

The Law of Nations and the Constitution: An Early Modern Perspective

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For political and cultural reasons that go beyond the boundaries of this forum, many American scholars, lawyers, and judges born in the latter half of the twentieth century have found it difficult to comprehend, or even recognize, the Founding generation's commitment to the law of nations as a system of law, jurisprudence, and morality. Perhaps for similar reasons, that commitment tends to get lost in much modern historical writing. So, too, with respect to a related, but, from a legal perspective, more consequential aspect of the Founding: the prominent place of the law of nations in the constitutional reform project that culminated in the Philadelphia Convention. It was the uncertain struggle to ensure that the United States complied with its (or their) treaty obligations and the law of nations that was arguably the most important, and the most consensual, reason for the drafting and ratification of the new Constitution. That imperative shaped the structure outlined in the text, as well as much of the way that judges, executive officials, and even legislators interpreted and administered the Constitution during the first generation of the federal government. The result was a government designed to interact productively with the law of nations. Some of those interpretations, and some aspects of federal administration, became enormously controversial and generated early partisan divisions. But the basic premise—that the law of nations was the law of the land—proved durable, creating a tradition of international “law-mindedness” that deserves more historical investigation than it has so far received. The result is not just a scholarly lacunae. Among many lawyers today, the Founders’ conception of the central position of the law of nations in the American legal order is even less appreciated than their cosmopolitan outlook.

*In offering a corrective to this forgetfulness, Professors Anthony Bellia and Bradford Clark, in *The Law of Nations and the United States Constitution*, make an important contribution to the ongoing dialogue over the Founding. Nonetheless, in our view, the legal theory that Professors Bellia and Clark offer downplays, misses, or misunderstands crucial features of the pertinent history, especially why and how the Founders struggled to interweave the law of nations into the*

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Constitution. These errors and elisions are important, in part for purely academic reasons, bearing on the extent to which their approach accurately portrays a foundational period in U.S. constitutional history. They are also important, however, because they lead Professors Bellia and Clark to reach some sound, but also some unsound, conclusions about important issues of constitutional law.

TABLE OF CONTENTS

INTRODUCTION	1595
I. THE RECOGNITION/ALLOCATION OF POWERS THEORY OF THE LAW OF NATIONS IN U.S. LAW	1598
II. THE CONSTITUTION'S ADOPTION OF THE LAW OF NATIONS AS THE LAW OF THE LAND	1605
A. THE FOUNDING GENERATION'S EMBRACE OF THE LAW OF NATIONS	1607
B. THE ADOPTION OF THE LAW OF NATIONS AS LAW OF THE UNITED STATES	1612
1. The Struggle over the Status of the Law of Nations During the Confederation	1612
2. The Founding Consensus that the Constitution Adopted the Law of Nations as Law of the Land	1616
C. THE LAW OF NATIONS AS LAW OF THE LAND: IMPLICATIONS IN THE EARLY REPUBLIC	1623
1. The Status of the Law of Nations as Law of the Land Meant that the States Were Obligated to Observe It	1624
2. The President Was Likewise Obligated to Observe the Law of Nations in Carrying Out the Duty to Execute the Laws	1624
3. Was Even Congress Obligated to Observe the Law of Nations When Exercising Its Legislative Power?	1633
III. THE HISTORICAL EVIDENCE FOR PROFESSORS BELLIA AND CLARK'S THEORY	1639
A. THE FOUR EARLY SUPREME COURT CASES AND THEIR PROPER INTERPRETATION	1640
1. United States v. Peters	1640
2. Schooner Exchange v. McFaddon	1643

2018] LAW OF NATIONS & THE CONST.: EARLY MODERN PERSPECTIVE 1595

3. The Nereide 1646

4. Brown v. United States 1651

B. FOUR MORE SUPREME COURT CASES: CONGRESS’S POWER TO
DISREGARD THE LAW OF NATIONS 1653

1. Neither *Bas v. Tingy* Nor *The Schooner Adeline* Upheld
 Acts of Congress that Violated the Law of Nations 1653

2. Neither *Schooner Exchange* Nor *Murray v. Schooner*
 Charming Betsy Ruled that Congress Had Constitutional
 Power to Violate the Law of Nations. 1655

CONCLUSION 1657

INTRODUCTION

It is often remarked that “[t]he past is a foreign country: they do things differently there.”¹ The early American Republic’s engagement with the law of nations may be foreign in that sense today, at least after a generation of studied forgetfulness. Yet there remain valuable lessons from the nation’s revolutionary origins. The way that the Founding generation marked out national sovereignty while simultaneously building in commitments to international law, in the form of treaties and the customary law of nations, offers insight into their truly revolutionary understanding of national sovereignty and its limits, as well as their vision of productive international relations.

For political and cultural reasons that go beyond the boundaries of this forum, many American scholars, lawyers, and judges born in the latter half of the twentieth century have found it difficult to comprehend, or even recognize, the Founding generation’s commitment to the law of nations as a system of law, jurisprudence, and morality. Perhaps for similar reasons, that commitment tends to get lost in much modern historical writing. So, too, with respect to a related, but, from a legal perspective, more consequential aspect of the Founding: the prominent place of the law of nations in the constitutional reform project that culminated in the Philadelphia Convention. It was the uncertain struggle to ensure that the United States complied with its (or their) treaty obligations and the law of nations that was arguably the most important, and the most consensual, reason for the drafting and ratification of the new Constitution.²

That imperative, moreover, shaped the structure outlined in the text, as well as much of the way that judges, executive officials, and even legislators interpreted

1. L.P. HARTLEY, THE GO-BETWEEN 1 (1953); see also DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY (1985).

2. For discussion of these themes, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

and administered the Constitution during the first generation of the federal government. The result was a government designed to interact productively with the law of nations. Some of those interpretations, and some aspects of federal administration, became enormously controversial and generated early partisan divisions. But the basic premise—that the law of nations was the law of the land—proved durable, creating a tradition of international “law-mindedness” that deserves more historical investigation than it has so far received.³ The result is not just a scholarly lacuna. Among many lawyers today, the Founders’ conception of the central position of the law of nations in the American legal order is even less appreciated than their cosmopolitan outlook.

In offering a corrective to this forgetfulness, Professors Anthony Bellia and Bradford Clark, in *The Law of Nations and the United States Constitution* make an important contribution to the ongoing dialogue over the Founding.⁴ There is a great deal to admire in their book and much about their theory of the Constitution and the law of nations with which we agree. Nevertheless, we disagree with fundamental aspects of their account and appreciate this opportunity to explore, or at least sketch, some of the most important of those differences.

In our view, the legal theory that Professors Bellia and Clark offer downplays, misses, or misunderstands crucial features of the pertinent history, especially why and how many of the Founders struggled to interweave the law of nations into the Constitution. These errors and elisions are important, in part for purely academic reasons, bearing on the extent to which their approach accurately portrays a foundational period in U.S. constitutional history. They are also important, however, because they lead Professors Bellia and Clark to reach some sound, but also some unsound, conclusions about important issues of constitutional law. A partly sound theory can yield helpful results on some points but have misleading implications for others. That is the case here.

In Part I, we describe the core of Professors Bellia and Clark’s theory, as we understand it, about how the Constitution as originally ratified interacted with the law of nations.⁵ Their account seeks to identify the original constitutional

3. We derive the term “law-mindedness” from legal historian John Phillip Reid, who devoted several books to documenting the common law-mindedness of American colonists in the revolutionary period and of early American settlers in the western territories. *See, e.g.*, JOHN PHILLIP REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION*, 4 vols. (1986-1993); REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1980). The international law mindedness of Americans in the same periods has gone almost unexplored. For a survey of the treatise literature, see MARK W. JANIS *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914* (2004); and for an exploration of early American encounters with the laws of war, see JOHN F. WITT, *LINCOLN’S CODE* (2013).

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

5. Professors Bellia and Clark are not explicit about whether their theory is “originalist” in nature or is instead rooted in an interpretation of the history of U.S. constitutional practice. They avoid addressing the issue, it seems, because they believe their theory is consistent both with original understandings and with continuing historical understandings through most, if not all, of U.S. history. *See, e.g.*, BELLIA &

justification for the application of the law of nations by courts in the United States and its status in relation to other forms of municipal law (for example, state and federal law) and, thus, the extent to which it binds the decisions and actions of different governmental institutions in the complex separation of powers and federal system created by the Constitution. In their view, the law of nations applied not because, as international law, it bound the United States and was incorporated into U.S. law. Instead, the law of nations applied because, and only insofar as, it served to uphold the principles of the separation of powers and federalism, or, as they put it, the law of nations applied to safeguard the Constitution's allocations of power over foreign affairs and, in particular, of the recognition power. On this view, the Constitution mandated that judges apply the law of nations to ensure that the judiciary did not infringe on the recognition power assigned to the political branches, and to prevent the states from doing likewise. At the same time, however, Professors Bellia and Clark argue that the Constitution was strictly neutral about U.S. compliance with the law of nations and sought only to preserve the complete discretion of the political branches over the issue.⁶ Their approach is thus broadly consistent with Chief Justice Roberts's repeated references in *Medellin v. Texas* to the importance of preserving the political branches' "option of noncompliance" with U.S. international obligations, a notion that, in our view, stands the Founding on its head.⁷

In Part II, we sketch an alternative, historically based argument to demonstrate that there was a broad consensus in the Founding period that the law of nations was incorporated into federal law and bound not only the states and the judiciary, but also the executive branch and, in the view of at least some, Congress as well.⁸ Indeed, leading members of the Founding generation explicitly so argued, and their commitment to this understanding is reflected in how many more of them actually behaved. The evidence is not secret or obscure. It can be found in judicial opinions, delegates' notes, ratification debates, executive branch discussions and actions, lawyers' briefs, congressional debates and legislation, and published pamphlets and newspaper essays.⁹ The more difficult task is uncovering dissent from the proposition that the law of nations was the law of the land. That dissent emerged only gradually in the early Republic, and even then most often involved not a wholesale jettisoning of the law of nations but a partial, and increasingly partisan, reconceptualization of its content to make it more favorable to a specific

CLARK, *supra* note 4, at xiii–xxxi. Our focus here will be on the early history, bracketing for now our several disagreements with their interpretations of the precedents from later periods. We note, however, that although we focus on the early history, we are not ourselves originalists.

6. For discussion, see *infra* Part I.

7. 552 U.S. 491, 511 (2008). This theme appears throughout the book, which repeatedly emphasizes that one of the Constitution's critical purposes was to preserve the discretion of the political branches to violate the law of nations. See, e.g., BELLIA & CLARK, *supra* note 4, at 94, 232–35.

8. That part of the law of nations, that is, which roughly corresponds to Professors Bellia and Clark's law of "state-state relations." BELLIA & CLARK, *supra* note 4, at 41. For discussion of terminological issues raised by the law of "state-state relations," see *infra* notes 11–13, 18, 31, 75 and accompanying text.

9. See *infra* Sections III.A, III.B, and III.C.

conception of the national interest. The available evidence from the formative years before and after the Philadelphia Convention reveals wide agreement among lawyers, judges, political officeholders, and executive officials that the law of nations was the law of the land, a position that remained dominant for a long time thereafter.

Finally, in Part III, we turn to the handful of early Supreme Court decisions that Professors Bellia and Clark marshal on behalf of their theory that the Constitution directed the courts to apply the law of nations as a means of defending the federal political branches' discretion in foreign affairs. The paucity of evidence they cite in support of their theory is, in itself, surprising. More importantly, a close reading of these cases suggests a more straightforward conclusion: the courts believed they were duty-bound to apply the law of nations in cases in which it supplied the relevant rule of decision because the law of nations was the law of the land.¹⁰

We conclude by offering some brief remarks situating our debate with Professors Bellia and Clark in a larger historical perspective. Recognition was, indeed, of central importance to the revolutionary generation, but not in the sense that Professors Bellia and Clark have in mind. Rather, it was an aspiration for the new nation that guided those who drafted, debated, and "liquidated" the Constitution in the Early Republic. These Americans had learned from the diplomatic failures of the Confederation that recognition for a new nation was not a birthright but instead a status that had to be earned and, crucially, maintained. They sought to earn it by developing a series of novel institutions for binding American citizens and their government to international law and treaties. It was recognition in this sense—not as a discretionary power of the political branches of the federal government—but rather as a discipline that would ensure the equal status of the nation in the community of "civilized nations" that explains the role of the law of nations in the Constitution. Professors Bellia and Clark have it precisely in reverse.

I. THE RECOGNITION/ALLOCATION OF POWERS THEORY OF THE LAW OF NATIONS IN U.S. LAW

Professors Bellia and Clark begin by recognizing the capacious character of the law of nations circa 1787, which encompassed, among other bodies of law, the so-called law merchant,¹¹ the maritime law,¹² and what they term "the law of state-state relations."¹³ In their view—which we generally share—the Constitution

10. For discussion, see *infra* Sections III.A and III.C.

11. Professors Bellia and Clark define "the law merchant—or general commercial law—[as] a body of law that applied to disputes between merchants from different countries," which "served to facilitate commerce between such merchants by providing a shared set of rules to govern their transactions." BELLIA & CLARK, *supra* note 4, at 1.

12. They define the maritime law as the law "govern[ing] both private transactions arising on or relating to the high seas, and the public rights and obligations of nations in the free and neutral use of the seas." *Id.*

13. *Id.* Professors Bellia and Clark describe the "law of state-state relations" as "provid[ing] a set of reciprocal rights and obligations that governed interactions among recognized sovereign nations." *Id.*

interacts in different ways with each of these bodies of law.¹⁴ The law merchant, for example, was part of the general law that federal courts, in cases falling within their jurisdiction, applied in the absence of contrary state or federal legislation.¹⁵ Similarly, the maritime law (or parts of it) applied as a kind of general law as well, though it was treated as federal in character and, thus, beyond the power of the states to displace.¹⁶ Today, to the extent that they have not been incorporated into treaties, the law merchant and the maritime law have mostly, though not exclusively, been absorbed into the municipal law.¹⁷

The main subject of Professors Bellia and Clark's argument—and of the modern debates to which they seek to contribute—is the law of state-state relations, which roughly corresponds to what is today called customary international law (CIL), a term that only came into wide usage in the twentieth century.¹⁸ For the past two decades, scholars have hotly debated the status of CIL in U.S. domestic

They add that “[t]his law served to maintain peace and facilitate friendly relations between nations and their respective citizens.” *Id.* It should be noted that the three areas of the law of nations that Professors Bellia and Clark identify are also not exhaustive. For example, the law of nations also encompassed private international law or, as it is now more commonly known, the conflict of laws and the laws of neutrality and war, neither of which was strictly limited to the law of state-state relations. For further discussion, see *infra* note 18.

14. They pursue these themes in several chapters. Their first chapter lays out their main ideas concisely. See *id.* at 3–18.

15. The second chapter of the book analyzes the relationship of the law merchant to the Constitution. See *id.* at 19–39.

16. As we note below, the maritime law presents difficulties for Professors Bellia and Clark's taxonomy, see *infra* note 18, but insofar as it was separate from the law of state-state relations, they consider it in Chapter 5. See BELLIA & CLARK, *supra* note 4, at 113–34.

17. We note that the constitutional position of the law merchant and the maritime law is, in our view, more complex than Professors Bellia and Clark's story recognizes. Exploring such nuances, however, is beyond the scope of this Article.

18. For their discussion of the law of state-state relations, see Chapters 3 and 4, and most of Part 2 of the book. See BELLIA & CLARK, *supra* note 4, at 41–112, 135–268. Although we commend the attempt to disentangle the various functions and branches of the early modern law of nations, in our view, the use of the phrase “law of state-state relations” is unsatisfactory. Among other problems, as Professors Bellia and Clark acknowledge, the content of the law of state-state relations overlaps with that of the other two categories they discuss. For example, prize law, which was itself a subset of the international laws of war and neutrality, was at the core of the law of state-state relations but was also often categorized as part of the maritime law. See *id.* at 1, 117. Contrariwise, the laws of war included many rules that were not part of the law of state-state relations, some of which might even be classifiable as forms of commercial law (perhaps the law merchant). For an example from the leading early American treatise on international law, see HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE 221–27 (De Capo Press 1972) (1836) (discussing the law of war's prohibition on trading with the enemy). Furthermore, the phrase “the law of state-state relations” has no pedigree in the usages of the law of nations at the time of the Founding, nor has it been utilized in the field of international law in modern times, except by Professors Bellia and Clark and those who have borrowed it from them. These functional categories did not exist with clear boundaries in the eighteenth century, and they cannot explain why or how contemporaries came to distinguish among them in practice, or when one problem or subject moved from one category to another. In this regard, their category of “state-to-state” relations remains conclusory and may have facilitated their claim that modern human rights law is not properly part of state-to-state relations, a proposition that—functionally examined—is dubious, as human rights have actually been the subject of intense state-to-state relations. For further discussion, see *infra* notes 31–37 and accompanying text. For these reasons, except when describing their account, we use the phrase the “law of nations” to refer roughly to what they call the “law of state-state relations.”

law.¹⁹ The key issue has been whether it is a form of federal law that judges must apply even in the absence of legislative incorporation. The “modern” view offers an affirmative answer, while “revisionists” defend the contrary position.²⁰ It is agreed on all sides, however, that the answer to this question has an important bearing on the resolution of a number of other salient doctrinal issues. For example, is CIL superior to conflicting state law? Does the President have a constitutional duty faithfully to execute it? Does a case arising under CIL arise under the laws of the United States for purposes of the Article III subject matter jurisdiction of the federal courts? And, at the far end of the spectrum, might even Congress be constitutionally obliged to follow and implement it, at least in some situations?

Professors Bellia and Clark’s answers to these questions put them somewhere in between the modernists and the revisionists. Although they tend to support many of the tenets of revisionism, they depart from revisionists in at least one critical respect, arguing that courts are sometimes constitutionally required to apply CIL and, in those instances, CIL must be applied as superior to state law. On this view, which overlaps with the modern position, the Constitution deprives the states of power to violate CIL.²¹ At the same time, however, they maintain that only some parts of CIL—decidedly not those that impose human rights obligations—fall within this constitutional injunction.²² More generally, like the revisionists, they answer the additional questions noted above in the negative: CIL is not federal law, cases arising under CIL do not arise under the laws of the United States, and the political branches of the federal government are under no injunction to respect its prohibitions or carry out its mandates.²³

That their position on these issues departs to some extent from those of both the modernists and the revisionists is noteworthy, but, for present purposes, their bottom

We acknowledge that we have not ourselves found a satisfactory linguistic solution to the capaciousness of the term “law of nations” in its historical usage. The critical point is to distinguish between those parts of the law of nations that gave rise to legal obligations to other nations and those that, having something like the character of transnational law today, did not. See *infra* note 75 and accompanying text. For purposes of this Article, and except where otherwise indicated by context, we use the term “law of nations” to refer to those rules that were binding upon nations and that when disregarded or violated gave rise to valid claims of right. We are uncertain whether Professors Bellia and Clark would view this limited conception of the law of nations as coterminous with their conception of the law of state-state relations. There is some reason to believe that they intend to define the scope of the law of state-states relations more narrowly. For further discussion, see *infra* note 31.

19. For discussion of the debate, see BELLIA & CLARK, *supra* note 4, at xi–xiii, 149–88.

20. The contemporary debate was sparked by Professors Bradley and Goldsmith’s now classic article, 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) (defending the “revisionist” position), which was answered in Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (defending the “modern” position). Since then, the issue has generated a large and ever-expanding literature. For a classic articulation of the modern position, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 232–46 (2d ed. 1996).

21. See, e.g., BELLIA & CLARK, *supra* note 4, at xx–xxi, xxvi–vii, 43–44, 56–57, 67–71, 247–55.

22. See, e.g., *id.* at 245–46, 256–68.

23. See, e.g., *id.* at 232 (asserting that “customary international law does not bind Congress and the President as a matter of domestic law when they choose to depart from such law in the exercise of their constitutional powers”).

line is not the critical point.²⁴ Rather, what is key is the underlying account they offer to justify interpreting the relevant constitutional principles in this distinctive way. In particular, how do they trace these claims to the original understanding of the Constitution? Is their account persuasive as an interpretation of the Founding?

It turns out that there is little early history in the book on this crucial point. Professors Bellia and Clark nevertheless insist that the Constitution, as originally ratified, did not adopt any part of the law of nations as the national law of the United States, and therefore the Constitution did not charge judges, or indeed permit them, to apply it as such. Rather, on their account, even the law of state-state relations, which governed core aspects of the nation's foreign affairs, was not strictly speaking part of federal law.²⁵ Although the Constitution did mandate the judicial application of the law of state-state relations in at least some instances, it did so for a different set of reasons, rooted in the allocation of powers over the conduct of foreign relations. The law of nations was, in their view, exclusively a tool for protecting the power of the federal political branches from the states and the courts; it was not a body of law that governed the foreign policy of the United States.²⁶ It is at this point that their account becomes most interesting.

As they rightly insist, the Constitution grants the federal government broad powers over foreign affairs. In particular, Professors Bellia and Clark emphasize its grant of plenary power over the recognition of foreign states and governments to the political branches. This grant, they argue, is implicit in the combined clauses granting the President power to appoint and receive ambassadors and other public ministers and the power to make treaties. International recognition, they note, was at least sometimes granted by the sending or receiving of ambassadors and at other times (as in the case of the French recognition of the United States in 1778) by the making of a treaty.²⁷ Moreover, the Constitution's grant of the recognition power was necessarily exclusive in the political branches and could not be interfered with either by the courts or the state governments.²⁸

The recognition power plays a crucial role in their overall account. According to Professors Bellia and Clark, the power to recognize a foreign nation is in essence a power to determine whether to respect the rights of that nation under the law of nations, and a decision to recognize amounts to a determination by the political branches that the United States will respect those rights. Unless the political branches

24. They are not alone in defending a middle ground position, although the theory they develop to support their particular approach is novel. For an example of a quite different middle ground position, see Professor William Dodge's contribution to this Symposium, William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559 (2018). For other versions, see MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 342–61 (2007); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 369–70 (2002).

25. See, e.g., BELLIA & CLARK, *supra* note 4, at 87–89, 161–63, 214.

26. Professors Bellia and Clark emphasize this critical point in virtually every chapter of the book. See, e.g., *id.* at xx–xii, xxvi–xxvii, 41–44, 53–58, 71, 73, 75–89.

27. See, e.g., *id.* at 51, 53–55, 76.

28. See *id.* at 53–57.

decide otherwise, therefore, recognition requires judges to avoid making decisions that would violate a recognized nation's rights under the law of nations and, in a properly presented case, to enjoin the states of the United States from doing so.²⁹ It follows, they maintain, that courts apply the law of state-state relations not because it is law binding the United States, but rather in aid of an implicit decision of the political branches that the law of nations rights of particular nations should be respected. In other words, it is applied as an entailment of the Constitution's allocation of the recognition power exclusively to the political branches of the federal government.³⁰

We find this focus on the (implicit) recognition power curious, but it appears to be the major premise from which Professors Bellia and Clark deduce a series of other propositions. At the center of their book, for example, is their argument that what they call "modern customary international law"—by which they mean one discrete portion of modern CIL, the customary law of human rights—is not included within the constitutional injunction on courts or states to apply the law

29. See *id.* at 53, 56–57. Professors Bellia and Clark argue:

When the political branches exercised their power to make treaties, send and receive ambassadors, or undertake other formal acts of recognition, they signified on behalf of the United States that the nation as a whole would respect the other nation's sovereign rights under the law of state-state relations. Respect for such rights was the essential meaning of recognition under well-known principles of the law of nations. Thus, when the political branches recognized a foreign nation or government on behalf of the United States, that determination necessarily bound both the courts and the states to respect that nation's sovereign rights. . . . Accordingly, the political branches' exercise of their constitutional powers to recognize foreign nations required courts and states to respect the rights of such nations as incidents of recognition. Any judicial or state action that violated another nation's rights . . . would have violated the Constitution by contradicting the political branches' exercise of their recognition powers.

