

Notre Dame Law School

NDLScholarship

Journal Articles

Publications

2018

Why Federal Courts Apply the Law of Nations Even Though it is Not the Supreme Law of the Land

Anthony J. Bellia

Notre Dame Law School, anthony.j.bellia.3@nd.edu

Bradford R. Clark

George Washington University Law School, bclark@law.gwu.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [International Law Commons](#), [Military, War, and Peace Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Anthony J. Bellia & Bradford R. Clark, *Why Federal Courts Apply the Law of Nations Even Though it is Not the Supreme Law of the Land*, 106 Geo. L.J. 1915 (2018).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1358

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

RESPONSE ARTICLE

Why Federal Courts Apply the Law of Nations Even Though it is Not the Supreme Law of the Land

ANTHONY J. BELLIA JR.* & BRADFORD R. CLARK**

TABLE OF CONTENTS

INTRODUCTION	1916
I. THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION.	1918
II. THE STATUS OF THE LAW OF NATIONS UNDER THE CONSTITUTION.	1926
A. THE LAW OF NATIONS AS SUPREME FEDERAL LAW	1927
B. THE LAW OF NATIONS AND THE CONSTITUTIONAL TEXT.	1931
III. THE LAW OF NATIONS AND THE RECOGNITION POWER.	1935
A. THE RECOGNITION POWER IN SUPREME COURT DECISIONS	1936
1. The Law of Nations as General Law	1937
2. The Recognition Power in the Twentieth Century	1939
B. THE LAW OF NATIONS, THE ALLOCATION OF POWERS, AND EARLY CASES.	1942
1. Recognition and the Allocation of Powers	1944
a. <i>Recognition and the Law of Nations</i>	1945
b. <i>Recognition and Other Foreign Relations Powers</i>	1946
c. <i>Recognition Under the Law of Nations</i>	1947
2. The Law of Nations in Early Supreme Court Cases	1950
CONCLUSION	1960

* O'Toole Professor of Constitutional Law, Notre Dame Law School. © 2018, Anthony J. Bellia Jr. & Bradford R. Clark. We thank Tricia Bellia, Val Clark, and John Manning for helpful comments and suggestions, and all of the participants for their contributions to this symposium. We also thank *The Georgetown Law Journal* for organizing and publishing this symposium.

** William Cranch Research Professor of Law, George Washington University Law School.

INTRODUCTION

We are deeply grateful to all those who participated in this Symposium examining our book, *The Law of Nations and the United States Constitution*.¹ We thank the extraordinary panel of judges who took the time to read and discuss our work: Justice Samuel Alito and Judges David Barron, Brett Kavanaugh, Debra Livingston, and Sri Srinivasan.² We also thank the scholars who graciously agreed to present and publish papers on this topic: Professors Bill Dodge,³ David Golove,⁴ John Harrison,⁵ Dan Hulsebosch,⁶ Tom Lee,⁷ Mike Ramsey,⁸ Paul Stephan,⁹ and Ingrid Wuerth.¹⁰ Finally, we thank the professors who moderated and participated in the various panels at the conference: Dean John Manning, and Professors Curt Bradley, Jack Goldsmith, Chimene Keitner, Marty Lederman, David Stewart, and Amanda Tyler.

Our goal here is to address two questions raised by this Symposium that go to the heart of the status of the law of nations under the Constitution. The first question is whether the Constitution adopted the law of nations (or some subset of it) as the supreme law of the land. This fundamental question has profound implications for the proper role and status of customary international law in the U.S. federal system. The second question is whether the Constitution's allocation of certain powers to the political branches of the federal government has any bearing on the power or obligation of federal courts to apply the law of nations. Resolution of this question is particularly important if one concludes, as we do, that the Constitution did not adopt the law of nations itself as supreme federal law. The recognition power—along with other foreign relations and war powers that the Constitution allocates to the political branches—can only be understood by reference to background principles of the law of nations. In various cases over time, the Supreme Court has upheld the Constitution's allocation of these powers by respecting the rights of foreign nations under the law of nations.

One of our goals in writing this book was to reinvigorate and advance the debate over the role of customary international law in U.S. courts. The papers in

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

2. See *Transcript: The Judicial Perspective Panel* (Nov. 2, 2017), in Symposium, *The Law of Nations and the United States Constitution*, 106 GEO. L.J. 1935 (2018).

3. See William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559 (2018).

4. See David Golove & Daniel Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593 (2018).

5. See John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659 (2018).

6. See Golove & Hulsebosch, *supra* note 4.

7. See Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707 (2018).

8. See Michael D. Ramsey, *The Constitution's Text and Customary International Law*, 106 GEO. L.J. 1747 (2018).

9. See Paul B. Stephan, *Inferences of Judicial Lawmaking Power and the Law of Nations*, 106 GEO. L.J. 1793 (2018).

10. See Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825 (2018).

this Symposium advance this debate by deepening understandings of how the Constitution interacts with customary international law. It is not possible in this Article to discuss all of the excellent points made at the conference and set forth in the published papers. We focus instead on several points made by Professors Golove and Hulsebosch because their paper addresses the foundational questions described above and, in our view, perpetuates significant misconceptions about the law of nations and the Constitution. Their paper makes the two interrelated assertions that (1) overwhelming evidence suggests that the Constitution adopted the law of nations as supreme federal law and (2) judicial reliance on the recognition power to justify application of the law of nations is both unnecessary and misguided. These claims lack meaningful support and reflect a misunderstanding of the relationship between the law of nations and the Constitution.

Scholars interested in the status of customary international law in the United States have long debated whether the Constitution adopted the law of nations as part of the supreme law of the land. Several of the commentators in this symposium—particularly Professors Golove and Hulsebosch—strongly contend that the Constitution took this fundamental step.¹¹ Upon analysis, however, the arguments that these commentators present fall short, and there is substantial textual, historical, and structural evidence to the contrary.

In arguing that the Constitution adopted the law of nations as the supreme law of the land, Professors Golove and Hulsebosch make three claims about the relationship between the Constitution and the law of nations. First, they claim that the Constitution was designed to enable the United States to comply with the law of nations and to signal that fact to other nations.¹² This claim is well established and uncontroversial. Adopting constitutional mechanisms to enable the United States to comply with the law of nations was crucial to the new nation's survival.

Their second and third claims are more problematic. Their second claim is that the Constitution enabled the United States to comply with the law of nations by adopting the law of nations as a form of supreme federal law.¹³ In their view, the Constitution assigned courts the power to enforce this “supreme” law of nations against states, the federal executive, and possibly even Congress.¹⁴ The evidence they offer in support of this claim is inadequate and mostly beside the point. Their primary evidence consists of statements by members of the Founding generation describing the law of nations as part of the “law of the land.”¹⁵ In relying on this evidence, Golove and Hulsebosch make a simple category mistake. They conflate the “law of the land”—a familiar concept inherited by the colonists from England—with the “supreme Law of the Land”—a distinctly American concept employed by the Constitution to distinguish the Constitution, laws, and treaties of the United States from other sources of the larger law of the land. Understood in

11. See Golove & Hulsebosch, *supra* note 4, at 1612; see also Dodge, *supra* note 3, at 1566.

12. See Golove & Hulsebosch, *supra* note 4, at 1595.

13. See *id.* at 1612.

14. See *id.* at 1606.

15. See *id.* at 1616–23.

historical context, Founding-era references to the law of nations as part of the “law of the land” say nothing about whether such law was supreme over other parts of the law of the land. The Supremacy Clause governs the hierarchy of various sources of law under the Constitution, and there is no credible basis for concluding that it *sub silentio* transformed the law of nations into the “supreme Law of the Land.”

While Professors Golove and Hulsebosch’s second claim lacks substantial support in the text, history, and structure of the Constitution, their third claim overlooks important evidence found in these same sources. Their third claim is that the Constitution’s allocation of power to the political branches to recognize foreign nations had no bearing on whether courts were obligated to respect the rights of recognized nations under the law of nations. This assertion contradicts the constitutional allocation of powers, background understandings of recognition under the law of nations at the Founding, and judicial precedent. The Constitution assigns to Congress and the President several powers—including the recognition power—that can be understood only by reference to the law of nations. This allocation of powers, however, did not transform the law of nations itself into supreme federal law. Rather, as the Supreme Court has recognized, the Constitution’s allocation of foreign relations powers to the political branches and the exercise of these powers sometimes requires federal courts to apply the law of nations and preempt state law because that allocation of powers is itself part of the supreme law of the land.

In short, federal courts must apply the law of nations when the Constitution’s allocation of powers to the political branches requires them to do so even though the law of nations is not, in and of itself, the supreme law of the land. Although space does not permit a full discussion of all of Professors Golove and Hulsebosch’s claims, we highlight and address what we regard as some of their more significant errors and omissions. Part I briefly recounts the thesis of our book—that the Constitution’s allocation of specific powers over war and foreign relations is the constitutional basis for judicial application of the law of nations in the United States. Part II explains why the law of nations does not qualify as the supreme law of the land notwithstanding Professors Golove and Hulsebosch’s claim to the contrary. Part III returns to the Constitution’s allocation of powers and explains why the Supreme Court’s reliance on the recognition power (and other war and foreign relations powers) as a basis for upholding the rights of foreign nations is consistent with both historical practice and early judicial precedent.

I. THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION

It may seem surprising that the status of customary international law in the U.S. legal system remains unsettled more than two centuries after the Founding. The need to ascertain its precise status, however, arose largely from two twentieth century developments: the changing content of customary international law in the second half of the twentieth century, and the demise of general law under *Erie*

Railroad Co. v. Tompkins.¹⁶ In recent decades, two opposing approaches have dominated the academic debate over this issue. The modern position maintains that all rules of customary international law qualify as supreme federal law under the Constitution and the Supremacy Clause.¹⁷ Under this position, rules of customary international law both provide a basis for Article III federal question jurisdiction and preempt contrary state law. The revisionist position maintains that rules of customary international law apply as supreme federal law only when adopted by the political branches in a law or a treaty, and apply as state law only when adopted by the appropriate state actors.¹⁸ On this account, uncodified rules of customary international law neither support Article III federal question jurisdiction nor preempt contrary state law.

In our view, neither the modern position nor the revisionist position is fully consistent with the text, history, and structure of the Constitution. In *The Law of Nations and the United States Constitution*, we endeavored to set forth a more exacting account of how customary international law has interacted with the Constitution from the Founding until the present. The Founders could have—but did not—include the law of nations in either the Supremacy Clause (as a source of supreme federal law) or Article III (as a basis for federal subject matter jurisdiction). Instead, they designed various provisions of the Constitution to interact in distinct and precise ways with the three main branches of the law of nations known to the Founders—the law merchant, the law of state–state relations, and the law maritime.¹⁹

It is inaccurate and anachronistic to say that the Constitution somehow “incorporated” or “adopted” the law of nations in its entirety. Rather, specific provisions of the Constitution were designed to interact with each of the three main branches of the law of nations in different ways.²⁰ This design is not surprising because each branch had distinctive characteristics known to the Founders, and a one-size-fits-all approach would have disserved the interests of the United States. Our scholarship seeks to illuminate the original public meaning of these specific provisions of the constitutional text in light of the background principles of the law of nations against which they were drafted and ratified.

The law merchant governed commercial transactions and furthered international (and interstate) trade by providing a well-developed body of general commercial law that transcended national borders. The Constitution gave Congress

16. 304 U.S. 64, 78 (1938).

17. See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295 (1994); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1826–27 (1998); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 393–94 (1997).

18. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 820–21 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1622–23 (1997).

19. See 4 WILLIAM BLACKSTONE, COMMENTARIES *66–67 (using the phrase the “law of nations” as a general term to describe the law of state–state relations, the law merchant, and the law maritime).

20. BELLIA & CLARK, *supra* note 1, at 13.

legislative power to regulate interstate and international commerce, but early Congresses had no interest in opting out of the general law merchant by localizing such law.²¹ Instead, Congress exercised its power to create inferior federal courts with jurisdiction to adjudicate controversies between citizens of different states and between a U.S. citizen and a citizen or subject of a foreign state.²² Such adjudication permitted out-of-state merchants to reap the benefits of the general law merchant while avoiding real or perceived bias against them in state courts. Article III's grant of diversity jurisdiction was the Constitution's primary means of facilitating fair and just application of the law merchant.

The law maritime was a general body of law that governed maritime commerce and transportation. Like the law merchant, it facilitated commerce by providing a shared body of rules to govern such transactions. Congress had the power to opt out of the law maritime by enacting statutes governing U.S. vessels, but it rarely did so in the early years of the Republic because of the perceived benefit of adhering to a relatively uniform body of customary law.²³ Instead, Congress again took advantage of Article III's grant of jurisdiction to federal courts by giving such courts admiralty and maritime jurisdiction.²⁴ This jurisdiction was significant because the law maritime overlapped with the law of state-state relations (most notably the law of prize) and violations of such law could lead to war.

