In particular, the text's distinct treatment of treaties–which it expressly makes part of supreme law and the basis of federal jurisdiction–strongly implies a different status for unwritten international law. The Constitution's framers confronted parallel problems of states violating U.S. treaties and states violating unwritten international law. But in drafting the Constitution they did not provide parallel solutions. This indicates a distinct approach for unwritten international law, requiring action by Congress (or the treaty-makers) to convert it into supreme domestic law. Second, however, this essay argues that the unwritten law of nations could be a rule of decision for U.S. courts with appropriate jurisdiction if it did not conflict with other domestic law. English and American courts prior to the Constitution routinely used the law of nations as a rule of decision, and there is no reason to suppose that the federal courts' "judicial Power" granted by Article III did not include this traditional authority. Moreover, U.S. courts in the immediate pre-ratification period routinely used the law of nations as a rule of decision without objection. Thus under the Constitution's original meaning the law of nations was part of domestic law, but it was not part of supreme law.

*This Article further considers a different "intermediate" view of the law of nations advanced by Professors Anthony J. Bellia and Bradford Clark in their important new book "*The Law of Nations and the U.S. Constitution*." Bellia and Clark argue, among other things, that different parts of the law of nations had different roles under the Constitution's original meaning. Specifically, they argue that the Constitution's*

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assignment to the federal government of the power to recognize foreign governments implicitly precluded states from interfering with the rights of foreign nations established by the law of nations. Thus, while the law of nations did not become part of supreme law for all purposes, the rights of recognized foreign governments–reflected for example in doctrines such as foreign sovereign immunity and the act of state doctrine–did in effect become part of supreme law, displacing contrary state law. This Article concludes that the Bellia and Clark position is not supported by evidence from the founding era. However, it further concludes that the Bellia and Clark position may be the best way to understand modern judicial practice, which appears to make foreign sovereign rights superior over state law without recognizing a full incorporation of unwritten international law into supreme domestic law.

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INTRODUCTION

A longstanding hypothetical dominates discussion of the relationship between the U.S. Constitution and customary international law. Suppose a U.S. state decides to override an international law immunity of an important and potentially hostile foreign power, permitting a suit that international law would preclude. Article III of the U.S. Constitution will likely bring the dispute to federal court, but must the federal court apply the state law overriding immunity (assuming no federal statute or treaty to the contrary),[1] at the risk of undermining the United States' diplomacy and international standing? One hesitates to say it must. But if federal courts can turn to international law to override state law in this circumstance, might they not also do so elsewhere—for example, to use international human rights law to supervise how states treat their own citizens; to hold the President to customary international law in national security operations; perhaps even to override congressional legislation that violates international norms—

1. Many international law immunities are incorporated into statutes or treaties and, as a result, are expressly made preemptive of contrary state law by Article VI of the Constitution. However, some international law immunities are not so incorporated, and their status and scope is less evident. *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 924–29 (2011).

giving federal courts a supervisory role in domestic affairs far beyond what the Constitution's Framers might have imagined?[2]

In *The Law of Nations and the United States Constitution*, Professors Anthony Bellia and Bradford Clark chart an intermediate course between the horns of this traditional dilemma.[3] In their view, federal courts have a constitutional obligation to protect the customary international law rights of foreign sovereigns recognized by the U.S. federal government, even if such protection occurs at the expense of state law. This obligation comes, they say, not from the general status of customary international law in the U.S. legal system, but from the constitutional authority of the national government to recognize foreign governments and the corresponding implicit obligation of the states not to interfere with that power. Relatedly, they say, the constitutional power of the political branches of the national government to resolve disputes with foreign powers, whether through diplomacy or war, precludes states and courts from enforcing duties upon foreign sovereigns without the direction of the political branches.

Accordingly, Bellia and Clark think the answer to this Article's opening hypothetical is that federal courts may (indeed, must) override a state's attempt to

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2. For leading recent contributions to this debate, see, for example, 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); David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367 (2016); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009); Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495 (2011).

For earlier discussions, see, for example, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); 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); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after* Erie, 66 FORDHAM L. REV. 393 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002).

My contributions include MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 344–76 (2007); Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002); David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

This Article leaves aside the relationship between customary international law and unilateral presidential power. *See* RAMSEY, *supra*, at 362–76; Moore, *supra*, at 377–78 & nn.31–32.

3. *See generally* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017) [hereinafter BELLIA & CLARK, LAW OF NATIONS]. Earlier discussions of the topic by the same authors include Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655 (2013); Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729 (2012); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

defeat international law immunities, but they think this does not imply a broader power of the federal courts to enforce international law more generally. Specifically, they argue that constitutional values—including federalism and the limited role of federal courts relative to the elected branches—indicate that federal courts applying customary international law should not go beyond enforcing the international rights of foreign sovereigns.

This Article presents a textual critique of the Bellia–Clark position. It concludes that their reading of the Constitution is a plausible one, but that it is not the best assessment of the text's original meaning taken as a whole. Rather, the Constitution's limited express treatment of the law of nations, along with its express incorporation of treaties as supreme law and the basis of federal jurisdiction, suggests a circumscribed role for the law of nations in federal court—as a rule of decision in the absence of other relevant law, but (unlike treaties) not supreme over state law. This analysis indicates that the international law immunities posited in the opening hypothetical would not displace inconsistent state law, but that courts could look to those immunities (and other aspects of the law of nations) as a source of law in the absence of inconsistent state law.

Although this Article finds Bellia and Clark's assessment of the Constitution's original meaning to be unpersuasive in some respects, it finds their position more attractive as an interpretation of modern law. In particular, in light of the Supreme Court's decisions in *Erie Railroad Co. v. Tompkins*[4] and *Banco Nacional de Cuba v. Sabbatino*,[5] some core aspects of the Constitution's original relationship to customary international law may be difficult to maintain today. Bellia and Clark offer a plausible accommodation of the Constitution's original meaning and subsequent judicial and practical developments.

The Article proceeds as follows. Part I describes a textual approach to the Constitution's original treatment of treaties and the unwritten law of nations. In particular, it emphasizes the text's differential treatment of these two topics, despite their close association in the minds of eighteenth-century Americans. It also emphasizes the Founding Era's background assumptions about the role of the law of nations as a key to understanding the law of nations' constitutional status. It concludes that, in contrast to treaties, under the Constitution's original meaning the unwritten law of nations lacked the status of supreme law in the U.S. domestic legal system. It further concludes that the Constitution incorporated the Framers' background understanding of the law of nations as part of general common law, and thus as a non-supreme source of law in domestic courts. The law of nations, it concludes, was law but not supreme law in domestic courts. Part II turns to the Bellia–Clark reading of the Constitution's text and finds that their account lacks persuasive evidence of the Constitution's original meaning. As that Part shows, Bellia and Clark principally rely on implications from the text and early judicial practice; however, the text as a whole does not support the implications they find,

4. 304 U.S. 64 (1938).
5. 376 U.S. 398 (1964).

and the judicial practice they identify does not apply the law of nations to override state law. Part III then addresses the relationship among the original meaning, modern law, and the Bellia–Clark position. It concludes that Professors Bellia and Clark provide a useful and important way to think about the modern relationship between the Constitution and the law of nations even if their view is not fully founded in the Constitution's original meaning.

I. THE LAW OF NATIONS' CONSTITUTIONAL STATUS: LAW BUT NOT SUPREME LAW

This Part develops a textual account of the constitutional status of the unwritten law of nations. It reaches two basic conclusions: that the Constitution did not make the law of nations part of supreme law within the U.S. domestic legal system, but that U.S. courts could use the law of nations as a source of law to decide cases absent conflict with other domestic law. On the first point, the Founding generation had parallel concerns arising from treaties and the law of nations, but the Constitution did not adopt parallel solutions. The Framers specifically designated treaties as supreme law of the land and a basis of federal jurisdiction, but they did not provide such specific treatment for the unwritten law of nations. The differential treatment of the law of nations and treaties in the Constitution's text indicates that they were to have different roles—notably, that treaties would become part of supreme law automatically, but the unwritten law of nations would require incorporation into supreme law by Congress or the treatymakers.

As to the second point, the eighteenth-century background understanding was that the unwritten law of nations formed part of general common law, available as a source of law to domestic courts in the absence of written law. It seems likely that this status was adopted in the Constitution, specifically through the "judicial Power" granted in Article III: the courts' traditional judicial power included the power to use the law of nations as a rule of decision.[6] As a result, the law of nations did not require incorporation into domestic law by domestic lawmakers to serve as a domestic source of law (even though it did require such incorporation to become part of supreme law).

A. THE OMISSION OF THE LAW OF NATIONS FROM SUPREME LAW

1. Parallel Concerns Arising from Treaties and the Unwritten Law of Nations in the Founding Era

The Constitution's text is, on its face, relatively opaque on the status of the unwritten law of nations.[7] The only express mention of the law of nations is in Article I, Section 8, giving Congress "Power . . . [t]o define and punish Piracies

6. *See* U.S. CONST. art. III, § 1.

7. For simplicity, in the ensuing discussion this Article uses "the law of nations" to refer to the unwritten law among nations in the founding era and "customary international law" to refer to the unwritten law among nations in the modern era. Also, as discussed below, eighteenth-century international law writing often described treaties as part of the law of nations. *See* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2212–17 (2015). Where important to the discussion, this Article uses "unwritten law of nations" to exclude treaties.

and Felonies committed on the high Seas, and Offenses against the Law of Nations."[8] This brief textual reference indicates that the Founding generation recognized an external body of law known as the law of nations (as historical accounts confirm),[9] but it leaves the larger question unanswered: did the Framers understand the law of nations to enter U.S. domestic law only when offenses against it were defined and punished by Congress, as the text expressly contemplates, or did background relationships in eighteenth-century legal theory and practice give rise to unstated assumptions about how the law of nations would interact with domestic law and judicial institutions?[10]

One way to begin answering this question is to examine the Constitution's treatment of a closely related issue: the domestic law status of treaties. Treaties and the unwritten law of nations were closely associated in Founding-Era America for at least three reasons. First, leading eighteenth-century legal authorities described treaty obligations as a subset of the law of nations, which also included unwritten obligations of the type we now call customary international law.[11] Indeed, treaty obligations at bottom rested on the unwritten law of nations because the unwritten law made treaty obligations binding upon treaty signatories; the unwritten law was what distinguished treaty obligations from mere diplomatic assurances or other informal promises.[12] Thus, in eighteenth-century legal theory, treaty obligations and law of nations obligations were fundamentally intertwined.

Second, in the international relations realities faced by the American Framers, treaties and the unwritten law of nations played a closely related—indeed, not materially distinguishable—role. European nations expected the United States to honor its obligations under treaties and the law of nations. Because the United States was weak militarily and diplomatically, its leaders were anxious to avoid giving offense to potentially hostile foreign powers. That was especially important at a time when offense was often the trigger for (or at least the excuse for) hostile action. More broadly, as David Golove and Daniel Hulsebosch show, American leaders wanted the European system of nation-states to accept the new nation as an approximate equal—a matter that turned on U.S. acceptance of that system's rules, as reflected in treaties and the unwritten law of nations.[13] Yet the United States prior to the Constitution was poorly structured to prevent or respond to violations of international norms. The national Congress had little authority or control over actions of the U.S. states or of individuals, and state disregard of international law (written and unwritten) became a mounting problem.

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8. U.S. CONST. art. I, § 8, cl. 10.

9. *See* Golove & Hulsebosch, *supra* note 2, at 937–39; *see also* RAMSEY, *supra* note 2, at 342–46 (citing authorities).

10. *See generally* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012) (discussing the role of background assumptions in constitutional law).

11. *E.g.*, EMER DE VATTEL, THE LAW OF NATIONS, bk. I, §24, at 89 (J.B. Scott ed., Charles Fenwick transl., 1964) (1758).

12. *See id.*; *id.*, bk. II, §§ 164, at 218–19.

13. *See* Golove & Hulsebosch, *supra* note 2, at 937–39.

Notably, violations of treaties and of unwritten law raised equivalent problems: compliance was expected by the European powers, U.S. states could not be counted on to comply, and the national Congress could not take meaningful action. The leading foreign policy headaches for national leaders in the 1780s were states' failure to comply with the 1783 peace treaty with Britain and states' reluctance to respect the customary law immunities of ambassadors and the rights of foreigners under the unwritten law of nations.[14]

Third, unsurprisingly, the Founding generation in America described the problem of treaty compliance and the problem of law-of-nations compliance as two parts of the same difficulty. Two famous examples illustrate. In his memorandum *Vices of the Political System of the United States*, prepared in anticipation of the 1787 constitutional convention, James Madison included under a single heading (numerically his third "vice"): "Violations of the law of nations and of treaties."[15] He elaborated:

> From the number of [state] Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly, not a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. [See the complaints to Congress on these subjects]. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.[16]

Similarly, when Edmund Randolph introduced the Virginia plan at the 1787 Convention, he described among the existing difficulties under the Articles of Confederation the problem that Congress could not "cause infractions of treaties or of the law of nations, to be punished."[17] Other similar examples may be found both before and during the drafting and ratification process.[18]

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14. *See* Sloss et al., *supra* note 2, at 9–12; FREDERICK MARKS, INDEPENDENCE ON TRIAL 3–95 (1973); RICHARD MORRIS, THE FORGING OF THE UNION, 1781–1789 (1987). As Golove and Hulsebosch observe: "[E]xperience under the Articles of Confederation led many Americans to conclude that adherence to treaties and the law of nations was a prerequisite to full recognition [by European nations] but that popular sovereignty, at least as it had been exercised at the state level, threatened to derail the nation's prospects." Golove & Hulsebosch, *supra* note 2, at 932; *see also id.* at 939 ("Historians have rightly emphasized how the limited powers of Congress under the Articles of Confederation left it unable to prevent the states from violating the nation's treaty obligations and the law of nations . . . ."). Golove and Hulsebosch further argue that the Constitution's Framers focused on assuring that the national government under the new Constitution would comply with international obligations, again combining treaty obligations and the law of nations. *Id.* at 939–40, 948–49. For skepticism on the latter point, see Moore, *supra* note 2, at 372.

