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# THE POLITICAL BRANCHES AND THE LAW OF NATIONS

Anthony J. Bellia Jr.\* & Bradford R. Clark†

## INTRODUCTION

In the late eighteenth and early nineteenth centuries, the U.S. Supreme Court went out of its way to follow background rules of the law of nations, particularly the law of state-state relations. As we have recently argued,<sup>1</sup> the Court followed the law of nations not because it believed such law qualified as “the supreme Law of the Land,”<sup>2</sup> but because adherence to such law preserved the constitutional prerogatives of the political branches to conduct foreign relations and decide momentous questions of war and peace.<sup>3</sup> Had the judiciary taken it upon itself to depart from well-established principles of the law of nations, it would have usurped the authority of Congress and the President to decide whether, when, and how to depart from such law in the conduct of foreign relations. Although we focused primarily on the extent to which the Constitution obligated *courts* to follow the law of nations in the early republic, the explanation we offered also rested

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1 See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009).

2 U.S. CONST. art. VI, cl. 2. The Constitution recognizes only “This Constitution,” “the Laws of the United States,” and “Treaties” as “the supreme Law of the Land.” *Id.* For a textual, historical, and structural argument that these are the exclusive sources of supreme federal law, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

3 Bellia & Clark, *supra* note 1, at 55–75.

on an important, but largely overlooked, predicate—that is, “that the political branches were free to make law in derogation of the law of nations, and that such law would bind courts as the supreme law of the land.”<sup>4</sup> Because decisions regarding when and whether to adhere to—or depart from—the law of nations “are rather questions of policy than of law,”<sup>5</sup> the Constitution’s allocation of powers assigned such decisions to the political branches of the federal government.<sup>6</sup> In other words, courts generally followed the law of nations in the early republic not as a form of supreme federal law in itself, but as a means of preserving the political branches’ exclusive constitutional prerogatives to decide whether, when, and how to depart from such law.

Scholars have long debated whether courts should uphold actions by the political branches that depart from the law of nations. In addition, some distinguish between congressional and executive action in this regard. Most scholars agree that courts must uphold acts of *Congress* that depart from the law of nations. The most prominent advocate of this position is Louis Henkin. “In principle,” he claimed, “every state has the power—I do not say the right—to violate international law and obligation and to suffer the consequences.”<sup>7</sup> Indeed, in his view, the Constitution recognizes a “national prerogative to violate international law.”<sup>8</sup> “If Congress enacts legislation that is inconsistent with, and causes the United States to violate, an established principle of customary law, the Executive and the courts are obliged to give effect to the act of Congress.”<sup>9</sup> In other words, “Congress, in legislating under its constitutional powers, can enact law inconsistent with an international agreement or other international obligation of the United States, thereby causing the United States to be in violation of that agreement or obligation.”<sup>10</sup>

A few scholars, however, have asserted that courts should enforce established rules of customary international law to restrict congres-

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4 *Id.* at 58.

5 *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812).

6 By “depart,” we mean either to violate a customary international law rule without judicial recrimination or to “opt out” of a customary international law rule in a way that international law recognizes as legitimate. See generally Curtis A. Bradley & G. Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. (forthcoming 2010), available at <http://ssrn.com/abstract=1523906> (analyzing the authority of nations to withdraw from customary international law rules).

7 Louis Henkin, *The President and International Law*, 80 AM. J. INT’L L. 930, 931 (1986).

8 *Id.* at 933.

9 *Id.* at 933–34.

10 Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1568 (1984).

sional action. Jordan Paust, for instance, has argued that “well into the 20th Century no one expected that the President or Congress could even authorize a violation of customary international law and nothing in the text or structure of the Constitution permits such a result.”<sup>11</sup> Jules Lobel has claimed that “fundamental” rules of customary international law are judicially enforceable against acts of Congress<sup>12</sup>: “those rules of international law that reflect the fundamental norms of contemporary society bind Congress . . . domestically as well as internationally.”<sup>13</sup>

Scholars have also debated whether customary international law limits the powers of the President. Several scholars have concluded that it does not, albeit for somewhat different reasons. Some have argued that customary international law is not judicially enforceable against the President because it does not have the status of federal law.<sup>14</sup> Others have argued that, as a functional matter, customary international law is an ineffective constraint on executive action.<sup>15</sup>

In contrast, several scholars have argued that customary international law is judicially enforceable against the President. Their general claim is that customary international law qualifies as the law of the United States; thus, the President is bound to follow it under the Article II duty to “take care that the laws be faithfully executed.”<sup>16</sup> Even

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11 Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 316 (1999); see also JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 88, 124–25, 143–46, 154–60 (1996) (arguing that federal officials are bound by customary international law).

12 Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1130–31 (1985).

13 *Id.* at 1130; see *id.* at 1131 (suggesting that many of the framers understood the Constitution to incorporate fundamental international principles as limitations on government conduct); cf. Henkin, *supra* note 7, at 933 (“[T]here are plausible arguments that the Framers accepted customary law as binding on the United States, including Congress, and that it was intended to be of higher status than the laws of Congress in the domestic legal hierarchy.”).

14 See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 844–46 (1997) (describing such an argument).

15 See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1226–30 (2007).

16 U.S. CONST. art. II, § 3, cl. 4; see Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT’L L. 923, 923 (1986) (“Federal common law is binding on every executive branch official, including the President. . . . [I]n the face of congressional silence, he is required to respect a clearly defined and widely accepted norm of customary international law.” (footnote omitted)); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325 (1985) [hereinafter Glennon, *Raising*] (“When the President acts in the face of congressional silence, federal common law governs the

so, scholars have recognized limited circumstances in which the Executive may violate customary international law without judicial reproach. First, Professor Henkin has argued that the President may disregard customary international law if the President is "acting within his constitutional authority"<sup>17</sup> to (1) make law in the United States<sup>18</sup> or (2) modify or terminate a principle of international law.<sup>19</sup> "The question," as Henkin describes it, is whether the President "has constitutional authority to do the act that . . . superseded the customary principle."<sup>20</sup> Second, numerous scholars have argued that the President may violate customary international law when enforcing an act of Congress that itself deviates from such law.<sup>21</sup> This claim of course presupposes that Congress's power to deviate from customary international law is not subject to judicially enforceable limitations, and that

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controversy. Because federal common law includes norms of customary international law, presidential violation of certain of those norms should be considered *prima facie* unconstitutional." (footnote omitted)); Lobel, *supra* note 12, at 1119 ("The President has a constitutional obligation to execute international law because it is the law of the land."); Jordan J. Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719, 727 (1982) ("[T]he President of the United States is . . . bound by international law, which is part of the supreme law of the land under article VI . . .").