The law of state-state relations was a body of customary rules governing relations between sovereign nations. These rules were especially important to peace and security because violations often generated hostilities between nations. Vattel's treatise, *The Law of Nations*,²⁵ described this branch of the law of nations as including the rights to enjoy territorial sovereignty, conduct diplomatic relations, engage in neutral commerce and use of the high seas, exercise treaty rights, and enjoy liberty peaceably.²⁶ Arguably, this branch of the law of nations was the most important branch to the Founders because one of their primary goals in adopting the Constitution was to prevent violations of the law of nations that could trigger conflict with European powers. Significantly, however, the Constitution made no attempt to adopt the law of state-state relations as "the supreme Law of the Land." Instead, the Constitution allocated to the federal government those powers necessary to enable it both to comply with the law of state-

21. *Id.* at 14.

22. *Id.*

23. *Id.* at 16.

24. *Id.* (quoting U.S. CONST. art. III, § 2).

25. 1 EMMERICH DE VATTEL, *THE LAW OF NATIONS* (London, J. Newberry et al. eds., 1760) [hereinafter 1 Vattel, *THE LAW OF NATIONS*]; 2 EMMERICH DE VATTEL, 2 *THE LAW OF NATIONS* (London, J. Coote ed., 1759) [hereinafter 2 Vattel, *THE LAW OF NATIONS*].

26. See 1 Vattel, *THE LAW OF NATIONS*, *supra* note 25, bk. I, §§ 281-282, at 113-14 (describing right to neutral use of high seas); *id.* bk. II, § 49, at 137 (describing "right of security"); *id.*, § 54, at 138 (describing right of each nation to govern itself and preserve itself from injury); 2 Vattel, *THE LAW OF NATIONS* *supra* note 25, bk. IV, § 57, at 133 (describing "the right of embassy").

state relations and to decide whether, when, and how to respond to any violations of such law by other nations.

Specifically, the Constitution assigned Congress important powers that were necessary for a nation to follow and enforce the law of state–state relations—the powers “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”²⁷ These powers involved matters of war and peace and provided Congress with the means of both complying with the law of nations and vindicating the rights of the United States under such law. The Constitution also gave Congress power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”²⁸ This power enabled Congress to punish and deter serious violations of the law of nations by Americans—violations that could lead to war if left unredressed.

In addition, the Constitution gave the President and the Senate important powers related to the law of nations. Together, these actors could appoint ambassadors and make treaties with other nations. The Constitution also charged the President with receiving foreign ambassadors, which facilitated his role of communicating and negotiating with foreign states on behalf of the United States. As Commander-in-Chief of the armed forces, the President was responsible for managing military interactions with other nations. Finally, the Constitution gave Congress necessary and proper power to carry these, and other powers, into execution. Taken together, these powers gave the political branches of the federal government all of the means necessary to conduct foreign relations, ensure that the United States complied with the law of nations, and uphold U.S. rights under such law.

The Constitution also gave federal courts an important—but limited—role in applying and enforcing the law of nations. The Constitution did not give federal courts power to hear all cases arising under the law of nations. Instead, Article III of the Constitution extended the judicial power of the United States to several categories of cases and controversies likely to involve such law. For example, Article III authorized federal courts to hear cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, cases of admiralty and maritime jurisdiction, controversies between citizens of different states, and controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”²⁹ By adopting federal laws and treaties on matters governed by the law of nations, Congress and the President could employ the federal question jurisdiction of federal courts—including the Supreme Court—to ensure U.S. compliance with the law of nations. Even in the absence of controlling statutes and treaties, federal courts could apply the law of nations as general

27. U.S. CONST. art. I, § 8, cl. 11.

28. U.S. CONST. art. I, § 8, cl. 10.

29. *See* U.S. CONST. art. III, § 2, cl. 1.

law in other cases within their Article III jurisdiction, most notably in cases of admiralty and maritime jurisdiction and diversity cases.

Under these heads of Article III jurisdiction, federal courts have applied all three branches of the law of nations since the Founding, but have treated each of them differently. Federal courts applied the law merchant as general law for over a century in diversity cases until the Supreme Court held in *Erie Railroad Co. v. Tompkins* that the Constitution requires federal courts to apply state law in the absence of an applicable federal rule of decision.³⁰ Similarly, federal courts applied the law maritime as general law for over a century until the Supreme Court held in *Southern Pacific Co. v. Jensen* that Article III's grant of admiralty and maritime jurisdiction adopts such law as federal law.³¹ Finally, federal courts also applied the law of state-state relations as general law, but did so in ways that upheld rather than contradicted the Constitution's allocation of war and foreign relations powers to the political branches of the federal government.³²

Although the status of the law merchant and the law maritime have been settled since the early twentieth century, the Supreme Court has not yet definitively addressed the status of the law of state-state relations under the Constitution. As noted, scholars have advanced two main positions—the modern position and the revisionist position. Both positions take a one-size-fits-all approach: the Constitution either adopts all rules of customary international law as supreme federal law, or adopts no rules of customary international law as supreme federal law. Both positions, however, lack adequate support in the Constitution's text, history, and structure and in Supreme Court precedent. Careful review of these sources reveals that the Constitution did not adopt a uniform approach to the law of nations. Instead, the Constitution was designed to interact differently with different branches of the law of nations.

Our book describes in detail the distinct strategies that the Founders employed in the Constitution regarding each branch of the law of nations. The book gives special attention to the Constitution's approach to the law of state-state relations because adherence to such law was necessary to maintain peace and security. The Founders' approach was to give the federal government all powers necessary to enable the United States to comply with the law of state-state relations. This allocation of powers ensured that the federal government could prevent member states from unilaterally risking hostilities with foreign powers, as some states had done under the Articles of Confederation.

Two important implications follow from this allocation of powers in the Constitution. First, by specifying the federal actors who can exercise powers implicating the law of state-state relations on behalf of the United States, the Constitution established that other actors—particularly state actors—cannot

30. See 304 U.S. 64, 78 (1938).

31. See 244 U.S. 205, 214–15 (1917).

32. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 779–822 (2012) (describing federal court cases that applied the law of state-state relations as general law in a manner consistent with allocation of power to the political branches).

exercise such powers. Second, when designated federal actors exercise their constitutional powers over war and foreign relations, the Supremacy Clause prevents other actors from contradicting the exercise of those powers. These implications are consistent with—and make sense of—Supreme Court decisions from the Founding to the present, even though the Court has not always spelled out (or had any need to spell out) these implications with precision. The Marshall Court relied on the Constitution’s allocation of foreign relations powers to the political branches to uphold the rights of foreign nations and to refrain from holding such nations accountable for their violations of U.S. rights.³³ In the Court’s view, the questions of whether to override a foreign nation’s rights and whether to hold it accountable for its violations of U.S. rights were questions of policy (to be decided by the political branches) rather than questions of law (to be decided by the courts).³⁴ In the eighteenth and nineteenth centuries, such decisions could contradict recognition or lead to war, and were thus more appropriate for the political branches. In the twentieth century, the Court invoked the recognition power in a series of cases to constrain judicial scrutiny of alleged misconduct by foreign nations.³⁵

In the 1780s, after the War of Independence, American states were notorious for violating other nations’ rights under the law of nations, including rights under the Treaty of Peace, rights of ambassadors, and rights to obtain redress for violence directed against foreigners.³⁶ Such violations hampered the United States’ ability to establish productive diplomatic and commercial relations with other nations. In addition, such violations invited other nations to retaliate against the United States, including by waging war.³⁷ Under the Articles of Confederation, the Continental Congress had no effective means to prevent or redress state violations of the law of nations.³⁸ A central reason the Founders established a new Constitution was to enable the United States as a whole to uphold the law of nations and avoid hostilities with other nations.³⁹

Accordingly, Articles I and II of the Constitution contain several provisions that gave the political branches of the federal government exclusive power over the means of conducting foreign relations. First, Articles I and II gave the

33. See BELLIA & CLARK, *supra* note 1, at 79–90 (discussing Marshall Court cases “respecting the traditional sovereign rights of foreign nations, or declining to adjudicate a foreign nation’s alleged violation of U.S. rights”).

34. See, e.g., *The Nereide*, 13 U.S. (9 Cranch) 388, 422–23 (1815) (“[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.”).

35. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (“[W]e decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit”); *United States v. Pink*, 315 U.S. 203, 222–23 (1942) (holding that recognition of foreign sovereigns binds the courts and prevents judicial inquiry); *United States v. Belmont*, 301 U.S. 324, 329–30 (1937) (same).

36. See BELLIA & CLARK, *supra* note 1, at 48–49; Bellia & Clark, *supra* note 32, at 758–59.

37. See BELLIA & CLARK, *supra* note 1, at 49; Bellia & Clark, *supra* note 32, at 759–60.

38. See BELLIA & CLARK, *supra* note 1, at 49; Bellia & Clark, *supra* note 32, at 759.

39. See BELLIA & CLARK, *supra* note 1, at 48–49.

political branches exclusive power over the traditional means of recognizing foreign nations, including sending and receiving ambassadors and making treaties.⁴⁰ Recognition by the political branches signified that the United States as a whole recognized a foreign nation as an independent sovereign state with all of the rights that accompanied that status under the law of nations. The Founders were familiar with the importance and effect of recognition because they were vigorously pursuing recognition of the United States by other nations at the time. The reason they sought recognition was to convince other nations to acknowledge the United States as an equal and independent sovereign entitled to all of the rights that accompanied that status under the law of nations.

Second, Articles I and II gave the political branches exclusive authority over the traditional means by which nations resolved their disputes with other nations.⁴¹ If one nation violated another nation's rights under the law of nations, the offended nation, if feasible, would use diplomacy to pursue an appropriate adjustment, compromise, mediation, or arbitration. Sending and receiving ambassadors facilitated such efforts. When peaceful measures failed to resolve a dispute, nations could pursue satisfaction through other means. Such means included retorsion (treating the citizens of the offending nation in the same manner as the offending nation had treated one's own), reprisals and captures (seizures of property belonging to another nation or its citizens in satisfaction of an injury, debt, or refusal to make satisfaction), and, in the last resort, war.⁴² The Constitution allocated exclusive power to the political branches to exercise all of these means of resolving disputes with other nations.⁴³ In doing so, the Constitution gave the political branches the exclusive power to decide whether, when, and how the United States would hold another nation accountable for violating its rights under the law of nations.

The exclusive allocation of these powers to the political branches required U.S. courts to uphold the traditional rights of recognized foreign nations under the law of nations and to avoid attempts to hold them accountable for violating U.S. rights. If courts—without authorization from the political branches—either refused to uphold the rights of recognized foreign nations or attempted to hold such nations accountable for violations of the law of nations, then they would have usurped the exclusive authority of the political branches over war and foreign relations.

The Constitution thus envisioned an important, though secondary, role for federal courts in ensuring that the United States upheld its obligations under the law of nations. As discussed, Article III extended the federal judicial power to several

40. See U.S. CONST. art. II, § 2, cl. 2.

41. See BELLIA & CLARK, *supra* note 1, at 42–43, 50–67.

42. See *id.* at 51–52.

43. Article I gives Congress power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. CONST. art. I, § 8, cl. 11. Article I also gives Congress several powers necessary to wage war. See *id.* art. I, § 8, cls. 12, 13, 15, 16, 18 (granting Congress the powers to “raise and support Armies,” “provide and maintain a Navy,” “provide for calling forth the Militia,” “provide for organizing, arming, and disciplining, the Militia,” and “make all Laws which shall be necessary and proper” to execute the foregoing powers).

categories of cases likely to involve the law of nations,⁴⁴ and federal courts routinely applied such law as general law in these cases.⁴⁵ In adjudicating these cases, however, federal courts were bound to respect political branch authority over war and foreign relations by simultaneously upholding the rights of foreign nations under the law of nations and refusing to hold such nations accountable for violations of such law.⁴⁶ These default rules followed from the Constitution's allocation of exclusive power to the political branches to declare and conduct war, recognize foreign nations, and conduct foreign relations. If a federal court failed to respect a recognized nation's rights under the law of nations, it would have contradicted the political branches' decision to recognize that nation—and its exclusive power to withdraw recognition of that nation—as an independent sovereign under the law of nations. Moreover, at the Founding, judicial failure to respect another nation's rights under the law of nations would have invited war against the United States, contradicting the Constitution's exclusive allocation of power to the political branches to initiate and conduct war with other countries. Similarly, if a court attempted to hold another nation responsible for violating U.S. rights, it would have usurped the political branches' exclusive authority to decide whether, when, and how to respond to another nation's misconduct.