15. James Madison, Vices of the Political System of the United States (Apr. 1787), *in* 9 THE PAPERS OF JAMES MADISON 345, 349 (William T. Hutchinson et al. eds., 1975).

16. *Id.* (brackets in original).

17. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 19 (Max Farrand ed., 2d ed. 1996) [hereinafter FARRAND, RECORDS].

18. *See*, *e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (opinion of Jay, C.J.) ("[I]n their national character and capacity, the *United States* were responsible to foreign nations for the conduct of

These are familiar points, but for present purposes the key emphasis is the equivalence of the concerns arising from treaties and the unwritten law of nations in the Confederation period and in the drafting and ratification process. Because the Framers saw treaty compliance and law-of-nations compliance as parallel problems, it is striking that the Constitution appears not to have adopted parallel solutions.

2. The Constitution's Adoption of Treaty Supremacy

In contrast to the law of nations, the Constitution's incorporation of treaties into U.S. domestic law is expressly declared in complementary ways in Article VI and Article III. Article VI provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[19]

Though this is familiar language, it is worth close consideration on three grounds. First, the incorporation of treaties into supreme domestic law is direct and unequivocal. "All" treaties "shall be" supreme law, and judges "in every State" are "bound thereby" even in cases of conflict with the "Constitution or Laws of any state." Thus, Article VI made the status of treaty provisions as supreme law automatic, not dependent on congressional implementation.[20]

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each State, relative to the law of nations, and the performance of treaties . . . ."); THE FEDERALIST NO. 3, at 42–43 (John Jay) (Clinton Rossiter ed., 1961) (urging the importance of observing treaties and the law of nations with respect to European powers); *id*. at 43 (urging a single national government so that "treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner"); FARRAND, RECORDS, *supra* note 17, at 316 (Madison criticizing New Jersey plan for failing to prevent "violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars"); 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136–37 (Worthington Ford et al. eds., 1912) (1781) (congressional resolution asking states to "provide . . . punishment . . . for infractions of the immunities of ambassadors and other public ministers [and] . . . infractions of treaties and conventions to which the United States are a party."); *see also* Golove & Hulsebosch, *supra* note 2, at 955–61 (describing difficulties under the Articles); *id*. at 932–33 (discussing the founding generation's concern over violations of treaties and the law of nations as a single problem and concluding that "the result [at the Constitutional Convention] was a novel and systematic set of constitutional devices designed to ensure that the nation would comply with treaties and the law of nations"); *id* at 981("For the framers, the critical concerns were with the law of nations and national treaty commitments. Observance of these obligations could not be left subject to the shifting winds of popular sentiment.").

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

20. Despite the Constitution's unequivocal language, the Framers likely understood that some treaty obligations would be written in ways that explicitly or implicitly required congressional implementation (what modern law calls non-self-executing provisions). *See* Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1648; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 606 (2008). The basic proposition, however, was that treaty provisions would automatically have the same status as statutes in the ordinary case—a proposition borne out by Founding-era commentary as well as the plain language of the text. *See* Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106

Second, Article VI made a radical change in the domestic legal status of treaties. Treaties were not part of domestic law in the English legal system familiar to the Framers. Made by the monarch alone, treaties were simply diplomatic instruments until parliament passed legislation to incorporate them into English law. This was not a requirement that parliament approve treaties; treatymaking power was wholly vested in the monarch.[21] But ordinarily English courts did not directly enforce treaty obligations. If a treaty needed to have domestic legal effect, parliamentary action was needed. [22]

Third, Article VI arguably went further than necessary for the Framers' purposes. The problem under the Articles of Confederation was that the national Congress lacked power to require states to comply with treaties. Randolph's opening statement to the Convention emphasized that *Congress* could not "cause infractions of treaties or the law of nations, to be punished"[23]—Congress lacked parliament's power of treaty implementation. That difficulty could have been fixed merely by giving Congress power to enforce treaties, in a manner parallel with other constitutional fixes where Congress's power under the Articles of Confederation had been thought insufficient, such as imposing taxes and regulating interstate commerce.[24] Moreover, making treaties automatically supreme over state law, rather than merely giving Congress power to enforce them, intruded on state sovereignty by overriding the federalism protections embedded in the legislative process.[25] That, however, was presumably the point—the Framers were so dedicated to treaty compliance they did not want the ordinary checks on legislation to stand in the way. And they were willing to risk state-level opposition—and defend the unprecedented nature of their design—to accomplish this result.[26]

In addition to making treaties supreme law of their own force in Article VI, the Framers in Article III contemplated that federal judges would play an important role in requiring state compliance with treaties. Article III provided: "The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or

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COLUM. L. REV. 1450, 1469–73 (2006) (discussing commentary) [hereinafter Ramsey, *Toward a Rule of Law*].

21. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *249.

22. *See* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 218–34 (1998); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2159 (1999).

23. FARRAND, RECORDS, *supra* note 17, at 19.

24. *See* RAMSEY, *supra* note 2, at 35–46 (discussing these issues); *see also* U.S. CONST. art. I, § 8 (giving Congress power over taxes and interstate commerce).

25. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328 (2001).

26. The federalism threat from treaties was somewhat mitigated by the need for approval of two-thirds of the Senate for treatymaking—especially because, under the original design, Senators were appointed by state legislators. *See* RAMSEY, *supra* note 2, at 306–07; Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1682 (2008). Nonetheless, the automatic supremacy of treaties encountered opposition on federalism grounds in the ratification debates, especially in Virginia. *See* Ramsey, *Toward a Rule of Law*, *supra* note 20, at 1470–71; *see also* Golove & Hulsebosch, *supra* note 2, at 996–97 (discussing the radicalism of Article VI and the resistance to it).

which shall be made, under their Authority . . . ."[27] This provision allowed Congress to give lower federal courts jurisdiction over all treaty-based claims, although in implementing Article III in the Judiciary Act of 1789, Congress initially did not go quite that far. The Judiciary Act did, however, direct many treaty controversies to the lower federal courts.[28] Moreover, Article III, Section 2 implicitly gave the Supreme Court appellate jurisdiction over state court treaty cases, as confirmed subsequently in *Martin v. Hunter's Lessee*.[29] Thus, although Article VI expressly bound state court judges to apply treaties as law, the Constitution's text provided a framework in which most treaty cases could be ultimately resolved by federal courts (which, in post-ratification practice, they were).

Commentary and post-ratification practice confirm the significance of these textual provisions in establishing the domestic legal status of treaties. It is true that the idea of treaties as supreme law was not an entirely new one at the Convention. Prior to the Convention, some leading figures—notably Alexander Hamilton and John Jay—had argued that the structure of the Confederation legally precluded states from violating treaties.[30] However, that view was not

27. U.S. CONST. art. III, § 2.

28. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789). Congress did not give lower federal courts jurisdiction over all cases arising under treaties and federal statutes, as Article III allowed. But the Act assured that many treaty controversies could be brought in federal court by providing lower federal courts with jurisdiction over disputes involving aliens (subject to an amount-in-controversy limit of $500). *Id.* § 11. It separately provided for federal district court jurisdiction where an alien sued for a tort constituting a violation of the law of nations or a treaty of the United States, without regard to the amount in controversy. *Id.* § 9.

29. The Constitution provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2.

This language suggests that in "the other Cases before mentioned"—that is, in the categories of federal jurisdiction listed earlier in Article III, including cases arising under treaties—the Supreme Court would have appellate jurisdiction over decisions of state courts. Presumably the First Congress, in not giving lower federal courts jurisdiction over cases arising under the Constitution, U.S. laws, and treaties, assumed the Supreme Court would be able to review state court decisions to ensure appropriate application of federal law. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789). The Supreme Court directly endorsed this reading of Article III in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), a case concerning a treaty obligation initially contested in state court and brought to the U.S. Supreme Court on appeal. This appellate role for the Supreme Court is confirmed by Hamilton's comment in *The Federalist* that "[t]o avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one tribunal paramount to the rest." THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. *See* RAMSEY, *supra* note 2, at 44–45; Golove & Hulsebosch, *supra* note 2, at 961–70 (discussing Hamilton's argument in the Confederation-era case *Rutgers v. Waddington*); *id.* at 995–96 (discussing arguments by Jay and Hamilton and noting that Article VI "incorporated into the Constitution a controversial doctrine, developed by John Jay, Alexander Hamilton and others during the Confederation, which made treaties, upon ratification, the supreme law of the land enforceable by the courts without the need for legislative implementation").

widely accepted, especially by the states.[31] During and after ratification of the Constitution, commentators and courts identified Article VI as the crucial provision establishing treaty supremacy.[32] By implication, if treaties had not been included in Article VI, they would not have been preemptive.

3. The Failure to Extend the Treaty Supremacy Model to the Unwritten Law of Nations

The treaty supremacy model, implemented through Article VI and Article III, is crucial for the debate over the unwritten law of nations because it points out an approach not taken. It would have been an easy matter for the Framers to add the unwritten law of nations to the text of Article VI and Article III had this been their intent. And given the parallel concerns over treaty enforcement and law of nations enforcement in the Founding era, discussed above, it is likely that the Framers considered this approach. But ultimately, the law of nations did not expressly appear in either Article VI or Article III. That omission is strong textual evidence that the Constitution did not make the law of nations an automatic part of U.S. domestic law using the treaty supremacy model.

It is important here to confirm that the law of nations was not *implicitly* encompassed within Article VI and Article III, despite not being named specifically. Might the "Laws of the United States"—appearing in both provisions, along with treaties—also have included the unwritten law of nations?

As to Article VI, this implicit inclusion seems especially unlikely. The relevant provision from Article VI established the supremacy of "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . ."[33] That phrasing appears to exclude the law of nations on two grounds. First, the Founding generation would not have understood the law of nations to be "made in Pursuance" of the Constitution. The U.S. Constitution had no relevance to the making of the law of nations, which was external to the United States and was formed in part from natural law and in part from the conduct of the community of nations.[34] Second, Article VI's phrasing is prospective: laws "which shall be

31. *See* Golove & Hulsebosch, *supra* note 2, at 967–68 (discussing responses to the decision in *Rutgers*); *id.* at 969 (noting that "in most [Confederation-era cases] advocates and judges did not assert the treaty or the law of nations directly" as a basis for overturning state law).

32. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 271–77 (1796) (opinion of Iredell, J.) (expressing this view); *id.* at 236–37 (opinion of Chase, J.) (same); *id.* at 282 (opinion of Cushing, J.) (same); Ramsey, *supra* note 22, at 220–22 (citing authorities); Ramsey, *Toward a Rule of Law*, *supra* note 20, at 1470 (same); *see also* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 518 (John P. Kaminski et al. eds., 2009) (James Wilson to Pennsylvania ratifying convention discussing Article VI and explaining "judges of the United States will be able to carry [treaties] into effect" because of "this clause"); Vázquez, *supra* note 20, at 605 (referring to Article VI, explaining that "to avoid the foreign relations difficulties . . . result[ing] from treaty violations and to capture the benefits of a reputation for treaty compliance the Founders gave treaties the force of domestic law enforceable in domestic courts").

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

34. *See* RAMSEY, *supra* note 2, at 348–49 (noting that "[t]he eighteenth century law of nations arose outside any single country, partly from rational inquiry into the nature of the international system and partly from long-standing practices"); Bradley, *supra* note 2, at 602–03 (eighteenth-century law of

made" are those to be made in the future.[35] Again, this is not how the Framers understood the law of nations; it was a pre-existing body of law to which the United States became bound upon becoming a nation.[36] Although the Framers understood the law of nations to be capable of development, and thus understood that new obligations might arise, there is no reason why the Constitution would make only new law-of-nations obligations part of supreme law. The longstanding provisions of the law of nations central to the diplomatic system of European nation-states, such as ambassadorial immunities, were the focus of the pre-Convention foreign policy difficulties and were the Framers' central concern.[37]

Instead, the "Laws of the United States" phrase in Article VI referred to laws *created by* the United States (that is, by Congress). Viewed this way, the two textual limitations noted above make perfect sense. The "made in Pursuance thereof" language assured that only constitutional laws became part of supreme law; laws Congress purported to enact but which were not made in pursuance of the Constitution—meaning those Congress made contrary to constitutional limitations—were excluded. And Article VI accorded the status of supreme law only to laws made by the United States in the future, meaning after ratification. Pre-existing laws made by the United States—laws made under the Articles of Confederation—did not become part of supreme law and required reenactment by the reconstituted Congress.[38] The law of nations was thus not only not included in Article VI, but textually excluded from it.[39]

This conclusion is strongly supported by the 1789 Judiciary Act, which directed federal courts to apply state law to decide cases "except where the constitution, treaties or statutes of the United States shall otherwise require or

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nations "was understood as stemming from either natural law or the customs of the international community, and judges involved in applying this law were seen as involved in a process of discovery rather than creation"). Blackstone called the law of nations "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world." 4 BLACKSTONE, *supra* note 21, at *66.

35. In contrast, the part of Article VI directed to treaties was specifically—and somewhat awkwardly—phrased to include pre-existing U.S. treaties made under the Articles of Confederation as well as future treaties: "all Treaties made, or which shall be made, under the Authority of the United States . . . ."

36. *See generally* Golove & Hulsebosch, *supra* note 2; *see also supra* note 34 (noting foundation of the eighteenth-century unwritten law of nations in natural law and in long-standing practice among European nations).

37. *See generally* Golove & Hulsebosch, *supra* note 2; *see also* RAMSEY, *supra* note 2, at 349 ("Ambassador's immunities, for example, existed long prior to the Constitution and bound the nation in the Articles period . . . . [S]uch long-standing rules would not fit within the future-oriented phrasing of Article VI.").

38. Thus, for example, the Northwest Ordinance of 1787, passed by the Articles' Congress to organize and regulate the U.S. territories in the Ohio Valley, was reenacted by the First Congress under the Constitution in 1789. *See* Reginald Horsman, *The Northwest Ordinance and the Shaping of an Expanding Republic*, 73 WISC. MAG. HIST. 21 (1989).