17 Henkin, *supra* note 7, at 936.

18 *Id.* at 935. He explains that "the President can supersede a principle of international law or a treaty by law made under his own authority, in those special circumstances when the President has constitutional authority to make law in the United States." *Id.*

19 *Id.* at 936. Specifically, Henkin argues that "acting within his constitutional authority, the President may take actions that have the effect of ending an international obligation of the United States with the result that the obligation is no longer law in the United States." *Id.* Relatedly, Jonathan Charney has argued that the Executive Branch may violate the law of nations, subject to no judicially enforceable limitations, when it is "participating in the legitimate process of developing customary international law." Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 919 (1985). "Just as the international system requires that the President be able to enter into executive agreements and, apparently, to terminate treaties unilaterally, so must the President have the unilateral power to enter into the international lawmaking process." *Id.* at 917.

20 Henkin, *supra* note 7, at 935.

21 See, e.g., Glennon, *Raising*, *supra* note 16, at 325 (arguing that "federal common law invalidates presidential acts in violation of international law until Congress, by statute, supersedes the federal common law rule"); Henkin, *supra* note 7, at 935 (arguing that the President must "give effect to an act of Congress that is inconsistent with a preexisting principle of customary law"); cf. Lobel, *supra* note 12, at 1119 ("If congressional deviation from international law is allowed, there may be limited circumstances in which the President may also depart from international law.").

the President's duty to take care that acts of Congress be faithfully executed encompasses statutes that depart from the law of nations.

Different conceptions of the role of customary international law in our constitutional system partially explain disagreement over the extent to which such law binds Congress and the President. If one believes that the Constitution somehow incorporates customary international law in its entirety—as superior to enacted statutes of the United States—then such law presumably binds Congress and the President to the same extent as the Constitution itself.<sup>22</sup> Or, if one believes that the Constitution authorizes judges to incorporate customary international law as federal common law, then such law may bind the President, absent congressional override.<sup>23</sup> Finally, if one believes that customary international law has no domestic effect unless and until adopted by the political branches, then such law imposes no judicially enforceable constraint on either Congress or the President.<sup>24</sup>

There is, however, a largely overlooked alternative to these three accounts that derives from the Constitution's allocation of powers and that better explains the Supreme Court's selective application of the law of nations since the Founding. This account maintains that courts historically followed the law of nations in order to preserve the constitutional prerogatives of the political branches to conduct foreign relations and to decide questions of war and peace on behalf of the nation. At the time the Constitution was adopted, the law of nations recognized a set of "perfect rights" enjoyed by all nations. These included the rights to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty.<sup>25</sup> These perfect rights were considered so fundamental that interference with any of them provided just cause for war.<sup>26</sup> Thus, respect for these rights was essential to maintaining peace among nations. As we have previously explained, federal courts upheld the perfect rights of nations as a means of avoiding war and preserving the constitutional prerogatives of the political branches to conduct foreign relations.<sup>27</sup> Accordingly, the Court has long held that any decision to depart from traditional law of nations principles—and thus risk war with another country—rests with the political branches, not the courts.

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22 Lobel, *supra* note 12, at 1130–31; Paust, *supra* note 11, at 316.

23 Henkin, *supra* note 7, at 935–36.

24 Bradley & Goldsmith, *supra* note 14, at 844–46.

25 EMMERICH DE VATTTEL, *THE LAW OF NATIONS* \*145, \*302.

26 *Id.* at \*lxii–lxiii.

27 See generally Bellia & Clark, *supra* note 1.

Although this account explains why the Constitution often required *courts* to follow the law of nations in the early republic, it also explains why the Constitution—through certain express clauses—arguably gave Congress more latitude than the President to depart from the law of nations. The Constitution vests Congress—rather than the President—with the express powers to declare war, to raise and support armies, and to provide and maintain a navy. When the Court has invoked the law of nations as a limit on executive wartime power, it has done so in order to uphold its conception of the constitutional allocation of authority between Congress and the President to decide whether and when the United States should risk starting or escalating a war by taking action that might violate the perfect rights of foreign nations. By requiring executive wartime authority to conform to the law of nations, the Court has respected congressional power to declare and determine the scope of war on behalf of the nation. It should come as no surprise, therefore, that as the Court has gradually recognized shared congressional and presidential powers over both war and foreign relations, it has also recognized some executive discretion to depart from the law of nations.

Part I describes the Constitution's allocation of foreign relations and war powers to Congress and the President. Part II explains how the Supreme Court, from the early days of the republic into the twentieth century, has applied certain principles of the law of nations as a means of respecting the constitutional prerogatives of the political branches to conduct foreign relations. Had courts departed from such principles, they would have given other nations just cause for retaliating against the United States, and thereby usurped political branch authority to determine momentous questions of war and peace. Part III explains how Supreme Court decisions applying the law of nations necessarily presupposed that the political branches may depart from the law of nations in the exercise of their respective constitutional powers. Although we do not attempt to provide a full account of the respective powers of the political branches to depart from the law of nations, Part IV offers a separation-of-powers rationale for why the Court has sometimes limited executive power according to the law of nations while leaving Congress free to depart from such law. According to this account, judicial enforcement of the law of nations against the Executive Branch simply reflects the Court's understanding of the Constitution's allocation of powers between Congress and the President. The Court has never suggested, however, that the law of nations could constrain the collective constitutional power of the political branches. To the contrary, the Court's opinions have expressly and implicitly assumed that the Constitution grants Con-

gress and the President—in some combination—discretion to depart from the law of nations in the exercise of their assigned powers.

## I. THE CONSTITUTION'S ALLOCATION OF POWERS

The political branches' power to depart from the law of nations follows from the Constitution's allocation of powers. The Constitution assigns the conduct of foreign relations—including the power to recognize foreign nations and make war and peace—to the political branches of the federal government. Specifically, Article I gives Congress power to “regulate Commerce with foreign Nations;”<sup>28</sup> “establish an uniform Rule of Naturalization;”<sup>29</sup> regulate the value “of foreign Coin;”<sup>30</sup> “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;”<sup>31</sup> “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;”<sup>32</sup> “raise and support Armies;”<sup>33</sup> “provide and maintain a Navy;”<sup>34</sup> “provide for calling forth the Militia to . . . repel Invasions;”<sup>35</sup> “provide for organizing, arming, and disciplining, the Militia;”<sup>36</sup> and “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>37</sup>

In addition, Article II establishes that “[t]he executive Power shall be vested in a President of the United States of America;”<sup>38</sup> that “[t]he President shall be Commander in Chief of the Army and Navy

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28 U.S. CONST. art. I, § 8, cl. 3.

29 *Id.* art. I, § 8, cl. 4.

30 *Id.* art. I, § 8, cl. 5.

31 *Id.* art. I, § 8, cl. 10. On the implications of this power, see J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

32 U.S. CONST. art. I, § 8, cl. 11.

33 *Id.* art. I, § 8, cl. 12.