Id. at 56–57. For further discussion, and criticism, of this conception of the recognition power, see *infra* notes 163–75 and accompanying text.

30. For Professors Bellia and Clark, this point is critical, and they make it repeatedly and emphatically throughout the book. For citations just from Chapter 3, see *id.* at 43, 44, 50, 56–57, 64, 71. In a typical formulation, they assert that "the Constitution's exclusive allocation of the recognition power to the political branches required courts and states to uphold the traditional rights of recognized foreign nations under the law of state-state relations." *Id.* at 41; see also *id.* at 43, 71 (declaring that "[t]he Constitution's allocation of the [recognition and other foreign affairs] powers to the political branches required courts (and states) to uphold the traditional rights of recognized foreign nations" and, again, that "[b]y respecting the rights of foreign sovereigns under the law of state-state relations in these cases, federal courts upheld both the Constitution's allocation of powers to the political branches and their specific exercise of these powers").

It is important to note that Professors Bellia and Clark also suggest that other foreign affairs powers that the Constitution assigned the federal political branches, in particular, the war powers (for example, Congress's power to declare war, U.S. CONST. art. I, § 8, cl. 11), may compel a similar result, a point with which we agree. See BELLIA & CLARK, *supra* note 4, at 57–65. For reasons that are not obvious, however, they prefer to emphasize the recognition power. One hypothesis for this somewhat peculiar feature of their approach is that their argument against treating the modern CIL of human rights as binding on courts and the states is tailored to a specific, albeit dubious, understanding of the recognition power. For discussion, see, e.g., *infra* notes 163–75, 231–51 and accompanying text. Even if their account of the recognition power were persuasive, however, it would provide only partial support for their position on the status of human rights law. Simply emphasizing one basis for application of the law of state-state relations, which they maintain does not apply to modern human rights law, does not provide an argument for why other possible bases (which they identify as potentially relevant but for which no similar argument seems in the offing) do not support the contrary result.

cof state-state relations.³¹ It is not, they maintain, for three reasons. First, the law

31. They devote the entirety of Chapter 6 to a discussion of so-called “modern customary international law,” see BELLIA & CLARK, *supra* note 4, at 139–48, but, in fact, most of the second half of the book is dedicated to the subject, see *id.* at 135–268. The burden of Chapter 6 is to establish that human rights law did not exist at the time of the Founding and that it is fundamentally different in nature from the traditional law of state-state relations, because it regulates the relationship between the state and its own citizens. In their view, human rights law creates a body of rules that is more akin to the law merchant or the maritime law than to the law of state-state relations. See *id.* at 139–40, 166–67, 170. Their suggestion is that their allocation of powers rationale for requiring courts and states to uphold the law of state-state relations does not apply to human rights law, just as it did not apply to the law merchant and the maritime law.

Although we cannot here respond to this aspect of their argument, we briefly note the reasons why, in our view, it is unpersuasive. First, the argument reveals an essential flaw in Professors Bellia and Clark’s tripartite typology of the law of nations, which, on their account, included the law merchant, the maritime law, and the law of state-state relations. See *supra* notes 11–18 and accompanying text. The problem is that their typology fails to offer a consistent basis for distinguishing among the three categories because the law of state-state relations, which is their own creation, overlaps with the other two. See *supra* note 18. Instead, the critical distinction from the Founding perspective was between those rules and principles of the law of nations that created binding obligations on states and those, which, like modern transnational law, states were free to follow or disregard in their discretion. See *id.* Once this essential distinction is recognized, the argument that the modern law of human rights is a new and separate category, more akin to the law merchant and the maritime law than to the law of state-state relations, dissolves. Human rights law, like all other principles of modern CIL, creates binding norms, the violation of which gives rise to claims by other nations. It therefore falls within the law of state-state relations, as that category was (or would have been) understood at the time of the Founding (if the term had then been in use).

Second, the fact that the international law of human rights did not develop in its modern form until the second half of the twentieth century, a point that Professors Bellia and Clark stress, is equally unhelpful to their position. Of course, the content of international law, like that of most other forms of law, has changed drastically since the time of the Founding, and human rights law provides only one salient example. Even more profound, for instance, is the epochal change wrought by the United Nations Charter’s outlawing of war (which had been the ultimate means in traditional international law for enforcing international rights) and its creation of a permanent institutional structure for enforcing international peace and security. See U.N. Charter art. 2, 39–51; see also OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017). Although from the perspective of an adherent to living constitutionalism, changes of this nature might justify departing from the original meaning of the Constitution, for originalists that is not case.

Finally, although Professors Bellia and Clark, referring to human rights law, repeatedly insist that “rules that regulate how a nation governs its own citizens within its own territory, did not exist at the founding,” see BELLIA & CLARK, *supra* note 4, at 140, that claim is simply false. Indeed, to falsify it, we need look no further than the Peace Treaty of 1783 with Great Britain, which ended the Revolutionary War, established the independence of the United States, and included provisions that did precisely what Professors Bellia and Clark insist did not exist at the time. See *Preliminary Articles of Peace, U.S.-Gr. Brit., Nov. 30, 1782*, in 2 *TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA* 96 (Hunter Miller ed., 1931). Thus, Article VI of the treaty provided:

That there shall be no future Confiscations made, nor any prosecutions commenced against any Person or Persons, for or by reason of the Part which he or they may have taken in the present War, and that no person shall on that account suffer any future Loss or Damage either in his Person, Liberty or Property; and that those who may be in confinement on such charges, at the time of the Ratification of the Treaty in America, shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.

Id. at 99. Article VI was designed to provide protection for Loyalists who had supported the British during the war but were American citizens wishing to remain in the country. It thus directly regulated how the United States and the states governed their own citizens. In fact, it was for this reason that it generated considerable controversy at the time, with some objecting to it on the ground that it intruded into the territorial sovereignty of the states. Contrary to the implication of Professors Bellia and Clark, however, those controversies only brought the issue to the attention of the Founders, who deliberately rejected the arguments of the critics and reaffirmed

of state-state relations is not federal law, but is applied only as a concomitant of the Constitution's allocation of powers.³² Courts therefore cannot apply it on the theory that it is among the (federal) "laws" referred to in: Article II (which the President is charged faithfully to execute),³³ Article III (which are made—by Congress—pursuant to the Constitution),³⁴ or Article VI (which are the supreme law of the land).³⁵ Second, a core commitment of the law of nations at the time of the Founding was to guarantee the exclusivity of a nation's territorial sovereignty, and recognition signaled the political branches' determination to respect the territorial sovereignty of recognized nations. In contrast, the modern law of human rights, which regulates how governments treat their own citizens, undermines this commitment. For courts to apply the CIL of human rights to a recognized government would thus be to undermine, not support, the political branches' authority.³⁶ Third, to apply CIL human rights principles to the United States, Professors Bellia and Clark claim, would not support the constitutional allocation of powers, but instead would be in direct tension with it. The Constitution vests the power to determine what rights citizens and other persons within the United States have, beyond those protected by the Constitution itself, in Congress and

in the Constitution the validity of the Treaty and the principles that it embodied. For extensive discussion, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1116–27 (2000).

32. For a statement of their view, see BELLIA & CLARK, *supra* note 4, at 161 (asserting that "[c]ourts upheld [the rights of foreign nations under the law of state-state relations] not because the law of nations was itself a form of federal law, but because the Constitution's allocation of specific war and foreign relations powers to the political branches required them to do so"). They also assert that:

Once the political branches recognized a foreign nation or government, the Constitution required U.S. courts to uphold the incidents of recognition until the political branches directed otherwise. . . . Courts applied the law of state-state relations in these circumstances not because the Constitution adopted such law, but because the political branches' exercise of their constitutional power to recognize foreign nations obligated courts to respect recognition by upholding the rights accompanying that status.

Id. at 214.

33. *See, e.g., id.* at 231–39 (rejecting the claim that the President's duty to execute the laws includes the law of nations as a form of federal law).

34. *See, e.g., id.* at 170–72 (asserting that cases arising under the law of nations do not support Article III "arising under" jurisdiction because "the law of state-state relations [does not] constitute[] federal common law," but that "[b]ecause the Constitution itself gives the political branches the power to recognize foreign nations, the exercise of that power requires state and federal courts alike to uphold the traditional sovereign rights of such nations as an incident of recognition" and that in such cases there is "arising under" jurisdiction to enforce the Constitution's allocation of powers by enforcing the law of nations).

35. *See, e.g., id.* at 213 (asserting that "[t]he Constitution . . . contained no provisions generally adopting . . . the law of nations as the supreme law of the land").

36. *See, e.g., id.* at 139–43, 225–32. For analysis of the relationship between territoriality and sovereignty in the early modern world, see LAUREN BENTON, *THE SEARCH FOR SOVEREIGNTY* (2010). Professors Bellia and Clark never explain why they believe the Founders meant to freeze in time international law's conception of territorial sovereignty at the Founding, rather than to embrace its changing conceptions of territorial sovereignty over the course of time. As far as we are aware, there is no such evidence, but much evidence to the contrary, establishing that the Founders understood that international law was a living institution that developed and improved with the advancement of human knowledge and understanding.

the state governments. It would thus turn on its head the Founders' rationale for insisting on judicial application of the law of state-state relations were courts to apply the CIL of human rights to actions taken by the political branches themselves or by state governments within their ordinary constitutional authority.³⁷

As we understand their argument, Professors Bellia and Clark offer a bracing and parsimonious theory for why some, but not all, parts of CIL bind some (but not all) of the institutions of American government. The theory manages, at first glance, to forge a compromise between those who have argued that the law of nations is federal law, and those who have argued that it is not. According to Professors Bellia and Clark, the state governments and the federal courts must comply with those parts of CIL that are properly classified as part of the law of state-state relations. They need do so, however, not because CIL is federal law but rather because the Constitution's allocation of the foreign affairs powers so requires. On the other hand, with their constitutional monopoly over foreign relations thus preserved, the federal political branches may exercise unlimited discretion about whether, when, and how to follow CIL. Whether or not such theory has appeal for political actors in the twenty-first century is a complicated normative question. The more immediate question their book raises is how much historical support there is for this theory in the Founding period.

II. THE CONSTITUTION'S ADOPTION OF THE LAW OF NATIONS AS THE LAW OF THE LAND

In our view, Professors Bellia and Clark's account of how the Constitution interfaces with the law of state-state relations is flawed, at least as a matter of early constitutional understandings. They are not wrong when they argue that judicial application of the law of state-state relations supported the Constitution's allocation of powers over foreign affairs. At least in most instances, it did. The point, however, is that their focus on the constitutional allocation of powers as

37. See, e.g., *id.* at 225–32, 245–46, 256–63. Professors Bellia and Clark never explain why these considerations would not apply equally to many, if not all, of the principles of the law of state-state relations. Consequently, their argument against judicial application of the CIL of human rights seems to undermine the thrust of their larger account. In any case, a similar logic, they maintain, explains why the so-called *Charming Betsy* canon of interpretation—which is named after the case, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and directs courts, whenever possible, to interpret congressional statutes in a manner that is consistent with the law of nations obligations of the United States—should receive a narrow construction in accord with arguments made by revisionist scholars. BELLIA & CLARK, *supra* note 4, at 83–85, 235–36. According to Professors Bellia and Clark, the *Charming Betsy* canon—notwithstanding its roots in the English common law and the judicial practices of other nations at the time of the Founding—is not designed to facilitate U.S. compliance with international law per se but only to uphold the Constitution's allocation of powers over the recognition of foreign governments. See *id.* Only when this allocation of powers rationale requires its application, therefore, should it be invoked. See *id.* Thus, for example, for the reasons discussed in the text, courts should refrain from applying the canon to statutes that may violate the CIL of human rights, because to do so would not be supported by a separation of powers logic but the opposite. See, e.g., *id.* at 84 & nn.35–36, 216–31 (supporting the view advocated by Professor Curtis Bradley in Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1997)). For further discussion of *Charming Betsy*, see *infra* Section III.B.2.

the exclusive, or even the main, justification for judicial application of the law of nations leads them to miss the forest for the trees.³⁸ It is as if modern human rights jurisprudence, which Professors Bellia and Clark repeatedly insist “did not exist at the founding,”³⁹ has nonetheless framed their historical exploration. By contrast, if we explore the Founding from the perspective of the late eighteenth century, moving forward with the historical actors, it becomes clear that many in the Founding era believed that the Constitution directed courts to apply the law of “state-state relations” because it was the system of public law norms that bound the United States and all other “civilized nations.” To refuse to adhere to it, they believed, would have placed the new nation outside the community of such civilized states, which was a prospect that they viewed with dismay and trepidation—a view constitutional reformers developed while working within and criticizing the Articles of Confederation.⁴⁰ “[T]o Violate the law[] of nations,” as Hamilton put it in the immediate aftermath of the Revolutionary War, would be to “forfeit our character as a civilized people.”⁴¹ Which is to say—or rather to explain why—he and other Framers sought, through constitutional reform, to incorporate the law of nations into the municipal law of the United States, where it would govern not only the decisions of the courts but also those of the state governments, the President, and, arguably, even Congress. Nor was this dimension and purpose of constitutional reform especially controversial by the late 1780s.

Perhaps Professors Bellia and Clark miss this overriding point because they focus so intently on the role of the judiciary and court decisions. To be sure, the federal courts were designed to play an important role in the new nation’s foreign affairs, precisely because they were charged with interpreting, applying, and enforcing treaty obligations and the law of nations. Nevertheless, the Constitution assigned the lion’s share of responsibility for the conduct of foreign affairs, as Professors Bellia and Clark rightly assume, to the political branches, and to the President and Senate in particular. The House was given a lesser role because the Drafters feared that the most popular branch would, institutionally, be less able to make decisions across a longer temporal and spatial horizon.⁴² As a result, the views and actions of early government officials provide an especially fruitful area in which to discover the early understanding of the Constitution. In

38. We note, moreover, that the allocation of powers is equivocal in its implications. It is not obvious, for example, that a separation, or allocation, of powers rationale can explain why the courts should apply the law of nations, rather than for example *state* law, as a default rule until Congress specifies otherwise. The latter approach would support the vertical allocation of powers between the federal and state governments by preserving state law until Congress decided that preemption was necessary to avoid conflict with other nations.

39. See, e.g., BELLIA & CLARK, *supra* note 4, at xvi, 135, 139, 270.

40. This theme is explored at length in Golove & Hulsebosch, *supra* note 2.

41. Alexander Hamilton, The Rutgers Briefs, Brief No. 6 [hereinafter Hamilton, Brief No. 6], in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 331, 381–82 (Julius Goebel, Jr. ed., 1964) [hereinafter 1 LAW PRACTICE OF HAMILTON].

42. See Golove & Hulsebosch, *supra* note 2, at 980–1019; David M. Golove & Daniel J. Hulsebosch, “The Known Opinion of the Impartial World”: *Foreign Relations and the Law of Nations in The Federalist* 10–11 (N.Y.U. Pub. Law & Legal Theory Working Paper No. 10-2017).

fact, leading officials and authorities on the Constitution—including the three authors of *The Federalist*⁴³—expressed their views on these points unequivocally and repeatedly.⁴⁴ It is striking that the views of those who drafted, defended, and implemented the Constitution play no role in Professors Bellia and Clark’s account.

We begin this Part by exploring the Founders’ commitment to the law of nations and their view that compliance with the new nation’s duties and obligations under it was of the highest importance. We then turn to the evidence from the Founding era that demonstrates the understanding of leading Founders, government officials, judges, lawyers, and jurists that the Constitution adopted the law of nations as part of the law of the United States. Finally, we explore the constitutional implications that the incorporation of the law of nations into the law of the United States had for the states and the President, touching as well on the more complicated relationship between the law of nations and Congress’s powers. With respect to the last issue, the incorporation of the law of nations into the nation’s laws did not provide any definitive guidance in answering how far the former constrained Congress, because Congress was itself the nation’s lawmaker and could generally modify and repeal federal law as it pleased.⁴⁵ Of course, the underlying reasons for incorporating the law of nations into federal law were relevant to the question of Congress’s powers, but whether the law of nations so constrained Congress was ultimately a question that turned on the hierarchy of the laws of the land, not on the status of the law of nations as part of the law of the land.

A. THE FOUNDING GENERATION’S EMBRACE OF THE LAW OF NATIONS

The commitment of the Founders, especially the Federalists, to the law of nations is difficult to miss in the historical sources. Indeed, their paeans to the law of nations as a source not only of legal principles but also of moral instruction are legion both before and after the Constitution was adopted.⁴⁶ Typical of the former is a 1784 opinion of Mayor James Duane rendered in the celebrated case, *Rutgers v. Waddington*.⁴⁷ Duane was a leading New York lawyer who had served in the Continental Congress, participated in the drafting of the Articles of Confederation, and then represented his state in the Congress of the Confederation.⁴⁸ He was also the Mayor of New York City from 1784 to 1789, and later President George Washington appointed him as the first federal judge in the District of New York,

43. See the essays by Alexander Hamilton, James Madison, and John Jay in *THE FEDERALIST* (Jacob E. Cooke, ed., 1961).

44. See *infra* Part II.

45. See *infra* Section II.C.3 (discussing Founding-era evidence on whether Congress was bound to comply with the law of nations).

46. On this theme in the Confederation period, see Golove & Hulsebosch, *supra* note 2, at 952–79.

47. Mayor Duane’s opinion in *Rutgers* is reprinted in 1 *LAW PRACTICE OF HAMILTON*, *supra* note 41, at 392–419.

48. See David William Voorhees, *Duane, James*, in *THE ENCYCLOPEDIA OF NEW YORK CITY* 380 (Kenneth T. Jackson ed., 2d ed. 2010).

where he sat for five years.⁴⁹ In his opinion, he pointedly emphasized the necessity, “in the infancy of our republic, . . . to inculcate a sense of national obligation, and a reverence for institutions, on which the tranquility of mankind, considered as members of different states and communities so essentially depends.”⁵⁰ “The truth,” he declared, is that “the law of nations is a noble and most important institution: The rights of sovereigns, and the happiness of the human race, are promoted by its maxims and concerned for its vindication.”⁵¹ Prior to the Revolution, Americans had had little reason to cultivate a thorough understanding “of this interesting science,” but political independence now made it “an indispensable obligation” to undertake the study of the law of nations, which was “founded upon reason and humanity, and will prevail as long as reason and humanity are cultivated.”⁵² Americans, he insisted:

[P]rofess to revere the rights of human nature; at every hazard and expence we have vindicated, and successfully established them in our land! and we cannot but reverence a law which is their chief guardian—a law which inculcates as a first principle—that the amiable precepts of the law of nature, are as obligatory on nations in the mutual intercourse, as they are on individuals in their conduct towards each other; . . . What more eminently distinguishes the refined and polished nations of Europe, from the piratical states of Barbary, than a *respect* or a *contempt* for this law.⁵³

In offering these remarks, Duane drew directly on Hamilton’s argument in the case, which he had used as a vehicle for challenging the validity of a New York statute, enacted after the armistice but before the final Treaty of Peace, which sought to punish loyalists and British subjects who had destroyed, occupied, or otherwise used patriot property during the war.⁵⁴ As his contemporaneous public essays confirm, Hamilton also had larger aims in mind, seeking to vindicate the law of nations and the Treaty of Peace, which he perceived were under assault in the states.⁵⁵ Nor was *Rutgers* an isolated case, although it is the only one with which constitutional historians remain familiar today. In fact, Hamilton was counsel in a large number of similar cases in New York during the 1780s in which he made similar arguments about the importance of adhering to treaties and the law

49. See *id.*

50. *Rutgers*, in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 418.

51. *Id.* at 400.

52. *Id.* at 400, 403.

53. *Id.* at 400 (footnote omitted).

54. For discussion of the context of the *Rutgers* case and Hamilton’s role in challenging the validity of the Trespass Act, see *id.* at 282–315.

55. For Hamilton’s contemporaneous essays developing these themes, see Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1–27, 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON 483–97 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter 3 HAMILTON PAPERS]; Alexander Hamilton, Second Letter from Phocion (Apr. 1784), in 3 HAMILTON PAPERS, *supra*, at 530–58.

of nations.⁵⁶ In this respect, *Rutgers*, and the many now-forgotten related cases, inaugurated the long struggle of constitutional reformers, later known as Federalists, to uphold the new nation's honor and defend its "character" and "respectability" on the international stage that would culminate in the Philadelphia Convention.⁵⁷ In *Rutgers*, Hamilton was already insisting on the transcendent importance of observing the law of nations, underscoring the case's "influence on the national character" and the likelihood that it would be "discussed in Europe; and may make good or ill impressions according to the event."⁵⁸ "T'will," he also predicted, "remain a record of the spirit of our courts and will be handed down to posterity."⁵⁹ He therefore exhorted the court to apply the law of nations as "the law of Universal society"⁶⁰ and invoked "the sacredness of its authority" and "the temerity and dishonour, in a national view, of countenancing any act repugnant to it."⁶¹

If *Rutgers* marked the commencement of the Federalists' struggle to bolster the new nation's commitment to the law of nations, Congress's resolutions following the receipt of Foreign Secretary John Jay's exhaustive report on state violations of the Treaty of Peace two-and-a-half years later marked its last exertion before the convening of the Philadelphia Convention.⁶² In the Confederation's waning days, just before the Convention began, Congress unanimously adopted resolutions reaffirming the supremacy of the Confederation's treaties over the laws of the states, and articulated the treaty self-execution doctrine that the delegates at the Philadelphia Convention would shortly incorporate into the Supremacy Clause.⁶³ After adopting the resolutions, it then seized the opportunity to offer the states not only a legal lesson, but also a strict admonition about the moral necessity of observing the nation's international legal commitments. In a circular letter to the states, which Jay drafted and Congress approved, the foreign secretary insisted that "[n]ot only the obvious dictates of religion, morality and national honour, but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made."⁶⁴ Jay then elaborated:

56. For samples from Hamilton's surviving legal papers, see 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 197–544. For similar cases and arguments in other states in the 1780s, see generally Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825 (2006).

57. For discussion of these themes as reflected in *The Federalist*, see Golove & Hulsebosch, *supra* note 42.

58. Alexander Hamilton, The Rutgers Briefs, Brief No. 2 [hereinafter Hamilton, Brief No. 2], in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 339.

59. *Id.* at 339–40.

60. Hamilton, Brief No. 6, *supra* note 41, at 373.

61. *Rutgers*, in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 400 (characterizing Hamilton's argument).

62. For Foreign Secretary Jay's report, see 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS 203–87 (William S. Hein & Co. 2005) (1821) [hereinafter 4 SECRET JOURNALS OF CONGRESS]. For Congress's resolves, see *id.* at 295–96.

63. *See id.*

64. *Id.* at 330. For the whole circular letter, see *id.* at 329–38.