39. In the modern era, it is argued that federal courts can create common law rules, perhaps including some or all law of nations obligations, that are laws of the United States "made in Pursuance" of the Constitution. That, however, is plainly not the original meaning of Article VI, because eighteenth-century legal theory did not understand judges to "make" common law rules (rather, they discovered them). *See* Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559, 619–20 (2013).

provide."[40] In adopting this phrasing, paralleling Article VI, the First Congress demonstrated (a) that it thought the "laws made in Pursuance thereof" language in Article VI meant federal statutes; and (b) that it did not consider the unwritten law of nations to be supreme law. Otherwise, the Judiciary Act would have been directing federal courts to apply state law contrary to supreme law reflected in the law of nations, which would have been both incongruous and unconstitutional.[41]

Article III is somewhat more difficult to assess because it referred to "Laws of the United States" without further qualification. Perhaps the non-parallel language suggests that Article III encompassed a broader range of "Laws" than Article VI. But two main considerations indicate that it did not include the unwritten law of nations.

First, Article III provided federal jurisdiction for disputes arising under "Laws of the United States" and, separately, for disputes arising under treaties.[42] That separate treatment indicates that "Laws of the United States" in Article III did not include treaties, even though Article VI made treaties part of supreme law. Similarly, Article III provided jurisdiction separately for disputes arising under "this Constitution"[43]—so constitutional provisions also apparently were not encompassed within Article III's "Laws of the United States." This phrasing suggests that "Laws of the United States" in Article III had the same (or a similar) narrow meaning that it did in Article VI: laws created by Congress. It is difficult to understand how "Laws of the United States" could have included the unwritten law of nations but not treaties or the Constitution, especially because Article VI made treaties and the Constitution, but not the unwritten law of nations, part of supreme law.

Second, Article III separately addressed important subsets of the law of nations. It expressly gave federal courts jurisdiction over "all Cases of admiralty and maritime Jurisdiction" and "all cases affecting Ambassadors, other public Ministers and Consuls."[44] As discussed further below, most of these disputes, if not governed by federal statutory or treaty law, were governed by the unwritten law of nations.[45] Indeed, as many commentators have explained, these provisions were included to provide federal courts with jurisdiction over key law-of-nations controversies, to promote uniform application of the law of nations, and to avoid international offense.[46] But if the law of nations was already included in federal jurisdiction as part of the "Laws of the United States," these specific provisions would be largely redundant. For example, disputes involving admiralty or ambassadors, if governed by federal statutes or treaties, would come under federal

40. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (1789).

41. *See* Bradley, *supra* note 2, at 603–04 (further developing this argument).

42. *See* U.S. CONST. art. III, § 2.

43. *Id.*

44. *Id.*

45. *See infra* Section I.B.

46. *See, e.g.*, BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 67–71; Golove & Hulsebosch, *supra* note 2, at 989–1014. For further discussion, see Bradley, *supra* note 2, at 597–619 (concluding that the law of nations is not part of the "Laws of the United States" in Article III).

jurisdiction on that ground. The separate grants of admiralty and ambassador jurisdiction were directed at disputes not involving federal treaties or statutes—which at the time principally meant disputes involving the law of nations. Thus, use of the specific categories demonstrates the Framers' adoption of a different approach to law-of-nations jurisdiction: rather than providing jurisdiction over law-of-nations controversies as a general matter, they provided jurisdiction over specific categories of law-of-nations controversies with which they were most concerned. Hamilton's *Federalist No. 80*, describing Article III's jurisdictional approach, adopted exactly this assessment. Hamilton reviewed each of Article III's express sources of jurisdiction and explained how they were needed to allow federal courts to resolve key international disputes—without saying or even implying that the law of nations as a general matter could be a basis for Article III jurisdiction.[47]

In sum, the Constitution's text adopted a novel and aggressive approach for making international obligations automatically part of U.S. domestic law, but it used that approach only for treaties, not for unwritten international obligations. Some modern commentators argue that this nonparallel treatment makes little sense given the Framers' parallel concerns over treaty compliance and law-of-nations compliance. As a result, they contend, the Framers must have understood other constitutional provisions to imply law-of-nations supremacy. But the text and its background point in the opposite direction. Given the concerns over law-of-nations compliance, it seems unlikely that the Framers would have left the supremacy of unwritten obligations to implication had they intended the law of nations to be part of supreme law. That is especially true because the text's adoption of express treaty supremacy provided an easy approach to also establish law-of-nations supremacy, had that been desired. As a result, in the hypothetical posed at the outset of this Article, under the Constitution's original meaning a U.S. court could not apply a non-supreme provision of the law of nations to override a state law in the way it would apply a supreme provision of a treaty. The supremacy of the law-of-nations provision would have to arise in a different way.

This outcome is not as radical as it might appear. The Constitution's text provided alternate routes by which law-of-nations obligations could become part of supreme law and part of federal jurisdiction. As noted, Article I, Section 8—the Constitution's only express reference to the law of nations—gave Congress

47. *See* THE FEDERALIST NO. 80, at 474–80 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing categories of Article III jurisdiction in detail without indicating the law of nations as a source of jurisdiction); *see also id.* at 587, 592 (describing the "laws of the United States" language in Article III as referring to "laws of the United States, passed in pursuance of their just and constitutional powers").

These textual points might be discounted if strong context and commentary from the Founding Era indicated the contrary, but they do not. As discussed below, *infra* Section I.B, the founding generation understood the law of nations to be part of the common law and hence a source of law for courts—and thus commonly referred to it as the law of the land. But there is little, if any, direct evidence of founding-era commentary specifically referring to the law of nations as "Laws of the United States" for Article III purposes. *See* Bradley, *supra* note 2. For a contrary view, see William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002) (arguing that Article III includes the law of nations within the "Laws of the United States").

power to define and punish offenses against the law of nations.[48] Any law-of-nations obligation defined and punished by Congress would become part of supreme law and a basis for federal jurisdiction through incorporation into a "Law[ ] of the United States." In addition, law-of-nations obligations could be incorporated into treaties and would become part of supreme law and subject to federal jurisdiction in the same manner as other treaty obligations.[49] In terms of the opening hypothetical, imposing state judicial processes on persons or entities with international immunity is an offense against the law of nations; Article I, Section 8 expressly gave Congress power to punish such offenses (and protections against them could be incorporated in treaties as well). Notably, when commentators in the pre-drafting and drafting process discussed the deficiencies of the Articles of Confederation structure regarding international law, this was the remedy they appeared to contemplate: as discussed, they argued that the problem under the Articles was that *Congress* did not have power to enforce the law of nations.[50]

To be sure, the existence of alternate routes does not conclusively demonstrate that law-of-nations obligations could not also become part of supreme law and a subject of federal jurisdiction by their own force. But taken with the other textual evidence described above, it indicates that the Framers deliberately chose a different path for treaties than they did for the unwritten law of nations.

B. THE LAW OF NATIONS AS A RULE OF DECISION

The foregoing discussion might suggest that the law of nations simply was not made part of the federal legal system under the Constitution's original meaning unless Congress or the treatymakers acted to incorporate its provisions into U.S. law. Unlike treaties, Article III and Article VI did not include the law of nations; the Framers rejected an approach to the unwritten law of nations paralleling the Constitution's treatment of treaties. And by giving Congress the "define and punish" power, they might seem to have adopted an alternate approach that required law-of-nations provisions (unlike treaty provisions) to pass through the legislative

48. U.S. CONST. art. I, § 8, cl. 10.

49. *See* Ramsey, *supra* note 39, at 587–93 (noting that many provisions of the unwritten law of nations have been incorporated into supreme law in this manner, starting with the Crimes Act of 1790, which, among other things, criminalized violation of ambassadorial immunities).

50. *See infra* Section I.B. Further, it was not fully the case that state law infringements of the law of nations were a leading problem in the pre-Convention era. The key incidents arose not from directly conflicting state law, but from a lack of state law remedies or from state courts' misapplication of the law of nations. For example, it was feared that state law would not provide remedies to ambassadors and other ministers whose rights were violated. *See* Sloss et al., *supra* note 2, at 9–12 (giving examples of an assault on the French minister and the unauthorized arrest of an ambassador's servant). The difficulty in those cases was not state law conflicting with the law of nations, but state-level failure to enforce the law of nations. By contrast, for treaty implementation, the core problem was conflicting state law, as repeatedly recited by the Framers and their contemporaries and as reflected in the early treaty-supremacy case *Ware v. Hylton*, which involved a challenge to a Virginia law conflicting with the Treaty of Peace. 3 U.S. (3 Dall.) 199, 201–03 (1796). Thus, the immunity-overridden-by-state-law hypothetical has less bite than it appears. Giving Congress enforcement power might well have appeared to the Framers to be an adequate solution.

process—with its structural protections for individual rights and federalism—before becoming part of domestic law.

That conclusion, however, is mistaken as a matter of the Constitution's original meaning. Instead, the Founding generation expected federal courts to use the law of nations as an available source of law—in eighteenth-century terms, as a rule of decision—to resolve cases over which federal courts had jurisdiction.

1. Text and Pre-Ratification Practice

Both the Constitution's text and its pre-ratification background indicate that the law of nations would be a source of law in U.S. courts in the constitutional system. As a leading example, Article III gave federal courts admiralty and maritime jurisdiction[51] but it did not specify what rules of decision federal courts should use in admiralty and maritime cases. Federal courts could apply federal statutes and treaties, where applicable—but in these cases federal jurisdiction would be based on Article III's jurisdictional grant for cases arising under laws and treaties of the United States. The separate grant of admiralty and maritime jurisdiction in Article III must have contemplated cases not governed by federal statutory or treaty law. Some of those cases might arise under state law or foreign law, but state laws typically did not extend to the high seas, and foreign law—even if it did extend to the high seas—might not cover disputes involving U.S. citizens. The far greater percentage of such cases would have been expected to arise under the unwritten law of nations. As Professors Bellia and Clark show, an important branch of the law of nations was the "law maritime," which "encompassed both public matters governed by the law of state-state relations (such as prize cases) and private transactions governed by general maritime law (such as maritime commerce)."[52] This unwritten law governed most admiralty and maritime disputes in the eighteenth century.

Further (as Professors Bellia and Clark also show) courts prior to the Constitutional Convention routinely applied the law of nations to resolve admiralty and maritime disputes. This was the way British courts operated, as Blackstone explained.[53] It is also the way the first U.S. federal court operated. Under the Articles of Confederation, Congress established a federal court to hear appeals from state courts in prize cases, and this court used the law of nations to

51. U.S. CONST. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .").

52. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 113; *see also id*. at 113–34 (discussing eighteenth-century idea of the law maritime and its relationship to the Constitution). As Bellia and Clark describe:

> [English admiralty courts] developed a body of general law derived from principles of "civil law" and "other marine laws"—"the whole being connected, altered, and amended by acts of parliament and common usage." As a whole, this "body of jurisprudence" owed "it[s] authority to it[s] reception [in England] by consent of the crown and people."

Id. at 117 (quoting 1 BLACKSTONE, *supra* note 21, at *108).

53. *Id*. at 117.

decide appeals that came to it.[54] To an eighteenth-century audience, saying that courts would hear admiralty and maritime cases carried the clear implication that courts would use the law of nations, as appropriate, as a rule of decision to resolve them. As Hamilton observed, referring to cases under the Constitution's grant of admiralty jurisdiction, "these [cases] so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace."[55] Textually speaking, a court's "judicial Power" included the power to find rules of decision for admiralty and maritime cases in the law of nations.

Although this conclusion is most evident with regard to admiralty and maritime law, nothing suggests it should be limited to those categories. Pre-Convention courts used the law of nations to resolve cases outside admiralty and maritime claims as well. Another broad field was the law merchant, the largely unwritten law of international commercial transactions. As Professors Bellia and Clark recount,

> In the eighteenth century, Blackstone described the law merchant as "a particular system of customs" that was "ingrafted into" the common law "for the benefit of trade" and "which all nations agree in and take notice of." Such law derived from the commercial customs and practices of merchants, and all "civilized" nations applied it to resolve disputes between merchants from different nations.[56]

Nonetheless, they continue,

> In accordance with prevailing notions of parliamentary sovereignty, an act of Parliament could override the general law merchant, just as it could override other parts of the common law. English courts also applied unwritten local usages that deviated from the general rules of the law merchant to account for local needs and circumstances.[57]

This approach carried over to state courts in the United States after independence: "For decades after ratification, state courts continued to understand the law merchant as a transnational or general, rather than local, body of customary law . . . . State courts also understood that local usages and positive

54. *See id.*; *see also* HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775–1787 (1977).

55. THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 83, at 504 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to "cases which concern the public peace with foreign nations—that is, in most cases where the question turns wholly on the laws of nations").

56. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 22 (quoting 1 BLACKSTONE, *supra* note 21, at *75, *273); *see also* 1 BLACKSTONE, *supra* note 21, at *273 (the law merchant "is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries").

57. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 23.

enactments could alter the law merchant as applied in a particular location."[58]

One would expect that under the Constitution, transnational commercial claims would often be brought in federal court as a matter of diversity jurisdiction. This was a central point of diversity jurisdiction: the Constitution's Framers feared that state courts were biased against foreigners—including foreign merchants—and that unfair decisions might be a source of international friction.[59] Federal courts, through their diversity jurisdiction, would be a more neutral forum. But it would be extraordinarily odd if federal courts, having jurisdiction over transnational commercial cases, could not use the most common body of law, the law merchant, to resolve them. Instead, it seems clear that the Framers' design was predicated upon the understanding that the federal courts' "judicial Power" included the power to use the law merchant (like the law maritime) as a rule of decision.

Following Blackstone, Bellia and Clark identify a third principal category of law-of-nations obligations that federal courts could enforce: what they call the law of state-state relations.[60] Again, this seems consistent with the Constitution's text and design. A leading component of this category in the eighteenth century was the law of ambassadors.[61] As with admiralty and maritime jurisdiction, Article III made cases affecting ambassadors a separate category of federal jurisdiction. But what rules of decision would apply in this jurisdictional category? It would not be only federal statutes and treaties because cases involving ambassadors and governed by federal statutes or treaties would come under Article III jurisdiction as arising under the laws and treaties of the United States. Ambassador jurisdiction was designed for cases *not* arising under laws or treaties of the United States. In some cases, that might be state law, but ambassadors' claims and defenses under state law were not the Framers' preoccupation. Rather, the Framers' worry was protecting ambassadors' rights under the unwritten law of nations. Violation of ambassadors' immunities established by the law of nations would threaten serious international relations difficulties for the United States, perhaps even leading to war; under the Articles of Confederation, violations of ambassadors' rights had been a practical problem and a motivation for the Constitutional Convention.[62] The Confederation period showed that states could not be relied on to protect ambassadors' law-of-nations rights, and so Article III directed such claims to the new, more-trusted federal courts. But this solution would work only if federal courts could apply the unwritten law of nations as a rule of decision in cases affecting ambassadors.