34 *Id.* art. I, § 8, cl. 13.

35 *Id.* art. I, § 8, cl. 15.

36 *Id.* art. I, § 8, cl. 16.

37 *Id.* art. I, § 8, cl. 18. Article I simultaneously restricts the states' ability to conduct their own foreign relations. Section 10 provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal.” *Id.* art. I, § 10, cl. 1. It also prohibits states, without the consent of Congress, from “lay[ing] any Duty of Tonnage, keep[ing] Troops, or Ships of War in time of Peace, enter[ing] into any Agreement or Compact with another State, or with a foreign Power, or engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” *Id.* art. I, § 10, cl. 3.

38 *Id.* art. II, § 1, cl. 1.



of the United States, and of the Militia of the several States, when called into the actual Service of the United States;"<sup>39</sup> that "[h]e shall have Power, by and with the Advice and Consent of the Senate, to make Treaties;"<sup>40</sup> that "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors [and] other public Ministers and Consuls;"<sup>41</sup> and that "he shall receive Ambassadors and other public Ministers."<sup>42</sup>

Taken together, these provisions assign responsibility for conducting the most important aspects of foreign relations to the political branches of the federal government rather than to the judiciary or the states. Acting in various combinations, the President, the Senate, and the Congress are responsible for recognizing foreign governments and nations, making international agreements, regulating foreign commerce and intercourse, and making other fundamental decisions affecting war and peace. All of these decisions have important foreign policy implications for the United States. They necessarily affect the United States's bilateral and multilateral relations around the globe. They affect how our citizens, corporations, diplomats, and military personnel are treated abroad, and whether the United States has relatively friendly or hostile relations with other nations. The political branches take all of these considerations (and more) into account when making important foreign policy decisions on behalf of the nation.

## II. JUDICIAL ADHERENCE TO THE LAW OF NATIONS

Since the early days of the republic, federal courts have followed rules drawn from the law of nations as a means of respecting the constitutional prerogatives of the political branches to conduct foreign relations. The most important of these rules involved the "perfect rights" of sovereigns. In the late eighteenth century, the law of nations required each nation reciprocally to respect the rights of every other nation to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty.<sup>43</sup> These perfect rights were so fundamental that interference with any of them

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39 *Id.* art. II, § 2, cl. 1.

40 *Id.* art. II, § 2, cl. 2.

41 *Id.*

42 *Id.* art. II, § 3. The power to send and receive ambassadors enabled the political branches, on behalf of the United States, to recognize foreign nations as equal and independent sovereigns under the law of nations. See Bellia & Clark, *supra* note 1, at 31-32.

43 VATTEL, *supra* note 25, at \*145, \*302.

provided just cause for war.<sup>44</sup> Thus, respect for these rights was essential to maintaining international peace. Courts recognized the perfect rights of foreign sovereigns in order to uphold the power of the political branches to recognize foreign sovereigns and to avoid usurping their power to determine war and peace. By exchanging ambassadors with a foreign nation, the political branches signaled their recognition of the nation in question as a coequal sovereign entitled to exercise and enjoy perfect rights under the law of nations.<sup>45</sup> Denial of a nation's perfect rights—whether by courts or the political branches—could trigger hostilities or even war. Early on, the Supreme Court concluded that the Constitution assigned decisions of this magnitude to the political branches, thus requiring courts to follow certain background principles of the law of nations unless and until the political branches decided otherwise.

Several early cases illustrate the judiciary's adherence to the law of nations as a means of preserving the constitutional prerogatives of the political branches. In *Murray v. The Schooner Charming Betsy*,<sup>46</sup> the Supreme Court interpreted an ambiguous federal statute to respect perfect rights.<sup>47</sup> During the undeclared war with France, Congress enacted the Nonintercourse Act of 1800,<sup>48</sup> which prohibited commercial intercourse between residents of the United States and residents of any French territory.<sup>49</sup> The Court concluded that this Act did not authorize seizure of an American-built vessel sold at a Dutch Island by an American captain to an American-born Danish burgher, who then took the vessel to a French island.<sup>50</sup> Such a seizure would have interfered with the Netherlands's perfect rights under the law of nations. Accordingly, Chief Justice Marshall's opinion for the Court famously declared that a federal statute "ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."<sup>51</sup> Because the Act did not plainly curtail neutral rights, he construed it to be inapplicable to the transaction in

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44 *Id.* at \*lxii–lxiii.

45 Bellia & Clark, *supra* note 1, at 89.

46 6 U.S. (2 Cranch) 64 (1804).

47 For an earlier example, see *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 29–32 (1801).

48 Federal Nonintercourse Act, ch. 10, 2 Stat. 7 (1800) (expired 1801).

49 *See id.* § 1, 2 Stat. at 8.

50 *Charming Betsy*, 6 U.S. (2 Cranch) at 64–65, 120–21.

51 *Id.* at 118.

question.<sup>52</sup> In so doing, Marshall ensured that Congress, rather than the Court, would determine whether the United States would risk foreign conflict by interfering with perfect rights recognized by the law of nations.<sup>53</sup>

*The Schooner Exchange v. McFaddon*<sup>54</sup> illustrates the Supreme Court's reliance on the Constitution's allocation of powers to choose between competing principles of the law of nations. The original owners of a French warship libeled the vessel when it entered the port of Philadelphia, seeking its return. They argued that French nationals had "violently and forcibly taken" the ship from them on the high seas "in violation of the rights of the libellants, and of the law of nations," and that "no sentence or decree of condemnation had been pronounced against her, by any [French] court of competent jurisdiction."<sup>55</sup> The question before the Court was "whether an American citizen can assert, in an American court, a title to an armed national vessel [of another country], found within the waters of the United States."<sup>56</sup> The Court concluded that a citizen cannot bring such an action notwithstanding the "general statutory provisions" conferring "the ordinary jurisdiction of the judicial tribunals."<sup>57</sup> The Court relied on a distinct (albeit implied) "principle of public [international] 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."<sup>58</sup> In the absence of contrary instructions from the political branches, the Court considered itself bound to follow this implied principle of the law of nations—rather than the competing principle invoked by the plaintiff—because failure to do so could provoke hostilities between nations. The Court acknowledged that "the sovereign of the place is

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52 *Id.* at 119 ("If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed." (emphasis omitted)).

53 See Vattel, *supra* note 25, at \*336–37 (recognizing perfect right of neutral nation to engage in neutral trade); see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 525–26 (1998) (suggesting that courts should adhere to the *Charming Betsy* canon to avoid putting "the United States in violation of international law contrary to the wishes of the political branches").

54 11 U.S. (7 Cranch) 116 (1812).

55 *Id.* at 117.

56 *Id.* at 135.

57 *Id.* at 146.