Contracts between nations, like contracts between individuals, should be faithfully executed, even though the sword in the one case, and the law in the other, did not compel it. Honest nations like honest men require no constraint to do justice; and though impunity and the necessity of affairs may sometimes afford temptations to pare down contracts to the measure of convenience, yet it is never done but at the expense of that esteem, and confidence, and credit which are of infinitely more worth than all the momentary advantages which such expedients can extort.⁶⁵

After the ratification of the Constitution, the Federalists-turned-federal-administrators continued to articulate and act upon these principles. The main focus of their concern in the ratification debates and the first few years of the Washington Administration was on the necessity of upholding the nation's treaty obligations, a point of urgency especially in relation to the Treaty of Peace with Great Britain, as well as with loan agreements with France and the Netherlands.⁶⁶ Although always a matter of importance, the customary law of nations was, by comparison, less foregrounded in the Federalists' public discourse. That changed dramatically with the outbreak of the French Revolutionary Wars in 1793.⁶⁷ Jay took every opportunity as the nation's first Chief Justice to educate the public on the subject, not only in his judicial opinions but also in well-publicized grand jury charges, which were as much civics lessons as instructions in the applicable law. For example, "The Peace Prosperity and Reputation of the U.S.," he told the jury in a widely circulated charge, "will always greatly depend on their Fidelity to their Engagements, & every virtuous Citizen (for every Citizen is a Party to them) will concur in observing & executing them with Honor and good Faith."⁶⁸ This duty applied

65. *Id.* at 333–34. The same reasoning applied not only to treaties but also to the law of nations. Thus, Jay advised:

Our national constitution having committed to us the management of the national concerns with foreign states and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction, by the laws of nations and the faith of treaties, remain inviolate. And it is also our duty to provide, that the essential interests and peace of the whole confederacy be not impaired, or endangered, by deviations from the line of publick faith, into which any of its members may from whatever cause be unadvisedly drawn.

Id. at 330.

66. On the centrality of treaty commitments to repay public debt, see Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239, 1249–55 (2018).

67. On the foreign policy crises prompted by the outbreak of war in Europe that followed the beheading of Louis XVI in 1792, and their constitutional implications in the United States, see Golove & Hulsebosch, *supra* note 2, at 1015–61; see also David Golove, *The American Founding and Global Justice: Hamiltonian and Jeffersonian Approaches*, 57 VA. J. INT'L L. (forthcoming 2018).

68. See John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793) [hereinafter Jay's May 22, 1793 Charge], in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 380, 382 (Maeva Marcus et al. eds., 1988) [hereinafter 2 DOCUMENTARY HISTORY OF THE SUPREME COURT]. For discussion of Jay's May 22, 1793 Charge, as well as similar charges by Jay and other Justices of the Supreme Court, see Golove & Hulsebosch, *supra*

whether they be made with nations respectable and important, or with Nations weake & inconsiderable[, because] our Obligation to keep our faith results from our having pledged it, & not from the Character or Description of the State or People to whom neither Impunity nor the Right of Retaliation can sanctify Perfidy, for altho[ugh] Perfidy may deserve Chastisement, yet it can never merit Imitation.⁶⁹

In another grand jury charge, he observed that the law of nations derives from “he from whose will proceed all moral Obligations, and which will is made known to us by Reason or by Revelation,” adding that “[a]n unjust War is among the greatest of Evils” and “the Blood & misery caused by it must rest on the Heads of those who wage it.”⁷⁰ Returning to the themes of his circular letter, he then declared:

Every Nation in like Manner is obliged by a due Regard to its own Dignity and Character, to behave towards other Nations with Decorum[.] Insolence and Rudeness will not only degrade and disgrace nations & Individuals, but also expose them to Hostility & Insult[.] It is the Duty of both to cultivate Peace and good Will, and to this nothing is more conducive than Justice Benevolence and good Manners[.] Indiscretions of this kind have given Occasion to many Wars[.]⁷¹

The other Justices proceeded similarly. Justice Wilson, who was one of the principal Drafters of the Constitution in Philadelphia and had delivered celebrated lectures on the law of nations, was even more enthusiastic. For example, “The Law of Nations as well as the Law of Nature[.],” he advised the grand jury, “is of Obligation indispensable: The Law of Nations as well as the Law of Nature is of Origin divine.”⁷² Wide public understanding of the “important [and] interesting . . . Truths” of the law of nations was especially important in a republic of “free People,” Wilson argued, for “[t]hey announce to a free People how . . . solemn their Duties are. If a practical Knowledge and a just Sense of those Duties were diffused universally among the Citizens; how beneficial and lasting would the Fruits be!”⁷³ Upholding the law of nations would also earn the new nation “an honest Fame,” which is “a valuable and an agreeable Possession . . . [that] represses Hostility; and secures Esteem. In Transactions with other Nations, the Dignity of a

note 2, at 1032 n.369. On the early Supreme Court Justices’ use of jury charges to impart civics lessons, see Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

69. Jay’s May 22, 1793 Charge, *supra* note 68, at 382.

70. Draft of John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia (before April 22, 1793), in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 68, at 359, 361–62.

71. *Id.* at 362.

72. See James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (July 22, 1793) [hereinafter Wilson’s July 22, 1793 Charge], in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 68, at 414, 417; see also Henfield’s Case, 11 F. Cas. 1099, 1105 (C.C.D. Pa. 1793) (No. 6360) (reprinting Wilson’s July 22, 1793 charge).

73. Wilson’s July 22, 1793 Charge, *supra* note 72, at 418.

State should never be permitted to suffer the smallest Diminution.”⁷⁴ Leading lawyers and judges repeatedly maintained that the law of nations was an invaluable resource for the new nation, at home and abroad.

B. THE ADOPTION OF THE LAW OF NATIONS AS LAW OF THE UNITED STATES

Even as stark disagreements emerged about exactly how to preserve national dignity, the sentiments expressed in the sources surveyed in the last section were widely shared in the Founding era and were reiterated by leading Founders, not only in formal public documents but also in private letters and exchanges. Nevertheless, however suggestive they may be from an interpretive perspective, these expressions of the Founders’ attitudes towards the law of nations are not themselves direct proof of how they understood its status in constitutional terms. Yet on these questions as well they left a considerable record of their thoughts. None of that evidence supports Professors Bellia and Clark’s theory or the notion that the recognition power (and its allocation to the political branches) played any role, let alone a dominant role, in their thinking.

From a modern perspective, the Constitution’s elliptical and indirect references to the law of nations make room for what have become (and were in some earlier eras) sharp disputes about its proper interpretation. Viewed from the perspective of 1787, however, the text posed less interpretive difficulty, as was reflected in the common understanding that the law of nations was incorporated by the Constitution into the municipal law of the United States and was thus the “supreme Law of the Land”—even if not among “the Laws of the United States which shall be made in Pursuance [of the Constitution].”⁷⁵

We begin by tracing how, even during the Confederation, leading Federalists argued—with some success in the courts—that the law of nations was incorporated into the law of the Confederation as law of the United States. We then consider how this view was carried forward and strengthened after the adoption of the Constitution.

1. The Struggle over the Status of the Law of Nations During the Confederation

Leading Federalists maintained that the law of nations was part of (con)federal law even under the Articles of Confederation. In *Rutgers*, Hamilton pressed this position with force. His argument was filled with references to, and fine-grained

74. *Id.* at 418–19.

75. U.S. CONST. art. VI, § 2. We reemphasize that we are referring to the part of the law of nations that created legally binding obligations on nations, not non-binding rules applicable to a wide variety of private transactions. We agree with Professors Bellia and Clark that the Founding generation understood that the pluralist content of the law of nations—interstate here, transnational there, and some areas ambiguously interstate and transnational—made it problematic to incorporate all of its rules into the Constitution as federal law. *See, e.g.*, BELLIA & CLARK, *supra* note 4, at 19–39. To do so would have federalized not only those obligations that were binding on the United States as a nation (that is, the law of state-state relations) but also rules and principles that nations were free to adopt or not, and that applied to virtually all commercial transactions and even sailor wage contracts. There is no record of anyone recommending such a complete transfer of jurisdiction from state courts and legislatures, nor of any confusion in identifying which principles fit into which category.

analysis of, the law of nations and the applicable principles of the laws of war, as well as with praise for its humane purposes, principles, and maxims.⁷⁶ The critical point, however, was constitutional: “[the] Laws of Nations [are] part of the law of the land,” he declared, adding that they are “to be collected from the principles laid down by writers on the subject and by the authori[z]ed practices of Nations.”⁷⁷

Nor was Hamilton content to leave this point simply as an assertion, but immediately undertook to explain how precisely the law of nations had become part of the law of the land. Commencing with the Declaration of Independence and continuing throughout the Revolutionary War, Hamilton noted, both the United States and the State of New York had claimed the rights of independent nations under the law of nations and had thereby become parties to it. From the outset, they “claimed and appealed to those rules.”⁷⁸ By all their “public acts . . . [which] claim the sanction of the law of Nations,” they had therefore “formally assent[ed] to that law.”⁷⁹

Nevertheless, it still remained to be explained not just why the United States was, like other “civilized nations,” bound to observe the law of nations, but also how it had become part of the law of the land.⁸⁰ On this point as well, Hamilton was explicit. To begin, he noted, the Constitution of the State of New York “adopts the common law of which the *law of nations is a part*.”⁸¹ Hence, it was strange to suggest, as Hamilton supposed opposing counsel might, “that the state of New York has no common law of nations.”⁸² More generally, the law of nations was the law of the land as a matter of first principles. “[I]t results,”

76. Hamilton’s Brief No. 6, which contains the most complete record of his arguments, reveals his dazzling knowledge of the law of nations, even at this early stage of his career. See Hamilton, Brief No. 6, *supra* note 41, at 362–92. His later writings, which include, among many others, his *Pacificus* and *Camillus* essays and his many Cabinet memoranda, display an encyclopedic knowledge of the field.

77. Hamilton, Brief No. 2, *supra* note 58, at 340. Hamilton was here drawing his argument directly from Lord Mansfield’s famous decision in *Triquet v. Bath* (1764) 97 Eng. Rep. 936, 937–38 (KB). Mansfield’s opinion in *Triquet* has long been viewed as the origin of the so-called English incorporation doctrine, which held the law of nations to be part of the law of the land in Great Britain. In language almost identical to Hamilton’s, Lord Mansfield, quoting an earlier decision by Lord Talbot, declared that “the law of nations, in its full extent was part of the law of England. . . . [and] [t]hat the law of nations was to be collected from the practice of different nations, and the authority of writers.” *Id.* at 938 (quoting Lord Talbot); see also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67 (stating that law of nations “is here adopted in its full extent by the common law”). Hamilton cited both. See Hamilton, Brief No. 2, *supra* note 58, at 340.

78. *Id.* at 345.

79. Hamilton, Brief No. 6, *supra* note 41, at 367.

80. This explanation is all the more necessary today in view of the decidedly “dualistic” perspective of contemporary lawyers. At the time of the Founding, legal sensibilities were more “monistic,” and it would have naturally followed that the municipal law incorporated the principles of the law of nations. As Jay put it in still another grand jury charge delivered shortly after adoption of the Constitution, “the Laws of Nations make Part of the Laws of this, and of every other civilized Nation.” John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790) [hereinafter Jay’s Apr. 12, 1790 Charge], in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 68, at 29.

81. Hamilton, Brief No. 6, *supra* note 41, at 368 (emphasis in original).

82. *Id.* at 367.

Hamilton declared, “from the relations of Universal society.”⁸³ Moreover, this result was overdetermined; it was the law of the land in New York because it was the law of the United States. “The United States,” he observed, “are the Directors of our Intercourse with foreign nations[,] [a]nd [t]hey have expressly become parties to the law of nations.”⁸⁴ If the United States was party to the law of nations, so too were the states, and if the law of nations was part of (con)federal law, so too was it part of New York law. At the very least, New York and its judges were bound by the Articles of Confederation to give it effect, state law notwithstanding.

On this last point, Hamilton was explicit. “[I]t may be said . . . that the [State] Legislature may alter the laws of Nations.”⁸⁵ However, that was “not true in theory . . . Nor is it constitutional in our government; for Congress have the exclusive direction of our foreign affairs & of all matters relating to the Laws of Nations. No single state has any legal jurisdiction to alter them.”⁸⁶ The states were thus bound to observe the law of nations because it was supreme federal law even under the weak structure of the Confederation (and, notably, with no explicit language of supremacy in the Articles). Hamilton was unwilling to concede even that Congress had power to violate the law of nations, stating more guardedly in the subjunctive, “[i]f such a power does exist in our Government[,] tis in Congress.”⁸⁷

Hamilton’s arguments in *Rutgers* not only persuaded the court, but also led Mayor Duane to devote a large part of his lengthy opinion to considering these points and affirming Hamilton’s position. Duane agreed with Hamilton that the law of nations was binding on the United States (and New York) out of its intrinsic force as the law of civilized nations, although he questioned how far that principle could be carried. In particular, he suggested that although it would apply to the natural law of nations—“no state can by its separate ordinance, prejudice any

83. *Id.*

84. *Id.* at 368.

85. *Id.* at 378. For a similar argument, see also Alexander Hamilton, The Rutgers Briefs, Brief No. 3 [hereinafter Hamilton, Brief No. 3], in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 345, 351–52.

86. Hamilton, Brief No. 6, *supra* note 41, at 378–79; see also Hamilton, Brief No. 3, *supra* note 85, at 351–52. Hamilton added that “a law of a particular state derogating from [the] constitutional authority [of the Confederation] [that is, a law violating the law of nations] is no law,” and, further, that because “[t]he CONFEDERATION [had] vest[ed] no judicial powers in Congress excepting in prize causes—In all other matters The judges of each state must of necessity be judges of the United States—And they must take notice of the law of Congress as a part of the law of the land.” Hamilton, Brief No. 6, *supra* note 41, at 380 (emphasis in original); see also Hamilton, Brief No. 3, *supra* note 85, at 351–52.

Note also that the use of the term “alter,” rather than “violate” or “disregard,” reflects the hesitancy of even those who favored a principle of parliamentary supremacy—and thereby rejected judicial review as incompatible with republican principles—to argue in favor of a power in the legislature to violate the law of nations. Rather, they were suggesting, the legislature was within its rights *under the law of nations* to alter its rules. That is what prompted Hamilton’s reply that the argument was false even “in theory.” Hamilton, Brief No. 6, *supra* note 41, at 378. For further discussion of the notion—held by some but apparently not Hamilton—that nations could “alter” the customary, as opposed to the natural, law of nations, see *infra* notes 91, 214.

87. Hamilton, Brief No. 3, *supra* note 85, at 351.

part of [the natural] law [of nations] . . . because being of moral obligation, it is immutable”⁸⁸—it might not include the merely customary usages of nations because the law of nations, on some accounts, recognized the right of a nation to reject a custom to which it had not previously (tacitly or otherwise) consented.⁸⁹ According to Duane, it was at least doubtful if the same doctrine applied “to all customs, which prevail *by tacit consent* as part of the law of nations.”⁹⁰ These latter are usages that “different states may agree to establish by treaty, or introduce by custom, at their pleasure.”⁹¹

More importantly for present purposes, Duane agreed that “[b]y our excellent constitution, the common law is declared to part of the law of the land; and the *jus gentium* is a branch of the common law.”⁹² In this connection, he further noted that if New York did not recognize the law of nations, “neither ought the benefit of that law to be extended to us: and it would follow that our *commerce* and our *persons*, in foreign parts, would be unprotected by the great sanctions, which it has enjoined.”⁹³

Most importantly, Duane also agreed with Hamilton’s most fundamental point that the Articles of Confederation made the law of nations part of the federal law, or, as he put it, “there appears to us very great force in the observation arising from the fóderal compact.”⁹⁴ He explained: “By this compact these states are bound together as one great independent nation; and with respect to their common and national affairs, exercise a joint sovereignty As a nation they must

88. *Rutgers*, in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 404.

89. It was widely agreed that the law of nations was comprised of a combination of natural law and customary law principles. The natural law principles were rooted in so-called natural reason and were referred to as the necessary law of nations. In contrast, the customary law of nations was based on the consent of states and included both their customary usages, to which they had tacitly consented, and their conventional agreements (that is, their treaties). Another important category was the voluntary law of nations, which was sometimes classified as part of the natural law and sometimes as part of the customary law of nations. See EMMERICH DE Vattel, *THE LAW OF NATIONS* intro., § 7, at 70 (Belá Kapossy & Richard Whatmore eds., 2008) (1757) (discussing the necessary law of nations); *id.*, intro., § 21, at 75–76 (discussing the voluntary law of nations); *id.*, intro., §§ 24–27, at 77–79 (discussing the customary and conventional law of nations).

90. *Rutgers*, in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 404.

91. *Id.* In so reasoning, Duane was relying upon Vattel. For a discussion of this aspect of Vattel’s jurisprudence, with which Hamilton was evidently not in agreement, see William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L. J. ONLINE 169 (2010), <http://yalelawjournal.org/forum/withdrawing-from-customary-international-law-some-lessons-from-history> [https://perma.cc/PPY6-9NDS]. For further discussion of the early understandings of the jurisprudential foundations of the customary law of nations, and of their constitutional implications, see *infra* notes 128–34, 214 and accompanying text. In the quoted passage, Duane was questioning whether under the law of nations itself states were bound by customary rules to which they had not given their (tacit or explicit) consent and, possibly, whether they could withdraw any such consent in their discretion. Unfortunately, “[t]ime w[ould] not permit” the “fuller discussion” of these points that might have clarified his views. *Rutgers*, in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 405. In any case, however, Duane was not questioning whether those rules of the law of nations that were binding—whether because rooted in the natural law or because customary rules to which the nation had given its consent—were incorporated into the municipal law.

92. *Rutgers*, in 1 LAW PRACTICE OF HAMILTON, *supra* note 41, at 402.

93. *Id.*

94. *Id.* at 405.

be governed by one common law of nations.”⁹⁵ The consequence, he concluded, was “that to abrogate or alter any one of the known laws or usages of nations, by the authority of a single state, must be contrary to the very nature of the confederacy, and the evident intention of the articles, by which it is established.”⁹⁶

Even before 1787, then, leading constitutional reformers believed that the law of nations was the law of the land, binding on courts and the state governments (and even possibly Congress). This position was controversial in some quarters, not least among newly empowered state legislators. But even many of them did not argue that they had the power to violate the law of nations. Instead, they maintained that they, as state legislators, possessed the constitutional authority to interpret, and determine how to comply with, the law of nations.⁹⁷ This specter of thirteen guardians of the law of nations, and in particular thirteen interpreters of Confederation treaties, was a leading catalyst for constitutional reform.

2. The Founding Consensus that the Constitution Adopted the Law of Nations as Law of the Land

That emerging Federalist leaders held the view that the law of nations was part of federal law during the Confederation powerfully suggests that when the Founders wrote and adopted the Constitution, they did not intend to leave the states free “to alter,” let alone violate it. Again, however, we need not speculate. Consider Hamilton’s views, which he expressed in 1795 in what was probably his greatest collection of essays, *The Defence*.⁹⁸ Writing as Camillus, he undertook a comprehensive defense of the Jay Treaty against the avalanche of criticism it had provoked among Republicans, led by Thomas Jefferson and James Madison. In the course of his argument, he took up, as he had in *Rutgers*, the question whether the “customary law of Nations as established in Europe bind the UStates,” as well as whether it was part of the municipal law of the United

95. *Id.* Were that not the case, Mayor Duane noted, “[w]hat then must be the effect? What the confusion? if each separate state should arrogate to itself a right of changing at pleasure those laws, which are received as a rule of conduct, by the common consent of the greatest part of the civilized world.” *Id.* at 405–06.

96. *Id.* at 406.

97. *See, e.g.*, An act to repeal so much of all and every act or acts of assembly as prohibits the recovery of British debts, Dec. 12, 1787, reprinted in 12 THE STATUTES AT LARGE: BEING A COLLECTION OF THE LAWS OF VIRGINIA FROM FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 528 (William Waller Hening ed., 1823) (state statute empowering the governor to determine when Great Britain fulfilled its duties under the Treaty of Peace, as a precondition to lifting prohibition on British suitors in Virginian courts); AN ADDRESS FROM THE COMMITTEE AT MRS. VANDERWATER’S ON THE 13TH DAY OF SEPTEMBER, 1784 (1784) (excoriating Duane’s court for deliberately misinterpreting a clear statute).

98. *The Defence* included thirty-eight essays, of which Hamilton authored twenty-eight and contributed to the rest. *See Introductory Note to The Defence No. 1*, in 18 THE PAPERS OF ALEXANDER HAMILTON 475 (Harold C. Syrett, ed., 1973) [hereinafter 18 HAMILTON PAPERS]. They were published between July 22, 1795 and January 9, 1796. *Id.* at 476–77. The essays are included in three different volumes of the Hamilton Papers. *See* 18 HAMILTON PAPERS, *supra*; 19 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett, ed., 1973) [hereinafter 19 HAMILTON PAPERS]; 20 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett, ed., 1974) [hereinafter 20 HAMILTON PAPERS]. For discussion, see Golove & Hulsebosch, *supra* note 2, at 1035–39; Golove, *supra* note 67.

States.⁹⁹ His answer was the same and his explanation closely tracked the argument he had pressed in *Rutgers*.

The United States was bound by the *customary* law of nations, Hamilton noted, because it had been so bound when part of the British Empire and chose not to object when the United States became an independent nation: “[N]ot having dissented from it when they became independent they are to be considered as having continued a party to it.”¹⁰⁰ Furthermore, Hamilton pointed out, the states like New York had accepted the law of nations expressly by adopting the common law of England, which itself “adopts the law of Nations, the positive equally with the natural, as a part of itself.”¹⁰¹ Most critically, after 1776 and during the Confederation, the United States had repeatedly acknowledged its assent to being subject to the law of nations. From the moment of its independence, “we have appealed to and acted upon the modern law of Nations as understood in Europe. Various resolutions of Congress during our revolution—the correspondencies of Executive officers—the decisions of our Courts of Admiralty, all recognised this standard.”¹⁰²

After the adoption of the Constitution, the federal government had continued to acknowledge that it was bound by the law of nations. “Executive and legislative Acts and the proceedings of our Courts under the present government speak a similar language. . . . And the general voice of our Nation, together with the very arguments used against the Treaty accord in the same point.”¹⁰³ The result was not only that the nation was bound by the customary law of nations, but “[t]is indubitable *that the customary law of European Nations is as a part of the common law and by adoption that of the U States.*”¹⁰⁴ Notably, Hamilton’s argument here was focused on the status of the *customary* law of nations. With respect to the natural law of nations, he felt any further argument was simply unnecessary. It was sufficient, he observed, that “the natural or necessary law of nations, [derived] from the eternal principles of morality & good faith” and thus had “a higher source.”¹⁰⁵

The Defence essays were not the first time since adoption of the Constitution that Hamilton had insisted that the law of nations was part of the law of the United States. For example, in his 1793 *Pacificus* essays¹⁰⁶—among his most

99. Alexander Hamilton, *The Defence No. XX* (Oct. 23–24, 1795), reprinted in 19 HAMILTON PAPERS, *supra* note 98, at 329, 341.

100. *Id.* at 341.

101. *Id.*

102. *Id.*

103. *Id.* at 341–42.