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58. *Id*. at 24–25.

59. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Jonathan Elliot ed., 2d ed. 1901) (James Madison stating that under the Articles, "foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us.").

60. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 41–71.

61. *See* 1 BLACKSTONE, *supra* note 21, at *246–47 (discussing immunities of ambassadors under the law of nations).

62. *See* Golove & Hulsebosch, *supra* note 2, at 1006–07; Sloss et al., *supra* note 2, at 10–11.

Moreover, it is likely that the Founding generation contemplated federal courts applying the law of nations in categories beyond the three directly identified by Blackstone and by Professors Bellia and Clark. For example, the laws of war, as part of the law of nations, protected individuals against the loss of life and property in wartime to some extent. As a general matter, it seems likely that a court with jurisdiction over a tort or property claim arising in wartime could use the laws of war to resolve it absent other appropriate rules of decision.[63] Similarly, the law of nations encompassed a set of rules addressed to overlapping jurisdictional claims in transnational cases—what became familiarly known in the nineteenth century as conflict of laws. This field came to include not only the choice of governing law in transnational claims but also topics such as the scope of nations' extraterritorial legislative authority, courts' jurisdiction over absent parties, and the enforcement of foreign judgments.[64] Although these topics became more systematically understood as part of the law of nations (or "private international law") in the nineteenth century, it seems likely that even in the eighteenth century it was commonly understood that the law of nations was an appropriate source of rules of decision when these matters arose.[65] More broadly, English practice and commentary indicated that, as a general matter, the law of nations formed part of the common law and thus was available as a rule of decision in English courts.[66]

In sum, it was within the ordinary power of an eighteenth-century court to look to the law of nations for rules of decision in appropriate cases. Given this ordinary practice prior to the Convention, it is natural to read the Constitution's grant of "judicial Power" to the federal courts to encompass it. Article III's grants of jurisdiction over areas in which the law of nations played a crucial decisional role, especially admiralty and maritime cases and cases affecting ambassadors, confirm that this was the Founders' design.[67]

2. Post-Ratification Practice

Post-ratification practice in the United States is consistent with this understanding of the law of nations as an available rule of decision. Federal courts almost immediately began applying the law of nations under their own authority—

63. *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 116–17 (1851) (applying the law of war to a property claim arising during the Mexican War).

64. *See generally* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (Bos., Billiard, Gray & Co. 1834).

65. *See* Jay, *supra* note 2, at 821–22 (including conflicts of law as part of law of nations in early U.S. law); *see also* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at xv n.4 (indicating that conflicts of law was part of law of nations in relevant period).

66. Triquet v. Bath (1764) 97 Eng. Rep. 936, 937–38 (KB) (per Lord Mansfield) ("[T]he law of nations, in its full extent [is] part of the law of England.") (ascribing this quote to Lord Talbot from Bubot v. Barbuit (1736) 25 Eng. Rep. 777, 778); 4 BLACKSTONE, *supra* note 21, at *67 (same).

67. *See* Golove & Hulsebosch, *supra* note 2, at 1001 ("In view of this jurisprudential background . . . . All that was needed for the federal courts, like their British complements, to incorporate the law of nations into the law of the land was a grant of jurisdiction over cases in which questions determined by the law of nations would arise.").

particularly in admiralty and maritime cases—with no noted objection.[68] The First Congress also seemed to assume federal courts had this power. As discussed, in section 34 of the Judiciary Act of 1789, it directed that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[69] Notably, Congress did not say what law federal courts should use in cases where state law did *not* apply, and similarly it did not say what law federal courts should use in cases other than "trials at common law" (such as many admiralty and maritime cases). Given the background of courts using the law of nations to resolve transnational cases in the absence of written law or local custom, it seems likely that Congress assumed federal courts would follow this practice; otherwise, the Judiciary Act appears incomplete and difficult to understand.[70]

It is important to see that federal courts' routine application of the law of nations as a rule of decision poses no conflict with the earlier conclusions regarding supremacy and jurisdiction. To take jurisdiction first, rules of jurisdiction and rules of decision were understood as distinct concepts in the eighteenth century. The fact that a court could use the law of nations as a rule of decision did not imply that it had jurisdiction over all cases involving the law of nations, just as the fact that federal courts could use state law as a rule of decision in diversity cases did not imply that federal courts had jurisdiction over all cases involving state law. The two were simply separate inquiries.[71] A court's constitutional power to use the law of nations to resolve a case depended on the court first finding that it had jurisdiction to do so. True, the Framers drafted Article III's categories of jurisdiction with the idea that those categories would cover most controversies involving the law of nations.[72] But that strategy is different from—indeed, it is the opposite of—a strategy generally conferring federal jurisdiction over all controversies arising from the law of nations.

Supremacy, similarly, should be understood as a separate concept from rules of decision. A bedrock principle of English law was that statutory law overrode

68. *See* RAMSEY, *supra* note 2, at 359–60; *see also, e.g.*, United States v. Worrall, 2 U.S. (2 Dall.) 384, 392 (1798) (referring to "the law of nations, which is part of the common law"); Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 159–161 (1795) (opinion of Iredell, J.) (referring to "the common law, of which the law of nations is a part"); Jennings v. Carson, 13 F. Cas. 540 (C.C.D. Pa. 1792) (No. 7281) (observing that a court in admiralty determines "according to the laws of nations").

69. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (1789).

70. Early post-ratification commentary routinely referred to the law of nations as part of the "law of the land" and assumed it could be used as a source of law by courts even without statutory direction (as long as the court had jurisdiction). *See* Bradley, *supra* note 2, at 612 (quoting commentary). Eighteenth-century writers would not have thought of common law as superior to statutory law, but they thought of it as a source of law to decide cases in the absence of contrary enacted law.

71. *See, e.g.*, 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1357 (Charlene Bangs Bickford et al. eds., 1992) (Fisher Ames stating "there is a substantial difference between the jurisdiction of the court, and the rules of decision.").

72. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 67–71; Golove & Hulsebosch, *supra* note 2, at 995–96; *see* THE FEDERALIST NO. 80, at 475–80 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

common law; thus, the law of nations, as incorporated into common law, was not supreme over statutes within the domestic English legal system.[73] As a result, the fact that the law of nations, incorporated into common law, was the "law of the land" did not mean it was *supreme* law of the land—only that it was a potential source of law, along with others. As discussed, Hamilton and others had argued in the Confederation era that the law of nations (like treaty obligations) should be seen as supreme over state law as a result of the federal structure. But as with treaty obligations, this argument was not widely accepted. And—sharply in contrast to treaty obligations—the Framers did not include language assuring law-of-nations supremacy in the Constitution. That simply meant that the law of nations, like other common law doctrines, was law but not supreme law; it could be used to decide cases but not to override conflicting domestic law.

This was not as problematic as it may sound. A central point, well outlined by Professors Bellia and Clark, is that eighteenth-century state law had a relatively narrow scope, at least compared to modern law, and thus left considerable room for a non-supreme law of nations to operate. There were relatively few state statutes, and most of them focused on highly local concerns. Even more importantly, state court application of common law was often understood as a search for and application of "general common law" rather than the application of the specific common law of a particular state.[74] The law of nations was understood as part of this general law, and thus it could be applied by state courts as well as federal courts.

In determining and applying general common law, federal and state courts saw themselves as part of a common enterprise operating under the same body of law (although they sometimes disagreed as to its content). Supremacy was, therefore, not an important worry. The law of supremacy directly told courts, state and federal, that the Constitution, federal statutes, and treaties prevailed over other kinds of law; by implication it told courts that state law prevailed in the absence of a constitutional, statutory, or treaty rule (a point confirmed by section 34 of the Judiciary Act).[75] But many—perhaps most—controversies in the eighteenth century were not governed by any of these sources of law. Rather, they were governed by general common law, including the law of nations.[76] Saying that the law

73. *See* Bellia & Clark, *The Federal Common Law of Nations*, *supra* note 3, at 9–27.

74. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 28–33; *see also* Clark, *supra* note 3, at 1276–89; Fletcher, *supra* note 2, at 1517; Michael D. Ramsey, *Customary International Law in the Supreme Court, 1901–1945*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 2, at 225, 227–29.

75. *See* RAMSEY, *supra* note 2, at 346–55; Clark, *supra* note 25, at 1338–39.

76. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 3–134; *see also* Bradley, *supra* note 2, at 595 ("The law of nations was considered at that time [in the late eighteenth century] to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary. Thus, 'American courts resorted to this general body of preexisting law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign.'" (footnote omitted) (quoting Fletcher, *supra* note 2, at 1517)). In this system, state courts sometimes applied a local custom that deviated from the general practice. Thus, in addition to general common law, there could be a common law specific to a state, also called local law.

of nations was a non-supreme source of law nonetheless meant it was a potential rule of decision in this large class of cases.

One aspect of this system crystalized in the nineteenth century and became a source of great complexity in the twentieth: the relationship between state court applications of general common law and federal court applications of general common law. By the early to mid-nineteenth century, the practice had developed a fairly settled foundation—explained later in Justice Story's famous decision in *Swift v. Tyson*.[77] The basic principle was that in transnational cases (and other cases involving the application of "general" rather than "local" law), the law being applied existed outside the legal system of any particular state, with federal and state courts engaged in a collective undertaking to find and apply that law. As a practical matter, this meant that federal and state court decisions on matters of general law were not binding on each other, and that state court decisions on general law were not "laws of the several states" binding on federal courts under the 1789 Judiciary Act.[78] Because the law of nations was not a source of supreme law, it had the status of other general law—that is, available as a rule of decision in the absence of other domestic law, but not itself superior to positive federal or state law.

C. CONCLUSION: LAW BUT NOT SUPREME LAW

In sum, the Constitution's text, and its surrounding practice and commentary, indicate a deliberate decision by the Framers to omit the unwritten law of nations from the status of supreme domestic law. Crucially, the Constitution's text extended domestic supremacy to treaty obligations—the written law of nations—through the supremacy provisions of Article VI and the jurisdictional provisions of Article III. Because the Founding generation saw compliance with treaty obligations and compliance with the unwritten law of nations as parallel issues, the failure to provide textually parallel solutions is especially telling. Although one may speculate on the reasons the Framers provided different solutions, it seems apparent that they did: unlike treaties, the unwritten law of nations depended on

77. 41 U.S. (16 Pet.) 1 (1842).

78. *See* Clark, *supra* note 3, 1276–89 (discussing *Swift*); Fletcher, *supra* note 2, at 1517 (indicating that *Swift* restated an understanding dating at least to the early nineteenth century); Ramsey, *supra* note 74, at 225, 227–29 (discussing *Swift*). In contrast, where state courts applied "local" law (whether statutory law or common law based on local practices), this law would be binding on federal courts, under the 1789 Judiciary Act and the implication of Article VI, unless a source of supreme law existed. *See Swift*, 41 U.S. (16 Pet.) at 18–19; Ramsey, *supra* note 74, at 227–29. Justice Story explained:

> In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the thirty-fourth section [of the Judiciary Act] limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality . . . and other matters immoveable and intraterritorial in their nature and character. It has never been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation . . . .

41 U.S. (16 Pet.) at 18–19.

an act of the domestic lawmakers—Congress or the treatymakers—to incorporate it into supreme law. And it should be reemphasized that this is not an unworkable solution. Throughout history, Congress and the treatymakers have routinely used their constitutional lawmaking powers to incorporate the unwritten law of nations into laws and treaty obligations that are part of supreme domestic law.

However, the law of nations' lack of supreme status does not mean that the unwritten law of nations was not law at all in the U.S. domestic legal system. It is true that the Constitution's text did not specifically establish it as a domestic source of law. But the text and its legal background imply that federal courts could use the law of nations in the manner of common law—as a rule of decision in cases that were not governed by positive law, and (as discussed further below) as an interpretive guide in cases that were. This was the ordinary status of the law of nations prior to the Constitution, and the Constitution indicated in various ways an assumption that it would continue. In short, the Constitution's text adopted the unwritten law of nations as law, but not supreme law.

II. PROFESSORS BELLIA AND CLARK'S ARGUMENT FOR THE PARTIAL SUPREMACY OF THE LAW OF NATIONS

This Part turns to the alternative reading of the law of nations' role in the constitutional design, as advanced by Professors Bellia and Clark in their important new book, *The Law of Nations and the United States Constitution*. As described below, Bellia and Clark endorse much of the analysis outlined in the prior Part. They agree that the unwritten law of nations was not, as a general matter, made preemptive or jurisdictional by Article III and Article VI. They also agree that the Constitution allowed the law of nations, as a general matter, to function as a source of law in federal court in the manner of non-preemptive common law. Nonetheless, they propose significant qualifications on both propositions. They argue that some aspects of the law of nations—specifically, the law-of-nations rights of foreign sovereigns—are preemptive and jurisdictional even though the law of nations as a whole is not. They also argue that in some circumstances—specifically, in challenges to actions of foreign nations—the law of nations cannot be a domestic source of law. This Part evaluates the Bellia–Clark hypothesis as a matter of the Constitution's text and original meaning, and concludes that it is not supported by textual or contextual evidence.