A new kind of customary international law emerged in the twentieth century that is qualitatively different from the three traditional branches of the law of nations. The three traditional branches governed how nations and their citizens treated other nations and their citizens. In governing these matters, the law of state–state relations recognized a strong form of territorial sovereignty and gave nations just cause for war when their sovereign rights were violated. Today, however, modern rules of customary international law sometimes govern how a nation treats its own citizens within its own territory.⁴⁷ Because such rules did not exist at the Founding—and were foreclosed by the law of state–state relations at the time—the Constitution was not designed to interact with them.⁴⁸ Such rules are fundamentally different from the three traditional branches of the law of nations, and thus the Constitution cannot be assumed to interact with them in the same ways. Of course, the political branches have power to incorporate modern

44. See BELLIA & CLARK, *supra* note 1, at 67–71; Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 37–44 (2009) [hereinafter Bellia & Clark, *Federal Common Law*].

45. See BELLIA & CLARK, *supra* note 1, at 74–75; see generally Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655 (2013) [hereinafter Bellia & Clark, *General Law*].

46. See BELLIA & CLARK, *supra* note 1, at 75–76.

47. See *id.* at 139–44.

48. *Id.* at 144–48. Professors Golove and Hulsebosch claim that it is “simply false” that the law of nations did not regulate how a nation governs its own citizens within its own territory. Golove & Hulsebosch, *supra* note 4, at 1603 n.31. As evidence, they point to the 1783 Peace Treaty, which restricted how the United States treated British Loyalists after the war. This evidence is simply inapposite, however, because a central function of treaties—especially peace treaties—was to make commitments that went beyond obligations under the customary law of nations. Thus, peace treaties often ceded sovereign rights (to territory, for example) otherwise protected by the law of nations.

rules of customary international law into the supreme law of the land through the adoption of federal statutes and treaties. In the absence of such affirmative adoption, however, the Constitution contains no provisions incorporating such rules.

In the following parts, we address two important aspects of this analysis—first, that the Constitution did not make the law of nations the supreme law of the land and, second, that the Constitution's allocation of foreign relations powers to the political branches sometimes requires courts to apply the law of nations notwithstanding contrary state law. Certain participants in this Symposium have raised objections to these points. Although space does not permit a comprehensive discussion in these pages, some objections warrant at least a preliminary response.

II. THE STATUS OF THE LAW OF NATIONS UNDER THE CONSTITUTION

In their contribution to this symposium, Professors Golove and Hulsebosch find key aspects of our account unpersuasive regarding how the Constitution interacts with the law of nations, particularly the law of state-state relations. They understand our thesis to be that “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, its application served to uphold . . . the Constitution's allocations of power over foreign affairs and, in particular, of the recognition power.”⁴⁹ In their view, this approach “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.”⁵⁰

More specifically, they assert that we overlook substantial evidence of “the common understanding [at the Founding] 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.’”⁵¹ They maintain 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.”⁵² The evidence, they say, “is not secret or obscure.”⁵³ Rather, “[i]t 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.”⁵⁴ Upon analysis, however, these sweeping claims lack meaningful support in the historical record.

49. Golove & Hulsebosch, *supra* note 4, at 1597.

50. *Id.* at 1596.

51. *Id.* at 1612.

52. *Id.* at 1597.

53. *Id.*

54. *Id.*

A. THE LAW OF NATIONS AS SUPREME FEDERAL LAW

The evidence upon which Professors Golove and Hulsebosch rely does not support their assertion that the Founders understood the Constitution to adopt the law of nations as the *supreme* law of the land. At most, the evidence they cite supports the unremarkable propositions that many Founders characterized the law of nations as part of the municipal law of the land, and that portions of the law of nations bound all nations (including the United States) as a matter of natural law and international obligation. Neither conclusion supports the altogether different proposition that the Founders regarded the law of nations as “the supreme Law of the Land” under the Constitution. Despite their claim that “there was a broad consensus in the Founding period that the law of nations was incorporated into federal law,”⁵⁵ Golove and Hulsebosch produce no real evidence on this crucial point.

The primary support that Professors Golove and Hulsebosch offer for their claim that the Constitution adopted the law of nations is a series of quotes before, during, and after the Founding to the effect that the law of nations was “part of the law of the land.”⁵⁶ This evidence is not new. Proponents of the modern position have long relied on many of the same quotes to support their view that customary international law should be regarded as supreme federal law,⁵⁷ and we have addressed these quotes at length in prior work.⁵⁸ To say that the law of nations was part of the law of the land was not to say that the law of nations was part of the *supreme* law of the land. The Founders were well aware of the difference between “the law of the land” and “the supreme Law of the Land” because they created the latter concept as a novel solution to the distinctly American problem of having two sovereigns with overlapping power to govern the same people in the same territory at the same time.

As Professors Golove and Hulsebosch recount, members of the Founding generation frequently characterized the law of nations as part of the “law of the land.”⁵⁹ The “law of the land” was a familiar phrase to lawyers of the era and was used in various contexts.⁶⁰ The phrase originated in England to describe the entire corpus of English municipal law, and the Founders used it following independence in much the same way. The Constitution’s drafters borrowed the phrase “law of the land” to create a new category of “supreme Law of the Land” in the Supremacy Clause, but the two phrases have never been interchangeable. The Supremacy

55. *Id.* at 1597.

56. *Id.* at 1612–13 (quoting ALEXANDER HAMILTON, *Brief No. 2*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 339, 340 (Julius Goebel Jr. ed., 1964)).

57. See, e.g., Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205 (2008); Stephens, *supra* note 17.

58. See BELLIA & CLARK, *supra* note 1, at 156–66; Bellia & Clark, *Federal Common Law*, *supra* note 44, at 20–22, 47–55.

59. Golove & Hulsebosch, *supra* note 4, at 1612–23.

60. See, e.g., 4 BLACKSTONE, *supra* note 19, at *71 (referring to the “law of the land”); see also Bellia & Clark, *Federal Common Law*, *supra* note 44, at 20 (discussing “the law of the land”).

Clause singled out three specific sources of the law of the land—the “Constitution,” “Laws” made in pursuance thereof, and “Treaties”—for special treatment as “the supreme Law of the Land” to ensure that courts would give them priority over other parts of the law of the land, especially the constitutions and laws of the individual states.⁶¹

In England, the phrase “the law of the land” was often synonymous with the common law or, more generally, the municipal law of England. Indeed, judges sometimes combined the two phrases and referred to “the common law of the land.”⁶² Blackstone used this phrase in this way in his famous *Commentaries*.⁶³ One of the colonists’ complaints against Great Britain was that it had denied them many of the common law rights enjoyed by English subjects. Thus, it is not surprising that, soon after declaring independence, all thirteen states adopted the common law of England as the law of the land in their respective territories.⁶⁴

It was well established that the common law incorporated the law of nations as part of the law of the land in England.⁶⁵ As Blackstone explained, “the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land.”⁶⁶ In adopting the common law of England as their own, the newly independent American states fully understood that such law included the law of nations—a customary body of general law developed over time by many nations. Accordingly, it is not surprising that prominent American Founders—like their English contemporaries—referred to the law of nations as part of the law of the land. Observations of this kind were the natural and obvious result of the states’ adoption of the common law as the law of the land, and of the judiciary’s application of the law of nations as general law.

Nor is it remarkable that members of the Founding generation sometimes referred to the law of nations as part of “the laws of the United States.”⁶⁷

61. See Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1432–33 (2008) (quoting U.S. CONST. art. VI, cl. 2).

62. See, e.g., *R. v. Despard* (1798) 101 Eng. Rep. 1226 (KB) (Kenyon, C.J.) (referring to the “common law of the land”).

63. See 4 BLACKSTONE, *supra* note 19, at *71 (referring to “the common law of the land”).

64. Most states received the common law through legislative adoption, but one received it through constitutional provisions and one through judicial decisions. See BELLIA & CLARK, *supra* note 1, 10–11.

65. See 4 BLACKSTONE, *supra* note 19, at *67.

66. *Id.*

67. The primary example given by Professors Golove and Hulsebosch is Chief Justice Jay’s grand jury charge, which characterized the laws of the United States as including the law of nations. See Golove & Hulsebosch, *supra* note 4, at 1620 (quoting John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, 380, 381 (Maeva Marcus, ed., 1988)). In the charge quoted by Golove and Hulsebosch, Jay remarked that “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.” John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, 380, 381 (Maeva Marcus, ed., 1988). According to Golove and Hulsebosch, “Jay’s intention in this charge was clear: to make explicit that the Constitution had incorporated the law of nations into federal law.” *Id.* at 50. The intention they ascribe to Jay is hardly clear. If anything, the fact that Jay listed the law of nations and the Constitution

Professors Golove and Hulsebosch anachronistically assert that such references signify that the Founders regarded the law of nations as supreme federal law. Both before and after the ratification, however, Americans understood “the United States” to be a plural noun and used it to refer collectively to the several states.⁶⁸ Thus, Founding-era references to the law of nations as part of the laws of the United States do not establish that the law of nations was federal law. On the contrary, because all states had adopted the common law (which included the law of nations), it is more likely that such references merely signified that the law of nations was part of the collective municipal law of the United States,⁶⁹ which consisted primarily of state common law augmented by state and federal constitutions and statutes.⁷⁰

Moreover, to say that the law of nations was part of the law of the land says nothing about the relationship between such law and other parts of the law of the land. As we have previously explained, “when English courts described the law of nations as part of the law of the land, they did not necessarily imply that it took priority over other parts of the law of the land, including not only acts of Parliament but also, in some instances, local custom.”⁷¹ In England, the law of the land simply referred to the entire corpus of municipal law. Accordingly,

American judges and writers who borrowed this phrase were speaking of a concept that bears no relationship to the distinctly American concept of the *supreme* law of the land—a novel construct adopted by the Supremacy Clause to resolve the inevitable conflicts that would arise in a federal republic with dual sovereignty.⁷²

The concept of “the supreme Law of the Land” was proposed by the Constitutional Convention as an innovative solution to a uniquely American problem. In England, the law of the land referred to a body of written and unwritten municipal law in a nation with only one sovereign. In the United States, the law of the land included both the municipal law of the several states as well as federal law adopted pursuant to the Constitution. The Constitution did not purport to abolish the states, their municipal law, or their right to govern themselves within their respective territories. Rather, the Constitution established a new federal

as separate sources of U.S. law suggests that he did not understand the Constitution to have incorporated the law of nations into federal law.

68. This usage persisted at least through the adoption of the Thirteenth Amendment. *See* U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” (emphasis added)).

69. *See* *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1416 (2018) (Gorsuch, J., concurring) (“While this Court has called international law ‘part of our law,’ *The Paquete Habana*, 175 U. S. 677, 700 (1900), and a component of the ‘law of the land,’ *The Nereide*, 9 Cranch 388, 423 (1815), that simply meant international law was no different than the law of torts or contracts—it was ‘part of the so-called general common law,’ but *not* part of federal law.”).

70. *See* *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834).

71. *Bellia & Clark, Federal Common Law*, *supra* note 44, at 28.

72. *Id.* (emphasis added).

government with limited powers to regulate enumerated matters of national concern. This arrangement resulted in a constitutional system consisting of two governments with overlapping power to govern the same people in the same territory at the same time. To be effective, the Constitution had to establish a means of resolving the inevitable conflicts between state and federal law that such a system would produce.⁷³

The Supremacy Clause was the mechanism chosen by the Convention and adopted in the Constitution to resolve conflicts between different parts of the law of the land in a federal system.⁷⁴ The Supremacy Clause provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”⁷⁵ By declaring these three sources of law to be the *supreme* law of the land, the Clause differentiated them from all other sources of the law of the land in the United States, including state constitutions, state statutes, state common law, and the law of nations.

It was no accident that the Supremacy Clause limited supremacy to the “Constitution,” “Laws,” and “Treaties” of the United States.⁷⁶ Elsewhere, the Constitution specified that each of these sources of law could be adopted only with the participation and assent of the Senate (designed to represent states) or the states.⁷⁷ This requirement gave the Senate (or the states) an absolute veto over the adoption of all forms of supreme federal law—that is, law capable of overriding state law. This veto was the price of supremacy, and thus part of a crucial compromise built into the constitutional design.⁷⁸

Given the care with which the Founders crafted the Supremacy Clause and the associated lawmaking procedures set forth in the Constitution, it is not plausible to think that they used the phrases “the law of the land” and “the supreme Law of the Land” interchangeably. The Supremacy Clause carefully singled out a precise subset of the law of the land for special treatment as the *supreme* law of the land. Thus, routine statements by the Founders that the law of nations was part of the law of the land do not establish that the law of nations qualified as the “supreme Law of the Land” under the Supremacy Clause. If anything, routine statements of

73. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1346–48 (2001).

74. The Convention first considered two other mechanisms initially preferred by James Madison: (1) authorizing Congress to use military force to coerce state compliance with federal law, and (2) authorizing Congress to negative (or veto) state law. Neither proposal garnered adequate support, and the Convention settled on the Supremacy Clause—a provision originally proposed as part of the New Jersey Plan. See Bellia & Clark, *Federal Common Law*, *supra* note 44, at 35–36, 35 n.168. For more extended treatment of the role of the Supremacy Clause, see Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 292–317 (2007); Clark, *supra* note 73, at 1346–55; James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 702–73 (1998).