104. *Id.* at 342 (emphasis added). Notably, Hamilton cited the adoption of the common law, and hence the law of nations, by the states only for the purpose of establishing—along with the other official acts he listed—that the United States had acceded to the law of nations. It was from this premise that he concluded that the “customary law of European Nations” was, by adoption, part of the law of the “U States.” *Id.*

105. *Id.*

106. Hamilton wrote seven essays as *Pacificus* (and a number of others under different pseudonyms). See 15 THE PAPERS OF ALEXANDER HAMILTON 33–43, 55–63, 65–69, 82–86, 90–95, 100–06, 130–35

well-known essays even today, and certainly his most misunderstood—he repeatedly made this claim. Responding to the constitutional questions that had been raised about President Washington’s famous Proclamation of Neutrality, Hamilton was explicit that the law of nations was part of the law of the land. Thus, for example, he referred to “the laws of the land (of which the law of Nations is a part)”¹⁰⁷ and to “the laws of Nations as well as the Municipal law, which recognises and adopts those laws,”¹⁰⁸ and he declared that “[o]ur Treaties and the laws of Nations form a part of the law of the land.”¹⁰⁹ Indeed, he closed his essay on constitutional issues with the comment that President Washington’s Neutrality Proclamation, in which the President authorized prosecutions of Americans who violated the nation’s duties under the law of nations,¹¹⁰ could have been defended on this “simple” ground: “It only proclaims a *fact* with regard to the *existing state* of the Nation, informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the Infractors of them.”¹¹¹ Thus, those who claimed that the Proclamation “enact[ed] some new law” had taken “a view of it entirely erroneous.”¹¹²

The belief that the law of nations was part of the national law of the land was not idiosyncratic or limited to Hamilton, but was widely held among leading governmental officials in both the Federalist and Republican parties. Madison’s equally celebrated *Helvidius* essays, which were written in reply to Hamilton’s *Pacificus* essays, for example, entirely agreed with the premise that the law of nations was part of the law of the United States.¹¹³ Madison even quoted one of the relevant passages from Hamilton for the purpose of underscoring the importance of this point and indicating his agreement.¹¹⁴ Indeed, as we shall consider

(Harold C. Syrett ed., 1969) [hereinafter 15 HAMILTON PAPERS] (reprinting essays dated June 29, 1793; July 3, 1793; July 6, 1793; July 10, 1793; July 13–17, 1793; July 17, 1793; and July 27, 1793). The first of these addressed constitutional issues, while the others focused on international law and policy issues. See Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 HAMILTON PAPERS, *supra*, at 33, 33–43. For discussion, see Golove & Hulsebosch, *supra* note 2, at 1035–39; see also Golove, *supra* note 67.

107. Hamilton, *Pacificus No. 1*, reprinted in 15 HAMILTON PAPERS, *supra* note 106, at 34.

108. *Id.* at 40.

109. *Id.* at 43.

110. George Washington, Neutrality Proclamation, in 12 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 472–74 (Philander D. Chase et al. eds., 2005).

111. Hamilton, *Pacificus No. 1*, reprinted in 15 HAMILTON PAPERS, *supra* note 106, at 43 (emphasis in original).

112. *Id.*

113. Madison wrote five essays as *Helvidius*, all of which responded to Hamilton’s single constitutional essay as *Pacificus*, *Pacificus No. 1*. See 15 THE PAPERS OF JAMES MADISON 66–73, 80–87, 95–103, 106–10, 113–20 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985) [hereinafter 15 MADISON PAPERS] (reprinting essays dated Aug. 24, 1793; Aug. 31, 1793; Sept. 7, 1793; Sept. 14, 1793; and Sept. 18, 1793). For discussion, see Golove & Hulsebosch, *supra* note 2, at 1035–39; Golove, *supra* note 67.

114. Madison quoted Hamilton’s assertion that “[t]he executive is charged with the execution of all laws, the laws of nations as well as the municipal law which recognises and adopts those laws.” James Madison, “*Helvidius*” Number 2 (Aug. 31, 1793), reprinted in 15 MADISON PAPERS, *supra* note 113, at

shortly, the recognition that the law of nations is part of the law of the United States was the core principle upon which Madison built his elaborate reply to Hamilton.

In this respect, moreover, Madison was fully in sync with his mentor Thomas Jefferson, who was, of course, Hamilton's great antagonist. As Jefferson was locked in battle with his nemesis over the Washington Administration's neutrality policy, Madison, at Jefferson's urging, was drafting his *Helvidius* essays.¹¹⁵ For present purposes, what is most striking is that for all their disagreements, Jefferson and Hamilton both agreed that the Constitution had adopted the law of nations and made it part of the laws of the United States. Indeed, this understanding was central to the Washington Administration's approach to dealing with the crisis provoked by Citizen Genet's actions in the spring of 1793. Jefferson's concurrence was manifest in his energetic support for the Administration's policies and his efforts to implement them, which were premised on the understanding that the law of nations was part of the national law.¹¹⁶ He said so repeatedly. Jefferson's declaration to Genet that "the law of nations makes an integral part" of "the laws of the land"¹¹⁷ was only a particularly explicit example, as was his observation to his ally in the Cabinet, Attorney General Edmund Randolph, that "[t]he Judges having notice of the proclamation, will perceive that the occurrence of a foreign war has brought into activity the laws of neutrality [that is, the law of nations], as a part of the law of the land."¹¹⁸ Nor was Jefferson informing Randolph of a point about which the latter needed instruction. Even before the Neutrality Crisis had begun, Randolph had written in an official opinion to Jefferson on an unrelated matter that "[t]he law of nations . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference."¹¹⁹

Finally, although some scholars, including Professors Bellia and Clark,¹²⁰ have sought to downplay its significance, it is a yet another striking fact that most of

86 (emphasis in original). Even as he proceeded to pick apart virtually every phrase in Hamilton's argument, he expressly noted that this "sentence is a truth." *Id.*

115. See Madison's "*Helvidius*" Essays, 24 August–18 September 1793, in 15 MADISON PAPERS, *supra* note 113, at 64–66.

116. For further discussion of the Neutrality Crisis of 1793, see Golove & Hulsebosch, *supra* note 2, at 1019–39.

117. Letter from Thomas Jefferson to Edmond Charles Genet (June 5, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 195, 196 (John Catanzariti et al. eds., 1995) [hereinafter 26 JEFFERSON PAPERS].

118. Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON 691, 692 (John Catanzariti et al. eds., 1992) [hereinafter 25 JEFFERSON PAPERS]; see also Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 JEFFERSON PAPERS, *supra* note 117, at 649–50 (making the same point implicitly in describing support for Washington's Neutrality Proclamation and neutrality prosecutions).

119. Letter from Edmund Randolph to Thomas Jefferson (June 26, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 127 (John Catanzariti et al. eds., 1990) [hereinafter 24 JEFFERSON PAPERS]. Attorney General Randolph added that the law of nations was part of the law of the land "tho' not specially adapted by the constitution, or any municipal act." *Id.* His point was not to deny that the law of nations was adopted by the Constitution, but that it was not done so "specially," by which he meant explicitly. The Constitution had instead implicitly made it part of the constitutional order. *Id.*

120. See BELLIA & CLARK, *supra* note 4, at 156–62.

the early Supreme Court Justices explicitly affirmed this view as well. Thus, for example, in widely published grand jury charges, Chief Justice Jay repeatedly declared that the law of nations was part of the law of the United States. As early as 1790, for example, he exhorted the jury: “You will recollect that the Laws of Nations make Part of the Laws of this, and of every other civilized Nation.”¹²¹ In explanation, he noted that by achieving independence, the United States had become subject to the law of nations, and it was therefore critical that the law of nations be incorporated into the national law: “We had become a Nation—as such we were responsible to others for the observance of the Laws of Nations; and as our national Concerns were to be regulated by national Laws[,] national Tribunals became necessary for the Interpretation & Execution of them both.”¹²²

In a subsequent charge, the Chief Justice was even more explicit. According to Jay, “the Laws of the united States admit of being classed under three Heads or Descriptions—1st. all Treaties made under the authority of the united States. 2dly. The Laws of Nations—3dly. The Constitution, and Statutes of the united States.”¹²³ Having become an independent nation, he added, “all those Duties as well as Rights, which spring from the Relation of Nation to Nation, have divolved upon us.”¹²⁴ He then exhorted the jury on the need “to be particularly exact & circumspect in observing the obligation of Treaties, and the Laws of Nations, which as has been already remarked, form a very important part of the Laws of our nation.”¹²⁵ Jay’s intention in this charge was clear: to make explicit that the Constitution had incorporated the law of nations into federal law. Nor was he alone in underscoring the importance of this understanding. When given the opportunity, the other Justices followed suit.¹²⁶

121. Jay’s Apr. 12, 1790 Charge, *supra* note 80, at 29.

122. *Id.* at 27.

123. Jay’s May 22, 1793 Charge, *supra* note 68, at 381; *see also* *Henfield’s Case*, 11 F. Cas. 1099, 1099–1102 (C.C.D. Pa. 1793) (No. 6360) (reprinting Jay’s May 22, 1793 Charge).

124. Jay’s May 22, 1793 Charge, *supra* note 68, at 382; *see also* *Henfield’s Case*, 11 F. Cas. at 1102.

125. Jay’s May 22, 1793 Charge, *supra* note 68, at 382; *see also* *Henfield’s Case*, 11 F. Cas. at 1102.

126. For discussion, *see* Golove & Hulsebosch, *supra* note 2, at 1032 n.369 (tracing the views of Justices Wilson and Iredell). According to Professors Bellia and Clark, the views of Chief Justice Jay and his colleagues on the Supreme Court reflected “early confusion” about this subject, *see* BELLIA & CLARK, *supra* note 4, at 159, which was clarified by the later dispute over the so-called federal common law and then swept away by the Supreme Court’s decision in 1812 in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). *See* BELLIA & CLARK, *supra* note 4, at 160–61. Although we cannot evaluate these claims here, it is sufficient merely to underscore that, as our discussion makes clear, “confusion” had nothing to do with the matter, and neither the federal common law debate nor *Hudson & Goodwin* addressed the status of the law of nations as law of the land or purported to resolve that issue.

Moreover, it was not only the Justices who held this view. Grand juries listened attentively to the Justices’ charges. In the summer of 1793, for example, a Philadelphia grand jury delivered presentments against about a dozen parties—citizens, business partnerships, and aliens—for violating the nation’s neutrality. Those indictments were spread between those accused of aiding France and those aiding Britain. The presentments from July 1793 are located in the Criminal Records Case Files, 1791–1970, U.S. District Court, Eastern District of Pennsylvania, National Archives and Regional Administration, Philadelphia, PA. Although the federal District Attorney for Pennsylvania chose to prosecute fully only one of these cases—the famous *Henfield’s Case*—it was apparently believed, by grand jurors in the

It should also be noticed that the idea that the Constitution incorporated the law of nations into the municipal law, as well as the distinctive formulation that was so widely employed by leading American authorities—that the law of nations “was part of the law of the land”—were not American inventions but were borrowed directly from English jurists. Thus, in the 1764 case of *Triquet v. Bath*, Lord Mansfield, Chief Justice of King’s Bench, had proclaimed “[t]hat the law of nations, in its full extent was part of the law of England.”¹²⁷ Sir William Blackstone, who had been counsel in *Triquet* and argued in favor of applying the law of nations in that case, elaborated on this point only a few years later in his *Commentaries on the Laws of England*.¹²⁸ Explaining why English law had incorporated the law of nations into the municipal law, Blackstone observed:

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes . . . and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. . . . [T]he rules of this law . . . mu[st] necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.¹²⁹

It was thus the character of the law of nations as based in natural reason and the agreement of nations, as well as its importance in the maintenance of peace and the enforcement of international justice, which provided the basis for the English incorporation doctrine. It was for these reasons, Blackstone concluded, that “the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.”¹³⁰ Indeed, according to Blackstone, were any “other rule of decision but this great universal law” to be applied in such cases, the nation “must cease to be a part of the civilized world.”¹³¹

This historical context confirms what in any case should already be evident. American statesmen self-consciously invoked the language of Lord Mansfield and Blackstone and cited them as authorities not out of mere deference, but rather because they embraced the same principles that had animated English

nation’s capital, that violating American neutrality, as pledged in treaties and under the customary law of nations, was a crime that could be prosecuted in the federal courts.

127. *Triquet v. Bath* (1764) 97 Eng. Rep. 936, 938 (KB) (applying the law of diplomatic immunity under law of nations and declaring the law of nations to be part of law of England).

128. See 4 BLACKSTONE, *supra* note 77, at *66–68 (internal footnotes omitted). For Blackstone’s participation in *Triquet*, see *Triquet* (1764) 97 Eng. Rep. at 938.

129. 4 BLACKSTONE, *supra* note 77, at *66–67.

130. *Id.* at *67.

131. *Id.*

jurisprudence.¹³² As it had been for Mansfield and Blackstone, so it was for the American Founders the character and importance of the law of nations—which Hamilton, borrowing this time from Vattel, called the law of “Universal society”¹³³—that explains why they too incorporated the law of nations into the law of the United States. That they said so explicitly on so many occasions is therefore no surprise.¹³⁴ Nor is this in any way to deny that it was the failure of

132. See, e.g., Hamilton, Brief No. 2, *supra* note 58, at 340.

133. Hamilton, Brief No. 6, *supra* note 41, at 367. For Vattel’s use of the phrase, see EMMERICH DE VATTEL, *THE LAW OF NATIONS*, intro., § 28, at 79 (Belá Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758); see also, e.g., *id.*, bk. II, § 12, at 267.

134. In affirming the incorporation doctrine, American lawyers and judges sometimes emphasized Blackstone’s dictum that the law of nations was “part of the law of the land” and, at other times, that the law of nations had been adopted by and incorporated into the common law. See *supra* notes 128–31 and accompanying text. For early Americans, at least in the period before and after the Founding, the choice between these two formulations was often made haphazardly, reflecting the sense that they were essentially interchangeable. In contrast, in the English context, the assertion that the common law had adopted the law of nations had important practical implications. The complex English legal order was divided more horizontally than vertically, with different court systems having, at least notionally, different jurisdictional parameters and using different rules of decision. Each court therefore had to justify its jurisdiction over a given cause in terms of its own body of law. See, e.g., William E. Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, in 62 *LAW IN COLONIAL MASSACHUSETTS 1630–1800*, at 419 (Daniel R. Coquillette et al. eds., 1984).

It had long been understood, for example, that the rules of decision in the English admiralty courts were supplied by the law of nations, and the admiralty bar, dubbed for this reason “civilians,” were thoroughly conversant with the subject. Notwithstanding Lord Mansfield’s claim to the contrary, however, the same had not been the case in the common law courts. For those courts to assert, as Lord Mansfield did, that the law of nations was part of the common law therefore served critical jurisdictional purposes. In *Triquet* and other similar cases, Mansfield was not only affirming the necessity of resolving legal controversies in accordance with the law of nations, when applicable—a point that had long been recognized and was largely carried out by other courts and the Privy Council—but was also insisting on a new jurisdiction that the common law courts had not previously exercised. For relevant discussion, see generally PHILIP C. JESSUP & FRANCIS DEÁK, 1 *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW: THE ORIGINS* (1935); Edwin D. Dickinson, *The Law of Nations as Part of the Law of the United States*, 101 U. PA. L. REV. 26, 26–34 (1952).

For American lawyers, these procedural issues, and the historical wrangling among the English court systems that they reflected, were beside the point. Consequently, they could be, and largely were, ignored. In this respect, when they invoked Blackstone’s trope about the common law adopting the law of nations, American lawyers were engaged in legal mimesis. The invocation of the common law would not have implied a diminution of the status of the law of nations in comparison with other bodies of law. For more than a generation, in serial contests against British imperial regulation, American lawyers and political actors had proclaimed the fundamentality of the common law, raising that law—though actually only parts of it—to quasi-constitutional status. Along with the more concrete connotations of the common law—an institutional network of courts, rules of that court system, and remedies for resolving disputes—the term also functioned for the revolutionary generation as a billowy umbrella to cover all kinds of legal claims, rights, and duties. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 28–32 (2005). It was in that sense that lawyers in the early republic referred to the “common law” when stating that the law of nations was part of the common law.

Nevertheless, the conceptual imprecision created by associating international law with the common law would soon reveal a potential for creating theoretical confusion, especially when the status of the common law became the subject of intense partisan dispute in the late 1790s, in the debates over the federal common law. On the federal common law controversy, see generally Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231 (1985). Indeed, Peter Du Ponceau, a leading

the states during the Confederation to comply with the law of nations and the diplomatic consequences that ensued, which brought the whole problem to the fore and lent it such a powerful sense of urgency.¹³⁵ Of course, constitutional reformers acted not only out of high principle and a sense of wounded honor, but also out of the imperatives of self-preservation and the aspiration to realize the benefits that recognition as an equal member of the European community of nations would, they hoped and expected, make possible.

C. THE LAW OF NATIONS AS LAW OF THE LAND: IMPLICATIONS IN THE EARLY REPUBLIC

The fact that American constitution-makers understood that the law of nations was incorporated into the law of the United States had a number of important constitutional implications that were well understood and broadly agreed upon in the early Republic. The most obvious applied to the role of the states, but perhaps

American lawyer who played a central role in the early cases applying the law of nations, underscored the problem in his 1824 lecture on the common law powers of the federal courts. See PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 3 n.* (Phila., Abraham Small 1824). Criticizing Justice Wilson for having maintained in one of the early neutrality prosecutions in 1793 that the law of nations was part of the common law, see *Henfield's Case*, 11 F. Cas. 1099, 1105, 1107–09 (C.C.D. Pa. 1793) (No. 6360), he observed that Wilson, by “placing the law of nations on the same footing with the municipal or local *common law*, and deriving its authority in a manner exclusively from the latter,” had “consider[ed] the subject in its narrowest point of view.” DU PONCEAU, *supra*, at 4 n.*. In fact, as Du Ponceau explained,

the *common law*, considered as a municipal system had nothing to do with this case. The law of nations, being the common law of the civilised world, may be said, indeed, to be a part of the law of every civilised nation; but it stands on other and higher grounds than municipal customs, statutes, edicts or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization . . . Every branch of the national administration, each within its district and its particular jurisdiction is bound to administer it. . . . It . . . acts every where *proprio vigore*, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental principles. Whether there is or not a national common law in other respects, this *universal common law* can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.

DU PONCEAU, *supra*, at 3 n.* (emphasis in original). It is likely that Justice Wilson would have accepted the criticism. Indeed, it is well-nigh impossible to avoid this conclusion after reading the rest of his enthusiastic discussion of the law of nations and its status as natural law, which “announce[s] to a free people how solemn their duties are!” *Henfield's Case*, 11 F. Cas. at 1107. For discussion of Wilson’s opinion in *Henfield*, see *supra* notes 72–74, 126 and accompanying text. For Wilson’s scholarly writings on the subject, see James Wilson, *Lectures on Law*, reprinted in 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 145–56, 376–81 (Bird Wilson ed., Phila., Lorenzo Press 1804). Nevertheless, Du Ponceau was prescient in anticipating how over the course of time the Blackstonian trope about the common law adopting the law of nations would begin to erode its status as supreme law of the land. Unfortunately, we cannot pursue this subject further here but plan to do so in another article.

135. It is again noteworthy that the problem in the states was not that they and their politicians claimed that the law of nations was not the law of their lands. Rather, it was that they also believed that each state possessed the power to decide how to comply with it and, in particular, how to retaliate against Great Britain’s real and perceived violations of the law of nations and the Treaty of Peace. For an example, see An act to repeal, *supra* note 97 (state legislature claiming power to retaliate for perceived British violations of Treaty of Peace).

even more important were its implications for presidential power. We consider both below. We also briefly take up the question of the relationship between the law of nations and Congress's powers. Although this last question is different in important respects, it is at the same time clearly related to the cognate questions of state and presidential power, and, in any case, the historical evidence related to the question of Congress's powers can only be fully understood when viewed in the context of the history we have been exploring. Professors Bellia and Clark, moreover, make the assertion that Congress was not bound to observe the law of nations a central plank in their theory and repeat it throughout their book. A tentative reply is therefore in order.

1. The Status of the Law of Nations as Law of the Land Meant that the States Were Obligated to Observe It

The question of whether the states are free to disregard the law of nations is hotly disputed today. As an original matter, the Constitution's adoption of the law of nations as part of the law of the United States straightforwardly disposed of the issue. Because the law of nations qualified as federal law, it was necessarily supreme over the law of the states. The consequence was that the states had no authority to disregard it. To be sure, that result was overdetermined because it may also be, as Professors Bellia and Clark suggest, an implication of the Constitution's broad and exclusive grants of foreign affairs powers to the federal government.¹³⁶ As Madison declared in *Federalist* 42, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."¹³⁷ Had the authority to violate the rights of other nations been left in the hands of the states, Madison would hardly have been confident that the Framers had achieved this fundamental aim. Nor, in view of their experience during the Articles of Confederation, would the Founders have imagined that the United States collectively, let alone the states individually, would ever have achieved full recognition as an equal member of the community of civilized nations.¹³⁸

2. The President Was Likewise Obligated to Observe the Law of Nations in Carrying Out the Duty to Execute the Laws

Whether in carrying out his duty faithfully to execute the laws, the President is bound to observe customary international law has been equally controversial in modern constitutional law.¹³⁹ On this critical issue, Professors Bellia and Clark maintain that, as an original matter, the President was under no such duty.¹⁴⁰

136. We underscore, however, that the allocation of powers is an equivocal basis for this practice. See *supra* note 38 and accompanying text.

137. THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961).

138. For discussion, see Golove & Hulsebosch, *supra* note 42.

139. See U.S. CONST. art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed").

140. Although Professors Bellia and Clark reject the claim that the President is bound faithfully to execute the law of nations, they are more coy about whether, under their approach, the President might, at least in some circumstances, be bound to comply on some other basis. In their view, the President has no general duty to execute the law of nations because the law of nations is not federal law; however, that does

Even on a conceptual level, however, their position would only make sense were it true that the Constitution did not adopt the law of nations as part of the law of the United States. That it did again largely resolves the issue. As Madison put it, “[a]ll [of the President’s] acts therefore, properly executive, must pre-suppose the existence of the laws to be executed.”¹⁴¹ The incorporation of the law of nations into the municipal law of the United States greatly empowered the executive to act in foreign affairs by expanding the body of laws—in this case, non-statutory laws—that authorized him to act in the international realm and that he was charged with the duty (or power) to execute. At the same time, however, because the law of nations was the law of the land, the President’s power to execute its rules and principles also required that he observe its limits. In this respect, the law of nations was no different than any other species of federal law. There were simply no U.S. laws that the President was free to disregard or violate, by “controlling executive [] act” or otherwise.¹⁴²

That the President was bound to observe the law of nations was, once again, the view of many lawyers, judges, and politicians, and it was strongly affirmed by both Hamilton and Madison in the *Pacificus/Helvidius* debate. Hamilton straightforwardly said so:

The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws. It is

not preclude the possibility that, like the courts and states, the President might be required to comply with the law of nations under their allocation of powers rationale. *See, e.g.,* BELLIA & CLARK, *supra* note 4, at 232–33 (explaining—albeit, counterfactually—that “[i]n early cases, when courts constrained executive action that violated the law of nations, they did so on the ground that it was the prerogative of Congress, not the executive, to determine whether the United States would violate the rights of a recognized foreign nation under the law of state-state relations. In other words, it was the Constitution’s allocation of powers to Congress, not the law of state-state relations itself, that constrained executive action in these cases.”).

On this critical point, they do not offer a clear judgment, but they suggest throughout at least sympathy for a negative answer. Their recognition power theory, moreover, seems to imply that result: If the President has the recognition power, as the Supreme Court recently held in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015)—and presidents have exercised the recognition power many times throughout U.S. history—then it is difficult to understand why the allocation of the recognition power to the President would render him bound to observe the law of nations in relation to nations he has recognized. In this connection, however, note the possibility that other foreign affairs powers are lodged exclusively in Congress—for example, the power to declare war—and possibly support, on Professors Bellia and Clark’s approach, a separation of powers duty in the President to comply with the law of nations. They address, but ultimately punt, on this issue as well. *See, e.g.,* BELLIA & CLARK, *supra* note 4, at 232–43.