A. THE BELLIA–CLARK HYPOTHESIS OF PARTIAL SUPREMACY

Professors Bellia and Clark posit an intermediate position of partial supremacy, in which only some aspects of the law of nations are binding on federal courts and supreme over state law. Specifically, in their reading, the Constitution precluded states from displacing foreign sovereign immunities established by the law of nations (and other law-of-nations rights of foreign sovereigns). That is so, they contend, because the national government's recognition power carried with it a promise that the United States would honor the sovereign rights of recognized foreign nations. State laws that refuse to respect those sovereign rights conflict

with the federal recognition power, and thus are unconstitutional. As they put it: "the Constitution's exclusive allocation of the recognition power to the [federal] political branches required courts and states to uphold the traditional rights of recognized foreign nations under the law of state-state relations."[79] Relatedly, in their view, "the Constitution's exclusive allocation of powers to the [federal] 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."[80] Thus, the Constitution's embrace of the law of nations was both narrow and one-sided: it incorporated into supreme domestic law only the rights (but not the obligations) of foreign sovereigns under international law.

This important and novel view of the constitutional status of the law of nations has multiple advantages over earlier theories. It is linked to particular constitutional powers[81] rather than being derived from structural implications or deduced more broadly from speculation about the Framers' abstract intentions. In adopting a narrow but important avenue for the law of nations to override state law, it explains why the Framers did not simply use the treaty-supremacy model for the law of nations: they wished (Professors Bellia and Clark contend) to incorporate only a subset of the law of nations into supreme law. It is sensitive to the fact that the eighteenth-century law of nations encompassed a wide variety of public and private rules, not all of which courts or constitutional law should necessarily treat the same way. And, as Professors Bellia and Clark further demonstrate, it goes some way toward explaining modern caselaw and modern assumptions about the domestic law status of international immunities.

B. LACK OF FOUNDING-ERA EVIDENCE FOR THE BELLIA–CLARK HYPOTHESIS

1. Textual Evidence

Although the Bellia–Clark hypothesis is a possible reading of the original meaning of the Constitution's text, there are reasons to think it is not the most probable one. Professors Bellia and Clark contend that the recognition power implies a self-executing duty of the states to respect foreign sovereign rights under the law of nations, but it is not obvious that this is so; their claim amounts to little more than an assertion. Recognition by the national government is not necessarily incompatible with state power to legislate regarding foreign sovereign

79. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 41.

80. *Id.*

81. One criticism of the Bellia–Clark hypothesis might be that it does not provide a clear constitutional account of the recognition power: on one hand, it appears to link it to the President's power to receive ambassadors (in Article II, Section 3), but on the other it acknowledges and does not attempt to resolve scholarly disputes about the allocation of the recognition power within the national government. A better approach might be to describe the President's recognition power as an aspect of the President's power in foreign affairs conveyed by the vesting of executive power in the President in Article II, Section 1. *See generally* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). If recognition has the effect Bellia and Clark contend, this is a better location for the power than the ambassador reception clause, because the power would not depend on an exchange of ambassadors.

rights—particularly unwritten rights whose contours might be uncertain or contested. That is especially true because the Constitution gave Congress power to protect foreign sovereign rights through the Define and Punish Clause, which Congress could use to override or remedy state infringements on sovereign rights.[82] Perhaps the Framers thought recognition created a self-executing duty on the states, but perhaps they thought—consistent with the Constitution's structural protections for federalism—that such a duty should arise from statutory implementation by Congress.

In effect, Bellia and Clark would find that the recognition power (itself an implied power) carries a negative implication that states must not interfere with the rights of recognized nations. As they acknowledge, the standard for finding negative implications in eighteenth-century legal interpretation was high: in Hamilton's words, a grant of federal power in the Constitution carried the negative implication of excluding states where "a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."[83] The Constitution's text itself indicates that the Framers did not rely on negative implications to exclude the states even for fairly obvious propositions. Many of the categories of federal foreign affairs exclusivity on which Bellia and Clark rely—war, reprisals, and treatymaking—are established not by negative implications from grants of power to the federal government, but from express exclusions of the states in Article I, Section 10.[84] The Framers' conclusion that these powers—manifestly inappropriate for states[85]—should be textually excluded indicates that they thought exclusion by negative implication would be difficult to establish.

Under this high standard for negative implications, the federal recognition power might well have been understood to exclude *recognition* of foreign governments by states. But Bellia and Clark would have the negative implication go much further to preclude any state involvement in the establishment of recognized foreign governments' domestic rights. That seems a substantial stretch even if viewed only from the perspective of the recognition power. As noted, a plausible alternative understanding would be that Congress would enforce foreign sovereigns' rights through the Define and Punish Clause.

Moreover, other aspects of the text undercut the Bellia–Clark reading, in particular the Constitution's treatment of treaties. If recognition implies the incorporation into supreme law of the foreign sovereign's rights under the unwritten law of nations, the adoption of a treaty would seem similarly to imply the incorporation into supreme law of the foreign sovereign's rights under the treaty.[86] As noted, that was Hamilton's argument for treaty

82. *See* U.S. CONST. art. I, § 8, cl. 10.

83. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 55 & n.51 (quoting THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

84. *See* U.S. CONST. art. I, § 10.

85. *See* THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961) (commenting that the justifications for these exclusions are self-evident).

86. Bellia and Clark make this connection. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 42 ("[S]ending and receiving ambassadors and making treaties were the traditional means by which

supremacy prior to the Constitution, but most people at the time did not see it that way.[87] Rather, the common understanding was that treaty obligations were not supreme over state law nor binding on state courts prior to the Constitution; instead they became supreme as a result of Article VI.[88] Put another way, the general understanding of the time was that U.S. recognition of a foreign sovereign's treaty-based rights (by U.S. ratification of the treaty) did not in itself incorporate those rights into supreme domestic law or preclude states from enacting laws in conflict. Rather, it was generally understood that the supremacy of treaties arose from Article VI's inclusion of treaties among its categories of supreme law.

That being so, it is doubtful that the Founding generation thought the federal government's recognition of a foreign sovereign's law-of-nations rights would automatically incorporate those rights into domestic law or preclude states from enacting laws in conflict. As discussed, the Founding generation thought of treaty-based rights as ultimately derived from the law of nations, and they thought of both treaty-based rights and law-of-nations rights as components of what Bellia and Clark call the law of state-state relations. It does not seem likely that they would have assumed one set of rights was automatically and implicitly incorporated against the states while the other needed express treatment in Article VI. At least, it seems very unlikely they would have thought it safe to leave the automatic incorporation of foreign nations' law-of-nations rights to a tenuous negative implication, had they intended such an automatic incorporation. Rather, it seems more likely that in each case the Framers thought a further act of incorporation was needed to displace the states. For treaty-based rights, it came as a constitutional matter through Article VI; for law of nations-based rights, it would come by statutory incorporation of the law of nations through Congress's define and punish power.

Similarly, the Constitution's text does not seem to compel the Bellia–Clark proposition that states and courts could not enforce the law-of-nations duties of foreign nations. It is true, as Bellia and Clark say, that the national political branches gained a constitutional near-monopoly on the use of force to resolve disputes with foreign nations through the Declare War, Reprisal, and Captures Clauses.[89] It does not follow, however, that these clauses precluded nonviolent means of resolving disputes with foreign nations.

To begin, it is worth noting again that the Framers apparently did not think the Constitution's express grants of war and reprisal power to Congress implicitly precluded states even from violent actions against foreign nations. Rather, they thought it necessary (or at least highly advisable) to expressly preclude states from engaging in war or issuing letters of marque and reprisal.[90] That being so, it

nations recognized each other as independent sovereigns entitled to exercise sovereign rights under the law of state-state relations.").

87. *See supra* Section I.A.

88. *See id.*

89. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 42–43.

90. U.S. CONST. art. I, § 10.

is difficult to see an implicit preclusion of nonviolent dispute resolution involving foreign sovereign obligations. Surely the case for an implied preclusion of the states would be much stronger for violent actions than for nonviolent actions.

Moreover, the Constitution and its background assumptions recognized that international rights and duties, including those involving foreign nations, would often appear in court. Article VI, after making treaties supreme law of the land, continued with the direction that the "Judges in every State shall be bound thereby."[91] Article III gave federal courts jurisdiction over disputes arising under treaties and over "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[92] Article III also established federal jurisdiction over admiralty and maritime cases,[93] which, as discussed, included rights and duties of foreign nations relating to captures and prizes. At minimum, therefore, the Founding generation contemplated that many disputes involving the interests of foreign states would be judicially cognizable.

Article III also did not expressly make any of these grants of jurisdiction exclusive of the states, and it seems clear that no implied exclusion was intended. The Constitution left it to Congress whether to establish lower federal courts, whether to give them exclusive jurisdiction or jurisdiction concurrent with state courts, and how much of Article III's permitted federal jurisdiction to convey to them.[94] If lower federal courts were not created, or if (as happened) their jurisdiction was curtailed by Congress, the assumption was that cases not directed to lower federal courts would proceed in state court, with appeals to the federal Supreme Court. And in fact, when Congress implemented these provisions in the 1789 Judiciary Act, Congress did not create exclusive federal jurisdiction over treaty cases or cases involving foreign nations or citizens (although it did create exclusive federal jurisdiction for admiralty and maritime disputes).

To be sure, it is likely that the Founding generation, in assessing the Constitution's probable consequences, assumed that cases would not be brought directly against foreign nations in either state or federal court. The law of nations—and hence the general law applied in both state and federal courts—provided immunity, and this immunity would be recognized by such courts absent a clear statutory rejection of it. But that was not the result of an exclusive constitutional allocation of dispute resolution power to the political branches. Rather, it was because the general law of immunity was a background rule courts would apply as part of their judicial power unless specifically told not to.

But the Founding generation likely recognized that cases might arise that implicated the duties of foreign nations under treaties or the law of nations and that did not involve a foreign nation (or other entity with international law immunity) directly as a defendant. The Constitution's text appears to have assumed—and, to some extent, directed—that these cases should proceed, even in state

91. *Id.* art. VI, cl. 2.
92. *Id.* art. III, § 2.
93. *Id.*
94. *See id.* art. III, § 1–2.

court, unless Congress provided otherwise.[95] The fact that the national political branches had a near-monopoly on the use of force to resolve disputes does not indicate otherwise.

In sum, the Constitution's text provides little support for the Bellia–Clark hypothesis and gives substantial reasons to doubt it. In particular, the text's express creation of treaty supremacy makes it doubtful that law-of-nations supremacy, even the limited version posited by Bellia and Clark, would have been left to implication. The text also seems to affirmatively contemplate that disputes involving foreign sovereigns—including the law-of-nations obligations of foreign sovereigns, if not precluded by immunity or related considerations—could be heard in domestic courts.

Ultimately, although nominally tied to particular constitutional powers, the Bellia–Clark hypothesis rests on a structural intuition: that it does not make sense in a federal system, especially given the Founders' experiences under the Articles of Confederation, to allow states to displace immunities and other rights of foreign nations recognized by the federal government, or to enforce the obligations of foreign nations contrary to the preferences of the national political branches. This may well be a sound structural intuition. But that does not show it was part of the original meaning of Constitution's text.

2. Drafting and Ratification Evidence

Professors Bellia and Clark point to no contemporaneous commentary stating or implying that the unwritten law of state-state relations displaced contrary state law under the Constitution's original meaning.[96] Of course, this is not fatal to their reading, and it does not appear that there is contemporaneous commentary rejecting their reading either; the matter does not seem to have been directly discussed. But Professors Bellia and Clark are claiming a somewhat indirect implication from the Constitution's text. In terms of federalism, it is a substantial power to implicitly convey to the President the ability to grant to foreign sovereigns rights superior to state law.[97] This is particularly true in light of Article I, Section 8's express grant of power to Congress to do so. Given the magnitude of that power, it seems that there should be some affirmative evidence in its support.

The Constitution's background assumptions provide a reasonable explanation of why the matter was not discussed. The Founding generation likely assumed that the rights and duties of foreign states would be adjudicated under the law of

95. *See id*. art. III, § 2 (establishing federal jurisdiction for disputes between U.S. citizens and foreign citizens or states); *id*. art. III, § 1 (leaving decision regarding establishment of lower federal courts to Congress).

96. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 41–71 (discussing the Constitution's text, but not contemporaneous interpretations of it).

97. As noted, see *supra* note 81, Bellia and Clark avoid the debate over the allocation of the recognition power within the federal government. But in discussing implied duties imposed on the states by recognition, they must principally have in mind presidential recognition. If Congress were to recognize a foreign nation, presumably Congress could also provide protections for that nation's sovereign rights in legislation, if it wanted to.

nations as incorporated into the general common law, as discussed above.[98] That would, therefore, include immunities and other law-of-nations-based limits on adjudication. As discussed, the problem in the Confederation period had been that state courts were not trusted to apply the law fairly to foreigners. That problem was solved at the Constitutional Convention by giving jurisdiction over most transnational cases to the new federal courts. The problem of states interfering with foreign nations' law-of-nations rights by statute was largely hypothetical and, had anyone been concerned about it, an adequate solution was Congress' power to enact supreme statutory law to protect law-of-nations rights.

3. Early Post-Ratification Judicial Practice

In support of their reading, Professors Bellia and Clark principally discuss post-ratification caselaw, in which they say "the [Supreme] Court has respected the rights of recognized foreign nations under the law of state-state relations" and refused to allow claims based on foreign nations' violations of law of nations obligations.[99] This claim is true as far as it goes, but it implies more support for their position than the cases deliver. In the early post-ratification period, Bellia and Clark do not identify any cases in which courts overrode state law to vindicate a law-of-nations right of a foreign sovereign, nor any case in which courts refused to hear a case implicating the duties of a foreign sovereign where the court clearly had jurisdiction to do so. The cases they discuss all involve distinct matters, and although the cases show that federal courts treated law of nations obligations carefully and generally vindicated them, they do not show that federal courts vindicated law-of-nations obligations at the expense of state law. To be clear, the cases Bellia and Clark discuss do not show the contrary either; that is, they do not show courts choosing state law over the law-of-nations rights of foreign sovereigns. It appears that the issue simply did not arise (with one important exception noted below). This is problematic for Bellia and Clark to the extent one thinks they need affirmative evidence in support of their reading of the Constitution's text.

As evidence of the Constitution's original meaning, Professors Bellia and Clark rely heavily on early post-ratification cases in which federal courts construed generally worded federal laws not to violate international law.[100] Undoubtedly, these cases show (as Bellia and Clark say) that federal courts in the post-ratification era worked hard to uphold the law-of-nations rights of foreign sovereigns. However, none of these cases involved a contrary state law, so they are not indicative of a constitutional displacement of state law by foreign sovereign rights.