58 *Id.* at 145–46.

capable of destroying this implication,”<sup>59</sup> but stressed that it would not consider the United States to have taken this step “until such power be exerted in a manner not to be misunderstood.”<sup>60</sup> In short, because exercising jurisdiction over the ship could have amounted to “a judicial declaration of war,”<sup>61</sup> the Court insisted that the political branches—rather than the courts—make the decision to override the immunity in question.

In *The Nereide*,<sup>62</sup> the Supreme Court again relied on the Constitution’s allocation of powers in refusing to depart from the perfect rights of sovereigns under the law of nations. The case raised the question whether it was lawful for a commissioned U.S. privateer to capture goods belonging to a neutral (a Spanish national) that the privateer found on an enemy (English) vessel.<sup>63</sup> According to the Court, “a neutral has a perfect right to transport his goods in a belligerent vessel.”<sup>64</sup> Although “[b]elligerents have a full and perfect right to capture enemy goods and articles going to their enemy,” the law of nations rendered neutral goods exempt from capture.<sup>65</sup> The captors asked the Court to disregard this part of the law of nations because “Spain . . . would subject American property, under similar circumstances, to confiscation.”<sup>66</sup> Thus, in their view, “the property, claimed by Spanish subjects in this case, ought to be condemned [sic] as prize of war.”<sup>67</sup> Chief Justice Marshall, writing for the Court, rejected this argument on the ground that the Constitution required the political branches—rather than the courts—to decide how to respond to a foreign nation’s breach of U.S. rights under the law of nations. Accordingly, until the government passed an act “apply[ing] to Spain any rule respecting captures which Spain is supposed to apply to us,”<sup>68</sup> “the Court is bound by the law of nations.”<sup>69</sup>

These early decisions reveal that the Supreme Court strictly followed the law of nations—particularly the perfect rights of sover-

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59 *Id.* at 146.

60 *Id.*

61 *Id.* at 126 (argument of counsel).

62 13 U.S. (9 Cranch) 388 (1815).

63 *Id.* at 388–90.

64 *Id.* at 426.

65 *Id.* at 427. Like the Court, Vattel described neutral nations to “enjoy perfect liberty to trade” in “goods which have no relation to war . . . . An attempt to interrupt or put a stop to this trade would be a violation of the rights of neutral nations, a flagrant injury to them.” VATTEL, *supra* note 25, at \*336–37 (emphasis omitted).

66 *The Nereide*, 13 U.S. (9 Cranch) at 422.

67 *Id.*

68 *Id.* at 423.

69 *Id.*

eigns—not because it considered such law itself to be part of “the supreme Law of the Land,” but because adherence to such law was necessary to preserve the constitutional prerogatives of the political branches. Departure from the law of nations could significantly affect foreign relations and might even lead to war. The Court, therefore, left the decision to depart from such law to those branches of the federal government charged with conducting foreign relations and making war and peace. Indeed, in cases like *The Charming Betsy* and *The Schooner Exchange*, the Court erred on the side of overprotecting political branch prerogatives by requiring a clear statement from Congress and the President that the United States wished to depart from the law of nations before the Court would risk foreign conflict by disregarding such law.

### III. POLITICAL BRANCH DEPARTURES FROM THE LAW OF NATIONS

The Supreme Court’s early decisions applied the law of nations as a means of preserving the constitutional prerogatives of the political branches. These decisions necessarily assumed that the political branches could depart from the law of nations in the exercise of their foreign relations powers, and that courts must follow unambiguous political branch directives of this kind. These conclusions follow from the Court’s reliance on the constitutional allocation of powers. Courts erred on the side of following traditional principles of the law of nations in order to preserve the political branches’ ability to decide whether and how to depart from such law in the course of conducting foreign relations. If the political branches unambiguously decide to override the law of nations in the exercise of their constitutional powers, then the same constitutional allocation of powers requires courts to follow their lead.

This conclusion is implicit in the *Charming Betsy* canon. The Supreme Court declared that federal statutes “ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>70</sup> The implication of this declaration is that Congress can depart from the law of nations so long as it does so clearly. Similarly, after recognizing an implied immunity for foreign warships under the law of nations, *The Schooner Exchange* Court expressly stated that “the sovereign of the place is capable of destroying this implication.”<sup>71</sup> The only question for the Court was whether the sovereign of the United States had done so “in a manner not to be misunderstood.”<sup>72</sup>

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70 *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

71 *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812).

72 *Id.*

Because existing federal statutes did not expressly abrogate this immunity, the Court adhered to the law of nations out of deference to the political branches.

On the other hand, on the rare occasions when Congress expressly and unequivocally departed from the law of nations, the Supreme Court followed its lead. In *The Schooner Adeline*,<sup>73</sup> for example, the Court applied an act of Congress specifying the mode of valuing a ship's cargo in order to ascertain the amount that recaptors could recover as salvage. The recaptors argued that the Court should assess value according to the law of nations, which provided a more generous recovery than the statute. The statute, they argued, was "an unreasonable departure from an universal usage founded on justice and common utility."<sup>74</sup> The Court rejected this argument on the ground that the statute clearly prescribed a different rule: "The statute is expressed in clear and unambiguous terms. . . . We cannot interpose a limitation or qualification upon the terms which the legislature has not itself imposed . . . ."<sup>75</sup> Thus, *The Schooner Adeline* confirmed what *The Schooner Charming Betsy* and *The Schooner Exchange* presupposed: Congress and the President may depart from the law of nations in the exercise of their constitutional powers and, when they do so in a manner not to be misunderstood, U.S. courts must give effect to their directives.

One potential reason that the political branches may decide to depart from the law of nations is to retaliate against another nation for its violation of the United States's rights under the law of nations. In the face of such foreign violations, litigants have sometimes urged courts to depart from the law of nations without awaiting instructions from the political branches. Historically, courts have refused to initiate such departures in order to preserve the political branches' exclusive authority to decide whether, when, and how to retaliate against other nations. According to the Court, such decisions raise questions of policy rather than law. Accordingly, they are committed to the discretion of the political branches in the exercise of their constitutional powers to conduct foreign relations and decide questions of war and peace.

Several cases illustrate the judiciary's refusal to take the lead in departing from the law of nations (even in response to an alleged violation of the law of nations by another nation), and suggest that the judiciary has traditionally followed such law out of deference to the

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73 13 U.S. (9 Cranch) 244 (1815).

74 *Id.* at 279–80 (argument of counsel).