141. James Madison, *Helvidius Number I* (Aug. 24, 1793), in 15 MADISON PAPERS, *supra* note 113, at 69.

142. *The Paquete Habana*, 175 U.S. 677, 700 (1900). Although based on a misreading of *The Paquete Habana*, modern constitutional doctrine affirms a power in the executive to disregard customary international law by something called a “controlling executive act,” a phrase drawn from that decision. Professors Bellia and Clark discuss this aspect of the decision and appear to believe that the now conventional interpretation is faithful to the Court’s language. Nevertheless, they do not quite express agreement with it. *See* BELLIA & CLARK, *supra* note 4, at 240–41. On the pertinent early history, see generally Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373 (2012). We cannot address the meaning of the critical passage from *The Paquete Habana*, which was decided more than a century after the Founding, here.

consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war to foreign Powers.¹⁴³

Hamilton made this point repeatedly, concluding his essay by arguing that the President's Neutrality Proclamation could be defended on the sole basis of "[t]hat clause of the constitution which makes it [the President's] duty to 'take care that the laws be faithfully executed.'"¹⁴⁴ Why? Because "[t]he President is the constitutional EXECUTOR of the laws," and "[o]ur Treaties and the laws of Nations form a part of the law of the land."¹⁴⁵ He did not mention the recognition power in this connection.

Furthermore, despite the intense debate and fundamental disagreements on the constitutional questions it reflected, Madison agreed with Hamilton on this critical point. Indeed, the understanding that the President's duty faithfully to execute the laws required him to observe and enforce the law of nations was an essential premise of his elaborate reply to Hamilton. To Hamilton's single constitutional essay as *Pacificus*, Madison, as *Helvidius*, offered five in rebuttal, minutely scrutinizing Hamilton's arguments. Yet, on this key point, Madison repeated verbatim Hamilton's claim that "[t]he executive is charged with the execution of all [the] laws" only to agree with it, while still quibbling, rather unfairly, with Hamilton's following sentence, which Madison interpreted as asserting that the President was charged with faithfully executing the law of nations *only* "to avoid giving [a] cause of war to foreign powers."¹⁴⁶ For Madison, the reasons why the President was bound to comply with the law of nations were broader and deeper than that.¹⁴⁷

Taking advantage of the purported ambiguity in Hamilton's formulation, Madison corrected Hamilton, insisting on the correct reason why the President was bound to observe the law of nations: "That the executive is bound faithfully to execute the laws of neutrality [that is, until Congress declares war] . . . is true," Madison observed, "but not for the reason here given, to wit, to avoid giving cause of war to foreign powers."¹⁴⁸ Rather, the President "is bound to the faithful execution of these as of all other laws internal and external, by the nature of its trust and the sanction of its oath."¹⁴⁹ To drive the point home, Madison noted what was emphatically the case in 1793 at the outbreak of the French Revolutionary Wars and a result of Citizen Genet's ongoing activities in the United States—that the President's faithful execution of the laws may well provoke war rather than avoid it.¹⁵⁰ No matter. Either way, the President's duty was the same: The President was

143. Hamilton, *Pacificus No. I*, in 15 HAMILTON PAPERS, *supra* note 106, at 40.

144. *Id.* at 43.

145. *Id.*

146. Madison, *Helvidius Number II* (Aug. 31, 1793), in 15 MADISON PAPERS, *supra* note 113, at 86 (quoting Hamilton, *Pacificus No. I*, in 15 HAMILTON PAPERS, *supra* note 106, at 40).

147. A survey of Hamilton's opinions across his career would show that the two actually agreed on this point.

148. Madison, *Helvidius Number II* (Aug. 31, 1793), in 15 MADISON PAPERS, *supra* note 113, at 86.

149. *Id.*

150. For discussion of the Neutrality Crisis, see Golove & Hulsebosch, *supra* note 2, at 1019–39.

bound to execute the law of nations “even if turbulent citizens should consider its so doing as a cause of war at home, or unfriendly nations should consider its so doing, as a cause of war abroad.”¹⁵¹ Why? Because “[t]he duty of the executive to preserve external peace, can no more suspend the force of external laws, than its duty to preserve internal peace can suspend the force of municipal laws.”¹⁵² In other words, because the law of nations was incorporated into federal law, the President was bound to execute it, and his duty in this respect rendered it irrelevant whether the likely consequence would be war rather than the preservation of peace.¹⁵³

It is clear that Hamilton and Madison did not rest their arguments on the Constitution’s allocation of the recognition power to the political branches. It is not just that neither in any way alluded to the recognition power in explaining the status of the law of nations within the American constitutional order. More importantly, they both emphatically placed that status on the Constitution’s incorporation of the law of nations into the municipal law, and the President’s corresponding obligation to enforce and comply with it on his duty faithfully to execute the laws—precisely the theory that Professors Bellia and Clark reject. In fact, Madison went a step further and made clear that rather than being the source for the application of the law of nations by the courts, *the recognition power was itself governed by the law of nations*.¹⁵⁴

Thus, in *Pacificus*, Hamilton had argued that a presidential refusal to recognize a new minister from a nation undergoing a change in government would effectively suspend the operation of treaties between that country (implicitly, France) and the United States—or at least, as he presciently qualified his doctrine, in regard to public rights.¹⁵⁵ Madison interpreted Hamilton as claiming a broad discretionary authority in the President to refuse to recognize a new government.

151. Madison, *Helvidius Number II* (Aug. 31, 1793), in 15 MADISON PAPERS, *supra* note 113, at 86.

152. *Id.*

153. Madison added: “It is certain that a faithful execution of the laws of neutrality may tend as much in some cases, to incur war from one quarter, as in others to avoid war from other quarters.” *Id.* To be sure, the Constitution’s incorporation of the law of nations into the municipal law helped enforce the separation of powers by ensuring that the executive avoided, as far as possible, making discretionary decisions that could lead to war. It did so, however, by imposing a duty on the executive to uphold the law of nations as part of the law of the land, irrespective of whether in any particular circumstance doing so would better preserve Congress’s prerogative to decide upon war or peace. The executive was simply bound to follow the law of the land; beyond fulfilling that obligation, it

ha[d] no other discretion than to convene and give information to the legislature on occasions that may demand it; and whilst this discretion is duly exercised the trust of the executive is satisfied, and that department is not responsible for the consequences. It could not be made responsible for them without vesting it with the legislative as well as with the executive trust.

Id.

154. See *infra* notes 156–62.

155. The right to receive ambassadors, Hamilton argued,

includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to (be) recognised or not: And where a treaty antecedently exists between the UStates and such nation that right involves the power of giving operation or not to such treaty. For until the new

Here, too, Madison insisted on a questionable interpretation of Hamilton's actual language, but he did so to give himself an opportunity to make some important points. Hamilton was wrong that the President had any discretionary power to deny recognition. Rather, under the law of nations, recognition was mandatory for any regime that was able to achieve *de facto* control over its territory.¹⁵⁶ According to Madison, the law of nations only permitted a nation to consider two questions in deciding whether to receive a new Minister and thereby recognize a new state or government. First, was the Minister sent by the *de facto* regime in power? And, second, were his diplomatic credentials in proper order?¹⁵⁷ Determining the answers to these questions was an executive responsibility; "but," Madison explained, "they involve no cognizance of the question, whether those exercising the government have the right along with the possession."¹⁵⁸ Rather, by the law of nations, the question whether an existing regime was in the rightful possession of its powers "belongs to the nation, and to the nation alone, on whom the government operates."¹⁵⁹ Indeed, not only was this a doctrine of the law of nations, but,

[i]f there be a principle that ought not to be questioned within the United States, it is, that every nation has a right to abolish an old government and establish a new one. This principle is not only recorded in every public archive, written in every American heart, and sealed with the blood of a host of American martyrs; but is the only lawful tenure by which the United States hold their existence as a nation.¹⁶⁰

Hamilton was also wrong, Madison continued, about the legal effect of a refusal to recognize. It did not, as Professors Bellia and Clark insist, mean that the United States would not be obligated to respect that nation's rights under the law of nations. Here, too, the law of nations controlled the effect in municipal law of a decision not to recognize a new regime. Thus, Madison observed, Hamilton had been prudent in avoiding the claim that even private rights under existing treaties would be suspended. Why? Because under the law of treaties—which was a part of the law of nations and provided rules for the interpretation of treaties—private rights guaranteed by a treaty would continue in force even in case of non-

Government is *acknowledged*, the treaties between the nations, as far at least as regards *public* rights, are of course suspended.

Hamilton, *Pacificus No. I*, in 15 HAMILTON PAPERS, *supra* note 106, at 41.

156. Madison, *Helvidius Number III* (Sept. 7, 1793), in 15 MADISON PAPERS, *supra* note 113, at 96–98.

157. *Id.* at 97. Thus, according to Madison: "When a foreign Minister presents himself, two questions immediately arise: Are his credentials from the existing and acting government of his country? Are they properly authenticated?" *Id.*

158. *Id.*

159. *Id.* As a result, Madison noted, "where the fact appears to be, that the Government does exist, the executive must be governed by the fact, and can have no right or discretion, on account of the date or form of the Government, to refuse to acknowledge it, either by rejecting its public minister, or by any other step taken on that account." *Id.* at 101.

160. *Id.* at 98.

recognition.¹⁶¹ More importantly, it was not true that under the law of treaties all public rights provisions of a treaty would be suspended. Whether they were suspended depended instead on whether the agency of the nation's government was necessary to carry them out, which would be the case in some instances but not in others. "It is not true," Madison declared that:

[A]ll public rights are of course suspended by a refusal to acknowledge the government, or even by a suspension of the government. . . . Public rights are of two sorts; those which require the agency of government; those which may be carried into effect without that agency. As public rights are the rights of the nation, not of the government, it is clear that wherever they can be made good to the nation, without the office of government, they are not suspended by the want of an acknowledged government, or even by the want of an existing government¹⁶²

Consider two implications of Madison's argument for Professors Bellia and Clark's account. First, it demonstrates how their theory understands the historical significance of the recognition power precisely in reverse. It was not the allocation of the recognition power to the federal government that explains the application of the law of nations in U.S. law. On the contrary, the recognition power, like other of the foreign affairs powers granted to the federal government, was itself subject to, and defined by, the law of nations. In exercising the recognition power, the President was thus bound to observe the applicable law of nations principles governing recognition, and the legal effects of a decision not to recognize—as, for example, with respect to existing treaty rights—were likewise determined by the law of nations, which was the law of the land.¹⁶³

161. *Id.* at 98–100 (observing that it was “evident that *private rights*, whether of judiciary or executive cognizance, may be carried into effect without the agency of the foreign government; and therefore would not be suspended of course by a rejection of that agency”). Nor would the judiciary follow the executive in declining to enforce private rights:

[T]he judiciary, being an independent department, and acting under an oath to pursue the law of treaties as the supreme law of the land, might not readily follow the executive example, and a *right* in *one expositor* of treaties, to consider them as *not in force*, whilst it would be the *duty* of *another expositor* to consider them as *in force*, would be a phenomenon not so easy to be explained.

Id. at 100. Note that Madison's invocation of “the law of treaties” is a reference not to the treaty itself but to the law of nations principles governing the interpretation and application of treaties. Thus, the law of nations, like treaties themselves, was “the supreme law of the land.”

162. *Id.* at 100.

163. Nevertheless, in an opinion by Chief Justice Marshall, the Supreme Court in *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808), ruled that the validity of a presidential decision to withhold recognition from an aspiring new state—in that case, Santo Domingo (that is, Haiti)—was non-justiciable. *See* 8 U.S. (4 Cranch) at 272 (holding that “the doctrines of *Vattel*” on recognition of states were “obviously addressed to sovereigns, not to *courts*”). That result was not entirely uncontroversial. *See* *Consul of Spain v. The Conception*, 6 F. Cas. 359, 359–60 (C.C.D.S.C. 1819) (No. 3137) (Johnson, J.) (expressing skepticism about the view “that this court cannot recognize the independence of a revolted colony, until that recognition shall have proceeded from our own government or the parent state” and noting that “[t]here was a time when this country negotiated and fought to maintain a different doctrine”), *rev'd on other grounds*, 19 U.S. (6 Wheat.) 235 (1821). In any case, a ruling that a court does not have

Second, and relatedly, at the time of the Founding, the law of nations did not accord nations unlimited discretion in deciding whether to extend recognition. In making this point, Madison offered an early public defense of the position advanced by Jefferson, as Secretary of State, which would remain the position of the United States on recognition under the law of nations into the distant future: A *de facto* regime was entitled to recognition and respect for its international rights by virtue of being an existing, functioning government and therefore presumptively the choice of its people.¹⁶⁴ Nor had this theory originated with Jefferson. It had been critically important to the United States, not least because, during the American Revolution, it was the position that the revolutionaries advanced as the basis for their claim to recognition.¹⁶⁵ It was maintained as early as July 4, 1776, in the Declaration of Independence's confident assertion, prior to recognition by any other state,

[t]hat these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES . . . and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.¹⁶⁶

It was also a position that the revolutionaries urged repeatedly in their early European diplomacy as they sought recognition, first from France and then more broadly.¹⁶⁷ And, finally, it was a claim that they had pressed vigorously as they demanded British recognition of their rights under the laws of war, complaining bitterly when the latter persisted in refusing to do so and instead continued to treat

jurisdiction to review the lawfulness of an act of recognition is not an affirmation that the political branches are constitutionally empowered to take any action they please without regard to applicable legal limits.

164. For a classic treatment of the issue in U.S. history, see JULIUS GOEBEL, JR., 1 *THE RECOGNITION POLICY OF THE UNITED STATES* 71–115 (1915). Notably, in the *Pacificus/Helvidius* debate, Madison was addressing the recognition of a new government—the revolutionary regime in France after the French Revolution—not the recognition of a new state. Both types of recognition fall within the recognition power of the federal government, though they have different implications for international law purposes. Refusal to recognize a new political entity as a state is effectively a determination that the entity does not qualify as a sovereign and thus is incapable of claiming the rights of sovereigns as recognized under international law. Nevertheless, although the distinction between recognition of governments and of states is of importance for some purposes, both types were governed by similar principles, at least according to the American interpretation of the law of nations in the Founding era. The distinction between the two, in fact, only began to emerge with any clarity in the early nineteenth century, and the *de facto* regime theory that Jefferson developed was applied to both. *See id.* at 116. *See generally* C.H. Alexandrowicz, *The Theory of Recognition* In Fieri, 34 *BRIT. Y.B. INT'L L.* 176 (1958) (analyzing the historical contests between the constitutive and *de facto* theories of recognition). The issue in the *Pacificus/Helvidius* debate was over recognition of a new government; in contrast, the issue in the American Revolution, discussed in the text below, was about recognition of the United States as a new state. The recognition of states issue emerged repeatedly in the early nineteenth century, first, after the Haitian Revolution and then again with the independence movements in South America during the breakup of the Spanish Empire.

165. *See* GOEBEL, *supra* note 164, at 89–102. *See generally* Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 *SUFFOLK U. L. REV.* 759 (2014).

166. *THE DECLARATION OF INDEPENDENCE* para. 32 (U.S. 1776).

167. *See* GOEBEL, *supra* note 164, at 89–102.

them as rebellious subjects.¹⁶⁸ In the midst of the French Revolution, it remained the dominant theory of recognition among Americans of all political stripes.¹⁶⁹ In American legal theory, at least, recognition was made rather than bestowed: it was a right that functioning nations created, or earned, for themselves and did not depend on affirmative acts by other nations.¹⁷⁰

168. See Hulsebosch, *supra* note 165, at 773–74 (analyzing Britain’s continued classification of the Revolution as an internal rebellion, not a war).

169. Chief Justice John Jay’s draft Neutrality Proclamation, for example, asserted:

Whereas every nation has a right to change and modify their constitution and Govt., in such manner as they may think most c(onducive) to their welfare and Happiness. And Whereas they who they who a(ctually) administer the governmt. of any nation, are by foreign nations (to) be regarded as its *lawful Rulers*, so long as they continue to b(e) recognized and obeyed *as such*. by the great Body of their (people.)←

John Jay, By George Washington President of the U.S. of Am(eric)a a Proclamation, in Letter from John Jay to Alexander Hamilton, April 11, 1793, in 14 THE PAPERS OF ALEXANDER HAMILTON 308–10 (Harold C. Syrett, ed. 1969).

170. It may be helpful to state precisely the different way the power to recognize new states fits into our two approaches. Critically, our disagreement with Professors Bellia and Clark is not about the consequence of a failure to recognize. We all agree that when the political branches decline to recognize a political entity as a state, the United States will not accord that entity the rights of sovereign nations under international law. Nevertheless, we disagree about the nature of the recognition power and about the implications of its allocation to the political branches for the status of the law of nations in the U.S. constitutional order.

For Professors Bellia and Clark, the recognition power is a grant of discretionary authority to the political branches to decide whether, and to what extent, the United States will enforce or comply with the law of nations rights of other nations. In their view, when the political branches recognize a nation, they implicitly direct the courts and the states to uphold the law of nations rights of the recognized nation. On the other hand, when they opt to withhold recognition, the courts and states are under no such obligation, because the law of nations is not otherwise part of U.S. law. Notably, even if the political branches opt to grant recognition, they are themselves in no way bound to respect the rights of the recognized nation. Moreover, they may at any point relieve the courts and the states of their obligation to do so.

In our view, this approach misunderstands the nature of the recognition power, at least as it was understood at the Founding. The power to recognize a new state is the power to determine whether a new political entity claiming to be a state qualifies as such. In other words, it is the power to judge whether such a political entity has the characteristics that entitle it to recognition as a sovereign state. To be sure, that is a judgment for the political branches to make, and, at least since the early nineteenth century, their decision has not been subject to judicial review. See *supra* note 163. It is also true that the legal consequence of a decision to withhold recognition is to deny that entity the rights of sovereigns under the law of nations. The critical point, however, is that those legal consequences flow not from the recognition power as such but directly from the background principles of the law of nations. Under the law of nations, an entity that did not qualify as a state was simply not entitled to claim the rights of sovereign nations. Professors Bellia and Clark’s mistake is thus to conflate the recognition power with the legal consequences that flow from its exercise, which are determined by the law of nations as part of the law of the land.

As we discuss in the text below, on our account, the recognition power did not apply to already existing sovereign nations at the time the Constitution was adopted, but was instead a power to be exercised in the future with respect to newly emerging states. See *infra* notes 171–75 and accompanying text. Without the need for any act of recognition by the political branches, all of the already existing nations were entitled to respect for their law of nations rights because the law of nations was part of the law of the land. In contrast, on Professor Bellia and Clark’s account, U.S. law provided no protections for the law of nations rights of existing nations until such time as the political branches recognized them, and neither the courts nor the states were under any obligation to observe their rights until the political

Finally, consider the curious anomalies that flow from Professors Bellia and Clark's conception of the recognition power. Their theory of mutual state recognition presupposes that, beginning at least in 1776, the revolutionary United States was as much deciding whether and when to "recognize" the established nations of Europe as seeking their recognition. In Professors Bellia and Clark's account, for example, the Franco-American Treaties in 1778 apparently signaled mutual recognition between the two nations. It would be surprising if France thought so, or if American diplomats would have had the temerity to suggest they had a discretionary option to refuse.¹⁷¹ To be sure, the Continental Congress, in some logical sense, acknowledged France's international existence when it commissioned Benjamin Franklin as its Minister to that nation, but to call that an act of recognition in the legal sense is a category error. Nor was that acknowledgment a precondition to respect for France's rights under the law of nations, for otherwise the notion of mutual recognition would have entailed that the new, embattled, and financially strained revolutionary government—by failing to send a phalanx of diplomats across the Atlantic to every established European nation—had decided to respect the rights of a few (France, Spain, and Great Britain, for example), but not those of the others.¹⁷² That counterfactual really does conjure a revolutionary world. To propound such a view would be to suggest, moreover, that an American court during the war would have refused to enforce the legal rights of nations to which the Continental Congress had not yet sent diplomats because the United States had not yet "recognized" them. In fact, American prize courts did enforce the international rights of neutral nations with which the Confederation did not yet have formal diplomatic relations.¹⁷³ In addition, the theory of mutual recognition

branches had so acted. In our view, that is simply not a plausible account of what actually occurred, nor how anyone at the time understood the Constitution. *See id.*

171. For the long negotiation process between the American diplomats and France that led to the 1778 treaties and French recognition of the United States—a history that is not consistent with the idea that the revolutionaries were pursuing "mutual" recognition—see GOEBEL, *supra* note 164, at 77–93.

172. To the degree that any legal thinker in the Revolutionary era theorized about the problem of why the United States was bound to acknowledge the already existing states of Europe, they may have assumed that the revolutionary states acceded to Britain's international commitments in this regard. As Attorney General Edmund Randolph put it in 1793 when arguing that the revolutionary United States' international commitments remained binding on the new federal government, "Did not many of the obligations under the royal, descend on the state-governments? Have not the state governments observed the same conduct in all their mutations? Did not the present government of the U.S. avow its own liability to the debts of the confederation?" *To George Washington From Edmund Randolph, 6 May 1793*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-12-02-0429> [<https://perma.cc/Q4LG-M9P8>] (last visited Apr. 17, 2018).

173. Consider in this connection, for example, the very early prize court decision of the Federal Court of Appeals under the Articles of Confederation, *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1 (1781), in which the captured property in issue was owned by a Dutch subject and the decision was rendered prior to the Dutch recognition of the United States in 1782. *See A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: The Netherlands*, U.S. DEP'T OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/countries/netherlands> [<https://perma.cc/KF7G-9DQZ>] (last visited May 29, 2018). Although the Court in *Miller* applied the law of nations in resolving the controversy—as American admiralty courts had always done—and although it arguably held that the law of nations is superior to any merely municipal law (including, in that case, the applicable ordinance of Congress)—"[t]he municipal laws of a country cannot change the law of

would also suggest that once the Constitution came into force, the federal government renewed its recognition of Britain, France, the Netherlands, and so on. The point is that the premise beneath Professors Bellia and Clark's understanding of the recognition power rests on a misunderstanding of the role of recognition in early American history. It is also doubtful as a characterization of the modern process of recognition. Aspiring states still seek recognition; they do not reciprocate by granting it to the existing states comprising the international community of nations.¹⁷⁴ Finally, Professors Bellia and Clark's approach directly conflicts with the ideas of the Drafters, Ratifiers, and political implementers of the Constitution we have discussed here, all of whom assumed that the law of nations was incorporated into the United States' municipal law as soon as it came into existence as an independent nation and acceded to the law of nations, not in virtue of its recognition of the already existing states of Europe.¹⁷⁵ The assumption that the U.S. was immediately and reflexively bound to adhere to the law of nations may not translate crisply across two centuries. In their attempt to bridge that divide—by embracing the historically important concept of recognition while holding on to a modern preference for voluntarism in international law—Professors Bellia and Clark's theory makes little sense even on its own terms.

3. Was Even Congress Obligated to Observe the Law of Nations When Exercising Its Legislative Power?

The final issue concerns Congress's powers and, in particular, whether and to what extent they, too, were understood at the Founding as limited by the principles of the law of nations. The whole question of the relationship between

nations, so as to bind the subjects of another nation" and, therefore, notwithstanding the captor's argument that the ordinance subjected the property to confiscation as prize, "the question must be decided by the law of nations"—it never queried whether the Netherlands had been recognized by Congress notwithstanding the refusal of the Dutch government to recognize the United States. *Miller*, 2 U.S. (2 Dall.) at 3–4. On Professors Bellia and Clark's theory, Congressional recognition would have had to precede judicial application of prize law to revolutionary captures. For discussion of the federal Prize Courts during the Confederation, see generally HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775–1787* (1977).