The most famous of these cases is *Murray v. Schooner Charming Betsy*, the case giving this practice its modern name, the "Charming Betsy canon."[101] As

98. *See supra* Section I.B.

99. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 73.

100. *See id.* at 74–94.

101. 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *see also* Curtis A. Bradley, *The*

Bellia and Clark show, *Charming Betsy* was just one of several cases of its kind. An earlier instance was *United States v. Peters* in 1795, in which the Court concluded that federal courts lacked statutory jurisdiction to hear prize cases where exercising jurisdiction would be contrary to the law of nations.[102] Similar conclusions followed, including *Charming Betsy* (finding that a federal law generally permitting seizure of ships trading with French territories did not apply to a ship owned by a Danish subject, because that application would violate the law of nations' protection of neutral shipping);[103] *Schooner Exchange v. McFaddon* (finding that federal courts lacked jurisdiction to hear a case contrary to the law-of-nations immunity for foreign warships, as an interpretation of the Judiciary Act);[104] and *Brown v. United States* (finding that Congress' generally worded declaration of war in 1812 did not authorize seizure of British property in violation of the law of nations).[105]

The only other case from this period discussed by Professors Bellia and Clark is *The Nereide*, another War of 1812 case.[106] In that case, the Court enforced the law of nations—specifically, the law of neutral rights invoked by a Spanish subject whose property had been wrongfully seized by a U.S. privateer. Although the privateer claimed Spain would not respect U.S. neutrality rights if the situation were reversed, the Court refused to consider this argument, saying it was for Congress to decide whether to retaliate against Spain.[107]

Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998).

102. 3 U.S. (3 Dall.) 121, 126–27 (1795). The issue was whether a U.S. federal court could reexamine a prize determination made by a French court; the Supreme Court held it could not. As Bellia and Clark explain:

> In the eighteenth and early nineteenth centuries, prize determinations by a nation's courts regarding property brought within its territory constituted official acts of the foreign states, and the law of state-state relations required the courts of other nations to treat them as conclusive and unreviewable. Had the *Peters* Court allowed the district court to adjudicate the legality of the capture [after a French prize court found it legal], it would have violated France's rights under the law of nations . . . .

BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 77. Although the basis for the Court's decision was not entirely clear, *Peters* seems best understood as finding that the generally worded 1789 Judiciary Act, giving the federal courts admiralty and maritime jurisdiction, should not be construed to extend jurisdiction contrary to international law. *See* Sloss et al., *supra* note 2, at 37 & n.255 (describing *Peters* as an early instance of the *Charming Betsy* approach).

103. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 83–84 (describing the *Charming Betsy* case).

104. 11 U.S. (7 Cranch) 116, 123 (1812); BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 79–82 (describing the *Schooner Exchange* case); *see also* Sloss et al., *supra* note 2, at 39–40 (identifying *Schooner Exchange* as an application of the *Charming Betsy* interpretive canon).

105. 12 U.S. (8 Cranch) 110, 112 (1814); BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 85–86; Sloss et al., *supra* note 2, at 40–41; *see also id*. at 37–41 (providing additional examples).

106. 13 U.S. (9 Cranch) 388 (1815).

107. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 87–88. Unlike the previous cases mentioned, *The Nereide* was a direct application of the law of nations pursuant to the Court's admiralty jurisdiction. As discussed earlier, see *supra* Section I.B., at the time this was a routine use of the law of nations as a rule of decision.

Based on these cases, it seems likely that federal courts would have worked very hard to construe a state law to comply with the law of nations (as they did for federal law), had the need arose. But it is a greater step to say that courts would have invalidated a clear state law that conflicted with the law of nations.[108] None of the cases Bellia and Clark discuss involved such a conflict, and none of them addressed such a conflict even indirectly.

There is, moreover, one early case Bellia and Clark do not discuss that points in the opposite direction: *Ware v. Hylton*.[109] *Ware* involved a British creditor's attempt to recover a pre-Revolutionary War debt from a Virginia debtor despite a Virginia statute purporting to discharge the debt as a war measure. The creditor based his claim principally on the 1783 Treaty of Peace ending the war, which provided that British creditors should not be prevented from recovering pre-war debts; the Court's conclusion that this treaty obligation overrode Virginia's contrary law was an important affirmation of Article VI's rule of treaty supremacy.

The British creditor also based his claim on the law of nations, which he contended precluded nations from confiscating pre-existing private debts in wartime.[110] Only some of the Justices addressed this claim, and what they said is not entirely clear. However, they appeared to agree that the law-of-nations obligation (unlike the treaty obligation) would not override the state statute, or at least that a federal court would not be able to apply the former at the expense of the latter.[111] Of course, this is not the same as saying that a state could override a law of nations immunity, and the law-of-nations right being claimed in *Ware* was a private right rather than (directly) the right of a foreign nation. But the discussion suggests, consistent with the constitutional framework outlined above,[112] that the Justices were not inclined to treat law of nations rights as superior to positive state law.

The short of the matter is that Bellia and Clark point to no case in the early period—or even up to the beginning of the twentieth century—that supports either prong of their hypothesis. No court decision in their account invalidated a

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108. The cases—particularly *Charming Betsy, Schooner Exchange*, and *Brown*—heavily implied that Congress could override foreign sovereigns' law-of-nations rights through express language. *See* Sloss et al., *supra* note 2, at 32. The Court, per Justice Story, later made this point explicit:

> But the act of Congress is decisive on this subject. It not only authorizes a capture, but a condemnation in our Courts, for such aggressions; and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that Courts of justice are bound to obey and administer them.

The Marianna Flora, 24 U.S. (11 Wheat) 1, 39–40 (1826).

109. 3 U.S. (3 Dall.) 199 (1796).

110. *Id.* at 254.

111. *See id.* at 239 (opinion of Chase, J.); *id.* at 265–66 (opinion of Iredell, J.); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT, THE FIRST HUNDRED YEARS, 1789–1888, at 37–38 (1985) ("Both Chase and Iredell agreed that it was immaterial whether Virginia's confiscation offended the law of nations: if it did, that was a matter for international sanctions, but the courts were bound by Virginia law."); RAMSEY, *supra* note 2, at 352–54 (discussing this aspect of *Ware*); Bradley, *supra* note 2, at 604 n.71 (finding that in *Ware* "two justices specifically stated that the law of nations did not preempt inconsistent state law, and the other justices did not assert the contrary").

112. *See supra* Sections I.A–B.

state law as contrary to the law of nations, and no court refused to consider the claims arising from the alleged wrongdoing of a foreign state where it unambiguously had jurisdiction. That is not to say their reading is wrong, only that it is unsupported by early cases.

It is worth adding, though, that the cases Professor Bellia and Clark describe are consistent with a more modest proposition: that the early federal courts applied a strong version of the rule that laws should, if possible, be interpreted consistently with the law of nations. Although this rule is associated with the *Charming Betsy* case, other cases may have been even more aggressive in deploying it. In particular, in *Schooner Exchange*, the Judiciary Act's text expressly provided that federal courts had jurisdiction of "all" admiralty and maritime cases; the Court found that this apparently comprehensive grant of jurisdiction was too general to override traditional law-of-nations immunities in admiralty and maritime cases.[113] The Court acknowledged that the political branches could override immunities but it required a very clear and specific direction to the courts to do so. One may readily conclude that the Court would have been even more aggressive in construing state law to conform to the law of nations.[114]

4. Modern Judicial Practice

Bellia and Clark's hypothesis finds more support in several modern cases in which the Supreme Court has suggested that the law of nations might potentially displace state law. Bellia and Clark specifically point to *United States v. Belmont*[115] and *United States v. Pink*,[116] two cases involving recognition, and *Banco Nacional de Cuba v. Sabbatino*,[117] which indicated that the federal act of state doctrine would override contrary state law. Professors Bellia and Clark also invoke the modern federal common law of foreign official immunity. These cases are important in that they involve displacement (or potential displacement) of state law. However, none of them provides insight on the Constitution's original meaning. The Court's opinions in these cases do not principally rely on evidence

113. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 123 (1812).

114. This approach is consistent with the longstanding rule in English law that declined to read statutes to override common law unless the statutory meaning was clear. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 & nn.1–2 (2012). As discussed, the traditional English understanding was that the law of nations was part of the common law.

115. 301 U.S. 324 (1937).

116. 315 U.S. 203 (1942).

117. 376 U.S. 398, 427–28 (1964). Bellia and Clark also discuss *The Paquete Habana*, 175 U.S. 677 (1900), and *Underhill v. Hernandez*, 168 U.S. 250 (1897). Neither case involved conflicting state law. *Paquete Habana* was a challenge to the U.S. navy's seizure of Spanish fishing boats during the Spanish–American War based on the claim that the law of nations exempted fishing boats from blockades. 175 U.S. at 677–78. *Underhill* involved the application of the act of state doctrine to dismiss a claim against a Venezuelan leader for alleged wrongful conduct in Venezuela. 168 U.S. at 250. Both reflected conventional pre-*Erie* application of international law as a rule of decision in cases where federal courts had jurisdiction (based, respectively, on admiralty and diversity) and no contrary state or federal law applied. *See supra* Section I.B. Although both cases upheld the law of nations rights of foreigners, they do not appear to be based on a broader constitutional proposition that courts *must* uphold the law of nations rights of foreigners, especially in the face of contrary state law.

from the Constitution's text or original meaning, and many of them appear to reach conclusions contrary to the original meaning.[118] As a result, these cases may support the Bellia–Clark hypothesis's consistency with modern law (a point taken up below), but they do not support the hypothesis's consistency with the Founders' design.

C. CONCLUSION: FAILURE OF THE BELLIA–CLARK HYPOTHESIS AS A MATTER OF THE CONSTITUTION'S ORIGINAL MEANING

In sum, Bellia and Clark do not offer persuasive evidence for their account of the role of the law of nations under the Constitution's original meaning. Although their account is linked to the Constitution's text through the recognition power and the national political branches' powers in foreign affairs, these provisions do not seem to support the inferences Bellia and Clark draw from them. Further, Bellia and Clark do not offer any direct evidence from the drafting and ratification period, and the post-ratification court cases they discuss do not endorse a preemptive role for any part of the law of nations. As a result, the textual account set forth in Part I of this Article appears to be the more plausible view of the text's original meaning.

III. THE BELLIA–CLARK HYPOTHESIS AS AN ACCOUNT OF MODERN LAW

Although the Bellia–Clark hypothesis appears unpersuasive as a matter of the Constitution's original meaning, it may fare better as an account of modern law. As Bellia and Clark describe, several key modern cases indicate that the law of nations, or matters concerning the sovereign rights of foreign nations, may override state law. However, as they also describe, modern law and modern commentary has not provided a coherent account of those cases. Bellia and Clark seek to do so. This Part assesses their contribution from this perspective. It concludes that their account requires substantial re-description of key cases, but that ultimately it may provide a plausible solution to the modern conundrum of law-of-nations supremacy.

A. BELLIA AND CLARK'S ACCOUNT OF MODERN CASELAW

As noted above, Bellia and Clark extensively discuss three seminal cases—*United States v. Pink*, *United States v. Belmont*, and *Banco Nacional de Cuba v. Sabbatino*—as well as the modern law of foreign official immunity. Each of these involves displacement of state law, but there has been no satisfactory explanation of their foundation. Bellia and Clark argue that a close examination of the cases can provide such an explanation, consistent with their view of the limited supreme role of the law of nations in U.S. law. This section begins by assessing their account of the key cases. It concludes that they propose substantial re-descriptions of those cases, but that re-description may be appropriate to provide a firmer constitutional foundation.

Belmont and *Pink* involved the same set of events. In connection with the U.S. recognition of the Soviet Union, the two countries entered into an executive

118. *See generally* Ramsey, *supra* note 39 (discussing *Pink*, *Belmont*, and *Sabbatino* as inconsistent with the Constitution's original meaning).

agreement (that is, an agreement made by the President without approval of the Senate or Congress) settling claims between them. By the terms of the agreement, the United States ceded its claims against the Soviet government and Soviet citizens to the U.S.S.R., and the U.S.S.R. ceded its claims against the United States and U.S. citizens to the U.S. government. The U.S. government then sought to claim property located in New York that had belonged to a nationalized Russian entity. New York law did not recognize the Soviet nationalization of the property, and the question was whether New York law defeated the U.S. claim.[119]

The Court in both cases held it did not. Its reasoning was not entirely clear. Professors Bellia and Clark read the two cases as recognizing the U.S.S.R.'s international right to nationalize property of its own citizens. In effect, they see the cases as an application of the act of state doctrine (the common law rule that the courts of one country will not examine the sovereign acts of other nations). Read this way, *Pink* and *Belmont* support their thesis: the Court used a foreign nation's law of nations right to defeat a contrary state law. The supremacy of the law-of-nations right arose from the President's act of recognition, not from any act of Congress (or treaty) that brought the right within the supreme law of Article VI.[120]

Pink and *Belmont* are, however, more conventionally read as resting on the executive agreement between the United States and the U.S.S.R. The Court in both cases analogized the executive agreement to a treaty and said (without much justification) that executive agreements should be given the same preemptive effect as treaties.[121] Subsequent court cases have described *Belmont* and *Pink* as executive agreement cases, not as act of state cases.[122] Bellia and Clark thus present an ambitious re-description of the opinions.

Despite the conventional readings of *Pink* and *Belmont*, there may be reasons to embrace an ambitious re-description. Giving supreme status to executive agreements is doubtful as a matter of the Constitution's text[123]—perhaps more doubtful (and more dangerous) than according supreme status to foreign nations' rights under the law of nations. Executive agreements could be made on a broad range of topics far beyond recognition or claims settlement, thus potentially

119. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 98–100; *see also* Ramsey, *supra* note 22, at 145–56 (describing *Pink* and *Belmont*).

120. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 99–100.

121. *See* Ramsey, *supra* note 22, at 139–40. As the *Belmont* Court held, "while this rule [granting supremacy over state law] in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements." United States v. Belmont, 301 U.S. 324, 331 (1937).