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

76. *Id.*

77. See Clark, *supra* note 73, at 1342–46.

78. See Clark, *supra* note 61, at 1422.

this kind made after the adoption of the Constitution carry a negative implication that the law of nations was *not* part of the supreme law of the land. Having just adopted the Supremacy Clause, the Founders knew the difference between the broader law of the land and the supreme law of the land they singled out for special treatment under the Constitution.

B. THE LAW OF NATIONS AND THE CONSTITUTIONAL TEXT

Apart from the lack of probative evidence, there is another, more fundamental flaw in Professors Golove and Hulsebosch's position. They assert that there was a "consensus in the Founding period that the law of nations was incorporated into federal law,"⁷⁹ but they never identify any provision of the Constitution's text that adopted or implemented such a consensus. In fact, they acknowledge that the Supremacy Clause's reference to "Laws of the United States" is not the basis for their position because the law of nations was not "made in Pursuance" of the Constitution.⁸⁰ Having excluded the only provision of the Constitution that explicitly addresses the hierarchy among various forms of law, they do not attempt to ground their conclusion in any other provision of the constitutional text. Rather, applying a strong (and controversial) form of original intent theory, they assert that what they regard as a widely shared intent or "common understanding" of the Founders somehow created a binding norm of constitutional law without a textual basis in the Constitution.⁸¹ Even if the unenacted intent of the Founders could suffice to generate constitutional law, statements that the law of nations is "part of the law of the land" do not establish the necessary intent for the reasons discussed in Section II.A. Under prevailing English and state practice, the law of nations was part of the law of the land, but was never considered to be the *supreme* law of the land. Thus, Golove and Hulsebosch bear at least the burden of identifying some provision of the constitutional text that could be interpreted to have altered this background understanding. The most obvious candidate—the Supremacy Clause—fails to include the law of nations in "the supreme Law of the Land," and no other provision of the Constitution (other than the Offences Clause) even mentions the law of nations. If the Founders' intent to adopt the law of nations as supreme federal law was as clear and pervasive as Golove and Hulsebosch claim, then this is a curious omission.

Professors Golove and Hulsebosch's inattention to the constitutional text may derive from their belief that the law of nations became supreme federal law

79. Golove & Hulsebosch, *supra* note 4, at 1597.

80. *See id.* at 1612; *see also* Harrison, *supra* note 5, at 1670 (explaining that "Laws of the United States made in Pursuance" of the Constitution cannot refer to the law of nations).

81. *See* Golove & Hulsebosch, *supra* note 4, at 1612 ("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].'").

before the Constitution was adopted.⁸² They offer several grounds to support this position. First, they stress that the Founders believed that the United States was bound by the law of nations after achieving independence from Great Britain. Relying on Hamilton's 1784 arguments in *Rutgers v. Waddington*,⁸³ they maintain that "[c]ommencing with the Declaration of Independence and continuing throughout the Revolutionary War, . . . 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 a party to it."⁸⁴ In other words, the states had assented to, and were thus bound by, the law of nations. The Founders' belief that the law of nations bound the United States, they say, continued through ratification.⁸⁵ Accordingly, Golove and Hulsebosch maintain (without specifying any particular constitutional provisions) that "key actors during the Founding-era believed that 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.'"⁸⁶ But establishing that the United States was bound by the law of nations as a matter of international law does not establish either the status of the law of nations under domestic law or who was responsible for ensuring U.S. compliance with such law. Our approach relies on particular constitutional provisions to answer these questions, whereas Golove and Hulsebosch rely on the supposed intent of the Founders, inferred from statements that do not discuss—or even refer to—the constitutional provisions that specify the means by which compliance would be achieved.

Second, Golove and Hulsebosch point out that the states adopted the common law of England upon gaining their independence, and that the common law incorporated the law of nations.⁸⁷ Accordingly, they observe, the common law (including the law of nations) became part of the law of the land.⁸⁸ As discussed, however, this observation does not establish that the law of nations became either the *supreme* law of the land or even *federal* law of any kind. The common law could have become the supreme law of the land only through congressional adoption. But because the common law was a complete system for the regulation of all aspects of human affairs, Congress lacked power to adopt this body of law under both the Articles of Confederation (which did not authorize legislation of this kind) and the Constitution (which conferred only limited and enumerated powers). Moreover, even if one thought that Congress had such power, Congress never attempted to adopt the common law for the United States as a whole. Thus,

82. *See id.* ("Leading Federalists maintained that the law of nations was part of (con)federal law even under the Articles of Confederation.").

83. *Rutgers v. Waddington* was a 1784 decision of the New York Mayor's Court. Both the opinion and Hamilton's briefs are reprinted in 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 392–419 (Julius Goebel Jr. ed., 1964).

84. Golove & Hulsebosch, *supra* note 4, at 1613.

85. *Id.* at 1616.

86. *Id.* at 1606.

87. *Id.* at 1613, 1617.

88. *Id.* at 1618.

the adoption of the common law by the individual states supports only the more modest proposition that the law of nations became part of the law of the land of the respective states.⁸⁹

Third, Golove and Hulsebosch argue that the Articles of Confederation gave Congress authority over foreign relations and that this allocation of powers transformed at least part of the law of nations into supreme federal law.⁹⁰ Relying again on Hamilton, they reason:

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.⁹¹

We need not attempt to resolve the accuracy of this interpretation of the Articles because the point soon became moot. The states continued to violate the law of nations with impunity, and the Founders, partly in response, replaced the Articles with the Constitution. Thus, whatever status the law of nations had under the Articles of Confederation, the status of the law of nations under the Constitution must be judged under the Constitution.

We agree completely with Professors Golove and Hulsebosch that the Founders adopted the Constitution in large part to enable the United States to comply with the law of nations. As discussed in Part I, key provisions of the Constitution strengthened the ability of the federal government to ensure that the United States as a whole complied with the law of nations. The relevant question, however, is precisely *how* the Constitution did so. The Constitution did not silently adopt the law of nations writ large as supreme federal law, automatically enforceable by courts as such, as Golove and Hulsebosch suggest. Rather, the Constitution contains precise provisions, using terms and concepts drawn from the law of nations, that allocate specific war and foreign relations powers to the political branches. These provisions enabled the federal government both to uphold the rights of foreign nations under the law of state–state relations and to vindicate U.S. rights under the same law.⁹² Because the Constitution assigned these powers to the political branches, not to courts, both the assignment itself and the political branches’ exercise of the assigned powers often required courts and states to uphold the law

89. As the Marshall Court explained in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834):

It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.

When, therefore, a common law right is asserted, we must look to the state in which the controversy originated.

90. Golove & Hulsebosch, *supra* note 4, at 1614.

91. *Id.*

92. *See supra* Part I.

of state–state relations unless and until the political branches directed otherwise. This more nuanced approach is grounded in express constitutional provisions, not in the Founders’ supposed intent unmoored from the constitutional text.⁹³

Professors Golove and Hulsebosch also rely on statements by several Founders suggesting that the law of nations bound the United States as a matter of natural law and thus originated from a higher source.⁹⁴ It does not appear that Golove and Hulsebosch are endorsing the proposition that the Constitution must be interpreted in accordance with natural or divine law, or that the Constitution adopted all natural law as the “supreme law of the land,” judicially enforceable as such. Rather, they invoke the Founders’ belief in natural law simply to bolster their assertion 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].’”⁹⁵ Again, this assertion is difficult to assess because Golove and Hulsebosch never identify any particular provision of the constitutional text as the source of such incorporation.⁹⁶

Finally, Professors Golove and Hulsebosch point out that the law of nations imposed international obligations on the United States, and that one of the purposes of the Constitution was to enable the United States to meet such obligations.⁹⁷ We agree with these two observations. But to say that the law of nations imposed international obligations on the United States and that the Founders wished to comply with these obligations says nothing about the precise means employed by the Constitution to enable such compliance. The crucial question is not *whether* the Founders wished to comply with the law of nations, but *how* the Constitution enabled the United States to do so. Golove and Hulsebosch simply assert—without identifying or discussing any particular provision of the text—that the Constitution adopted the law of nations as supreme federal law and made it automatically enforceable by courts. The Founders, however, designed the Constitution in a more nuanced and adaptable way. That the law of nations had different branches was a well-known legal fact. That different applications of the law of nations had different consequences for war and foreign relations was a well-known political fact. As discussed in Part I, specific provisions set forth in

93. Professors Golove and Hulsebosch appear to agree with our structural argument. *See* Golove & Hulsebosch, *supra* note 4, at 1624 (stating that the states’ lack of authority to disregard the law of nations may 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”). At the same time, they consider the result to be “overdetermined” because, just “[a]s 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.” *Id.* at 1639.

94. *Id.* at 1608, 1611.

95. *Id.* at 1612 (alteration in original) (quoting U.S. CONST. art. VI, cl. 2).

96. As Dean Manning has explained, general constitutional doctrines unmoored from the text are problematic because they threaten to override compromises built into the Constitution. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2016 (2009).

97. Golove & Hulsebosch, *supra* note 4, at 1595.

Articles I, II, and III establish the precise means by which the Constitution enabled the United States both to comply with the law of nations and to vindicate its rights under such law. These provisions allocated powers to the political branches of the federal government that required courts—in the absence of contrary instructions from the political branches—to uphold the rights of recognized foreign states under the law of nations, and to refrain from deciding whether and how to hold foreign nations accountable for violating U.S. rights under such law. Golove and Hulsebosch do not necessarily disagree that the Constitution allocated power in these ways, but insist that the result is “overdetermined” because the Constitution somehow adopted the law of nations as supreme federal law, rendering careful analysis of these textual and structural features of the Constitution unnecessary.⁹⁸ As discussed in Section II.A, Golove and Hulsebosch have presented no persuasive evidence—or even identified a relevant constitutional provision—to support this position.

To say that the Constitution did not adopt the law of nations as part of the supreme law of the land is not to downplay the significance of the law of nations in the constitutional order. The Constitution was drafted against the backdrop of the law of nations and uses terms and concepts drawn directly from such law in allocating powers to all three branches of the federal government. Accordingly, courts cannot interpret the scope and meaning of such powers without resort to the law of nations. This is true, for example, of Congress’s power over war, reprisals, and captures; the President and the Senate’s power to send and receive ambassadors; and the federal courts’ power to hear admiralty and maritime cases, as well as cases affecting ambassadors. By conferring these powers (along with several others), the Constitution gave the federal government all the means necessary to conduct the full range of relations with foreign nations contemplated by the law of nations at the Founding. As Part III next explains, the existence and exercise of these powers—including the recognition power—imposed certain obligations and restraints on courts regarding their application of the law of nations.

III. THE LAW OF NATIONS AND THE RECOGNITION POWER

Perhaps because of their sweeping claim that the Constitution adopted the law of nations as supreme federal law, Professors Golove and Hulsebosch reject our more specific argument that the Constitution’s allocation of war and foreign relations powers to the political branches sometimes requires courts to uphold rights under the law of nations. In particular, they take issue with our reliance on the Constitution’s allocation of the recognition power to the political branches to explain why courts and states are bound to uphold the rights of recognized foreign nations and governments under the law of nations.⁹⁹ We do not suggest that recognition was the only basis upon which U.S. courts were obligated to uphold the

98. *Id.* at 1624.

99. *See id.* at 1639.

rights of foreign states under the law of nations.¹⁰⁰ Nonetheless, recognition was one basis, and the Supreme Court has placed increasing reliance on it over time to uphold the rights of foreign nations. The Court's reliance on recognition is consistent both with the Founders' understanding of recognition under the law of nations and with the Constitution's allocation of foreign relations powers to the political branches of the federal government.

This Part describes the judiciary's increasing reliance during the last century on the recognition power as a constitutional basis for upholding the rights of foreign nations, and maintains that this reliance is consistent with the original constitutional design and early Supreme Court precedent. It is not surprising that most early cases did not expressly address the status or role of the law of nations under the Constitution. At the Founding and well beyond, the law of nations was regarded as general law.¹⁰¹ As a result, during the eighteenth and nineteenth centuries, federal courts had no need to examine the relationship between the law of nations and the Constitution to resolve most cases involving such law. In the twentieth century, however, the Supreme Court broadly rejected the concept of general law in *Erie Railroad Co. v. Tompkins*.¹⁰² Without general law as an available source of law, federal courts were forced, in certain cases, to examine the status of the law of nations when it conflicted with otherwise applicable state law. In resolving these conflicts, the Supreme Court has sometimes invoked recognition and relied on its legal effects.