174. Consider, for example, whether Kosovo recognized the United States in 2008. Nothing in the official U.S. announcement of U.S. recognition suggests that what was involved was an act of mutual recognition. See *U.S. Recognizes Kosovo as Independent State*, U.S. DEP'T OF STATE (Feb. 18, 2008), <https://2001-2009.state.gov/secretary/rm/2008/02/100973.htm> [<https://perma.cc/M363-34JK>]; see also *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Kosovo*, U.S. DEP'T OF STATE OFFICE OF THE HISTORIAN <https://history.state.gov/countries/kosovo> [<https://perma.cc/LSJ6-ZZK4>] (last visited Apr. 20, 2018).

175. Recall, for example, Attorney General Randolph's understanding that "[t]he law of nations . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation." Letter from Edmund Randolph to Thomas Jefferson (June 26, 1792), in 24 JEFFERSON PAPERS, *supra* note 119, at 127. See also *supra* notes 76–86 and accompanying text (discussing the views of Alexander Hamilton, among others, who asserted that the law of nations was incorporated into the municipal law as a result of the accession of the United States to the law of nations itself, not because of the new nation's recognition of the established nations of Europe). For another example, see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), in which Justice Wilson affirmed: "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Id.* at 281 (opinion of Wilson, J.).

congressional power and the law of nations raises many difficult issues, and there is conflicting evidence from the early Republic. Again, Professors Bellia and Clark insist that the Constitution did not require Congress to comply with the law of nations but afforded it a discretionary option of noncompliance. However, the historical evidence indicates that the issue is more complicated than their claim suggests.

Before addressing the question, we emphasize that even if Professors Bellia and Clark's claim in this respect was correct, it would in no way undermine the conclusion that the law of nations was adopted by the Constitution and made part of federal law. Putting aside all the evidence we have already surveyed on that latter point, it is of course fundamental that when acting within its constitutional powers, Congress can repeal or modify federal law at will. As a result, the mere fact that the law of nations was incorporated into federal law would not have been understood to determine in one way or the other whether Congress was bound to observe its limits in enacting legislation. The answer to that question depended not on whether the law of nations was incorporated into the law of the United States, but instead on what its hierarchical status was in comparison to other forms of federal law, in particular congressional statutes. Was it understood that, even though incorporated into federal law, the law of nations was inferior or equal in status to federal statutory law? Alternatively, were the powers granted to Congress understood as limited by the law of nations so that Congress would have overstepped its authority in enacting legislation had it disregarded the applicable constraints?

Again, the evidence from the Founding era on this question is conflicting, and much remains to be uncovered and analyzed. Therefore, we cannot now offer a view about how best to interpret the available evidence. Nevertheless, to provide a sense of the range and level of authority in support of the view that Congress was bound to observe the law of nations, it is worth pursuing the point briefly here.¹⁷⁶ Consider, for example, the understanding expressed by then-Representative John Marshall in his famous speech in the House of Representatives during the debate over the Jonathan Robbins Affair in 1800.¹⁷⁷ Republicans in the House were seeking to censure President John Adams for having extradited Robbins to Great

176. For contrary evidence, see *Ware*, 3 U.S. (3 Dall.) at 220, 223–24 (opinion of Chase, J.) (arguing that during the Confederation the Virginia Constitution did not limit the state legislature from violating the law of nations, and suggesting that the same applied to Congress under the Articles of Confederation and presumably under the U.S. Constitution); *id.* at 256, 265–66 (opinion of Iredell, J., concurring in part and dissenting in part) (arguing to a similar effect). For a discussion of the views of some Antifederalists, who, during the Confederation, arguably favored the principle of legislative supremacy, including when interpreting the obligations of the law of nations, see HULSEBOSCH, *supra* note 133, at 192–202.

177. On the Robbins Affair, see generally Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 299 (1990). For Marshall's speech, see 10 ANNALS OF CONG. 596–618 (1800) (statement of Rep. John Marshall). It was in the course of the Robbins speech that Marshall coined the phrase "the sole organ of the nation" in the conduct of its foreign affairs, see *id.* at 613, which the Supreme Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), turned into virtually a new quasi-text-based power of the President in foreign affairs. See *id.* at 319 (also referring to Marshall's "great argument" in the debate).

Britain for an offense committed on board a British naval vessel, arguing that Robbins should instead have been tried in federal court under a congressional statute making piracy a federal offense.¹⁷⁸ In response, Marshall argued that Robbins had not committed piracy as defined by the law of nations and, therefore, could not have been constitutionally tried for the offense in U.S. courts.¹⁷⁹ Congress's powers, he maintained, extended no further than the law of nations allowed:

Gentlemen have cited and relied on that clause in the Constitution, which enables Congress to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; together with an act of Congress, declaring the punishment of those offences; as transferring the whole subject to the courts. But that clause can never be construed to make to the Government a grant of power, which the people making it do not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation. Of consequence, in framing a Government for themselves, they cannot have passed this jurisdiction to that Government. The law, therefore, cannot act upon the case.¹⁸⁰

Notably, although he quoted the Offenses Clause in its entirety, Marshall did not rest his argument on its reference to the "Law of Nations."¹⁸¹ Instead, he invoked a broader ground for his position: the people, he insisted, could only grant their government those powers that they, as the collective sovereign of the nation, rightfully possessed, and they only rightfully possessed those powers that were consistent with the nation's rights and duties under the law of nations—or, as the Declaration of Independence had put it in claiming the status of an independent nation, over those "Acts and Things which Independent States may of right do."¹⁸² Thus, irrespective of whether enforcement of these limits would fall

178. For the facts underlying the Robbins Affair, see Wedgwood, *supra* note 177, at 236–38.

179. See 10 ANNALS OF CONG. 598–605 (1800).

180. *Id.* at 607.

181. U.S. CONST. art. I, § 8, cl. 10. In fact, the power at issue was the power "To define and punish Piracies and Felonies committed on the high Seas," not to define and punish "Offences against the Law of Nations." *Id.*

182. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). Marshall proceeded to apply the same reasoning to the admiralty and maritime power specified in Article III, Section 2 of the U.S. Constitution:

But this clause [that is, the Offenses Clause] of the Constitution cannot be considered, and need not be considered, as affecting acts which are piracy under the law of nations. As the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the United States of course extends to it. On this principle the Courts of Admiralty under the Confederation took cognizance of piracy, although there was no express power in Congress to define and punish the offense.

But the extension of judicial power of the United States to all cases of admiralty and maritime jurisdiction must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States.

to the judiciary, Congress was bound to recognize that its constitutional powers were governed by a background understanding that they extended no further than the nation's legitimate rights and powers under the law of nations.

Nor did this view merely reflect the constitutional vision of Federalists like Marshall. The Republicans were equally emphatic that Congress's powers were limited to those consistent with the nation's rights and powers under the law of nations. The same year as Marshall's speech, James Madison authored the landmark *Virginia Report of 1800*, which denounced Federalist interpretations of Congress's constitutional powers as heretical and launched an attack on the Alien and Sedition Acts that would sweep the Republicans into power in the elections of 1800.¹⁸³ Yet a mainstay of his, and of much of the Republican, opposition was the claim that one of the most controversial statutes violated the law of nations. There were actually two Alien Acts, both enacted by the same Congress. Republicans had opposed only one, the so-called Alien Friends Act, but supported the other, the Alien Enemies Act, which remains on the books to this day.¹⁸⁴ When explaining why the former was unconstitutional but the latter not, Republicans articulated the same view that Marshall asserted in the debate over the Robbins Affair during the very same session of Congress.

Madison began his criticism of the Alien Friends Act by noting "that much confusion and fallacy, have been thrown into the question, by blending the two cases of *aliens, members of a hostile nation*; and *aliens, members of friendly nations*."¹⁸⁵ "With respect to alien enemies," he then observed, "no doubt has been intimated as to the federal authority over them; the constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies."¹⁸⁶ In contrast, it was equally clear that Congress was without power over "aliens, who are not enemies, but members of nations in peace and amity with the United States."¹⁸⁷ What was the ground for this distinction? The "clear and conclusive answer" was that "[a]lien

There are cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation; the people of America possessed no other power over the subject, and could consequently transfer no other to their courts; and it has already been proved that a murder committed on board a foreign ship-of-war is not comprehended within this description.

10 ANNALS OF CONG. 607–08 (1800).

183. See James Madison, The Report of 1800 (Jan. 7, 1800) [hereinafter Madison, Report of 1800], in 17 THE PAPERS OF JAMES MADISON 307 (David B. Mattern et al. eds., 1991) [hereinafter 17 MADISON PAPERS]. Madison drafted the report for the Virginia General Assembly and in support of the so-called Virginia Resolutions, which denounced the Alien and Sedition Acts. See *Editorial Note* to The Report of 1800, in 17 MADISON PAPERS, *supra*, at 303–06.

184. For the differences between the two acts, the bipartisan support of the first, and the partisan divide on the second, see STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 591–93 (1993).

185. Madison, Report of 1800, *supra* note 183, at 317 (emphasis in original). Madison noted as well "that the two cases are actually distinguished by two separate acts of Congress, passed at the same session . . . the one providing for the case of 'alien enemies'; the other 'concerning aliens' indiscriminately." *Id.* at 318.

186. *Id.*

187. *Id.*

enemies are under the law of nations, and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.”¹⁸⁸

In other words, Madison was arguing that Congress’s power over aliens depended upon the law of nations, which distinguished between alien enemies and alien friends. Where the law of nations authorized summary removal of resident aliens, as it did in wartime in the case of alien enemies, Congress had constitutional authority to act; where the law of nations did not, as with respect to alien friends, Congress lacked the authority. As Madison explained, the law of nations countenanced the expulsion of resident alien enemies when their nation’s conduct had provoked war. In that case, “the offending nation can no otherwise be punished than by war, one of the laws of which authorizes the expulsion of such of its members, as may be found within the country, against which the offence has been committed.”¹⁸⁹ In contrast, under the law of nations, alien friends could only be punished for offenses they had personally committed against the municipal law of the host country. “[T]he offence being committed by the individual, not by his nation, and against the municipal law, not against the law of nations; the individual only, and not the nation, is punishable; and the punishment must be conducted according to the municipal law, not according to the law of nations.”¹⁹⁰ Alien friends were, of course, subject to municipal criminal law; they were also, however, due all the protections offered citizen criminal defendants. “[B]anishment,” Madison explained, was a punishment and therefore necessitated a criminal conviction, which in turn, under the Bill of Rights, required a jury trial.¹⁹¹ When the principles of the law of nations were thus understood, Madison maintained, it was clear that “the act of Congress, for the removal of alien enemies, being conformable to the law of nations, is justified by the constitution: and the ‘act,’ for the removal of alien friends, being repugnant to the constitutional principles of municipal law, is unjustifiable.”¹⁹² Madison added for good measure: “Nor is the act of Congress, for the removal of alien friends, more agreeable to the general practice of nations, than it is within the purview of the law of nations.”¹⁹³ All nations lacked the power to expel alien friends, except under the

188. *Id.* at 320.

189. *Id.* at 320–21.

190. *Id.* at 321. By the phrase “not according to the law of nations,” Madison meant not on executive discretion without trial, as was acceptable for enemy aliens.

191. *Id.* at 319. According to Madison, “if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.” *Id.*

192. *Id.* at 321.

193. *Id.* Madison’s remarks were specifically directed at the argument that the Alien Friends Act could be justified under the Offenses Clause, which explains his somewhat awkward references to the term “offenses” in the quoted passages. See *id.* at 319–21. In fact, as indicated in the text, Madison himself grounded the Alien Enemies Act on Congress’s power to declare war, see *supra* note 186 and accompanying text, and he made clear that the same reasoning applied to any argument that expulsion of not just enemy aliens, but friendly aliens as well, could be justified on that basis. “It is said,” he noted, “that the right of removing aliens is an incident to the power of war, vested in Congress by the constitution.” Madison, Report of 1800, *supra* note 183, at 322. However, that was just the same

procedures of their municipal law applicable to criminal trial and punishment. And simple expulsion, even if permissible under a nation's municipal constitutional regime, was contrary to the "general practice" of civilized nations.

Madison's argument on these points in the 1800 report was not new. Republicans had asserted it in 1798 at the time of the passage of the two Alien Acts. Especially revealing were the remarks of Albert Gallatin, Jefferson and Madison's chief lieutenant in the House after Madison's departure in 1796. Speaking against the Alien Friends Act, Gallatin addressed the Federalist charge that Republicans were being inconsistent in supporting the Alien Enemies Act while challenging the constitutionality of the Alien Friends Act. "And here," he observed:

[H]e must take notice that, although Congress has not the power to remove alien friends, it cannot be inferred, as had been objected, that it had not the power to remove alien enemies; this last authority resulted from the power to make all laws necessary to carry into effect one of the specific powers given by the Constitution. Among these powers is that of declaring war, which includes that of making prisoners of war, and of making regulations with respect to alien enemies, who are liable to be treated as prisoners of war. By virtue of that power, and in order to carry it into effect, Congress could dispose of the persons and property of alien enemies as it thinks fit, *provided it be according to the laws of nations and to treaties*.¹⁹⁴

Although Federalists fiercely attacked Gallatin's speeches, they never challenged this point. In fact, both Federalists and Republicans agreed that the law of nations set boundaries for the congressional power over aliens. Their disagreement was over what precisely that law permitted in respect to alien friends. Federalists thus accepted the premise, but contested the Republican claim that the law of nations did not authorize the expulsion of alien friends. In their view, the law of nations did permit the expulsion of technically "friendly" resident aliens who were suspected of posing a threat to national security, at least in the context of near hostilities, as they asserted (correctly as it turned out) was the situation with regard to France in 1798. Indeed, the first speaker following Gallatin in the debate rejected Gallatin's understanding of the law of nations. Under that law, "the United States had certainly the right," Federalist William Gordon shot back immediately after Gallatin sat down, "to withdraw their protection to aliens, whenever they thought proper, notwithstanding all that had been said by the gentleman from Pennsylvania."¹⁹⁵

argument "in a new shape only" and was answered by the same principles, "by repeating, that the removal of alien enemies is an incident to the power of war; that the removal of alien friends, is not an incident to the power of war." *Id.*

194. 8 ANNALS OF CONG. 1980 (1798) (emphasis added) (remarks of Rep. Albert Gallatin).

195. *Id.* at 1983 (remarks of Rep. William Gordon). Every nation, Gordon continued, had "the power to order foreigners to depart the country who have been guilty of treasonable or seditious practices abroad[.] . . . [I]t is a power possessed by Government to protect itself." *Id.* at 1983-84.

A fuller assessment of the extent to which the law of nations limited the constitutional powers of Congress would be necessary before reaching any definitive conclusions about whether the generation that wrote, ratified, and implemented the Constitution believed that Congress's powers were both defined and circumscribed by the law of nations. For the present, it is sufficient to underscore that the answer would have no bearing on the persuasiveness of Professors Bellia and Clark's argument that the law of nations was not adopted by the Constitution and made part of federal law. A vast amount of historical evidence, from political actors across the political spectrum in the Founding period, demonstrates the reverse.

III. THE HISTORICAL EVIDENCE FOR PROFESSORS BELLIA AND CLARK'S THEORY

The historical evidence surveyed thus far suggests that Professors Bellia and Clark are trying too hard to construct a complex theory when a simple explanation lies in plain sight. As the Articles of Confederation had done before (at least in the view of leading Federalists), so too the Constitution adopted the law of nations and incorporated it into the law of the United States as the law of the land.

For this reason, Professors Bellia and Clark labor under a heavy burden to establish the historical basis of their recognition/allocation of powers theory. Their evidence is, however, underwhelming. To be sure, they cite and discuss a great deal of historical and other authority throughout the book. Much of that discussion is helpful and enlightening in its own right. It is also tangential, if not irrelevant, to the central theory that animates their book.¹⁹⁶ Their strongest evidence turns out, on close inspection, to be a small number of quotations from early Supreme Court cases, which they use, along with "background" principles not mentioned in the decisions, to construct a theory with little historical foundation. Remarkably, the term "recognition" never appears in any of the relevant passages on which they rely, nor does any other term connected to that concept.

We first address the four early Supreme Court cases on which Professors Bellia and Clark rely as direct support for their recognition power theory. We then consider four other early decisions, which they interpret as confirming Congress's unlimited power to violate the law of nations. These cases do not support the positions for which Professors Bellia and Clark cite them.

196. Chapters 2 and 5, for example, offer in-depth consideration of the historical development of the law merchant and the maritime law. See BELLIA & CLARK, *supra* note 4, at 19–39, 113–34. The main point of these explorations is to establish that the capacious body of legal doctrine known historically as the law of nations dealt with a variety of different subjects, which the Constitution, in turn, treated differently. Moreover, interspersed throughout the book is much discussion of the modern act of state doctrine and its historical antecedents. See *id.* at 97–112. These parts of the book are principally offered to establish that the courts were never conceived of as the appropriate government organ for deciding whether and when to hold foreign nations accountable for violations of U.S. rights under the law of nations. Even were Professors Bellia and Clark's claims about both of these points entirely correct, they would have no bearing on the questions whether the Constitution incorporates that part of the law of nations that they term the law of state-state relations into the law of the United States, nor whether the historical basis for the judicial application of the law of state-state relations was the allocation of the recognition power to the political branches of the federal government.

A. THE FOUR EARLY SUPREME COURT CASES AND THEIR PROPER INTERPRETATION

Professors Bellia and Clark showcase four Supreme Court cases as direct evidence for their approach, and they discuss these cases extensively and repeatedly. They are: the 1795 decision in *United States v. Peters*,¹⁹⁷ the 1812 decision in *Schooner Exchange v. McFaddon*,¹⁹⁸ the 1815 decision in *The Nereide*,¹⁹⁹ and the 1814 decision in *Brown v. United States*.²⁰⁰ None of these cases supports their theory.

1. *United States v. Peters*

Peters is one in a series of cases the Court decided arising out of the Neutrality Crisis of 1793.²⁰¹ These cases comprised roughly half of the Supreme Court's docket for several years and more or less turned on the law of nations and related provisions of the 1778 Treaty of Amity with France.²⁰² Like the other cases, *Peters* reflects the wide consensus among judges, lawyers, and government officials in the early Republic that the law of nations was part of the law of the land and would be enforced by the judiciary as such. In this instance, the Court issued a writ of prohibition ordering District Court Judge Richard Peters to dismiss the action because, under the law of nations, exclusive jurisdiction over the validity of the prize at issue was in the nation of the captor, here, France.²⁰³ Because of the diplomatic urgency surrounding the case, the Court rapidly issued a one sentence opinion and a writ of prohibition directing the Judge to dismiss the action.²⁰⁴ The writ simply adopted, essentially word for word, the proposed order written by counsel for the captor.²⁰⁵

197. 3 U.S. (3 Dall.) 121 (1795). They lead with *Peters*. See BELLIA & CLARK, *supra* note 4, at 76–79; see also *id.* at 216.

198. 11 U.S. (7 Cranch) 116 (1812). Their principle discussion of the case is in BELLIA & CLARK, *supra* note 4, at 79–83.

199. 13 U.S. (9 Cranch) 388 (1815). For their various discussions of the case, see, for example, BELLIA & CLARK, *supra* note 4, at 87–89, 161–63, 217–18.

200. 12 U.S. (8 Cranch) 110 (1814). See BELLIA & CLARK, *supra* note 4, at 85–87, 238–40.

201. See David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 147 (2008).

202. See *id.* For discussion of the Neutrality Crisis, see *supra* notes 107–19, 150, 237 and accompanying text. Materials on these cases fill much of Volumes 6 and 7 of *The Documentary History of the Supreme Court of the United States*. See 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800 (Maeva Marcus et al. eds., 1998) [hereinafter 6 DOCUMENTARY HISTORY OF THE SUPREME COURT] (discussing cases from 1790–1795); 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800 (Maeva Marcus et al. eds., 2003) (discussing cases from 1796–1797). A number of the Court's decisions were unpublished and most of the published decisions are brief and sometimes opaque. For the proceedings in these cases in the lower federal courts, see generally Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1.

203. See *Peters*, 3 U.S. (3 Dall.) at 129–31.

204. See *id.* at 129 (noting simply that “a majority of the Court are clearly of opinion, that the motion ought to be granted” and issuing the writ of prohibition); see also *id.* at 129–32 (printing the writ of prohibition).

205. See Suggestion of Samuel B. Davis (Aug. 21, 1795), in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 202, at 734–36. The Suggestion is reprinted along with the Court's opinion and prohibition in the official report of the case. See *Peters*, 3 U.S. (3 Dall.) at 122–25. The first clause

What is critical for Professors Bellia and Clark, however, are a couple of phrases included among the technical verbiage in the Supreme Court's writ directed to the District Court. The writ begins with a series of "whereas" clauses stating the basis for the judgment in the law of nations, and then goes on to describe the conduct of the libellant, James Yard, who claimed ownership of a ship captured on the high seas by a privateer acting under what Yard alleged was "pretend[ed] . . . authority from the *French Republic*."²⁰⁶ With respect to Yard, the writ stated:

Nevertheless a certain James Yard, of the city of Philadelphia, merchant, not ignorant of the premises, *but contriving and intending to disturb the peace and harmony subsisting between the United States and the French Republic*, and him, the said Samuel B. Davis, wrongfully to aggrieve and oppress . . . the said Samuel B. Davis, and the said corvette, or vessel of war, of the French Republic, the *Cassius*, in the port of Philadelphia, under the protection of the laws of nations, and of the faith of treaties, has, by process out of the District Court of the United States, in and for the District of Pennsylvania, attached and arrested him.²⁰⁷

It then continues:

[T]he said James Yard . . . by force of the process aforesaid, out of the said District Court, had and obtained, as aforesaid . . . with all his power, endeavours, and daily contrives, *in contempt of the government of the United States*, against the laws of nations, and the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States, to the manifest violation of the law of nations, and treaties, and *to the manifest disturbance of the peace and harmony happily subsisting between the United States and the French Republic*.²⁰⁸

of the suggestion/prohibition captures the essence of the whole, commencing a long string of "whereas" clauses that invoke the law of nations and treaties:

That whereas by the Laws of Nations, and the Treaties subsisting between the *United states* and the Republic of *France*, the trial of prizes taken on the high seas, without the Territorial limits and Jurisdiction of the *United states*, and brought within the Dominions and Jurisdiction of the Said Republic, for legal adjudication, by Vessels of War belonging to the sovereignty of the Said Republic, acting under the authority of the same, and of all questions incidental thereto, does of right & exclusively, belong to the Tribunals and Judiciary Establishments of the Said Republic, and to no other Tribunal or Tribunals, Court or Courts, whatsoever . . .

Suggestion of Samuel B. Davis (Aug. 21, 1795), in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 202, at 734; *see also Peters*, 3 U.S. (3 Dall.) at 122–23, 129. The argument of counsel, included with the case report, goes into the merits of the law of nations issues at greater length. *See Peters*, 3 U.S. (3 Dall.) at 125–29. At no point is there any mention of the recognition power.

206. *Id.* at 122.

207. *Id.* at 130 (original emphasis removed and emphasis added to indicate the language upon which Professors Bellia and Clark rely).

208. *Id.* at 131–32 (original emphasis removed and emphasis added to indicate the language upon which Professors Bellia and Clark rely).