122. *See, e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076, 2088 (2015) ("Those cases [*Belmont* and *Pink*] considered the validity of executive agreements, not the initial act of recognition."); Medellín v. Texas, 552 U.S. 491, 530–31 (2008) (describing *Belmont* and *Pink* as part of "a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement").

123. *See* Ramsey, *supra* note 22, at 138; Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 906–21 (2004).

enabling the President in effect to make domestic law unilaterally. Further, granting preemptive power to executive agreements might imply that presidential foreign policy in general—even if not reflected in an executive agreement—might have preemptive effect. Both implications would expand presidential power far beyond the original design by granting the President ability to act as a domestic lawmaker without involving any other domestic entity.[124] As a result, the Bellia-Clark reading of *Pink* and *Belmont* may do more than the conventional modern reading to preserve the original design.

To be sure, *Pink* and *Belmont* are poor indicators of the Constitution's original meaning. Whether seen as resting on the act of state doctrine or on the U.S.–U.S.S.R. executive agreement, they do not provide Founding-era evidence in support of their displacement of state law nor identify early post-ratification caselaw or commentary in support.[125] Instead, they represent a departure from the Constitution's original meaning and an aspect of a new era of foreign affairs law associated with the mid-twentieth century.[126]

Further, *Pink* and *Belmont* illustrate the extent to which Bellia and Clark seek to stretch the constitutional implications of the recognition power. As discussed, it may be a fair conclusion that, as a matter of the Constitution's original meaning, a state cannot refuse to accept the national government's recognition of a foreign nation (or, conversely, a state cannot recognize a foreign state that the national government refuses to recognize).[127] Giving a state such power would be, in Hamilton's words, "absolutely and totally *contradictory* and *repugnant*"[128] to the federal recognition power. But in *Pink* and *Belmont*, New York did not deny the U.S. recognition of the U.S.S.R. or make anything turn on the U.S.S.R. being an illegitimate government. Instead, New York had a different view of the effect of nationalization than the President did; New York's rule was that nationalization of a foreign entity within a foreign nation did not change title to the foreign entity's assets located outside the foreign nation. In taking this position, New York did not prevent the President from exercising the recognition power; it would be hard to say that giving New York power to decide the effects of foreign nationalizations on property in New York would be "absolutely and totally

124. *See* 552 U.S. at, 530–31 (in the context of rejecting the President's claims to override state law for foreign policy purposes, observing that the Constitution does not vest the President with lawmaking powers); Denning & Ramsey, *supra* note at 123, at 906-21 (arguing against unilateral presidential preemption power on structural grounds).

125. The closest the Court came to Founding-era evidence was its citation in *Belmont* to *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which propounded a novel and now much-debunked theory of presidential foreign affairs exclusivity. The *Curtiss-Wright* opinion purported to rest at least in part on Founding-era evidence, which it read to suggest an extraconstitutional source for foreign affairs power based on the inherent nature of sovereignty and independent of any grants of power in the Constitution. *See generally* Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

126. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 111–34 (1999).

127. *See supra* Section II.B.1.

128. THE FEDERALIST NO. 32, at 194 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

contradictory and *repugnant*" to the recognition power. As a result, the Bellia–Clark re-description of *Belmont* and *Pink* does not support their view of the Constitution's original meaning, but it may provide a better account of those cases in modern law.

The other key modern case for Professors Bellia and Clark is *Sabbatino*, which was expressly an act of state case. The Court there held that the act of state doctrine precluded U.S. courts from examining Cuba's nationalization of sugar located in Cuba (the sugar subsequently was exported and sold, with the proceeds being present in New York and disputed between Banco Nacional, on behalf of Cuba, and Sabbatino, on behalf of the former owners). Importantly for the Bellia–Clark thesis, the Court held that the application of the act of state doctrine was a matter of federal common law, not a matter of New York state law. In Bellia and Clark's view, that conclusion arose from the constitutional imperative to protect the law of nations rights of foreign sovereigns.[129]

As Bellia and Clark acknowledge, there are several problems with this reading. First, the Court did not seem to understand itself to be applying a constitutional rule derived from the recognition power. Rather, although the Court referred to the rule's "constitutional underpinnings," it appeared to see the matter as one of using federal common law to prevent judicial interference in foreign affairs.[130] In addition (again as Bellia and Clark acknowledge), it does not appear that Cuba had an international law right to have its nationalization recognized by foreign courts, especially as the former owners claimed that the nationalization violated international law. In any event, the Court did not rest its conclusions on Cuba having such an international law right, and indeed it expressly denied that its holding was required by international law.[131] As a result, the Bellia–Clark thesis regarding enforcement of law of nations rights does not explain the result in *Sabbatino*.

Rather, in describing *Sabbatino*, Bellia and Clark shift to their related proposition, "the Court's long-standing refusal to hold foreign nations accountable for violations of customary international law without political branch authorization to do so."[132] Here again, though, it is hard to see the handful of cases discussed as adding up to such a sweeping proposition. It is true that courts traditionally used foreign sovereign immunity and the act of state doctrine to avoid holding foreign nations accountable. But, as discussed, these decisions were in the context of applying international law as a rule of decision in the absence of conflicting law,[133] or in the context of using international law to interpret and limit ambiguous statutes.[134] Professors Bellia and Clark do not point to any cases (apart from

129. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 102–12.

130. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428–31 (1964).

131. *See id.* at 421 ("[I]nternational law does not require application of the [act of state] doctrine . . . ."); BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 105.

132. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 105.

133. *E.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897).

134. *E.g.*, Schooner Exchange v. McFaddon, 11 U.S. (1 Cranch) 116 (1812).

Sabbatino itself) establishing or even suggesting a general rule that courts could not entertain suits seeking to hold foreign nations or their citizens accountable for violations of customary international law. It is true that such suits were difficult if not impossible to maintain in the pre-modern era due to common law rules such as sovereign immunity and the act of state doctrine. But that does not mean that there was a free-standing rule prohibiting them or that such a rule was constitutionally required.

Moreover, as discussed further in the ensuing section, *Sabbatino*'s relationship to the Constitution's original meaning is complicated by the Court's prior decision in *Erie Railroad Co. v. Tompkins*[135] and the emergence of modern federal common law. Prior to *Erie*, it seems likely that the act of state doctrine would have been understood as a matter of general common law that state and federal courts would apply as part of a common enterprise.[136] The question whether the doctrine was a matter of state or federal law would not have arisen. The idea of preemptive federal common law, which took root after *Erie*, provided a regime in which the *Sabbatino* Court could comfortably displace state law without worrying about a constitutional justification.[137] Although it is possible that courts prior to *Erie* would have regarded the act of state doctrine as constitutionally compelled (and hence preemptive even under a strict view of Article VI preemption), *Sabbatino* does not provide evidence that they did. Thus, it is difficult to see *Sabbatino* as useful evidence of the Constitution's original meaning.

Nonetheless, as with *Pink* and *Belmont*, the Bellia–Clark reinterpretation of *Sabbatino* may have advantages in the modern context. The Court's explanation of *Sabbatino* is hard to justify in terms of the Constitution's text and historical practice because it rests—without much further explanation—on the modern innovation of preemptive federal common law. Although some doctrines described as preemptive federal common law may be consistent with the Constitution's original meaning, the version applied in *Sabbatino* lacks an obvious foundation.[138] The Bellia–Clark redescription explains—better than any other approach grounded in constitutional text—why the *Sabbatino* Court was not obliged to apply the New York rule.

Finally, Bellia and Clark's hypothesis gains support from the modern law of immunity.[139] Much of modern immunity law in the United States is governed by the Foreign Sovereign Immunities Act (FSIA),[140] and the immunities identified in the Act (roughly tracking international law) override any contrary state law as a

135. 304 U.S. 64 (1938).

136. *See supra* Section I.B.

137. *See* Ramsey, *supra* note 39, at 608–10. As discussed below, *Erie* concluded that the law applied by federal courts had to be either federal law or state law, apparently ruling out the idea of general common law. At the same time, the Court recognized that some common law doctrines, re-described as federal common law, would preempt state law. *See* Ramsey, *supra* note 74, at 243–49.

138. *See* Ramsey, *supra* note 39, at 608–10 (discussing *Sabbatino*).

139. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 253–55.

140. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in 28 U.S.C. §§ 1602–1611 (2012)).

matter of the ordinary operation of Article VI. But the Act does not cover all immunities—in particular, it does not cover immunities of individuals such as foreign heads of state or foreign governmental officers acting in their official capacities.[141] Although the Supreme Court has not directly spoken to the point, it is widely assumed—in large part on the basis of *Sabbatino*—that non-FSIA immunities are matters of federal common law that presumably would displace any contrary state law.[142] Apart from *Sabbatino*, however, the constitutional justification for this approach is, to say the least, underdeveloped. Bellia and Clark provide a cogent foundation for it.[143]

The modern law of foreign sovereign immunity provides little evidence of the proper treatment of immunity under the Constitution's original meaning. Like the act of state doctrine, the emergence of a federal common law of immunity that would displace contrary state law is a modern phenomenon. As discussed, it does not rest on caselaw or commentary from the Founding period. It seems more likely that in the Founding era immunity (like the act of state doctrine) would have been regarded as a matter of general law, subject to override by specific state statutes (which themselves would have been subject to override by federal statutes such as the FSIA). As the FSIA and related treaties implementing diplomatic immunity illustrate, the Constitution's text provides ways to incorporate the international law of immunity and the needs of federal foreign policy into supreme domestic law without resorting to strained implications of the text.

Further, the Bellia–Clark description of official immunity is, like their descriptions of *Pink*, *Belmont*, and, *Sabbatino*, a departure from the conventional view. The modern understanding of official immunity is that federal courts apply it as part of a court-created common law.[144] Bellia and Clark re-describe it as a constitutional imperative based on the recognition power. Again, as discussed below, this may be a useful re-description, but it represents a departure from, rather than reliance on, the modern approach. In sum, the Bellia–Clark hypothesis is unsupported not only by the Constitution's original meaning, but also by the conventional view of modern law.

B. CHANGES IN THE LEGAL LANDSCAPE COMPLICATING APPLICATION OF THE CONSTITUTION'S ORIGINAL MEANING

If this Article's account of the original relationship between the Constitution and the law of nations is correct, there remains the substantial question of what

141. Samantar v. Yousuf, 560 U.S. 305, 308 (2010).

142. *See* Ramsey, *supra* note 39, at 609 (noting close connection between *Sabbatino* and the modern federal common law of immunity); Wuerth, *supra* note 1, at 924–29 (noting general assumption that head-of-state immunity is part of federal common law).

143. As Bellia and Clark discuss, a leading contrary case is *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948). The court there held, applying *Erie*, that the New York state law of sovereign immunity governed whether a foreign diplomat transiting through the United States to a posting elsewhere was immune from suit in the United States. However, modern law likely regards that conclusion as overridden by *Sabbatino*.

144. It is disputed whether, in developing this law, courts should be bound by—or at least show great deference to—immunity determinations of the executive branch. *See* Wuerth, *supra* note 1, at 929.

that should mean for modern law. The challenges here go far beyond the contrary holdings of a handful of cases such as *Pink*, *Belmont*, and *Sabbatino*. Even an interpreter dedicated to implementing the Constitution's original meaning might be confounded by three drastic changes in the relevant law in the modern period. First, the Court in *Erie Railroad Co. v. Tompkins* purported to abolish the idea of general law, proclaiming that all rules of decision in federal court not based on the Constitution or federal statutes (or, one assumes, treaties) must be based on state law.[145] Second, notwithstanding *Erie*, the Court has developed a body of federal common law, linked to categories of special federal interest, that—unlike the general law of earlier times—is preemptive of state law and forms the basis of federal jurisdiction.[146] Third, the scope of the law of nations—now called customary international law—has expanded to include human rights law, and especially to include duties a nation owes its own citizens.[147]

1. *Erie*'s Rejection of General Common Law

The first of these changes—limitations on general common law—is, for present purposes, the least problematic, despite extensive commentary devoted to the challenges of *Erie*. The Court's opinion in *Erie* contains broad language that may be difficult to reconcile with the Constitution's original background and meaning. But read more narrowly as a reaffirmation of section 34 of the Judiciary Act, it is mostly commonplace. State law establishes the rule of decision in federal court where it applies, unless it is displaced by a form of Article VI supreme law. This direction includes state law contained in state-specific common law. Though that proposition is not inconsistent with *Swift v. Tyson*'s treatment of the law of nations,[148] it is inconsistent (as Professors Bellia and Clark show)[149] with the way *Swift* was subsequently applied: federal courts began disregarding state law even as to obviously local common law rules, as in *Erie* itself. The central point of *Erie* was (rightly, in terms of the Constitution's original design) to correct that error.

But *Erie* appeared to go much further, to reject altogether the idea of general law and to declare that in *all* cases (apart from those governed by federal statutes and the Constitution) the rules of decision applied by federal courts must arise from state law.[150] Taken to apply to customary international law, this categorical

145. 304 U.S. 64, 78 (1938).

146. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (applying federal common law to resolve an interstate water rights dispute); Ramsey, *supra* note 39, at 604–11 (discussing further categories, including military affairs, obligations of the United States, and state boundary disputes). Prior to *Erie*, federal courts had applied a form of federal common law in admiralty disputes, and they continued to do so afterward. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 131–34; Ramsey, *supra* note 39, at 604.

147. *See* William S. Dodge, *Customary International Law in the Supreme Court, 1946–2000*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 2, at 353, 383.

148. *See supra* Section I.B.

149. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 28–39; *see also* Clark, *supra* note 3, at 1278 (discussing the relationship between *Erie* and *Swift*).

150. *See Erie*, 304 U.S. at 78–79; Ramsey, *supra* note 74, at 243–49. This reading is the basis of the "revisionist" view of customary international law in modern academic discussion, namely that

conclusion is inconsistent with the Constitution's original meaning. As discussed,[151] state and federal courts in the Founding era often thought of themselves as applying an external source of law—including, in particular, the law of nations. The Constitution did not prohibit them from doing so—so long as there was no superior form of law—and indeed its Framers assumed they would do so. *Erie* had no basis for saying otherwise. State law should be a rule of decision where it applies, but conversely, state law is not a rule of decision where it does not apply—and in such cases, federal courts should, under the original meaning of the judicial power, be able to apply rules of decision drawn from other sources, including the law of nations.