Our book examines whether the Supreme Court's increasing reliance on recognition to uphold the rights of foreign sovereigns is consistent with the original constitutional design and early decisions of the Supreme Court. Most early Supreme Court decisions applying the law of nations as general law did not—and had no reason to—rely expressly on the Constitution's allocation of specific powers to the political branches to justify the application of such law. In some cases involving the law of nations, however, the Court relied on the allocation of powers to resolve the dispute before it. Whether expressly addressing these matters or not, the Court's early decisions are consistent with the allocation of powers approach that the Court has taken to such disputes following the demise of general law in the twentieth century.¹⁰³

A. THE RECOGNITION POWER IN SUPREME COURT DECISIONS

This section explains how, over time, the recognition power came to play a more explicit role in Supreme Court decisions involving the rights of foreign nations. When U.S. courts applied the law of nations as general law, they had

100. See BELLIA & CLARK, *supra* note 1, at 50–65 (discussing the Constitution's exclusive allocation to the political branches of powers over recognition, war, reprisals, and captures—all of which contributed to the judicial obligation to respect the rights of foreign nations under the law of nations).

101. See *id.* at 75; Bellia & Clark, *Federal Common Law*, *supra* note 44, at 76–77; Bellia & Clark, *General Law*, *supra* note 45, at 660.

102. 304 U.S. 64, 78 (1938).

103. See BELLIA & CLARK, *supra* note 1, at 73–112 (describing how judicial application of the law of nations has been consistent with the Constitution's allocation of powers to the political branches).

little need to consider the relationship between the law of nations and the constitutional structure.¹⁰⁴ Once the Supreme Court rejected the concept of general law in the twentieth century, however, cases involving the rights of foreign sovereigns required an examination of the interaction between the law of nations and the constitutional structure.

1. The Law of Nations as General Law

In the initial decades following ratification, U.S. courts had little reason to consider the precise status of the law of nations under the Constitution. All three branches of the law of nations had been incorporated by the common law, and all states had adopted the common law as the law of the land.¹⁰⁵ Because the law of nations was considered general law in England and America, courts used their own independent judgment to ascertain the content of such law by reference to the customs and practices of many nations, and were not bound by the decisions of any single jurisdiction.¹⁰⁶ This conception of the law of nations as general law helps to explain why the status of the law of nations was not more widely discussed until the twentieth century.

Early federal courts routinely ascertained and applied the general law of nations as the law of the land (even though not as “the supreme Law of the Land”). To understand this practice, one must distinguish between local law and general law.¹⁰⁷ Local law governed matters of concern to a single sovereign, including “rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.”¹⁰⁸ General law, by contrast, governed matters concerning more than one sovereign, such as the relations between independent nations and their citizens.¹⁰⁹ At the Founding, all three main branches of the law of nations—the law merchant, the law maritime, and the law of state–state relations—were regarded as general rather than local law.¹¹⁰

Although incorporated by the common law, general law, by definition, was not the law of a single sovereign. Rather, such law was “an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years.”¹¹¹ Thus, when state and federal courts applied the law of nations, they used independent judgment to ascertain the content of

104. *See id.* at 75.

105. *See id.* at 10–11.

106. *See* Bellia & Clark, *General Law*, *supra* note 45, at 658.

107. *See generally id.*

108. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

109. *See* Bellia & Clark, *General Law*, *supra* note 45, at 658.

110. Of course, there were other aspects of general law, such as conflict of laws and enforcement of judgments. *See* BELLIA & CLARK, *supra* note 1, at xv n.4. However, the three main branches we identify were centrally important to the peace and prosperity of the United States, and the Founders designed specific provisions of the Constitution to facilitate their application.

111. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279 (1996); *see also* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 889–91 (2005) (describing general law).

such law.¹¹² To be sure, state and federal courts would sometimes disagree about the precise content of general law, but neither had authority to prescribe the meaning of general law for the other. Every court applying general law sought to ascertain for itself the true rule established by the relevant custom and practice, as well as the demands of reason.¹¹³ In the United States, this judicial practice meant that federal and state courts with overlapping jurisdiction were free to disagree about the content of general law.

In practice, however, such disagreements were relatively rare during the early decades of the Republic. Cases governed by the law of state–state relations and the law maritime fell primarily within the federal courts’ exclusive admiralty and maritime jurisdiction, thus preventing adjudication in state court.¹¹⁴ Even in diversity cases, over which state and federal courts had concurrent jurisdiction, courts largely agreed on the main tenets of general law, perhaps in part because of the limited number and availability of legal sources discussing such law.¹¹⁵ A famous exception was *Swift v. Tyson*, in which the Supreme Court asserted the right to disagree with New York’s interpretation of general commercial law.¹¹⁶ Just as New York’s interpretation of general law was not binding on federal courts, the Supreme Court’s interpretation of such law was not binding in subsequent state court cases.¹¹⁷ By the nature of general law, neither federal nor state courts could authoritatively resolve questions of general law.

Near the end of the nineteenth century, the federal courts’ continued application of general law under the so-called *Swift* doctrine came under greater scrutiny in light of two developments. First, states increasingly abandoned general commercial law in favor of local law.¹¹⁸ Second, federal courts vastly expanded their conception of general law to include historically local matters such as torts.¹¹⁹ In light of these developments, the Supreme Court interpreted the Constitution in *Erie Railroad Co. v. Tompkins* to require federal courts “in any case” to apply “the law of the State,” including unwritten law, “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress.”¹²⁰ Accordingly, *Erie* ended the

112. See Bellia & Clark, *General Law*, *supra* note 45, at 658.

113. See *id.* at 666.

114. See U.S. CONST. art. III, § 2.

115. See Clark, *supra* note 111, at 1283 (observing that “during the late eighteenth and early nineteenth centuries, federal and state courts jointly administered the various branches of the law of nations”); see also William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1561 (1984) (noting that “[s]tate courts generally followed [general] common law decisions by the United States Supreme Court”).

116. 41 U.S. (16 Pet.) 1, 19 (1842).

117. See Bellia & Clark, *General Law*, *supra* note 45, at 669, 681–83.

118. See *id.* at 694–96.

119. See *id.* at 697–701.

120. 304 U.S. 64, 78 (1938). Two decades earlier, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), the Supreme Court essentially federalized the law maritime by interpreting Article III’s grant of admiralty and maritime jurisdiction to incorporate the law maritime as federal law. By contrast, in *Erie*, the Court rejected the idea that Article III’s grant of diversity jurisdiction permitted federal courts to disregard state law in favor of their own understanding of general law. 304 U.S. at 78.

federal courts' practice of contradicting local state law in favor of their own conceptions of general law in tort and commercial cases.

Erie, however, did not expressly address the status of uncoded rules derived from the law of state–state relations. The question of how courts should treat such rules arose soon after *Erie* in *Bergman v. DeSieyes*, when the Second Circuit had to decide whether an ambassador in transit was immune from suit.¹²¹ Customary international law supported such immunity, but the court did not apply the rule as a matter of general law. Rather, under the apparent influence of *Erie*, the court reasoned that New York law governed the validity of service because the defendant was served there. The court stated that “although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves.”¹²² The Supreme Court did not review the Second Circuit's decision in *Bergman*, but it adopted a very different approach to resolve conflicts between the rights of foreign sovereigns and state law in several cases, as the next section explains. These cases involved the act of state doctrine.

2. The Recognition Power in the Twentieth Century

The act of state doctrine upholds the traditional territorial sovereignty of foreign nations by prohibiting the courts of one country from invalidating the official acts of a recognized foreign state taken within its own territory.¹²³ The Supreme Court recognized and applied this doctrine in cases decided long before *Erie*, but these cases arguably applied the doctrine as a matter of general law.¹²⁴

One year before *Erie*, the Supreme Court adopted a new rationale for applying the act of state doctrine in *United States v. Belmont*.¹²⁵ This rationale tied the act of state doctrine to the President's recognition power. Following the communist revolution in Russia in 1917, the United States refused to recognize the Soviet government, continuing instead to recognize the Provisional Russian Government long after it lost de facto power over the nation. In 1933, the United States finally recognized the Soviet government in a sole executive agreement, the Litvinov Agreement, between the Roosevelt administration and the Soviet government.¹²⁶ In exchange for recognition, the Soviet Union released and assigned to the United States all amounts due to the Soviet Union from American nationals.¹²⁷ The United States, as assignee, then sued Augustus Belmont, a private banker in New York, to recover funds deposited with him by a Russian

121. 170 F.2d 360, 361 (2d Cir. 1948).

122. *Id.*

123. See BELLIA & CLARK, *supra* note 1, at 97–98.

124. See, e.g., *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

125. 301 U.S. 324 (1937).

126. Exch. of Commc'ns Between the President of the U.S. and Maxim B. Litvinov, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics (Nov. 16, 1933), in 28 AM. J. INT'L L. 2, 2–3 (Supp. 1934).

127. *Belmont*, 301 U.S. at 326.

corporation prior to its nationalization by the Soviet Union in 1918.¹²⁸ The district court dismissed the complaint, and the Second Circuit affirmed on the basis of New York law, which rejected the validity of foreign confiscations of property located in New York.¹²⁹

The Supreme Court reversed and found state law to be preempted by the President's recognition of the Soviet Union in the Litvinov Agreement.¹³⁰ The Court stated that determining "who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts."¹³¹ In addition, the Court explained, "recognition by these departments is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence."¹³² In other words, the President's decision to recognize the Soviet Union triggered retroactive application of the act of state doctrine. Although modern commentators usually cite *Belmont* for the broad proposition that sole executive agreements preempt state law, the Court's precise holding is limited to agreements conferring recognition. As the Court explained, "[t]he recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments."¹³³ According to the Court, "[t]he effect of [recognition and establishment of normal diplomatic relations] was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence."¹³⁴ Thus, the Court held that recognition operated to override state law in this case.

A few years after *Erie*, the Supreme Court reached the same conclusion in *United States v. Pink*.¹³⁵ In 1907, a Russian corporation, the First Russian Insurance Company, opened a New York branch.¹³⁶ In accordance with New York law, the company maintained reserves with the New York Supervisor of Insurance to secure payment of claims resulting from its New York operations.¹³⁷ After the Soviet Union nationalized the company, the Supervisor of Insurance took possession of the company's New York assets pursuant to a court order.¹³⁸ After paying all domestic creditors of the New York branch, the Supervisor had a surplus of more than one million dollars.¹³⁹ As in *Belmont*, the United States (as the Soviet Union's assignee) sued to recover the assets held in New York.¹⁴⁰ The New York courts dismissed the

128. *Id.* at 325–26.

129. *United States v. Belmont*, 85 F.2d 542, 543 (2d Cir. 1936).

130. *Belmont*, 301 U.S. at 330–32.

131. *Id.* at 328.

132. *Id.*

133. *Id.* at 330.

134. *Id.*

135. 315 U.S. 203 (1942).

136. *Id.* at 210.

137. *Id.*

138. *Id.* at 211.

139. *Id.*

140. *Id.* at 210.

suit on the ground that New York law governed disposition of assets found in New York, and the United States, as assignee, had no greater claim than the Soviet Union.¹⁴¹

The Supreme Court reversed, relying on the rationale set forth in *Belmont*. According to the Court, New York courts violated the act of state doctrine by refusing “to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question.”¹⁴² On this account, the act of state doctrine was an incident of recognition. In addition, *Pink* explicitly tied the act of state doctrine’s preemption of state law to recognition: “The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system.”¹⁴³

In upholding the rights of recognized foreign sovereigns, the Supreme Court has been careful not to decide questions of policy assigned by the Constitution to Congress and the President. To avoid usurping the constitutional authority of these branches, the Court generally has both upheld the rights of recognized foreign nations, as it did in *Belmont* and *Pink*, and refrained from holding foreign nations accountable for their alleged violations of U.S. rights unless and until the political branches have instructed otherwise. For example, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court applied the act of state doctrine both to uphold Cuba’s claim to property confiscated within its own territory, and to refuse to hold Cuba accountable for violating the alleged rights of the United States under customary international law.¹⁴⁴ After the Cuban government nationalized Cuban sugar companies owned in part by U.S. citizens, a dispute arose over whether Cuba or the original owners were entitled to the proceeds of subsequent sugar sales.¹⁴⁵ The original owners argued that Cuba’s expropriation of the sugar companies violated a norm of customary international law that prohibited nations from confiscating private property owned by foreign nationals.¹⁴⁶

The Supreme Court, however, refused to consider whether Cuba had violated U.S. rights under the asserted norm of customary international law, holding

141. *Id.* at 215.

142. *Id.* at 231.

143. *Id.* at 233. In fact, the Court went so far as to say that if it declined to treat recognition as final and conclusive in the courts, “[w]e would usurp the executive function.” *Id.* at 230. As in *Belmont*, the Court also included language that could be read to endorse broad executive power to make sole executive agreements capable of preempting state law. According to the Court, “state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.” *Id.* at 230–31 (citing *Nielson v. Johnson*, 279 U.S. 47 (1929)). In context, however, this language should be understood as limited to executive agreements—like the one in *Belmont* and *Pink*—that include recognition and thus trigger the act of state doctrine.

144. 376 U.S. 398, 401 (1964).