75 *Id.* at 287 (Story, J.).

political branches. As discussed, in *The Schooner Exchange*, the original owner of a French warship claimed that the ship had been seized by the French in violation of the law of nations. He asked the judiciary to override the protection that foreign warships enjoyed under the law of nations and return the ship to its rightful owner. The Supreme Court declined this invitation. Once it concluded that warships are immune under the law of nations, it indicated that courts must adhere to the immunity unless and until the political branches took action to override it “in a manner not to be misunderstood.”<sup>76</sup> In addition, the Court signaled that “great weight” should be accorded to the arguments “that the sovereign power of the nation alone is competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than law, [and] that they are for diplomatic, rather than legal discussion.”<sup>77</sup> Absent political branch intervention, therefore, courts considered themselves powerless to depart from the law of nations, even in the face of an allegation that a foreign state had itself violated the law of nations.

Similarly, in *The Nereide*, the Supreme Court declined to interfere with the neutral rights of Spanish nationals to ship their goods on enemy vessels even though the American captors argued that “Spain . . . would subject American property, under similar circumstances, to confiscation.”<sup>78</sup> The Court stressed that the Constitution required the political branches—rather than the courts—to decide how to respond to a foreign nation’s violation of America’s rights under the law of nations:

[T]he court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics.<sup>79</sup>

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<sup>76</sup> *The Schooner Exch.*, 11 U.S. (7 Cranch) at 146.

<sup>77</sup> *Id.*

<sup>78</sup> *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815).

<sup>79</sup> *Id.* at 422–23.

In short, the Court made clear that the Constitution's allocation of powers precluded the Court from overriding Spain's rights under the law of nations, but that the political branches remained free to do so.

Judicial adherence to the law of nations as a means of upholding political branch prerogatives also explains language in *The Paquete Habana*<sup>80</sup> that modern commentators often find puzzling. The question presented was whether Spanish "fishing smacks were subject to capture by the armed vessels of the United States during the recent [Spanish-American] war."<sup>81</sup> The Court concluded that the "ancient usage among civilized nations" of exempting coastal fishing vessels from capture had ripened "into a rule of international law."<sup>82</sup> Accordingly, the Court considered itself bound to follow the rule "where there is no treaty and no controlling executive or legislative act or judicial decision" to the contrary.<sup>83</sup> Those who regard international law as a form of customary law binding on the United States and its courts struggle to explain the Court's suggestion that Congress and even the President acting alone can override such law.<sup>84</sup> The Court's suggestion makes sense, however, when one recalls that courts did not consider the law of nations to apply of its own force as supreme law, but rather as a means of preserving the Constitution's allocation of powers.<sup>85</sup> Thus, in the absence of political branch instructions, courts refused to depart from rules whose violation might trigger or escalate a war. The logical corollary, however, is that the political branches remained free to depart from the law of nations in the exercise of their foreign relations and war powers, and that courts would follow their lead.

Finally, in *Banco Nacional de Cuba v. Sabbatino*,<sup>86</sup> the Supreme Court afforded a foreign nation even greater protection than the law of nations conferred by applying the act of state doctrine "in its traditional formulation"<sup>87</sup> to uphold Cuba's expropriation of sugar companies in its own territory. The act of state doctrine reserves to the political branches the decision whether to restrict or uphold other nations' territorial sovereignty by "preclud[ing] the courts of this country from inquiring into the validity of the public acts a recognized

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80 175 U.S. 677 (1900).

81 *Id.* at 686.

82 *Id.*

83 *Id.* at 700.

84 See, e.g., Glennon, *Raising*, *supra* note 16, at 324 (summarizing commentators' "extensive disagreement as to whether the President may violate international law").

85 See Bellia & Clark, *supra* note 1, at 78–80.

86 376 U.S. 398 (1964).

87 *Id.* at 401.



foreign sovereign power committed within its own territory.”<sup>88</sup> The claimant in *Sabbatino* argued that Cuba had violated customary international law by discriminatorily confiscating private property belonging to foreign nationals, and that this violation gave the judiciary license to disregard the act of state doctrine and override the traditional territorial rights of a foreign sovereign. As in *The Schooner Exchange*, however, the Court rejected this argument as inconsistent with the Constitution’s allocation of powers. Any retribution for Cuba’s alleged violation of international law must be initiated by the political branches rather than the judiciary. Even though international law no longer recognized an unqualified act of state doctrine, the Court reasoned that “since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders.”<sup>89</sup> Such judicially generated resentment would interfere with the conduct of foreign relations by the political branches, and therefore undermine the Constitution’s allocation of powers.<sup>90</sup> On the other hand, the Court indicated that the political branches remained free to abrogate the act of state doctrine as applied to Cuba, and Congress promptly did so following the Court’s decision.<sup>91</sup> The same allocation of powers that required the Court to apply the act of state doctrine in the absence of political branch abrogation compelled the courts on remand to give effect to Congress’s decision to override the doctrine.<sup>92</sup>

#### IV. ALLOCATING POLITICAL BRANCH AUTHORITY TO DEPART FROM THE LAW OF NATIONS

To say that the political branches have constitutional power to depart from the law of nations is not to resolve which branch, alone or in combination with others, has such power in any given case. Most

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88 *Id.* (emphasis added).

89 *Id.* at 431–32.

90 See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 404 (1990) (stating that the act of state doctrine is best understood as “a consequence of domestic separation of powers”).

91 Following *Sabbatino*, for example, Congress enacted the second Hickenlooper Amendment, which limited the act of state doctrine in cases like *Sabbatino*. Foreign Assistance Act of 1964 (Hickenlooper Amendment), Pub. L. No. 88-633, §§ 301(d)(4), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2006)).

92 On remand, the judiciary applied the statute retroactively to defeat Cuba’s claim to the proceeds from expropriated sugar. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967).

commentators agree that Congress may take action contrary to the law of nations in the exercise of its constitutional powers. The more controversial question for scholars has been whether the Executive has unilateral power to depart from the law of nations. In the first several decades of the republic, the Supreme Court was skeptical of executive branch actions that might usurp the powers of Congress to define the existence of war and determine its limits. The Supreme Court's stance on this question has shifted over time, apparently in accordance with its expanding view of the scope of executive powers. In early cases, the Court suggested that the Executive Branch—like the judicial branch—was bound to follow the law of nations when necessary to preserve Congress's exclusive power to decide whether and when to initiate or escalate hostilities with foreign nations. In later cases, however, the Court suggested that Congress and the President had shared responsibility over questions of war and peace, and also that either branch could depart from the law of nations in the exercise of its constitutional responsibilities. This brief article is not the place to explore the relative constitutional powers of Congress and the President over war and foreign relations. Our point—descriptive rather than normative—is that the Court's view of the Executive's power to depart from the law of nations appears to correspond with the Court's view of the Executive's own constitutional power to conduct foreign relations and risk hostilities with other nations. In other words, as the President's powers have expanded over time, so too has his power to depart from the law of nations.