Despite *Erie*'s categorical language, there seems no necessary objection to reading *Erie*'s requirements more narrowly. *Erie* was not a transnational case and the status of customary international law was not at issue: the Court in *Erie* even erroneously omitted treaties from its list of preemptive federal law,[152] illustrating the extent to which it was not thinking of international matters. As to the purely local law that was at issue in *Erie* (liability of a railroad for injury sustained by someone walking along the tracks), the Court's conclusion seems correct as matter of the Constitution's original meaning. Nothing in the Constitution empowered federal courts to override local variations of tort law on the authority of a supposed "general" law. But *Erie* offered no sound reason to curtail courts' traditional power to look to international law in the absence of other rules of decision. Thus, it seems plausible to read *Erie* to require application of state law (including state common law) where it applies but to allow federal courts to look at other sources of law (especially including international law) when state law does not apply—that is, roughly the framework of the Constitution and the 1789 Judiciary Act.[153]

It is true that in the twentieth century and beyond, this system in practice would look very different than it did in the eighteenth century. State law, both as increasingly codified and as expressly local adoptions of general common law, greatly expanded over the course of the late nineteenth and early twentieth centuries.[154] The areas in which state law did not apply correspondingly contracted. *Swift*, by this measure, was not so much wrong as outrun by events; the post-*Swift* cases that *Erie* overruled were refusals to acknowledge these events. Even if *Erie* is read to allow federal courts to apply international law in areas where state law does not apply, in modern times there are few such areas. Conceptually, though, the relationship between *Erie* and the pre-*Erie* approach to the law of nations need not be problematic. Customary international law can be a rule of decision where state law does not apply.

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customary international law cannot be a rule of decision in federal court absent a federal law or state law incorporating it. *See* Bradley & Goldsmith, *supra* note 2, at 827.

151. *See supra* Section I.B.

152. *Erie*, 304 U.S. at 78 (listing only the Constitution and federal statutes as sources of federal law).

153. *See generally* Ramsey, *supra* note 2 (expanding on this argument).

154. *See* Ramsey, *supra* note 74, at 234–38.

Nonetheless, this is not how *Erie* has been read by modern courts and most modern commentators. The prevailing view is that *Erie* precluded *all* general common law, including customary international law—with the apparent result that international law must be part of federal law, part of state law, or not directly applicable by U.S. courts.[155]

2. The Modern Role of Federal Common Law

Although the Court eliminated general common law in *Erie*, it acknowledged at the same time a continuing role for common law in federal courts.[156] Because this common law would be developed by federal courts, it could not be state law, and thus under *Erie* it had to be federal law. Accordingly, it was designated federal common law. Initially applied to interstate water disputes,[157] the Court expanded it over time to cover a variety of areas it described as having unique federal interests such that the development of legal standards could not be left to state law.[158] Notably, because this new type of common law was federal law, it preempted state law. On this basis, among other things, the Court used the federal common law of the act of state doctrine to override state law in *Sabbatino*.[159]

Once federal courts could create preemptive federal law, that power produced a lawmaking system not envisioned by the Framers nor established by the text's original meaning.[160] And once federal courts could make law in this way, it became possible that they could make law incorporating customary international law obligations as preemptive federal law. As a result, modern arguments for the constitutional supremacy of customary international law strongly invoke the development of modern federal common law, and especially *Sabbatino*'s conversion of the act of state into preemptive common law.[161] To be sure, one could say that federal courts should not incorporate international law in this way, but it became difficult to argue that they were constitutionally precluded from doing so.

3. The Expanded Scope of the Law of Nations

Federal courts' potential power to incorporate international law into preemptive U.S. law became more problematic as a result of the third key development in the area—the expansion and transformation of modern international law. Because modern customary international law potentially encompasses a broad range of individual rights, including individuals' rights against their own governments, courts' ability to create law affecting domestic governmental operations is greatly enhanced. As Bellia and Clark show, this development potentially puts

155. *See id*. at 243–56.

156. *See supra* note 144.

157. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

158. *See* Ramsey, *supra* note 39, at 572–94.

159. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425–26 (1964) (discussing *Erie*).

160. *See* Ramsey, *supra* note 39, at 572–94. How much of modern law is subject to objection on this ground may be debated. At least some of what is today called federal common law may actually reflect reasonable implications of the Constitution or federal statutes, which would not be constitutionally objectionable. *See id*. at 604–11.

161. *See* Ramsey, *supra* note 74, at 234–38 (discussing these arguments).

lawmaking courts in the center of U.S. foreign policy (by enabling enforcement of aliens' claims against their own governments) and in the center of domestic policymaking (by enabling U.S. citizens' claims against U.S. state and local governments).[162] The potential to drift very far from the Constitution's original design is profound.

C. BELLIA AND CLARK'S RESOLUTION OF THE CHALLENGES OF THE LAW OF NATIONS AND MODERN LAW

Bellia and Clark's important book—even if unpersuasive on some points of the Constitution's original meaning—offers a way to limit and manage the modern expansion of the role of federal courts and the modern expansion of the law of nations. Bellia and Clark point out that the only rules of judge-made preemptive law that have actually been established in modern transnational cases are: (a) certain rights of foreign nations acknowledged by the President in connection with diplomatic recognition may preempt state law, as established in *Pink* and *Belmont*; (b) the foreign policy concerns reflected in the act of state doctrine may preempt state law attempts to hold foreign nations accountable, directly or indirectly, for their actions, as established in *Sabbatino*; and (c) by extension, common law immunities of foreign government officials may preempt state law attempts to hold them accountable for their actions or the actions of their governments, as generally assumed in modern immunity law.[163] This adds up, they say, to the twin propositions that federal courts will enforce the international law rights of foreign nations and will not (absent federal statutory authorization) hold foreign nations accountable for violations of their international duties.[164]

Professors Bellia and Clark argue that theirs is an appropriate approach because it comes from the Constitution's text and original meaning. As outlined above, that claim is not demonstrated.[165] However, their approach may be appropriate on a different ground: it offers a viable account of modern law that minimizes departures from the Constitution's original meaning. Precedent may demand respect for deeply entrenched propositions of modern law, even those inconsistent with the Constitution's original meaning. That is especially true where modern law does not radically upset the original design. At the same time, modern precedents that do not have a foundation in the Constitution's original meaning should be read narrowly to prevent further departure from that meaning.[166]

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162. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 245–68. *E.g.*, Serra v. Lappin, 600 F.3d 1191, 1195 (9th Cir. 2010) (rejecting claim that customary international law could be the basis of suit challenging conditions in U.S. prison).

163. *See* Ramsey, *supra* note 39, at 604–611 (describing modern law's departures from the original meaning of Article VI in similar terms).

164. BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 269–72.

165. *See supra* Part II.

166. *See* Ramsey, *supra* note 39, at 613–18 (developing and applying this model in the context of the Supremacy Clause and preemptive law).

As to their first proposition, Professors Bellia and Clark seem on firm ground. Requiring states to recognize the international law rights of foreign states reflected in the act of state doctrine and in foreign official immunity is not a large departure from the original design. The Constitution's Framers—focused as they were on avoiding offense to foreign nations—likely would have thought it appropriate, even if they did not write it into the Constitution. It was probably assumed at the Founding that these immunities would be typically enforced by federal courts established under Article III and applying the general common law of immunity. In that system, state common law decisions regarding immunity would not have bound federal courts because they would have been interpretations of general rather than local law. The Founders likely did not contemplate express state statutory overrides of law of nations immunities, because this had not been a material issue in the Confederation period. Federal courts likely would have read generally worded state laws in harmony with the law of nations (as they did with federal statutes under the *Charming Betsy* rule), not because of a constitutional obligation but as a result of the broader direction inherited from English law to harmonize, as much as possible, common law and statutory law. Finally, if states did expressly override foreign nations' immunities, that likely would have caused Congress to intervene to protect national foreign policy. In sum, although the original design may have preserved a theoretical ability of the states to override foreign nations' immunities, that ability likely had little role as a practical matter.

Moreover, Bellia and Clark seem correct in their concern to avoid a broader role for preemptive customary international law. As discussed, because modern customary international law includes a potentially wide array of individual rights, including rights against one's own government, recognizing a broader preemptive role would be intrusive on the states in ways that fundamentally alter the original constitutional design. Federal courts would potentially have the power to direct internal operations of state governments to conform to the federal courts' view of customary international law.[167] It is extremely unlikely that the Framers could have contemplated anything resembling this structure, or that it would have been accepted by the states if proposed.[168]

The second part of the Bellia–Clark framework is less easy to describe and less easy to justify in terms of the Constitution's original meaning. Bellia and Clark argue that courts should not enforce the law-of-nations obligations of foreign nations because resolving disputes with foreign nations should be exclusively committed to the political branches of the national government.[169] Presumably, this means courts should not act—unless directly authorized by the national political branches—even when not precluded from doing so by foreign official

167. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 245–68.

168. Even assuming treaties had the potential to create this level of judicial oversight of state operations, states were protected in the treatymaking process by the role of the Senate. *See* Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 73 MO. L. REV. 969, 970 (2008) (defending a broad view of treatymaking power on this basis).

169. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 269–72.

immunity, the act of state doctrine, or other traditional rights of foreign nations. There are several reasons to question this proposal, even apart from a lack of foundation in the Constitution's original meaning.

First, it is not clear that the proposal has a firm foundation in modern law. The modern cases Bellia and Clark principally invoke—*Belmont*, *Pink*, *Sabbatino*, and the official immunity cases—do not establish a limit on adjudication beyond the act of state and official immunity doctrines.[170] Second, the proposal potentially affects state governance to a significant degree. States may wish to regulate the way foreign governments interact with the state's territory or with state residents or entities abroad, including through application of the law of nations. If the resulting cases do not implicate immunity or act of state concerns, preventing the cases from proceeding puts states in a materially worse position than they had under the original design. Similarly, under the original design, individuals could bring cases to vindicate law of nations rights in federal court (again, assuming immunity doctrines were not a barrier); removing this ability to vindicate individual rights seems a substantial departure not adequately justified by the contours of modern law. Third, and most importantly, the proposal appears to lack a limiting principle. If courts cannot enforce the law-of-nations obligations of foreign nations without specific federal political branch approval, one may doubt that they can enforce other obligations of foreign nations without that approval. Moreover, the core justification for the proposal appears to be that courts and states should not interfere with the national political branches' foreign policy.[171] If enshrined as a constitutional principle, that proposition would allow wide-ranging and unpredictable judicially created limits on the ability of states and individuals to regulate and seek remedies in cases in which foreign interests are implicated.[172]

CONCLUSION

Professors Bellia and Clark offer an important and attractive resolution to the longstanding debate over the relationship between the U.S. Constitution and customary international law. They would chart a middle course between the view that sees all of customary international law as constitutionally preemptive federal law and the view that sees none of it having that status. They emphasize the differing strands of the law of nations as the Founding generation knew them and conclude that the Constitution made only a subset—the international rights of foreign nations—part of the U.S. constitutional system. As a result, in their view,

170. As outlined above, the early post-ratification cases Bellia and Clark discuss also are not supportive of such a limitation on the courts. *See supra* Section II.D.1.

171. *See* BELLIA & CLARK, LAW OF NATIONS, *supra* note 3, at 269–72.

172. The Court has at times invoked something like this principle, in cases that seem difficult to explain under the Constitution's original meaning. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (finding unconstitutional a state law that conflicted with presidential foreign policy); Zschernig v. Miller, 389 U.S. 429 (1968) (finding unconstitutional a state law that implicated foreign affairs); *see also* Denning & Ramsey, *supra* note 123, at 925–42 (criticizing these cases). Bellia and Clark do not defend these cases, but it is not clear whether their proposal would extend to them.

states and courts were constitutionally obligated to respect the immunities and other protections the law of nations gave foreign nations but were not obligated to implement other aspects of the law of nations; indeed, the Constitution's assignment to the federal political branches of the power to resolve disputes with foreign nations precluded enforcement of law-of-nations duties against foreign nations. Their position is attractive as a structural matter because it protects the conduct of U.S. foreign relations from local interference (a goal the Framers undoubtedly favored) while limiting the ability of courts to use unwritten international law to expand their power in the domestic federal system.

Unfortunately for the Bellia–Clark position, it lacks persuasive foundation in the Constitution's original meaning. Its starting point is well-supported: the text strongly indicates that the law of nations as a whole was not incorporated into supreme preemptive law nor made the basis of federal jurisdiction. But the next step is largely an assertion: Professors Bellia and Clark contend that the national government's constitutional power to recognize foreign governments carried with it an implication that state laws and court judgments must respect the international rights of the recognized nations. As described above, however, the Founding-era evidence for this position is quite thin. It does not appear to be a necessary implication from the text, especially because the text expressly gave Congress and the treatymakers the ability to protect the international rights of foreign nations through preemptive treaties and legislation. No member of the Founding generation is identified as directly endorsing the proposition, and no court in the early post-ratification era adopted it. As a reading of the Constitution's original meaning, it remains speculation.

Nonetheless, the Bellia–Clark position has force as an interpretation of modern law. Several large shifts in the legal landscape in the twentieth century make implementation of the Constitution's original meaning regarding the law of nations difficult in modern times. In particular, modern law holds that at least some common law doctrines based on the law of nations—at minimum, foreign official immunity and the act of state doctrine—have the status of preemptive federal common law. At the same time, as Professors Bellia and Clark describe, modern customary international law has expanded beyond the traditional Founding-era law of nations to encompass open-ended and incompletely defined domestic individual rights. The combination has led some scholars to propose a broad role for preemptive international law in the constitutional system that would be a considerable departure from the Framers' design. The Bellia–Clark position offers a way to limit the domestic effect of customary international law and channel its domestic incorporation through the U.S. political branches, while upholding the Framers' concern over state interference with national foreign policy. In short, it resolves the dilemma posed in the opening hypothetical: law of nations immunities can be honored without unduly expanding the judicial role in matters of federalism or of foreign policy. As a result, the Bellia–Clark position is best understood not as a conclusive reading of the Constitution's original meaning, but rather as a way to reconcile the original meaning with modern law.