According to Professors Bellia and Clark, the Court “pointedly”²⁰⁹ included the italicized language—italicized by us, not by the Court—to make clear that the basis for the prohibition was not that the law of nations, as the law of the land, supplied the rule of decision in the case. Rather, Professors Bellia and Clark maintain that the Court wished to emphasize that it was applying the law of nations only because the political branches of the federal government had recognized the French Republic, a fact of which the Court was aware and which required it to apply the law of nations to avoid interfering with the Constitution’s allocation of the recognition power. Lest this seem an unfair characterization of their reading of the case—which constitutes a significant part of the evidence they offer for their theory—consider their argument in their own words:

The *Peters* Court also characterized the district court proceedings as being “in contempt of the government of the United States, against the laws of nations, and the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States.” As noted, the United States and France had recognized each other as independent states under the law of nations, and entered into treaties reflecting this understanding. Recognition signified that each nation would respect the sovereign rights of the other under the law of nations. Thus, recognition by the United States required its courts to give effect to the French judgment—and thus to respect France’s rights under the law of nations—in order to respect the Constitution’s allocation of the recognition power to the political branches. A decision by the district court overriding France’s prize determination would have been “in contempt of the government of the United States” because it would have contradicted recognition.²¹⁰

That this reading is a non-starter requires little elucidation. The evident thrust of the Court’s language indicates just the opposite of what Professors Bellia and Clark assert: Proceeding on the understanding that the law of nations was incorporated into the law of the land and thus applicable to the case, the Supreme Court issued its prohibition in order to prevent the District Court from violating France’s rights under the law of nations by interfering with the exclusive jurisdiction of its prize courts. Few maxims were more settled in the eighteenth-century laws of war than that the validity of a prize captured on the high seas was a matter for the captor nation’s courts alone, and the Justices applied that rule unanimously. It is also worth recalling again that the case was one of the many that arose during the Neutrality Crisis. As we have seen, that crisis provoked a large number of leading government officials, as well as judges and lawyers, to affirm their understanding that the law of nations was part of the law of the United States. It is difficult to understand how the language on which Professors Bellia and Clark focus could be interpreted as rejecting that consensus.

209. BELLIA & CLARK, *supra* note 4, at 77.

210. *Id.* at 78 (quoting *Peters*, 3 U.S. (3 Dall.) at 131).

2. Schooner Exchange v. McFaddon

Professors Bellia and Clark next rely on the decision in *Schooner Exchange v. McFaddon*, a landmark Marshall Court decision that provided the foundation in U.S. law for what is known today as foreign sovereign immunity. The status and extent of any such immunity was uncertain at the time, and the precise issue in the case—whether a public armed vessel of a foreign sovereign was immune from suit in U.S. courts—was a matter on which U.S. authorities had previously expressed differing views.²¹¹ Indeed, the District and Circuit Courts that heard the case had disagreed about whether any immunity applied.²¹² In an opinion by Chief Justice Marshall, the Court held that foreign sovereign immunity was a principle of the law of nations and extended to public armed vessels. On this basis, it dismissed the libel.²¹³ Chief Justice Marshall’s opinion raises some interpretive difficulties, mostly because of the then-contested (and now obscure) jurisprudential foundations of the customary law of nations.²¹⁴ Essentially, however, the Court held that, under the law of nations, the immunity of a public armed vessel depended on the consent to immunity by the nation in whose territory it was found. That consent could be express or implied, but, critically, it was deemed implied in law unless the nation wishing to withhold it made clear in advance of a ship’s entry into its territory (“in a manner not to be misunderstood”²¹⁵) that it would decline to respect the immunity. According to Chief Justice Marshall, to withdraw immunity otherwise “would be a breach of faith.”²¹⁶ The Court thus concluded that the immunity of foreign public ships was the default rule under the law of nations, but that nations were permitted to change the default, to no immunity, after giving notice.

For these reasons, the decision in *Schooner Exchange* provides yet another example of American courts treating the law of nations as part of the law of the land and resolving cases on that basis. Professors Bellia and Clark, however,

211. For example, Attorney General Charles Lee had offered an opinion denying the immunity of public ships of war in 1799. *See* Service of Process on a British Ship-of-War, 1 Op. Att’y Gen. 87, 91 (1799).

212. *See* *McFadden v. The Exchange*, 16 F. Cas. 85, 88 (C.C.D. Pa. 1811) (No. 8786).

213. *See* *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146–47 (1812).

214. For helpful discussion, see Dodge, *supra* note 91.

215. *Schooner Exchange*, 11 U.S. (7 Cranch) at 146.

216. *Id.* According to the Court, implied consent “may, in some instances, be tested by common usage, and by common opinion, growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.” *Id.* at 136–37. The Court therefore concluded that it was “a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.” *Id.* at 145–46. To be sure, however, “the sovereign of the place is capable of destroying this implication. . . . But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.” *Id.* at 146.

disagree.²¹⁷ In their view, the Court was not applying the law of nations as law of the land but instead upholding the allocation of the foreign affairs powers to the political branches.²¹⁸ For them, the decision “confirmed the essential role of the Constitution’s allocation of powers in the Court’s decisions involving the respective rights of the United States and foreign nations.”²¹⁹ In support of this conclusion, Professors Bellia and Clark quote from the closing rhetorical flourishes of counsel for the United States. They note that “the U.S. Attorney argued,”

“[i]f the courts of the United States should exercise such a jurisdiction[,] it will amount to a judicial declaration of war[;]” [i]ndeed, he went so far as to argue that the judiciary’s exercise of jurisdiction in a case of this nature “will absorb all the functions of government, and leave nothing for the legislative or executive departments to perform.”²²⁰

Although neither this, nor any similar language, is found in the Court’s opinion, Professors Bellia and Clark nevertheless conclude that the Court “found these arguments persuasive because it ruled in favor of immunity just one week after argument.”²²¹ Moreover, they add that the Court’s ruling that the “sovereign power of the nation”²²² has authority to withdraw the United States’ implied consent is especially significant. In their view,

[t]he Court’s reference to the “sovereign power of the nation” appears to have been a reference to the political branches’ exclusive constitutional power over war and reprisals. . . . If the Constitution vested the political branches with the

217. Putting aside its implausibility, their reading of the decision is marred by some mistakes. Thus, for example, they assert that the Court held that “the law of nations did not bar U.S. courts from examining the legality of the capture.” See BELLIA & CLARK, *supra* note 4, at 79. For their discussion, see *id.* at 79–80. In fact, the Court held that the law of nations did bar U.S. courts from exercising jurisdiction because the United States had impliedly consented to respect the immunity of such vessels. Their mistake in this respect creates confusion for their reading of the case even on the points they consider relevant.

218. BELLIA & CLARK, *supra* note 4, at 79–83.

219. *Id.* at 79.

220. *Id.* at 81 (alterations in original) (quoting *Schooner Exchange*, 11 U.S. at 126 (argument of counsel)). In the absence of any French claimant challenging the libel, Alexander Dallas, the U.S. District Attorney for Pennsylvania, appeared at the instance of the executive to raise a jurisdictional objection to the case based on the law of nations.

221. *Id.* Dallas also argued that “we can only have recourse to the law of nations to try the validity of that claim. That law requires the consent of the sovereign, either express or implied, before he can be subjected to a foreign jurisdiction.” *Schooner Exchange*, 11 U.S. (7 Cranch) at 125 (inverting, although to the same effect, the Court’s ruling that the immunity depended on the consent of the forum nation). He further maintained that a nation would be within its rights to deny immunity but only “upon giving notice,” which it could do by changing what its “municipal law, previously provides” and thereby “change[] the law of nations.” *Id.* at 123. “But,” he added, “it cannot be implied where the law of nations is unchanged—nor where the implication is destructive of the independence, the equality, and dignity of the sovereign.” *Id.* Indeed, according to counsel, “[s]uch a jurisdiction is not given by the constitution of the United States.” *Id.* Is it possible that the Court’s agreement with these points led to its quick decision?

222. BELLIA & CLARK, *supra* note 4, at 81 (quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 146).

exclusive “sovereign power” to authorize such a seizure and thereby trigger hostilities, then courts would have to treat foreign warships as immune from judicial process until the political branches instructed otherwise.²²³

It is difficult to avoid the conclusion that Professors Bellia and Clark’s theoretical commitments have again led them to offer an unconvincing interpretation of a case on which they rely. To be sure, had the Court upheld the exercise of jurisdiction over the vessel, it might well have prompted diplomatic controversy with France, as would have any (real or perceived) violation of France’s rights under the law of nations. In hyperbolic terms, such a ruling might have amounted to “a judicial declaration of war.”²²⁴ As we have seen, part of the reason for the Constitution’s incorporation of the law of nations into U.S. municipal law was precisely to avoid provoking unnecessary conflicts with foreign nations, especially in contexts in which the United States would be in the wrong.²²⁵ It was for this reason that John Jay began the argument of *The Federalist* by declaring that “[i]t is of high importance to the peace of America that she observe the laws of nations,” adding, in explanation, that “designed or accidental violations of treaties and the laws of nations afford *just* causes of war.”²²⁶ The Constitution sought to ensure that neither designed nor accidental violations would eventuate, as they had so often during the Confederation, and among the strategies it employed for realizing that aspiration was adopting the law of nations as the law of the land.²²⁷ To notice the potential for diplomatic conflict from a court’s failure to enforce the rights of a foreign nation does not imply that the law of nations was not part of the law of the land but was applied only as a concomitant of the Constitution’s allocation of the foreign affairs powers. Much less is it probative of such a view that a U.S. District Attorney urged the Court to adopt a particular interpretation of the customary law of nations and warned that the failure to do so could have adverse diplomatic consequences. The rule of decision in *Schooner Exchange* was the customary law of nations, which the Court insisted would apply until such time as Congress exercised the prerogative accorded the United States by the law of nations to adopt a different rule. In interpreting the case otherwise, Professors Bellia and Clark are simply grasping at straws.

223. *Id.* at 81 (quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 146). In the passage they quote, the Court is unlikely to have had any such reading in mind. Rather, the Court was simply reflecting the suggestion of the U.S. District Attorney that Congress would be within its rights under the law of nations to enact legislation eliminating the immunity from what “the municipal law, previously provide[d],” which would also constitute fair notice to foreign sovereigns of its new policy. *Schooner Exchange*, 11 U.S. (7 Cranch) at 123. A central point of counsel’s argument, and of the Court’s opinion, is that doing so would not amount to a violation of the foreign sovereign’s rights and would, therefore, not provide a just cause of war. Thus, the Court is unlikely to have had Congress’s war powers in mind but, rather, one of its other foreign affairs powers (for example, the foreign commerce power), which could justify legislation withdrawing immunity as a matter of municipal constitutional law.

224. See *Schooner Exchange*, 11 U.S. (7 Cranch) at 126 (argument of counsel).

225. See *supra* notes 46–74, 88–96, 99–105, 143–53 and accompanying text.

226. THE FEDERALIST NO. 3, at 16 (John Jay) (Jacob E. Cooke ed., 1961) (emphasis in the original).

227. See *supra* notes 99–162 and accompanying text.

3. The Nereide

In addition to *Peters* and *Schooner Exchange*, Professors Bellia and Clark place particular reliance on the Supreme Court's decision in *The Nereide*.²²⁸ *The Nereide* is a prize case in which the Court, in an opinion by Chief Justice Marshall, unequivocally declared that "the law of nations [] is a part of the law of the land,"²²⁹ and, after an elaborate discussion of the underlying principles, applied a law of nations rule to resolve the dispute in issue.²³⁰ The case thus falls in line with the other authorities already discussed and is an unpropitious authority for Professors Bellia and Clark's theory.²³¹

They nevertheless rely on the case for two propositions. First, they cite it in support of their claim that the Constitution's allocation of the foreign affairs powers entailed that, absent authorization from the political branches, the judiciary could not adjudicate claims that a foreign nation had violated the law of nations, including the rights of the United States.²³² Second, they insist, remarkably, that the case supports their theory that the law of nations was not part of the law of the United States and that courts enforced it against U.S. litigants only because they were required to do so by the allocation of the recognition power to the federal political branches.²³³

With respect to the first claim, Professors Bellia and Clark maintain that from early on, the federal judiciary refused to adjudicate claims based on allegations that a foreign nation had violated the law of nations. It is something of a puzzle, they suggest, that courts would apply the law of nations in cases claiming that the United States, one of the states, or an American citizen had violated the law of nations, but would refuse to do so when the claims were against foreign governments.²³⁴ However, the solution to this mystery, they insist, is to be found in the

228. 13 U.S. (9 Cranch) 388 (1815). For their various discussions of the case, see, for example, BELLIA & CLARK, *supra* note 4, at 87–89, 161–63, 217–18.

229. *The Nereide*, 13 U.S. (9 Cranch) at 423.

230. In fact, the Court's lengthy opinion is dedicated almost entirely to interpreting and applying the relevant principles of the law of nations. *See id.* at 412–31. The same is true of the extended and learned arguments of eminent counsel. *See id.* at 391–412 (argument of counsel for the appellant).

231. Notably, at no stage did the Court, or counsel, in any way suggest that the case turned on the law of nations because of the Constitution's allocation of the foreign affairs powers, nor does the case mention the recognition power. The crucial passage quoted in the text is directly to the contrary. *See id.* at 423. It is worth underscoring, as well, that Chief Justice Marshall uses the same distinctive phrase—that the law of nations is “part of the law of the land”—that leading Federalists and Founders, borrowing from Lord Mansfield and Blackstone, employed to make the point that the Constitution had incorporated the law of nations into the nation's municipal law. *See supra* notes 77–83, 92, 101, 104, 107–34, 153, 175 and accompanying text. That choice of language could hardly have been accidental.

232. Professors Bellia and Clark pursue this point at great length in their book, especially in their extended treatment of the modern act of state doctrine and its historical antecedents. *See, e.g.*, BELLIA & CLARK, *supra* note 4, at 94–112.

233. *See id.* at 87–89.

234. *See, e.g. id.* at xxi, xxiv.

principles of the separation of powers over foreign affairs.²³⁵ In their view, *The Nereide* affirms this proposition.²³⁶

Professors Bellia and Clark are mostly right in suggesting that the courts would not entertain cases alleging that other nations had violated the law of nations.²³⁷ Their explanation for the practice, however, is misleading. It is true that, unless Congress otherwise directs, it is not (ordinarily) the role of the courts to impose retaliatory measures against foreign nations for violating U.S. rights under the law of nations. To rest this point on the allocation of powers over foreign affairs, however, is to miss the deeper explanation for the practice of leaving retaliation to the other branches. The courts generally declined to impose remedies for violations of U.S. rights because the question of what retaliatory measures to adopt—or, in more modern language, which countermeasures, if any, to impose²³⁸—was not a legal question at all, but instead one of policy. The law of nations did not *require* states whose rights were violated to adopt any particular retaliatory measure or, indeed, to do anything at all. Instead, it *authorized* them to adopt certain measures—up to and including war—and then left the question whether to do so and, if so, which measures to choose, to their discretion, which would depend on complex policy considerations. Making these discretionary judgments was simply not for the courts—not because (or not only because) of the Constitution’s particular allocations of the foreign affairs powers, but primarily because courts may only enforce governing law and may not make policy. In contrast, the courts did adjudicate claims under the law of nations asserted against U.S. actors. In that

235. See, e.g. *id.* at xxi, xxiv, 61–66. In this context, Professors Bellia and Clark emphasize Congress’s war powers (for example, the powers to declare war, issue letters of marque and reprisal, and make rules for captures). See U.S. CONST. art. I, § 8, cl. 11.

236. See, e.g., BELLIA & CLARK, *supra* note 4, at 87–88.

237. There is, however, a glaring historical counterexample that warrants mention. The courts did in fact entertain such claims during the Neutrality Crisis of 1793–1794. For reasons that are difficult to understand, Professors Bellia and Clark fail even to mention (except in relation to a different point, see *id.* at 123–24 & n.37), the Supreme Court’s landmark decision in *Glass v. Sloop Betsey*, in which the Court ordered the lower federal courts to assume admiralty jurisdiction over suits charging France with having violated U.S. neutral rights. 3 U.S. (3 Dall.) 6, 16 (1794). For discussion of *Glass* and its progeny, see WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* (2006); Arlyck, *supra* note 202; Golove & Hulsebosch, *supra* note 2, at 1025–27; Sloss, *supra* note 201. *Glass* was rendered before Congress passed the Neutrality Act of 1794, ch. 50, 1 Stat. 381 (1794), which after the fact supplied a statutory basis for at least some of the litigation spawned by *Glass*. Note, however, that the decisions in *Glass* and its progeny raise many complex issues that are beyond our ability to address here.

Nevertheless, although the Founding-era precedent from the Supreme Court contradicts much of what Professors Bellia and Clark assert throughout the book, we believe that the decision in *Glass* should be viewed as an unusual exercise of admiralty jurisdiction that the Court believed was necessitated by the extraordinary circumstances provoked by Citizen Genet’s activities after his arrival in the United States. For discussion of the Neutrality Crisis, see Golove & Hulsebosch, *supra* note 2, at 1019–39. On the other hand, *Glass* may be the first case in which the Court explicitly ruled that the federal courts, in exercising their jurisdiction, must apply the law of nations, enjoining the lower federal courts to grant restitution of prizes only when “such restitution can be made consistently with the laws of nations and the treaties and laws of the *United States*.” *Glass*, 3 U.S. (3 Dall.) at 16.

238. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Ch. V, in Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

context, judicial application of the law of nations—like judicial enforcement of treaties under the self-executing treaty doctrine—was a constitutional strategy for ensuring that the United States would observe its international obligations, and it only required courts to apply existing law, that is, the law of nations, as part of the law of the United States, not to make discretionary policy judgments. Thus, although the separation of powers does indeed explain the puzzle Professors Bellia and Clark identify, it was not the allocation of the foreign affairs powers that was fundamental. Instead, it was the duty of the judiciary to be governed by the applicable law and not rule based upon the judges' (foreign) policy judgments.

Nor is this point a matter for speculation. The Supreme Court's early case law—and *The Nereide* in particular—was explicit in propounding this rationale. At issue in *The Nereide* was the capture of an enemy (British) vessel by a U.S. privateer and the fate of cargo on board owned by a neutral Spaniard.²³⁹ The rule of the customary law of nations was that neutral goods on board an enemy vessel were not subject to confiscation as prize.²⁴⁰ The privateer, however, hoped to avoid this result by claiming that Spain itself refused to observe that rule. Because Spain treated neutral goods on enemy ships as good prize, the privateer urged the Court not to enforce the customary rule but to apply the Spanish rule reciprocally and, therefore, to validate the American's capture of neutral Spanish property on board the British ship. Such a retaliatory measure was justified, he maintained, by the prior Spanish violation of U.S. rights.²⁴¹

Chief Justice Marshall would have none of it. Whether to retaliate against Spain for its alleged deviations from the law of nations was simply not for judges to decide. "[T]he Court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure."²⁴² It was a matter of policy, not law because "[t]he degree and the kind of retaliation depend entirely on considerations foreign to this tribunal."²⁴³ For example, "[i]t may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all."²⁴⁴ It was therefore up to the political branches to decide how to respond to Spain's noncompliance with the law of nations, rather than for the Court "to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics."²⁴⁵ Indeed, reflecting the Federalist consensus view going back to *Rutgers*, it was the Court's job strictly to apply the law of nations as the law of the land until such

239. See *The Nereide*, 13 U.S. (9 Cranch) 388, 388–91 (1815).

240. See *id.* at 418–22.

241. See *id.* at 422.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 422–23. For the Marshall Court's navigation of the line between law and politics, see WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 41–53 (2000).

time as Congress enacted a statute directing what form of retaliation, if any, was appropriate. As Chief Justice Marshall put it:

If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, *the Court is bound by the law of nations which is a part of the law of the land.*²⁴⁶

Which brings us to Professors Bellia and Clark's second, and more critical, point—that *The Nereide* somehow confirms that the constitutional basis for the judiciary's application of the law of nations was the allocation of the recognition power to the political branches, not its incorporation into the law of the land. Professors Bellia and Clark are aware of the passage just quoted and, indeed, they

246. *The Nereide*, 13 U.S. (9 Cranch) at 423 (emphasis added). In this respect, Chief Justice Marshall was following the argument of counsel, who maintained:

The rule of retaliation is not a rule of the law of nations. The violation of the law of nations by one nation does not make it lawful for the offended nation to violate the law in the same way. It is true that states may resort to retaliation as a means of coercing justice from the other party. But this is always done as an act of state, and not as the mere result of a judicial execution of the law of nations. . . . The government of a state always undertakes to punish the violation of its rights and it chooses its own means. But the tribunals of justice must decide according to law. . . . The principle of retaliation, or reciprocity, is no rule of decision in the judicial tribunals of the U. States.

Id. at 407, 409–10, 412 (argument of T.A. Emmett).

Furthermore, although he dissented from the judgment in the case, Justice Johnson was fully onboard with this point. His opinion makes clear how the duty of courts to apply the law of nations (not engage in retaliation) also supported the constitutional separation of powers over war:

Nor does the argument founded on reciprocity stand on any better ground. There is a principle of reciprocity known to Courts administering international law; but I trust it is a reciprocity of benevolence, and that the angry passions which produce revenge and retaliation will never exert their influence on the administration of justice. Dismal would be the state of the world and melancholy the office of a judge if all the evils which the perfidy and injustice of power inflict on individual man, were to be reflected from the tribunals which profess peace and goodwill to all mankind. Nor is it easy to see how this principle of reciprocity, on the broad scale by which it has been protracted in this case, can be reconciled to the distribution of power made in our constitution among the three great departments of government. To the legislative power alone it must belong to determine when the violence of other nations is to be met by violence. To the judiciary, to administer law and justice *as it is*, not as it is made to be by the folly or caprice of other nations.

Id. at 431–32.

The Court reasoned similarly in a variety of early decisions. *See, e.g., Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, C.J.) (noting with approval counsel's argument "that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal, discussion," but not needing to rely on that principle to resolve the case). We note that, despite the aspirational sentiments expressed in passages quoted above, the law of nations countenanced retaliation by one state against another where the latter had committed the first violation. Consequently, even when disregarding an offending state's usual rights under the law of nations, a victim state was not thereby acting in violation of its law of nations duties, so long as it acted proportionately. For contemporaneous discussion of the issue, see WHEATON, *supra* note 18, at 209–12.

too quote it in full.²⁴⁷ However, what they find in it, and in the opinion more generally, are implicit references to the recognition power. In their view, scholars who have pointed to Chief Justice Marshall's seemingly unequivocal affirmation that the courts are bound to apply the law of nations as part of the law of the land have misunderstood what he meant to say. The Chief Justice, they insist, did not mean that the law of nations was part of the law of the land, but rather that the courts were bound to apply the law of nations to uphold the Constitution's allocation of the recognition power to the political branches.²⁴⁸ Had it done otherwise, the Court "would have contradicted or usurped the constitutional authority of the political branches to recognize Spain."²⁴⁹ Thus, according to Professors Bellia and Clark, the law of nations was part of the law of the land only in the sense that—and to the extent that—"the Constitution required courts to apply such law . . . absent contrary instructions from the political branches."²⁵⁰ Where they purport to find support for any of this is difficult to say. What is clear, however, is that their interpretation of the case finds no support in Chief Justice Marshall's opinion, nor in any other opinion of the Supreme Court from this era, nor in the understandings of a broad range of leading Founders, none of whom mentioned the recognition power or suggested that the reason why courts are bound to apply the law of nations was anything other than that it had been adopted by the Constitution as part of the law of the land. To suggest otherwise is simply to conjure facts to suit the theory.²⁵¹

247. See BELLIA & CLARK, *supra* note 4, at 88–89.

248. See *id.*

249. *Id.* at 89.