In early cases, such as *Brown v. United States*,<sup>93</sup> the Court explicitly limited executive wartime authority in order to protect Congress's exclusive constitutional authority over wartime policy. During the War of 1812 with Great Britain, the U.S. Attorney for the District of Massachusetts confiscated British-owned timber found within the United States after hostilities commenced.<sup>94</sup> The U.S. Attorney filed a libel in federal court to condemn the timber as enemy property, apparently without the knowledge or consent of the President.<sup>95</sup> Such confiscation, although permitted by the law of nations, would have escalated hostilities between the warring parties and almost certainly would have led Britain to confiscate American property as well. The Court dismissed the case on the ground that Congress alone possessed the constitutional authority to authorize confiscation of enemy property during wartime.

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93 12 U.S. (8 Cranch) 110 (1814).

94 *Id.* at 121–23.

95 *Id.* at 121–22.

Chief Justice Marshall began by acknowledging that the United States unquestionably had "power" to condemn enemy property under the law of nations: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded."<sup>96</sup> The Court would not uphold the confiscation, however, unless Congress authorized it. Without such authorization, Marshall thought that confiscation would usurp authority that the Constitution vested exclusively in Congress.<sup>97</sup> Marshall denied that the international rule subjecting enemy property to confiscation "constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power."<sup>98</sup> War "is not an absolute confiscation of this property, but simply confers the right of confiscation" upon the sovereign.<sup>99</sup> The law of nations principle, then "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."<sup>100</sup>

The question for the *Brown* Court, therefore, was who exercises the sovereign will of the United States in deciding whether to confiscate enemy property. Chief Justice Marshall indicated unequivocally that the Constitution gave Congress the exclusive power to decide this question: "[F]rom the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law . . . ."<sup>101</sup> "Like all other questions of policy," the question whether to confiscate enemy property found within the United States "is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary."<sup>102</sup> Thus, "until that will shall be expressed, no power of condemnation can exist in the Court."<sup>103</sup>

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96 *Id.* at 122.

97 *Id.* at 129.

98 *Id.* at 128.

99 *Id.* at 123.

100 *Id.* at 128; *see also id.* ("The rule is, in its nature, flexible. It is subject to infinite modifications. It is not an immutable rule of law, but depends on political considerations which may continually vary.").

101 *Id.* at 123.

102 *Id.* at 129.

103 *Id.* at 123.

Applying this principle, the Court concluded that no act of Congress authorized the confiscation under consideration. Specifically, Marshall found that Congress's declaration of war did not "authorize proceedings against the persons or property of the enemy found, at the time, within the territory."<sup>104</sup> Marshall also noted that the U.S. Attorney had not seized the property "under any instructions from the president of the United States."<sup>105</sup> Marshall might have been suggesting here that the declaration of war empowered the President to formally authorize seizures through letters of marque and reprisal or some other form of instruction, but did not empower U.S. Attorneys to act without such a formal instruction. In any event, since "the power of confiscating enemy property is in the legislature, and . . . the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war," the U.S. Attorney was without authority to confiscate the property, and the courts were without authority to issue a sentence of condemnation.<sup>106</sup>

The Supreme Court's opinion in *Brown* confirms that the Court understood questions relating to the law of nations as a function of the Constitution's allocation of powers. Although the law of nations allowed the United States to confiscate enemy property, this step would have escalated hostilities between the United States and Great Britain. The *Brown* Court did not believe that the Constitution authorized either the executive or the judicial branch unilaterally to take such action. In the Court's view, this restriction on executive and judicial power was not meant to limit the collective foreign relations powers of the political branches, but rather to uphold Congress's exclusive constitutional power to declare war and define its limits. Thus, *Brown* rested upon an important constitutional separation of powers principle—that Congress must determine whether and to what extent the United States will engage in hostilities with other countries.

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104 *Id.* at 126.

105 *Id.* at 121–22.

106 *Id.* at 129. Although Justice Story dissented, he did not challenge the Court's premise that Congress must authorize confiscation of enemy property. Rather, he concluded that Congress's declaration of war in fact included such an authorization. Justice Story inquired "whether congress (for with them rests the sovereignty of the nation as to the right of making war, and declaring its limits and effects) have authorized the seizure of enemies' afloat in our ports." *Id.* at 145 (Story, J., dissenting). Story concluded that the declaration did authorize it, and that even if it did not do so expressly, the President has "a right to employ all the usual and customary means acknowledged in war, to carry it into effect." *Id.* Thus, "there being no limitation in the act, it seems to follow that the executive may authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized." *Id.*

The Supreme Court relied on virtually the same understanding of the Constitution's allocation of powers ten years earlier in *Little v. Barreme*.<sup>107</sup> In 1799, during the Quasi-War with France, Congress passed an act prohibiting ships owned, hired, or employed by U.S. residents from proceeding "to any port or place within the territory of the French Republic, or the dependencies thereof."<sup>108</sup> The act declared that ships violating this prohibition shall be liable to be seized and forfeited in a condemnation proceeding in U.S. courts.<sup>109</sup> In addition, the act authorized the President "to give instructions to the commanders of the public armed ships of the United States" to examine ships of the United States on the high seas and to seize any ships determined to be "bound or sailing to any port or place within the territory of the French Republic, or her dependencies."<sup>110</sup> The President thereafter instructed the commanders of the armed vessels of the United States to prevent all intercourse "between the ports of the United States, and those of France and her dependencies."<sup>111</sup> He also urged the commanders not to let American vessels "bound to or from French ports" to escape.<sup>112</sup>

In accordance with the President's command, Captain Little seized a Danish ship sailing from a French port, brought her to Boston, and sought to have the ship and its cargo condemned for violating the act. The district court directed restoration of the ship and cargo as neutral property, but declined to award damages against Captain Little for his capture and detention of the ship. On appeal, the circuit court held that damages were appropriate because the capture was not authorized by statute. The Supreme Court took the case to decide the following question: "Is the officer who obeys [the President's orders] liable for damages sustained by this misconstruction of the act, or will his orders excuse him."<sup>113</sup> The Court held that Little was liable for damages and that the President's orders "cannot . . . legalize an act which without those instructions would have been a plain trespass."<sup>114</sup>

The Supreme Court's brief opinion did not expressly rely on an allocation-of-powers rationale for its decision. Nonetheless, the decision makes clear that the Court viewed Congress as possessing sole

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107 6 U.S. (2 Cranch) 170 (1804).

108 *Id.* at 177 (emphasis added).

109 *Id.*

110 *Id.* at 171 (emphasis added).

111 *Id.* (emphasis added).

112 *Id.* at 178 (emphasis added).

113 *Id.*

114 *Id.* at 179.

and exclusive power to determine the scope of hostilities between the United States and other nations. Although the Court conceded that Congress's narrow prescription "would be very often evaded," and that the President's broader construction was "much better calculated to give it effect," the Court concluded that it was for Congress rather than the President to decide how best to respond to ongoing hostilities with France. On this view, the President possessed no independent constitutional power to generate or escalate hostilities by augmenting—or even making more effective—the precise prohibitions adopted by Congress.