145. *Id.*

146. *Id.* at 420.

instead that the act of state doctrine precluded such an inquiry.¹⁴⁷ The Court tied the act of state doctrine to recognition, and explained:

[U.S. courts] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, *extant and recognized by this country at the time of suit*, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.¹⁴⁸

Although the Supreme Court's opinion in *Sabbatino* is not a model of clarity, the Court conditioned the act of state doctrine on U.S. recognition of the Cuban government and rested its decision at least in part on the Constitution. The "act of state doctrine," the Court explained, has "'constitutional' underpinnings" because it "arises out of the basic relationships between branches of government in a system of separation of powers."¹⁴⁹ Having described the act of state doctrine as arising out of the Constitution's allocation of powers, the Court further explained that the doctrine constituted "a principle of decision binding on federal and state courts alike."¹⁵⁰ The Court thus relied on the Constitution's allocation of powers to uphold the territorial sovereignty of a recognized foreign nation and to refuse to hold that nation accountable for violating U.S. rights under the law of nations.

In 2015, in *Zivotofsky v. Kerry*, the Supreme Court endorsed a broad view of the recognition power, and described its decision in *Sabbatino* as turning on the United States' recognition of Cuba.¹⁵¹ "Legal consequences follow formal recognition," the Court explained.¹⁵² "Because the Executive had recognized the Cuban Government, the [*Sabbatino*] Court held that it should be treated as a sovereign and could benefit from the 'act of state' doctrine."¹⁵³

In short, from the early part of the twentieth century until today the Supreme Court has increasingly and explicitly understood recognition by the political branches to require courts and states to respect the traditional rights of foreign sovereigns notwithstanding claims that a foreign sovereign acted in violation of state law or customary international law. As discussed in the next section, this understanding finds support in the original constitutional design and early judicial precedent.

B. THE LAW OF NATIONS, THE ALLOCATION OF POWERS, AND EARLY CASES

One of the issues we considered in our book was whether the Supreme Court's increasing reliance over the last century on the recognition power in cases involving rights of foreign states under the law of nations is consistent with the original

147. *Id.* at 425–28.

148. *Id.* at 428 (emphasis added).

149. *Id.* at 423.

150. *Id.* at 427.

151. 135 S. Ct. 2076, 2089 (2015).

152. *Id.* at 2084.

153. *Id.* at 2089.

constitutional design and with early Supreme Court decisions, particularly those of the Marshall Court. In the era of general law, the Court had little reason to spell out the relationship between the Constitution's allocation of powers and the law of nations in cases in which the law of nations supplied the rule of decision. Nonetheless, the Court's early decisions are consistent with the Constitution's allocation of war and foreign relations powers (including the recognition power) to the political branches, and several cases expressly invoked this allocation of powers when necessary to decide whether and how the law of nations should apply in a particular context.

Professors Golove and Hulsebosch take issue with our reliance on the Constitution's allocation of the recognition power to help explain the Supreme Court's decisions upholding the rights of foreign nations under the law of state-state relations. They set forth two main objections. First, they argue that judicial application of the law of nations in the United States was unrelated to the Constitution's allocation of the recognition power to the political branches.¹⁵⁴ They contend, as discussed in Part II, that the Constitution simply adopted the law of nations as supreme federal law, and that this adoption explains the Supreme Court's application of such law.¹⁵⁵ For the reasons discussed, this claim is unpersuasive. Golove and Hulsebosch rely primarily on statements by the Founders that the law of nations was part of the "law of the land."¹⁵⁶ Such statements, however, simply reflected the states' adoption of the common law (and by extension the law of nations) as the law of the land, and the judiciary's application of the law of nations as general law. The Supremacy Clause carefully singled out an important subset of the law of the land—the Constitution, Laws, and Treaties—for recognition as "the supreme Law of the Land."¹⁵⁷ The Supremacy Clause makes no mention of the law of nations. Thus, Golove and Hulsebosch make a basic category mistake by conflating the "law of the land" with the "supreme Law of the Land."

Second, Professors Golove and Hulsebosch argue that recognition was not a particularly significant power at the Founding. In their view, the Constitution's allocation of the recognition power to the federal political branches did not play "any role, let alone a dominant" role in the Founders' thinking about the judicial obligation to apply the law of nations.¹⁵⁸ Again, this assertion is based at least in part on their (mistaken) view that the Constitution adopted the law of nations as supreme federal law. Additionally, their view of the recognition power would have potentially significant implications for a number of landmark Supreme Court decisions in the twentieth century that relied on recognition to justify upholding rights of foreign sovereigns under the law of

154. Golove & Hulsebosch, *supra* note 4, at 1639.

155. *Id.* at 1612.

156. *Id.* at 1616–23.

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

158. Golove & Hulsebosch, *supra* note 4, at 1612.

nations.¹⁵⁹ If Golove and Hulsebosch were correct, the Supreme Court would have to rethink or overturn these decisions. As we explain below, however, Professors Golove and Hulsebosch undervalue the significance of recognition even at the Founding.

1. Recognition and the Allocation of Powers

The Constitution vested the political branches of the federal government with power over the accepted means by which nations recognized one another. These means included sending and receiving ambassadors, making treaties, and perhaps even enacting legislation.¹⁶⁰ The Constitution allocated all of these powers to the political branches of the federal government; neither courts nor states were given any role. Recognition by one nation of the sovereignty of another was an acknowledgement by the first nation that the other was entitled to all the rights of sovereignty under the law of nations.¹⁶¹ Once the political branches took steps to recognize a foreign nation, courts were bound to respect such recognition and to refrain from taking action in derogation of the rights that traditionally accompanied recognition. Failure to respect such rights would have contradicted or usurped the exclusive power of the political branches over recognition. It is this allocation of powers—rather than the supposed intent of the Founders—that requires courts to uphold the rights of recognized foreign states under the law of nations.

Professors Golove and Hulsebosch's position that recognition was relatively insignificant at the Founding, and had no bearing on the obligation of U.S. courts to apply the law of nations, is inconsistent with the Founders' own experience. After declaring independence, the United States eagerly sought recognition from other nations, both before and after the United States received recognition from Great Britain in the Treaty of Peace.¹⁶² The importance that the Founders placed on securing recognition is consistent with Vattel's view that nations should *acknowledge* the sovereign rights of other nations. Under the law of nations, sovereign nations owed an outward respect to each other, demonstrating that they "acknowledge a state or its sovereign to be truly independent and sovereign, and consequently, worthy of every thing due to that quality."¹⁶³ That diplomats including John Adams pursued recognition of the United States by other nations reveals their understanding that these nations had political discretion to recognize the United States as a free and independent sovereign, and that such recognition would help the United States secure and enjoy its rights under the law of nations. As the

159. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

160. See U.S. CONST. art. II, § 2, cl. 2 (power to appoint ambassadors and make treaties); *id.* art. II, § 3, cl. 4 (power to receive ambassadors).

161. See BELLIA & CLARK, *supra* note 1, at 53; Bellia & Clark, *supra* note 32, at 754–58 (describing recognition under the law of nations at the founding).

162. Bellia & Clark, *supra* note 32, at 755–58.

163. See 1 VATTEL, THE LAW OF NATIONS, *supra* note 25, bk. II, § 47, at 136–37.

Founders continued to seek recognition of the new United States by other nations, they adopted a Constitution that gave the political branches of the federal government the same authority to recognize other nations on behalf of the United States as a whole.¹⁶⁴

a. Recognition and the Law of Nations

Given the Founders' vigorous pursuit of recognition for the United States, they well understood the significance of the United States' decision to recognize (or refuse to recognize) another nation. Indeed, the Founders' campaign for recognition after declaring independence was motivated, in large part, by their understanding that recognition carried political and legal significance. Just as the Founders understood other nations' recognition of the United States to signify respect for U.S. rights under the law of nations, they understood the United States' recognition of other nations, including newly formed nations, to signify reciprocal respect for the same rights.

Professors Golove and Hulsebosch have made this point in prior work, explaining:

[I]n the late eighteenth century, it was already widely appreciated that recognition served critical, functional purposes. For example, it was a prerequisite for making treaties, like the French treaty of alliance during the American Revolution and various commercial treaties that most founders believed were imperative for the economic development of the United States. Recognition was also essential for security. Without granting genuine acceptance of the nation's sovereign status, the European empires that surrounded the new nation would feel little compunction about interfering in its internal affairs or even seeking to break it apart. The founders, of course, sought recognition with these functional considerations at the forefront of their minds.¹⁶⁵

The Founders rightly believed that recognition would enhance the power and security of the United States. The effect of recognition was well known to

164. John Harrison argues that the Constitution does not confer any recognition power. In his view, "[t]he Constitution does not confer a power to recognize the existence of foreign states and governments, and therefore no legal effects can result from recognition." Harrison, *supra* note 5, at 1664. We disagree with this conclusion. It would be strange for the Constitution to give the federal government express powers to make treaties and to send and receive ambassadors, but to prohibit the federal government implicitly from exercising those powers to recognize other nations. This is like saying that, although the Constitution vests the President with the executive power and the power to take care that the laws be faithfully executed, the President nonetheless lacks power to prosecute crimes. It is no answer to argue that there is no recognition power because it potentially could be exercised in conflicting ways through different means of recognition. Many federal powers—law-making powers, war powers, judicial powers—may be exercised in conflicting ways by different constitutional actors. When material conflicts arise, courts must ascertain which institution has overriding power. Indeed, in the face of conflicting claims by Congress and the President, the Court recently held that the President has exclusive power to recognize foreign nations. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

165. 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, 936–37 (2010) (footnotes omitted).

them.¹⁶⁶ Recognition by another nation signified that it would respect the rights of the United States as a sovereign under the law of nations. Having actively sought the benefits of recognition for the United States, the Founders would have understood recognition by the United States to hold the same legal implications for other nations. Moreover, because the Constitution vested power to recognize foreign nations in the political branches, courts of the period would have understood U.S. recognition of another nation to require them to respect the sovereign rights of that nation under the law of nations. This is not a matter of speculation. As we have explained here and in prior work, the Supreme Court relied on the recognition power in certain early cases to determine whether to uphold the asserted rights of foreign nations in court.¹⁶⁷

b. Recognition and Other Foreign Relations Powers

Professors Golove and Hulsebosch contend that respect for the rights of foreign nations was not dependent upon formal recognition. They argue that the United States had no need to recognize established nations at the Founding because the status of such nations as independent sovereigns under the law of nations was self-evident. Thus, Golove and Hulsebosch claim that early U.S. courts would have upheld the rights of established nations even in the absence of recognition by the political branches.

As we have discussed in prior work, the Constitution's allocation of several different powers to the political branches obligated courts to uphold the rights of foreign sovereigns.¹⁶⁸ Thus, although recognition required judicial respect for such rights, the political branches' exercise of this power was not a strict prerequisite. In other words, formal recognition was sufficient to require judicial respect for another nation's sovereign rights under the law of nations, but it was not always necessary. The exclusive allocation of other powers to the political branches also required judicial respect for the rights of established foreign sovereigns under the law of nations at the Founding. Of particular significance, the Constitution gave the political branches the power to declare and make war—in addition to exclusive power over the means of recognition.¹⁶⁹ During the Founding era, if a U.S. court

166. For example, in 1781 John Adams sought to have a U.S. representative received in peace negotiations as a minister plenipotentiary because such recognition would entitle the minister and the United States to certain rights under the law of nations. Letter from John Adams to the Comte de Vergennes (July 19, 1781), in 11 THE ADAMS PAPERS 425, 427 (Gregg L. Lint et al. eds., 2003). If received as a minister plenipotentiary, the representative, Adams explained, would "enjoy all the Prerogatives which the Law of nations has annexed to the Character, Person, Habitation and Attendants of Such a minister." *Id.* at 426. And to be received as a minister, he continued, "would be an implied Acknowledgement of his Character and Title, and those of the United States." *Id.* (emphasis added). Such acknowledgement of the United States would carry legal consequences. For example, once acknowledged by a foreign nation, a U.S. minister would enjoy immunity from process in the courts of that sovereign.

167. See Bellia & Clark, *supra* note 32, at 788–91 (discussing cases); see *infra* notes 226–28 and accompanying text (discussing *Rose v. Himley*).