250. *Id.*

251. According to Professors Bellia and Clark, Chief Justice Marshall's explicit language affirming that, "the law of nations [] is a part of the law of the land," *id.* (quoting *The Nereide*, 13 U.S. (9 Cranch) at 423), cannot "bear the weight that these commentators [that is, those who interpret his language to mean that the law of nations is part of the law of the land] would put on it." *Id.* Instead, what he meant to say was that:

[j]udicial application of the law of state-state relations as it existed at this time unquestionably was "part of"—indeed a necessary "part of"—the Constitution's exclusive allocation of recognition, war, reprisal, and capture powers to the political branches. . . . Under these circumstances, the law of state-state relations was "part of the law of the land" in cases like *The Nereide* only because the Constitution required courts to apply such law to uphold Spain's neutral rights absent contrary instructions from the political branches.

Id.; see also *id.* at 161–63 (asserting that "[c]ourts upheld such rights not because the law of nations was itself a form of federal law, but because the Constitution's allocation of specific war and foreign relations powers to the political branches required them to do so" and that in *The Nereide* the Court's affirmation that the law of nations is part of the law of the land only "confirmed the Court's understanding that—under the Constitution's allocation of powers—the judiciary must apply the law of state-state relations to uphold the rights of a neutral nation until Congress and the President direct otherwise"). Chief Justice Marshall did not, however, say anything like this in his opinion in *The Nereide* or, for that matter, in any other decision, nor did any other constitutional authority or commentator at the time. Not only is their allocation of powers rationale not supported by the historical record, it also contradicts extensive, and uniform, evidence to the contrary.

4. *Brown v. United States*

Finally, Professors Bellia and Clark rely on yet another prize decision by the Marshall Court, *Brown v. United States*.²⁵² *Brown* arose at the outset of the War of 1812 and involved the power of federal executive officials to confiscate enemy property without prior approval from Congress. Although Chief Justice Marshall's opinion for the Court can be difficult to interpret, it is, as Professors Bellia and Clark suggest, manifestly grounded on separation of powers principles. However, the problem is that Marshall's invocation of the separation of powers provides no support for Professors Bellia and Clark's recognition power theory.

For present purposes, it is sufficient to underscore that the Court explicitly ruled that the law of nations did not limit the power of the United States to confiscate the enemy property in issue.²⁵³ At the same time, however, it ruled that at least some wartime confiscations of property—in particular, of enemy property that was already in the United States when the war broke out—could not be confiscated on executive authority alone but required explicit authorization by Congress. Thus, in contrast to Professors Bellia and Clark's reading of the case, the Court invoked the separation of powers not to uphold the political branches' decision to violate the law of nations, nor to restrain the judiciary itself from interfering with the recognition power by violating the law of nations rights of a recognized sovereign. Instead, it carved out a limited area implicating sensitive property rights in which both political branches had to agree before the executive could exercise rights sanctioned by the law of nations.²⁵⁴ The Court thus refused

252. 12 U.S. (8 Cranch) 110 (1814); see BELLIA & CLARK, *supra* note 4, at 85–87, 238–40.

253. *Brown*, 12 U.S. (8 Cranch) at 122–23 (agreeing that “war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found” and that “[t]he mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself”).

254. *Id.* at 127–29. At issue was an effort by the attorney for the United States to confiscate as prize certain timber, owned by a British national, which was already in the United States before Congress declared war on Great Britain in 1812 and which remained in the United States thereafter. Chief Justice Marshall, writing for the majority, refused to uphold the confiscation even though by the law of war it was subject to confiscation as enemy property.

According to the Chief Justice, the Constitution—and, in particular, the Captures Clause, which grants Congress the power to “make Rules concerning Captures on Land and Water,” U.S. CONST. art. I, § 8, cl. 11—placed the decision whether to exercise the law of nations rights of the United States in this respect in Congress, not the President, and Congress had not authorized confiscations of property already in the United States at the time war was declared. See *Brown*, 12 U.S. (8 Cranch) at 125–27. The Court's holding provides an illustration of how separation of powers principles have sometimes been interpreted to limit the President not only from violating the law of nations but even from engaging in actions that are sanctioned by the law of nations. In fact, *Brown* is quite unusual in this respect and is best understood as a reflection of the great sensitivity that leading American statesmen, mirroring the views of the most “enlightened” European authorities, repeatedly expressed about wartime confiscations of enemy property, especially debts, which were located in a nation's territory when war commenced. For discussion, see *infra* note 256. The critical point is that the Court in *Brown* employed separation of powers reasoning to safeguard rights—in this case, property rights—that were, in effect, underprotected by the law of nations. It did not empower the President, nor even Congress, to disregard law of nations protected rights. Unfortunately, once again for reasons of space, we cannot pursue this subject further here.

to defer to the executive's wartime judgment even when the latter was acting consistently with the existing rules of the law of nations.

Justice Story dissented from the Court's ruling in this respect, but he would not have upheld the right of the executive to violate the law of nations. On the contrary, he explicitly reaffirmed the by-then longstanding understanding that the law of nations was part of the federal law, and that the President, in exercising his power as Commander-in-Chief and his duty to execute the laws faithfully, was bound to observe its limitations. "By the Constitution," Justice Story explained,

the executive is charged with the faithful execution of the laws; and the language of the act declaring war authorizes him to carry it into effect. . . . There is no act of the legislature defining the powers, objects or mode of warfare; by what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; *for with him the sovereignty of the nation rests as to the execution of the laws*. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion.²⁵⁵

Although Chief Justice Marshall refused to accord the President quite that latitude of power—requiring legislative authorization for especially sensitive wartime confiscations—there is nothing in his opinion that is inconsistent with Justice Story's basic understanding.²⁵⁶

255. *Brown*, 12 U.S. (8 Cranch) at 149 (emphasis added).

256. There is a passage in Chief Justice Marshall's opinion that may give rise to misinterpretation. At the end of his opinion, Marshall considers and rejects an argument made by Justice Story in dissent that was a transparent effort to split the baby. As we have seen, in view of the rule of the law of nations that permitted the confiscation of all enemy owned property, Story would have countenanced executive confiscations of enemy owned tangible property located in the United States at the time war commenced. At the same time, however, he expressed an unwillingness to carry that principle to its logical conclusion, which would have required him to permit the confiscation of similarly situated debts owed to the enemy. *See id.* at 145–46. "I do not mean to include the right to confiscate debts due to enemy subjects," he equivocated, because "though a strictly national right, [it] is so justly deemed odious in modern times, and is so generally discountenanced, that nothing but an express act of congress would satisfy my mind that it ought to be included among the fair objects of warfare." *Id.*

In response, Chief Justice Marshall characterized Story's argument as assuming "that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power." *Id.* at 128. He then concluded:

This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

Id. Although at first blush it may appear otherwise, Chief Justice Marshall was not denying that the law of nations is part of the law of the United States, nor was he affirming a power in Congress (or the President) to disregard the law of nations. The "usage" to which he referred was the growing consensus among European statesmen that enemy property (especially debts) found within the territory of a nation

B. FOUR MORE SUPREME COURT CASES: CONGRESS'S POWER TO DISREGARD THE LAW OF NATIONS

These four cases constitute the historical evidence that Professors Bellia and Clark rely on in support of their recognition power theory. They also cite four early Supreme Court cases for the separate proposition that Congress was not bound to comply with the law of nations. As we have explained, even if their interpretation of these cases was correct, it would not undermine the conclusion that the law of nations was adopted by the Constitution and incorporated into federal law.²⁵⁷ When acting within its constitutional powers, Congress can repeal or modify federal law at will. As a result, these additional cases are beside the main point. Still, as we have already offered a tentative discussion of this issue, and surveyed some of the historical evidence contrary to Professors Bellia and Clark's position, it is worthwhile briefly to consider the cases upon which they rely.²⁵⁸ Here, again, on close inspection, it becomes evident that the cases do not support their position.

1. Neither *Bas v. Tingy* Nor *The Schooner Adeline* Upheld Acts of Congress that Violated the Law of Nations

Professors Bellia and Clark cite two cases—*Bas v. Tingy*²⁵⁹ and *The Schooner Adeline*²⁶⁰—as examples of the Supreme Court upholding acts of Congress that violated the law of nations.²⁶¹ In neither case, however—and in no other case from this era of which we are aware—did the Court actually do so. In *Bas*, the Court held only that, during the so-called Quasi-War with France, France

at the time war commenced ought not to be confiscated. Marshall had already explained that this “modern usage” was not a binding rule of the law of nations that limited the right of a belligerent nation to confiscate all captured enemy property wherever located, but, rather, a humane policy lacking legal force, for the violation of which a sovereign might face international opprobrium. *See id.* at 122–23. He immediately reiterated that position after the quoted text: “The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.” *Id.* at 128. He then added:

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens.

Id. at 128–29. For the development of the modern usage against confiscating debt in wartime and its mixed reception in the United States, see generally Daniel J. Hulsebosch, *Magna Carta for the World? The Merchants' Chapter and Foreign Capital in the Early American Republic*, 94 N.C. L. REV. 1599 (2016). Marshall's point was thus that a nonbinding international usage, no matter how morally imperative, could not be transformed into a binding rule of municipal law by the judiciary. It was, rather, a matter of policy for Congress to consider in deciding how to proceed.

Based on the relevant passages in their book, it is not entirely clear whether, or how far, Professors Bellia and Clark would disagree with the above. *See* BELLIA & CLARK, *supra* note 4, at 85–87, 238–40.

257. *See supra* notes 175–76 and accompanying text.

258. *See supra* notes 176–95.

259. 4 U.S. (4 Dall.) 37 (1800).

260. 13 U.S. (9 Cranch) 244 (1815).

261. For their discussion of *Bas*, see BELLIA & CLARK, *supra* note 4, at 85 n.38, 94 n.65, 236 n.74. For their discussion of *The Schooner Adeline*, see *id.* at 236.

qualified as an “enemy” under the statute in issue. It is difficult to understand the basis on which Professors Bellia and Clark conclude otherwise.²⁶² Whatever the explanation, however, they are simply mistaken.²⁶³

In contrast, in *The Schooner Adeline*, the Court upheld a statute that might have departed from what counsel for the captors called a “universal usage founded on justice and common utility.”²⁶⁴ Assuming this “universal usage” was a rule of the law of nations, it was almost certainly a rule derived from the maritime law of salvage, or the general law of nations, and not, using Professor Bellia and Clark’s terminology, part of the law of state-to-state relations and binding on every nation.²⁶⁵ The statute at issue dealt with the rate of salvage for recaptures from the enemy. For some reason, Congress provided a higher rate of salvage on the value of the recaptured vessel (one-half) than it did on the value of the vessel’s cargo (one-sixth), even though “the service” provided by the recaptor was the same for both.²⁶⁶ Notwithstanding the mystery, Justice Story enforced the statutory rate because “[t]he statute is expressed in clear and unambiguous terms.”²⁶⁷ Notably, he nowhere intimated that the statute violated the nation’s duties under the law of nations, much less that it violated a binding obligation of the United States.²⁶⁸ It is puzzling why Professors Bellia and Clark believe

262. Note that four Justices delivered separate opinions in the case. *See Bas*, 4 U.S. (4 Dall.) at 39–40 (Moore, J.); *id.* at 40–43 (Washington, J.); *id.* at 43–45 (Chase, J.); *id.* at 45–46 (Paterson, J.).

263. Although they do not explain the basis for their claim that the Supreme Court in *Bas* upheld acts of Congress that violated the law of nations, nor cite a relevant page, it is possible that Professors Bellia and Clark were misled by language in Justice Chase’s opinion. Justice Chase observed:

There are four acts, authorized by our government, that are demonstrative of state of war. A belligerent power has a right, by the law of nations, to search a *neutral* vessel, and, upon suspicion of a violation of her *neutral obligations*, to seize and carry her into port for further examination. But by the acts of congress, an American vessel is authorised; 1st, [t]o resist the search of a French public vessel; 2d, [t]o capture any vessel that should attempt, by force, to compel submission to a search; 3d, [t]o re-capture any American vessel seized by a French vessel; and 4th, [t]o capture any French armed vessel wherever found on the high seas. This suspension of the law of nations, this right of capture and re-capture, can only be authorised by an act of the government, which is, in itself, *an act of hostility*.

Id. at 43–44 (original emphasis removed and emphasis added). Justice Chase’s point was not that Congress’s statutes had authorized a violation of the law of nations, but that they constituted acts of hostility, initiating a public war with France and thereby exempting the U.S. from the neutral duties it would otherwise have been required to follow. His point was therefore the reverse of what Professors Bellia and Clark suggest. Because he presumed that Congress did not intend to violate its neutral obligations, he inferred that the statutes at issue were acts of hostility directed at an enemy. *Id.*

264. 13 U.S. (9 Cranch) at 280.

265. Professors Bellia and Clark never explain either why they believe that the “universal usage” at issue qualified as a rule of the law of nations or, more importantly, of the law of state-state relations in particular. *See BELLIA & CLARK, supra* note 4, at 236.

266. 13 U.S. (9 Cranch) at 287 (discussing the terms of the statute). That is, the recaptor could only recapture the cargo by recapturing the ship, and thus the recapture of the cargo imposed the same risk on the recaptor as the recapture of the ship. For this reason, counsel complained that Congress should have applied a rule “of general average” because “the service is an act done for the common benefit, and to be recompensed by common and proportionate contributions.” *Id.* at 279.

267. *Id.* at 287.

268. All the opinion says regarding the statute and the argument of counsel on this point is that “if there be ground for higher salvage in cases of armed vessels, either upon public policy or principle, such

otherwise. Ironically, Justice Story's ruling on this point followed closely on the heels of his characteristic comment that "[t]he court of prize is emphatically a Court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."²⁶⁹ He would not have so declared had he imagined that applying the salvage rate statute would do precisely the opposite.

2. Neither *Schooner Exchange* Nor *Murray v. Schooner Charming Betsy* Ruled that Congress Had Constitutional Power to Violate the Law of Nations

The remaining two cases on which Professors Bellia and Clark rely are *Schooner Exchange* (here, with respect to a separate point from that discussed above)²⁷⁰ and *Murray v. Schooner Charming Betsy*.²⁷¹ Professors Bellia and Clark do not claim that in these cases the Court upheld statutes that violated the law of nations. Instead, they claim that the Court indicated that it would do so if presented with such a case.²⁷² At best, both cases are ambiguous on this point. Again,²⁷³ the better reading of *Schooner Exchange* is that Chief Justice Marshall ruled only that Congress, consistently with the law of nations, could withdraw its consent to the immunity of foreign armed public vessels and, were it to do so, that the Court would then exercise jurisdiction in such a case. The opinion did not contemplate that Congress would violate the law of nations. Instead, the Court's supposition was, as Chief Justice Marshall elsewhere proclaimed, that "congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred,"²⁷⁴ and it therefore expressed no view on that question.

In contrast, *Charming Betsy* is more ambiguous in its implications.²⁷⁵ It is the source of—or, rather, lends its name to—the traditional interpretive principle that, as Chief Justice Marshall put it for the Court, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."²⁷⁶ As Professors Bellia and Clark point out, the negative implication, arguably, is that if no other construction did remain, the Court would enforce the statute notwithstanding that it violated the law of nations.²⁷⁷ It

considerations must be addressed with effect to another tribunal [that is, Congress]." *Id.* Moreover, the opinion makes clear that the statute in this respect applied only to American claimants. *Id.* The salvage rule for foreign claimants—in *The Schooner Adeline*, French claimants—was governed by another provision that was not subject to the same objection. *Id.* at 288. Hence, the law of state-state relations could have had nothing to do with the Court's ruling. In any case, the ruling disfavored the American captors in this respect, not the claimants.

269. *Id.* at 284.

270. 11 U.S. (7 Cranch) 116 (1812).

271. 6 U.S. (2 Cranch) 64 (1804).

272. For their discussion of these two cases, see BELLIA & CLARK, *supra* note 4, at 81–85.

273. See *supra* notes 211–27 and accompanying text.

274. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 44 (1801) (Marshall, C.J.).

275. 6 U.S. (2 Cranch) 64 (1804). At issue was the scope of a statutory prohibition on trade with France and, in particular, whether and how the statute applied to neutrals. See *id.* at 115–120.

276. *Id.* at 118.

277. See BELLIA & CLARK, *supra* note 4, at 83–85.

complicates matters, however, to note that Chief Justice Marshall immediately added: “and consequently [an act of Congress] *can never* be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”²⁷⁸ Marshall’s artful phraseology seems designed to signal that the Court’s interpretive powers would always be adequate to prevent a statute from violating the law of nations, thereby obviating any need to address the possibility that Congress would in fact “violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.”²⁷⁹ In this respect, Marshall was invoking yet another tradition that reached back at least to *Rutgers*²⁸⁰ and which enabled the Court to avoid addressing the larger constitutional question.

Whatever interpretive difficulties arise from the language in *Charming Betsy*, there is no reason to insist that the Marshall Court would never have applied a statute that did, in fact, violate the law of nations. There are other Marshall Court cases, not cited by Professors Bellia and Clark, which seem so to suggest in less ambiguous terms.²⁸¹ The critical point here is that Professors Bellia and Clark conflate two different principles: first, that separation of powers principles require courts to give effect to a statute violating the law of nations, and second, that Congress has constitutional power to violate the law of nations. The principles of justiciability, including the political question doctrine, were in their infancy in this era and only emerged slowly over the course of the next several decades, in significant part to relieve courts of the duty of reviewing the validity of acts of Congress based on the law of nations. Cases like *Charming Betsy* are best interpreted as early versions of this approach and are, accordingly, evidence only for the first principle, not the second. In this respect, it is at least suggestive that the author of the 1804 *Charming Betsy* opinion was Chief Justice Marshall, who, as we have seen, had only a few years earlier, in his congressional speech on the Robbins affair, unequivocally expressed the view that Congress was bound by the law of nations.²⁸²

It is true that these cases do not establish the principle that the generation that fought the Revolution and constructed the Constitution believed that Congress was bound to comply with the law of nations. Evidence on that question can be sought not just, or even primarily, in judicial opinions, but also in the views of the Founders, statesmen of the era, and in the understandings of public officials

278. *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (emphasis added).

279. See *Talbot*, 5 U.S. (1 Cranch) at 44.

280. For *Rutgers*, see *supra* notes 76–97 and accompanying text.

281. Even those cases are ambiguous, a matter we cannot pursue here.

282. For discussion of then-Representative Marshall’s speech in 1800, see *supra* note 177 and accompanying text. Indeed, as the newly installed Chief Justice, he had affirmed what is now called the *Charming Betsy* canon as early as 1801. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (declaring that “the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national [meaning, international] law”).

charged with the duty of conducting the nation's foreign affairs, as well as in informed public discussion.²⁸³

CONCLUSION

Our disagreements with Professors Bellia and Clark about the role of the law of nations in the constitutional order can be traced ultimately to our different understandings of the goals of American constitution-making in the Founding era. All of us agree that *recognition* was critical to the Founders' engagement with the law of nations. For Professors Bellia and Clark, however, what was crucial was recognition as an exclusive constitutional power of the federal political branches—meaning, the power to recognize *other* nations. The desire to avoid prejudicing the political branches' exercise of this power, they argue, was the ground for applying the law of nations in the municipal law of the United States. For us, by contrast, what was crucial was recognition as a legal status among the community of “civilized nations” that was either earned by or bestowed upon (depending on the theory) a polity that could demonstrate an ability to perform its duties under the law of nations, and which would accordingly entitle it to enjoy the rights of nationhood. It was the pursuit *by the United States* of full recognition in this sense that explains in large degree both why the Federalists sought a new Constitution and why the Founders proceeded to intertwine the law of nations in the constitutional system they were constructing.

Recognition was not a jealously guarded weapon. It was, we argue, a primary goal of federal constitution-making. Revolutionary Americans eagerly sought, from the Declaration of Independence onward, the rights and powers of a nation under the law of nations, and, consequently, they accepted the law of nations' corresponding duties. Indeed, a core aim of the Revolution had been not just to withdraw from the British Empire, but also to enter as an equal member of the community of “civilized nations.” Avoiding involvement in European alliances and wars—so-called political connections—was a point of American consensus, but so too was the need to promote a flourishing commercial intercourse between the United States and Europe, including its colonies.²⁸⁴ Moreover, admission on an equal footing into the community of civilized states was desirable not only for the crucial instrumental gains it promised but also for its own sake, as an acknowledgement of the nation's status as a civilized people.²⁸⁵

There were of course many debates in the early Republic about the content of the law of nations, but there was a remarkable consensus that acting the part of a “civilized” nation, and observing the duties imposed by this dynamic body of law

283. Beyond the evidence on this point that we have already discussed above, *see supra* notes 176–95 and accompanying text. A fuller discussion awaits a future article.

284. For a classic discussion, see generally FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* (1961); *see also* Daniel J. Hulsebosch, *The Fulfillment Revisited: Political Experience, Enlightenment Ideas, and the International Constitution*, 91 *NEW ENG. Q.* 209, 213–19 (2018).

285. *See* Golove & Hulsebosch, *supra* note 2, at 937–39, 970–79.

and practice, was an essential commitment of the new nation. Therefore, the Constitution did not grant the “recognition power” to the federal political branches to give them discretionary authority over whether to comply with the law of nations, as Professors Bellia and Clark repeatedly suggest. However urgent it may seem to some today, the modern “option of non-compliance” was not on the minds of the Founders, nor was it a prerogative they sought to preserve (assuming that such prerogative existed under the English Constitution, which is a debatable point).²⁸⁶ Rather, the Constitution *adopted* the law of nations as law of the land to advance the American yearning for recognition, a status the revolutionaries had won in war but that the “imbecility” of the Confederation had revealed as defeasible.²⁸⁷ The fear was not so much that other nations would use some supposed discretionary authority to revoke recognition; it was instead that the United States would, by its own actions, forfeit recognition as a *de facto* matter, by losing the capacity to govern according to the standards of “civilized states” under the law of nations.²⁸⁸ The goal of constitutional reform in the 1780s was therefore to build a new government that had the capacity to function under international standards, with efficacy at home and abroad, and that would in the future reliably comply with its international obligations.²⁸⁹

Professors Bellia and Clark are absolutely correct that the Constitution was designed to prevent the state governments from obstructing this pursuit of productive relations abroad. They are also correct that the constitution-makers envisioned a strong role for the courts in enforcing the law of nations as one means of obtaining and retaining American membership in the larger world. Finally, they usefully disaggregate a few different strands of the early modern law of nations, and rightly emphasize the importance of the strand that regulated what they call “state-to-state” relations. What they miss is the pervasive view in the Founding generation that all branches, at all levels of government, were bound to respect and regulate their behavior by the law of nations. It was no mere default law, subject to discretionary enforcement by the executive or even, arguably, discretionary redefinition by Congress. It was instead the law of the land.

286. *Medellin v. Texas*, 552 U.S. 491, 511 (2008). Parliamentary supremacy meant that no other organ of the British state could refuse to execute an act of Parliament, but it did not imply that the unwritten English Constitution placed no limits on Parliament’s authority. That conclusion is reasonably clear from the portions of Blackstone’s *Commentaries* discussing the English Constitution, see 1 BLACKSTONE, *supra* note 77, at *41–44 (explaining that the natural law, of which the law of nations is a part, “is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original”), and is implicit in the colonists’ charge that Parliament was acting *ultra vires* in imposing legislation, including, of course, taxation, on the colonies. These difficult historical and jurisprudential ideas, however, are beyond the scope of this article. For an exploration of the limits on the eighteenth-century British Parliament, see FRANCIS D. WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* 169–214 (1949).

287. THE FEDERALIST NO. 15, at 76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

288. See Golove & Hulsebosch, *supra* note 2, at 942–43, 952–79.

289. See *id.* at 980–1015.