The Supreme Court's decision in *Brown* was founded on the same assumptions regarding the constitutional allocation of powers between Congress and the President. Congress had declared war against Great Britain, but it had not expressly authorized confiscation of enemy property found within the United States. Authorizing such confiscations might or might not be a prudent wartime strategy, but it almost certainly would have escalated hostilities between the parties and led to retaliation against American property abroad. In the Court's view, the Constitution reserved decisions of this kind to Congress rather than to the executive or judicial branches.

This view appears to have persisted at least through the Civil War. In 1862, in the *Prize Cases*,<sup>115</sup> the Supreme Court upheld executive authority to impose a wartime blockade, but gave no indication that the President possessed independent power to violate neutral rights under the law of nations. At issue was President Lincoln's decision to blockade Southern ports following the commencement of the Civil War. Lincoln had declared and provided notice of the blockades in April 1861.<sup>116</sup> U.S. ships captured several vessels, rebel and foreign, violating the blockade, and a U.S. District Court condemned them as lawful prizes.<sup>117</sup> The primary issue on appeal was whether the President had authority to institute the blockade.<sup>118</sup>

The Court's opinion made clear that the Constitution authorizes Congress, not the President, to initiate or declare war on behalf of the United States:

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power.

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115 67 U.S. (2 Black) 635 (1862).

116 *Id.* at 666.

117 *Id.* at 637–38.

118 *Id.* at 665.

He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State.<sup>119</sup>

The Court sustained the President's blockade of southern ports not on any sweeping view of executive power, but on the narrow grounds that a legal state of war existed with inhabitants of states in rebellion, that the President's blockade was consistent with the law of nations, and that Congress had retroactively authorized the President's conduct.<sup>120</sup> Relying on Vattel and other publicists, the Court explained that under the law of nations a sovereign could treat rebellious states as enemy belligerents.<sup>121</sup> Because a state of war existed, the President—"as the Executive Chief of Government and Commander-in-chief"—had the derivative power to assert the right of prize and capture as defined by the law of nations:<sup>122</sup>

The right of prize and capture has its origins in the "*jus belli*," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.<sup>123</sup>

The President's compliance with the law of nations was necessary to the Court's holding that the blockade was consistent with the Constitution's allocation of powers, particularly Congress's exclusive power to initiate war. Had the President asserted prize and capture rights against neutrals in violation of the law of nations, he would have given neutral countries just cause for war against the United States. The Court made clear, however, that the President "has no power to initiate or declare a war either against a foreign nation or a domestic state;" "Congress alone has the power to declare a national or foreign war."<sup>124</sup> Accordingly, the Constitution's allocation of powers constrained the President to follow the law of nations in this context. The Court also noted—without asserting that it was necessary to uphold

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119 *Id.* at 668.

120 See Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1893–1902 (2010) (discussing the legality of President Lincoln's blockade under the law of nations).

121 See *Prize Cases*, 67 U.S. (2 Black) at 666–67.

122 *Id.* at 666.

123 *Id.*

124 *Id.* at 668.

the President's conduct—that Congress had, in fact, passed an act ratifying the President's decision to institute a blockade.<sup>125</sup> Thus, as an alternative holding, the Court stated that “if the President had in any manner assumed any powers which it was necessary should have the authority or sanction of Congress, . . . this ratification has operated to perfectly cure the defect.”<sup>126</sup>

In 1900, in *The Paquete Habana*,<sup>127</sup> the Court signaled a possible shift from its position that Congress has exclusive constitutional authority to abrogate fundamental principles of the law of nations, and thus precipitate or escalate war.<sup>128</sup> As discussed, during the Spanish-American War, U.S. armed ships attempted to libel Spanish fishing vessels as prizes of war. The law of nations, the Court explained, recognized an exception for coastal fishing vessels from the ordinary rules of capture in wartime.<sup>129</sup> Neither Congress nor the President had specifically authorized the seizures, and the Court applied the law of nations to exempt such vessels from capture. Read in light of long-standing precedent, the Court adhered to the law of nations (as it had in *The Schooner Exchange*) in order to avoid judicial escalation of hostilities and to preserve the constitutional prerogatives of the political branches to conduct war and foreign relations. Consistent with this rationale, the Court indicated that the exemption it recognized could be overridden by a “controlling executive or legislative act.”<sup>130</sup> Scholars have long been puzzled by the Court's suggestion that the President could override international law in prosecuting a war. If the Court had followed its approach in *Brown*, then it might have reserved the decision whether to depart from international law exclusively to Congress. Instead, the Court suggested some measure of overlapping executive and congressional power to depart from the law of nations. Of course, the Court had no need to—and made no attempt to—define the respective powers of the political branches to depart from the law of nations, either alone or in combination. But its discussion does represent a departure from *Brown*, at least insofar as the Court acknowledges some executive authority to depart from the law of nations.

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125 *Id.* at 670.

126 *Id.* at 671.

127 175 U.S. 677 (1900).

128 *Cf. id.* at 711–12 (noting that “no act of Congress or order of the President” had expressly abrogated the law of nations and discussing relevant presidential proclamations (emphasis added)).

129 *See id.* at 701–06.

130 *Id.* at 700.



It is worth observing, as a descriptive matter, that this shift occurred alongside a contemporaneous shift in the relative war powers of Congress and the President during the twentieth century. The relative powers of Congress and the President in making and conducting war is a complex and controversial topic, beyond the scope of this Article. But this much may be said: in the twentieth century, the President came to assert greater authority to initiate hostilities without congressional authorization, and the Supreme Court came to acknowledge that Congress and the President have a degree of shared constitutional responsibility to conduct foreign relations and formulate national policy on questions affecting war and peace.

First, moving from the nineteenth to the twentieth century, the President exercised greater authority to initiate hostilities without express congressional authorization. "If practice during the nineteenth century was largely faithful to the original understanding of the war powers, the Constitution came under strain at the turn of the century."<sup>131</sup> After ordering various small-scale military operations in the nineteenth century, Presidents asserted greater power to order hostile military actions without congressional authorization through the twentieth century.<sup>132</sup>

Second, in the twentieth century, the Supreme Court acknowledged that the President has broader wartime authority than early cases like *Brown* recognized. Decisions addressing executive wartime powers are few, but prominent. One such case is the Court's 1936 decision in *United States v. Curtiss-Wright Export Corp.*<sup>133</sup> *Curtiss-Wright* involved a challenge to a congressional delegation authorizing the President to prohibit the sale of arms to certain countries engaged in conflict. The Court assumed (without deciding) that the delegation would have been unconstitutional in the domestic context, but upheld the statute on the ground that the President possessed broad independent powers in the field of foreign relations. In particular, the Court cited "the very delicate, plenary and exclusive power of the

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131 Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 868 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1996)); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 946 (2008) (examining "how the political branches have actually considered and treated the legislature's power to regulate the President's 'command of the forces' and the 'conduct of campaigns,' from 1789 to the present day"); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 50–56 (1993) (describing early American accounts of presidential power in foreign affairs and the Supreme Court's recognition in the twentieth century of "some independent law-making authority in foreign affairs").