168. See Bellia & Clark, *supra* note 32, at 760–79.

169. U.S. CONST. art. I, § 8, cl. 11.

failed to uphold the rights of an established nation—regardless of whether it had been formally recognized by the United States—the court’s action would have amounted to an act of war. Accordingly, the Constitution’s allocation of war powers provided a compelling reason, independent of recognition, for courts to respect the rights of foreign nations. These principles were well known to the Founders. As we have explained elsewhere, if the United States violated another nation’s rights under the law of nations, the law of nations gave the offended nation just cause for war.¹⁷⁰

Professors Golove and Hulsebosch’s observation that U.S. courts would have upheld the rights of established nations even without any formal act of recognition by the political branches is thus true, but not determinative of the effect of recognition. With or without recognition, federal courts would have upheld the rights of established foreign nations to avoid triggering a war and usurping the prerogatives of the political branches to decide whether and when the United States would risk war with another country by violating its rights. But this observation does not mean recognition was irrelevant to the obligation of U.S. courts to respect sovereign rights of other nations. Even after international law no longer acknowledged most violations of the law of state–state relations as just cause for war, recognition of a foreign nation by the United States continued to require U.S. courts to uphold the sovereign rights of that nation, as illustrated by the Supreme Court’s decisions in *Belmont*, *Pink*, and *Sabbatino*.

c. Recognition Under the Law of Nations

Professors Golove and Hulsebosch also downplay the significance of the Constitution’s allocation of the recognition power to the political branches because they say the law of nations required recognition as a matter of course in most cases. “A de facto regime was entitled,” they contend, “to recognition and respect for its international rights by virtue of being an existing, functioning government and therefore presumptively the choice of its people.”¹⁷¹ Professors Golove and Hulsebosch observe that this understanding was “critically important to the United States, not least because during the American Revolution it was the position the revolutionaries advanced as the basis for their claim to recognition.”¹⁷² They argue that because the law of nations obligated the United States to recognize most nations, the political branches’ decision whether to recognize a nation did not determine U.S. courts’ obligation to uphold its rights under the law of nations. In other words, they maintain that the law of nations determined a foreign nation’s rights in U.S. courts with or without recognition by the political branches.

170. See Bellia & Clark, *Federal Common Law*, *supra* note 44, at 59. John Adams had this idea in mind when he remarked that once the United States earned recognition of their status as an established sovereign, any “denial of their Sovereignty [would be] a declaration of War against them.” Letter from John Adams to the Comte de Vergennes, *supra* note 166, at 428.

171. Golove & Hulsebosch, *supra* note 4, at 1630.

172. *Id.*

Golove and Hulsebosch's argument conflates the international obligations of the United States with its choice of internal government structure. Even if the law of nations obligated the United States to recognize nations under certain circumstances,¹⁷³ it did not purport to govern how the United States carried out this obligation as a matter of domestic allocation of powers. Vattel explained repeatedly in his treatise that "nations acknowledge no common judge. Each judges of what it has to do in fulfilling its duties."¹⁷⁴ In designing the Constitution, the Founders gave the political branches of the federal government exclusive power to recognize foreign states by sending and receiving ambassadors, making treaties, and enacting laws.¹⁷⁵ The Constitution gave neither states nor courts any role in exercising the means of recognition. Thus, although Golove and Hulsebosch are correct in observing that the law of nations governed recognition, this observation is beside the point. Under the Constitution, the political branches alone have the power and responsibility to recognize foreign nations in accordance with the law of nations.¹⁷⁶

The Constitution's allocation of war and foreign relations powers to the political branches was significant because the Founders understood that the law of nations was not always clear, and that the actors charged with complying with the law of nations would necessarily exercise some discretion. The evolution of the Offences Clause at the Constitutional Convention illustrates the point. Initially, the Convention proposed empowering Congress to punish violations of the law of nations, but it later amended the proposal to empower Congress to *define* and punish violations of the law of nations.¹⁷⁷ Gouverneur Morris persuaded the Convention to make this change by pointing out that "[t]he word *define* is proper when applied to *offences* in this case; the law of (nations) being often too vague and deficient to be a rule."¹⁷⁸ As adopted, the Offences Clause gave Congress the power to resolve ambiguities in the law of nations.

In keeping with this view of the law of nations, the Constitution's allocation of the recognition power to the political branches empowered them, not courts, to decide whether a nation or government was entitled to recognition under the law of nations, and to resolve any ambiguities that determination might entail. Professors Golove and Hulsebosch maintain that "under the law of nations, recognition was mandatory for any regime that was able to achieve *de facto* control

173. We agree that the law of nations obliged sovereign nations to acknowledge each other, and to respect each other's rights as equal and independent sovereigns. As noted, Vattel explained that each sovereign ought to acknowledge and respect the sovereign character of every other, as defined by the law of nations. *See supra* note 163 and accompanying text.

174. 2 VATTEL, THE LAW OF NATIONS, *supra* note 25, bk. III, § 173, at 65.

175. *See* U.S. CONST. art. II, § 2, cl. 2.

176. Professors Golove and Hulsebosch may respond that the Constitution adopted the law of nations as supreme federal law—preemptive of contrary state law, preemptive of any contrary executive action, and possibly preemptive of acts of Congress. Thus, courts were free, if not obligated, to enforce the law of nations, including recognition determinations against the political branches. This suggestion is unpersuasive for the reasons discussed in Part II.

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

178. Madison's Notes (Sept. 14, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 615 (Max Farrand ed., 1911) (alterations in original).

over its territory.”¹⁷⁹ Accordingly, they say that “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”—whether the minister was sent by the de facto government and whether the minister’s papers were in order.¹⁸⁰ Even assuming that the law of nations imposed this obligation, the Constitution vested the political branches with the responsibility to make these determinations, and making these determinations necessarily involved the exercise of at least some discretion.

From the founding to the present, courts have respected this allocation of powers by deferring to recognition decisions made by the political branches and refusing to second-guess or contradict them. John Marshall explicitly described this allocation of powers under the Constitution in 1818 in his opinion for the Court in *United States v. Palmer*.¹⁸¹ In *Palmer*, the Court had to decide whether the federal piracy statute applied to crimes committed on vessels belonging to subjects of a foreign nation.¹⁸² In the course of making this determination, Marshall explained for the Court why the Constitution requires judicial deference to recognition determinations made by the political branches:

Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.

... [S]uch questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government, that it is difficult to give a precise answer to questions which do not refer to a particular nation.—It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.¹⁸³

179. Golove & Hulsebosch, *supra* note 4, at 1628.

180. *Id.*

181. 16 U.S. (3 Wheat.) 610 (1818).

182. *Id.* at 613–14.

183. *Id.* at 634–35.

The Marshall Court's views regarding the respective constitutional roles of the political branches and the courts in recognizing foreign nations refute Golove and Hulsebosch's suggestion that courts may—indeed, must—apply the law of nations themselves to make recognition determinations without guidance from the political branches.¹⁸⁴

Professors Golove and Hulsebosch are correct that the American Revolutionaries advanced the position that their regime was entitled to recognition under the law of nations. But the Revolutionaries made this argument to convince other nations to recognize the United States. They did not think that such recognition occurred “automatically” under the law of nations, or that courts of other nations were obligated or entitled to recognize the United States without any formal act of recognition by their governments. To the contrary, the Revolutionaries understood that recognition required *a political decision by other sovereigns*. In prior work, Golove and Hulsebosch acknowledge the intense political considerations at play when other nations recognized the United States:

The European nations that originally recognized the United States did so for their own strategic reasons, primarily to weaken Great Britain. Those reasons were subject to change. During the course of European and American diplomacy in the 1780s, there was a tentative, revocable quality to the recognition accorded the United States.¹⁸⁵

This earlier account undercuts their current suggestion that recognition was a mere formality under the law of nations.

2. The Law of Nations in Early Supreme Court Cases

Early Supreme Court cases involving the rights of foreign sovereigns are consistent with both the Constitution's allocation of the recognition power to the political branches and the Court's more recent decisions invoking this power. Although early cases often applied the law of nations with only passing or general reference to the Constitution's allocation of war and foreign relations powers to the federal political branches, they nonetheless shed some light on the relationship between the Constitution's allocation of powers and judicial application of the law of nations.

One example discussed in our book is *United States v. Peters*.¹⁸⁶ In *Peters*, the Supreme Court issued a writ of prohibition divesting a U.S. district court of jurisdiction over the *Cassius*, a vessel that France had commissioned to cruise against

184. Two examples from the twentieth century illustrate the practical and constitutional difficulties with Golove and Hulsebosch's approach. The United States did not recognize the communist governments in the Soviet Union and China for decades after they gained de facto control of those nations. Recognition by the United States was an important bargaining chip, and recognition only occurred in the context of larger negotiations. Under Golove and Hulsebosch's approach, however, courts could have “recognized” these governments well before the political branches decided to do so.

185. Golove & Hulsebosch, *supra* note 165, at 953.

186. 3 U.S. (3 Dall.) 121 (1795).

enemy ships.¹⁸⁷ James Yard, the owner of a U.S. schooner captured by the *Cassius*, initiated an action against the *Cassius* and her commander while both were present in the port of Philadelphia.¹⁸⁸ Yard alleged that the *Cassius* seized his neutral ship in violation of the law of nations, and sought damages in federal court.¹⁸⁹ Counsel for the *Cassius* objected to jurisdiction on the ground that the captured schooner had been taken to a French port and adjudicated as a lawful prize by a French court.¹⁹⁰ Under the law of nations, the courts of the captor's nation had exclusive jurisdiction to adjudicate the legality of a prize brought within its jurisdiction.¹⁹¹ The Supreme Court issued a writ of prohibition to halt the district court's proceedings on the ground that the exercise of jurisdiction would have violated France's rights under the law of nations.¹⁹²

We observed that the Constitution's allocation of powers helps to explain language in the Court's order that the district court proceeding could "disturb the peace and harmony subsisting between the United States and the French Republic," and was "in contempt of the government of the United States."¹⁹³ This language can only be understood by reference to background principles of the law of nations. Although France allegedly violated U.S. rights by seizing a neutral ship, the law of nations required the injured party to seek judicial relief solely in the French court that adjudicated the legality of the prize. If Yard was unable to obtain satisfaction there, he had the option of asking the U.S. government to take up his cause through espousal, negotiations, retorsion, reprisal, or even war. By contrast, if the district court had taken jurisdiction of Yard's claim in violation of the law of nations, it would have violated France's rights under the law of nations and given France just cause for war against the United States. Under the Constitution's allocation of the recognition, war, and reprisal powers, a decision of this kind was reserved exclusively to the political branches.

Golove and Hulsebosch argue that we read too much into *Peters*. First, they suggest that the Court's writ of prohibition should not be taken literally because it "simply adopted, essentially word for word, the proposed order written by counsel for the captor."¹⁹⁴ Second, they contend that the "evident thrust of the Court's language indicates just the opposite of what [we] assert."¹⁹⁵ In their view, *Peters* applied the law of nations not on the basis of the Constitution's allocation of powers to the political branches, but simply because "the law of nations was part of the law of the United States."¹⁹⁶

187. *Id.* at 132.

188. *Id.* at 130.

189. *Id.*

190. *Id.* at 126.

191. *Id.* at 126–27.

192. *United States v. Peters*, 3 U.S. (3 Dall.) 121, 126–27 (1795).

193. *Id.* at 130–31.

194. *See Golove & Hulsebosch, supra* note 4, at 1640.

195. *See id.* at 1642.

196. *See id.*

It is difficult to know what to make of their first point. Courts regularly adopt language in their orders and opinions suggested by the parties. We are unaware of any principle that courts may not adopt such language or that such language carries less weight than other language used in court orders. Moreover, the very same order contains references to the law of nations that Golove and Hulsebosch invoke to argue that the Court merely applied the law of nations as part of the law of the United States.¹⁹⁷ In short, we believe the order of the Court should be regarded as the order of the Court.

In response to their second point, we simply note that the Court's brief order can only be fully understood by reference to certain basic principles of the law of nations and how they interacted with the respective powers of courts and the political branches under the Constitution. Under the law of nations as it existed in 1789, a U.S. district court order assessing damages against the capturing vessel in disregard of the order of the French court would have given France just cause of war against the United States. This explains why the Court indicated that adjudication by the district court could "disturb the peace and harmony subsisting between the United States and the French Republic."¹⁹⁸ Under the Constitution, the political branches, not courts, had the power to declare and make war.¹⁹⁹ Thus, a judicial order invalidating the capture would have usurped the constitutional authority of the political branches. Such an order also would have denied France's rights as a sovereign nation recognized as such in treaties by the United States, and thus would have stood "in contempt of the government of the United States."²⁰⁰ Under the Constitution, the political branches, not the courts, had power over recognition, war, and the pursuit of redress against foreign nations.²⁰¹ We readily acknowledge that the *Peters* Court did not spell out these matters in detail in its order. Our contention is that the Constitution's allocation of powers to the federal political branches—understood against well-known principles of the law of nations—provides a plausible explanation for why the Court adopted this language in its order.

Notably, Justice Story also understood *Peters*'s restriction of judicial power to be informed by background principles of the law of nations. In *The Invincible*, an 1814 circuit court case involving a claim against a French ship for illegally capturing an American vessel, the *Mount-Hope*, Justice Story relied on *Peters* to support dismissal of the claim.²⁰² Justice Story rejected counsel's argument that the rule of *Peters* was inapplicable when the captured vessel had not been brought within the jurisdiction of the capturing power, or when the vessel had been

197. *See id.* at 1641–42.