132 Stromseth, *supra* note 131, at 868.

133 299 U.S. 304 (1936).

President as the sole organ of the federal government in the field of international relations.”<sup>134</sup> The Court suggested that, to carry out his constitutional functions, the President must possess “a degree of discretion and freedom from statutory restriction which would not be admissible, were domestic affairs alone involved.”<sup>135</sup> Although *Curtiss-Wright* has been widely criticized in academic quarters,<sup>136</sup> there is no question that it understood the management of foreign relations—and the corresponding risk of foreign conflict—to be the shared constitutional responsibility of Congress and the President.<sup>137</sup>

In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>138</sup> Justice Jackson’s famous concurring opinion described “[m]uch of the Court’s opinion in *Curtiss-Wright*” as “dictum,” explaining that *Curtiss-Wright* involved only “the question of [the President’s] right to act under and in accord with an Act of Congress.”<sup>139</sup> Although Justice Jackson pulled back from some of *Curtiss-Wright*’s language, Jackson himself recognized broader executive authority in foreign relations than the Marshall Court cases contemplated. First, Jackson described a “zone of twilight” in which the Executive might exercise “independent presidential responsibility” in foreign affairs.<sup>140</sup> Although Justice Jackson—and subsequent Courts—have refrained from precisely defining what those independent powers might be,<sup>141</sup> the Court has acknowledged their existence. Moreover, Justice Jackson explained that “[w]hen the President acts pursuant to an express or *implied* authori-

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134 *Id.* at 320.

135 *Id.*

136 See, e.g., Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L. J. 1 (1973).

137 See, e.g., H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999) (assessing the overlapping powers of Congress and the President over foreign affairs); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (arguing that the constitutional text allocates foreign affairs powers between Congress and the President). Some commentators maintain that the President also possesses certain implied powers. See, e.g., Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (arguing that the President has “authority to prescribe incidental details needed to carry into execution a legislative scheme”); Monaghan, *supra* note 131, at 11 (maintaining that the President possesses a narrow, inherent power “to protect and defend the personnel, property, and instrumentalities of the United States from harm”).

138 343 U.S. 579 (1952).

139 *Id.* at 636 n.2 (Jackson, J., concurring).

140 *Id.* at 637.

141 *Id.*; see *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (resolving question of whether the President had authority to settle foreign claims on the basis of implied congressional authorization rather than independent presidential power).

zation of Congress, his authority is at its maximum.”<sup>142</sup> After *Youngstown*, the Court has found broad implied congressional authorizations of presidential war and foreign relations authority.<sup>143</sup> In *Dames & Moore v. Regan*,<sup>144</sup> for instance, the Court asserted that “the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’”<sup>145</sup> Such reasoning allows broader executive wartime authority than the Marshall Court recognized in *Brown*, which limited executive and judicial authority to escalate war through condemnation “until [Congress’s] will shall be expressed.”<sup>146</sup>

The important point for present purposes is that the Supreme Court’s recognition of some measure of executive authority to depart from the law of nations emerged in the twentieth century, as the Court began to acknowledge greater executive wartime powers. In the early period, when the Court understood the Constitution to give Congress exclusive power over the initiation or escalation of war, it required both the judicial and the executive branches to follow rules derived from the law of nations whose violation could trigger hostilities. In later years, as the President began to exert greater independent war powers, the Court suggested in *The Paquete Habana* that either political branch may depart from the law of nations in exercising its constitutional responsibilities over war and foreign relations.

Understanding the Supreme Court’s leading decisions applying the law of nations as a function of the Constitution’s allocation of powers sheds new light on longstanding academic debates over the extent to which such law imposes judicially enforceable limits on the political branches. First, the contention that the law of nations imposes judicially enforceable limitations on *congressional* power finds no support in the Court’s cases because the primary goal of these cases has been to preserve the constitutional prerogative of Congress to follow, modify, or depart from the law of nations in the exercise of its war powers. Second, Supreme Court cases suggest that the Presi-

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142 *Id.* at 635 (emphasis added).

143 *See, e.g.*, Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COM. 87 (2002).

144 453 U.S. 654 (1981).

145 *Id.* at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). For a critical evaluation of the Supreme Court’s approach to sole executive agreements, see Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007).

146 *Brown v. United States*, 12 U.S. (8 Cranch) 110, 123 (1814).

dent must abide by the law of nations only to the extent necessary to avoid usurping Congress's exclusive constitutional authority. They do not suggest that the law of nations imposes a judicially enforceable limitation on *executive* power when the President is exercising a valid constitutional power of his own. In requiring the President to adhere to traditional perfect rights under the law of nations (in the absence of congressional authorization to depart from such law), the Court has historically acted only to uphold the power of Congress to declare and define the limits of war. To the extent that the Court now regards the war power as the shared responsibility of Congress and the President,<sup>147</sup> it may be more likely to uphold both congressional and executive decisions to depart from the law of nations.

### CONCLUSION

Modern commentators have suggested that customary international law—the modern law of nations—binds the political branches no less than courts. This suggestion is difficult to reconcile with the text, history, and structure of the Constitution. Absent incorporation of the law of nations in a federal statute or treaty, the Constitution traditionally has bound courts to follow the law of nations only when necessary to preserve the constitutional prerogatives of Congress and the President to conduct foreign relations and make war and peace. Because departures from certain principles of the law of nations gave aggrieved nations just cause for war, courts historically followed those principles as a means of ensuring that the political branches—rather than courts—made important foreign policy decisions regarding whether, when, and how to depart from such law. Given that courts followed the law of nations in order to uphold the constitutional prerogatives of Congress and the President, it follows that the political branches possess discretion to depart from such law in the exercise of their constitutional authority to conduct foreign relations and make fundamental decisions affecting war and peace. Courts allow such departures for the same reason that they follow the law of nations in the absence of such departures: to uphold the Constitution's allocation of powers. To say that the political branches collectively may depart from the law of nations does not resolve complex questions relating to the Constitution's precise allocation of powers between

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147 Commentators disagree over how to reconcile Congress's power to declare war and the President's commander-in-chief power. See, e.g., Barron & Lederman, *supra* note 131; Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

Congress and the President. Those questions turn on the proper understanding of Congress's and the President's respective constitutional powers. Although the Supreme Court's description of these powers has shifted over time, it has never questioned the collective power of the political branches to depart from the law of nations in the exercise of their constitutional responsibilities.