198. *Peters*, 3 U.S. (3 Dall.) at 130.

199. *See* U.S. CONST. art. I, § 8, cl. 2 (granting Congress the power to declare war); *id.* art. II, § 2 (naming the President the "Commander-in-Chief" of the armed forces).

200. *Peters*, 3 U.S. (3 Dall.) at 131.

201. U.S. CONST. art. II, § 3, cl. 4 (granting the President the power to receive ambassadors); *id.* art. II, § 2 (granting the President the power to appoint ambassadors with the advice and consent of the Senate).

202. 13 F. Cas. 72 (C.C.D. Mass. 1814) (No. 7054).

recaptured before the prize jurisdiction of the capturing power attached. Regardless of these factors, he explained, “[t]he ordinary mode of seeking redress by neutrals for such injuries is, to apply to the prize tribunals of the sovereign, under whose authority the capture has been made, for damages,”²⁰³ in this case, France. In explaining why “the French courts had complete authority, as courts of prize, to award damages for the capture of the Mount-Hope, if it was illegal,” Justice Story posed the following hypothetical:

Suppose an American ship had been captured under the British orders in council for having a certificate of origin on board, would it have been competent for an American tribunal, if the cruiser had come within our ports, to decide upon the legality of the capture thus made under the orders of the sovereign, who had already declared such certificates to be a good cause of condemnation?— It seems to me difficult to maintain, that such a capture, so made, could, in an American court, subject the party to damages, even supposing it be a clear infringement of our neutral rights, and of the laws of nations. The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not responsible therefor in their private capacities. If the citizens of a neutral country are injured by such acts, it belongs to their own government to apply for redress, and not for judicial tribunals to administer it.²⁰⁴

This discussion of the relative powers of the government and its courts helps to explain why the *Peters* Court described the district court’s exercise of jurisdiction over a vessel, which a French court had held to be a lawful prize, as “in contempt of the government of the United States.”²⁰⁵ If a U.S. court were to have second-guessed the determination of a French prize court, it would have “disturb[ed] the peace and harmony” between the two nations by challenging France’s sovereign act and inviting retaliation against the United States. As Justice Story explained, if U.S. citizens are injured by the authorized acts of a foreign sovereign, “it belongs to their own government to apply for redress, and not for judicial tribunals to administer it.”²⁰⁶

Professors Golove and Hulsebosch also take issue with our discussion of the *Schooner Exchange v. McFaddon*,²⁰⁷ an important Marshall Court opinion upholding the immunity of foreign warships in U.S. ports. Golove and Hulsebosch regard the decision as just one of countless examples “of American courts treating the

203. *Id.* at 77.

204. *Id.*

205. *Peters*, 3 U.S. (3 Dall.) at 131.

206. *The Invincible*, 13 F. Cas. at 77. On appeal, the Supreme Court also endorsed *Peters* in affirming Justice Story’s decision. The Court held that the question of prize or no prize was “a question exclusively proper for the courts of the capturing power” under the law of nations, and “observe[d] the correctness with which the law applicable to this case, in principle, [was] laid down in the recital to the prohibitions” in *Peters*. *L’Invincible*, 14 U.S. (1 Wheat.) 238, 259–61 (1816).

207. 11 U.S. (7 Cranch) 116 (1812).

law of nations as part of the law of the land and resolving cases on that basis.”²⁰⁸ Accordingly, they reject our reading of the opinion as reflecting deference by the Court to the political branches based on the Constitution’s allocation of foreign relations powers.²⁰⁹ There are at least two problems with Golove and Hulsebosch’s account of the case. First, the Court’s opinion contains no language purporting to apply immunity under the law of nations as part of “the law of the land” or federal law. Second, the Court’s approach went out of its way to uphold the primacy of the political branches in conducting foreign relations. We consider each point briefly in turn.

Professors Golove and Hulsebosch reiterate their claim that the Constitution incorporated the law of nations into federal law, and maintain that the *Schooner Exchange* Court found immunity on this basis.²¹⁰ This account of the *Schooner Exchange* simply assumes their conclusion that the Constitution adopted the law of the nations as a form of supreme federal law. Their position seems to be that because the Court applied the law of nations, it must have applied it as supreme federal law. But nothing in the *Schooner Exchange* supports this conclusion. The Court’s opinion does not refer to the law of nations as “federal law,” the “supreme law of the land,” part of the “laws of the United States,” or even the “law of the land.”²¹¹ And, as discussed in Part II, even if the Court had referred to the law of nations as part of the law of the land, an innocuous reference of this kind would not have signified that the Court considered the law of nations to be part of the supreme law of the land.

Professors Golove and Hulsebosch also claim that the *Schooner Exchange* rested solely on the law of nations, and that the Constitution’s allocation of powers played no role in the Court’s decision.²¹² A brief description of the case is necessary to evaluate this claim. According to the complaint, the *Schooner Exchange*, an American ship, was “violently and forcibly taken by certain persons, acting under the decrees and orders of [France], out of the custody of the libellants, . . . and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations.”²¹³ The ship was never condemned as a lawful prize by a French court, but was refitted and put into service as a French warship.²¹⁴ When the ship subsequently entered the port of Philadelphia, the original owners filed a libel proceeding against the ship in federal court, seeking an order of attachment and restoration.²¹⁵ The district court dismissed the case at the suggestion of the U.S. Attorney, but the circuit court

208. Golove & Hulsebosch, *supra* note 4, at 1643.

209. *Id.* at 1644–45.

210. *Id.* at 1645.

211. *See generally* *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

212. Golove & Hulsebosch, *supra* note 4, at 1645.

213. *Schooner Exchange*, 11 U.S. (7 Cranch) at 117.

214. *Id.* at 146–47.

215. *Id.* at 117.

reversed.²¹⁶ The Supreme Court heard the case on an expedited basis and reinstated the district court's order of dismissal.²¹⁷

The Court began by acknowledging the territorial sovereignty of nations visited by foreign warships. The Court explained:

[A]ll exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory, that this consent may be implied or expressed, and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.²¹⁸

After canvassing the practice of nations, and distinguishing private ships and foreign armies from foreign warships, the Court found it “to be 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.”²¹⁹ In light of this principle, the Court concluded that the sovereign power of the United States should be taken to have impliedly waived its jurisdiction over the *Schooner Exchange*.²²⁰

The Court found this implied consent even though the Judiciary Act of 1789 contained a general grant of admiralty and maritime jurisdiction authorizing district courts to adjudicate the legality of captures on the high seas. The *Schooner Exchange* Court began by acknowledging that “[w]ithout doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals.”²²¹ The Court employed a strong clear statement requirement (akin to

216. *Id.* at 119–20.

217. *Id.* at 147.

218. *Id.* at 143.

219. *Id.* at 145–46. Golove and Hulsebosch argue in a footnote that our description of the decision is mistaken because we observed that “the law of nations did not bar U.S. courts from examining the legality of the capture.” Golove & Hulsebosch, *supra* note 4, at 1644 n.217 (quoting BELLIA & CLARK, *supra* note 1, at 79). They say this is a mistake because “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.” *Id.* The language they quote from our book, however, is taken out of context. The quote is not a description of the Court's holding in the *Schooner Exchange* (as they mistakenly assert), but comes from a sentence differentiating the *Schooner Exchange* from the Court's earlier decision in *Peters*. In *Peters*, the claimants sought damages stemming from France's alleged illegal capture of a U.S. ship subsequently adjudicated by a French court as a lawful prize. *United States v. Peters*, 3 U.S. (3 Dall.) 121, 130 (1795). Under the law of nations, such adjudication barred the courts of other nations from relitigating the legality of the capture. *Id.* at 130–31. In the *Schooner Exchange*, by contrast, the U.S. ship captured by France was never adjudicated as a lawful prize. Thus, in the full sentence from which they quote, we correctly noted: “Unlike in *Peters*, the law of nations did not bar U.S. courts from examining the legality of the capture because ‘no sentence or decree of condemnation had been pronounced against [the ship], by any [French] court of competent jurisdiction.’” BELLIA & CLARK, *supra* note 1, at 79–80. Later in the same discussion, we accurately recounted that the *Schooner Exchange* Court “concluded that the United States' consent to immunity for foreign warships could be inferred from the practice of nations.” BELLIA & CLARK, *supra* note 1, at 81.

220. *See Schooner Exchange*, 11 U.S. (7 Cranch) at 144.

221. *Id.* at 146.

the *Charming Betsy* canon²²²) to find the Judiciary Act inadequate to destroy the nation's implied consent.²²³ According to the Court:

Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.²²⁴

The Court then noted several additional "arguments in favor of this opinion."²²⁵ According to the Court, these arguments were:

drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion . . .²²⁶

Although the Court did not engage in "a particular examination of these points," it did characterize them as having "great weight" and "merit[ing] serious attention."²²⁷

These arguments implicate the Constitution's allocation of powers and draw a distinction between the relative powers of the courts and the political branches to initiate conflict with foreign nations. If the Court was correct that the practice of nations was to exempt foreign warships from the jurisdiction of local tribunals, then a U.S. court's exercise of such jurisdiction in this case would have generated friction with France, if not outright conflict. The Court's use of a clear statement rule to exclude this case from the general provisions of the Judiciary Act was designed to ensure that Congress and the President—rather than the courts—made the crucial decision to deny immunity to a French warship. Professors Golove and Hulsebosch do not even acknowledge these arguments.

In other cases, the Supreme Court relied more directly on specific foreign relations powers of the political branches. For example, in *Rose v. Himely*,²²⁸ the question presented was whether the law of nations required U.S. courts to give effect to the prize determination of a tribunal sitting in Santo Domingo that had

222. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that a federal statute "ought never to be construed to violate the law of nations if any other possible construction remains").

223. See *Schooner Exchange*, 11 U.S. (7 Cranch) at 146 ("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.").

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. 8 U.S. (4 Cranch) 241 (1808).

pronounced a judgment of condemnation. The Court refused to uphold the asserted right of Santo Domingo to have the tribunal's judgment enforced under the law of nations.²²⁹ The Court's stated reason for refusing to uphold the judgment was that France still asserted sovereignty over Santo Domingo, and it was for the political branches, not the courts, to determine whether the United States would recognize Santo Domingo as an independent nation with sovereign rights under the law of nations. The Court explained:

It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.²³⁰

Accordingly, the Court refused to uphold the asserted rights of an unrecognized government without regard to whether it had de facto control of the territory. Recognition by the political branches had real legal consequences in such cases. Its presence or absence determined whether U.S. courts would recognize judicial decrees from courts located in the territory in question.

Professors Golove and Hulsebosch also misread *The Nereide*, arguably the most famous Marshall Court opinion applying the law of nations.²³¹ The question before the Court was whether a federal court should hold a United States privateer liable for capturing goods belonging to an alleged neutral (Spanish) person that were found on an enemy (English) vessel.²³² Among other things, the captors argued that Spain would subject American goods to capture under comparable circumstances.²³³ Counsel asked the Court to uphold the legality of the capture on the basis of a rule of reciprocity under the law of nations—that the United States should condemn property of a nation that would subject U.S. property to condemnation in the same circumstances. In arguing the case, Alexander Dallas contended that “[r]eciprocity is the permanent basis of the law of nations,”²³⁴ and William Pinkney attempted to demonstrate that nations had “acknowledged the rule of reciprocity as a rule of the law of nations.”²³⁵

Chief Justice Marshall distinguished between the respective powers of “governments” and “Courts,” and refused even to consider judicial application of any such rule of reciprocity:

[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

229. *See id.* at 281.

230. *Id.* at 272.

231. 13 U.S. (9 Cranch) 388 (1815).

232. *Id.* at 393.

233. *Id.* at 422.

234. *Id.* at 400.

235. *Id.* at 406.

political and not a legal measure. It is for the consideration of governments 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.²³⁶

In its opinion, the *Nereide* Court further distinguished the respective roles of “the government” and “the Court”:

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 part of the law of the land.²³⁷

In our book, we suggest that these passages reflect an understanding that the Constitution’s allocation of powers required U.S. courts both to uphold the neutral rights of Spain under the law of nations and to refrain from attempting to hold Spain accountable for violations of U.S. rights, even if the law of nations permitted the United States to do so under the rule of reciprocity. The Court’s concluding statement—“Till such an act be passed, the Court is bound by the law of nations which is part of the law of the land”—was an unexceptional statement of prevailing judicial practice.²³⁸ Courts regularly upheld the rights of foreign sovereigns under law of the law nations and refused to hold such sovereigns accountable for their own misconduct unless and until they received contrary instructions from the political branches.

Professors Golove and Hulsebosch object to our reading of the case, suggesting that Marshall’s language is a “seemingly unequivocal affirmation that the courts are bound to apply the law of nations as part of the law of the land”²³⁹—in their view, a form of supreme federal law. As discussed, their reading is mistaken on its own terms because it conflates “the law of the land” with “the supreme Law of the Land.” Moreover, even if one regarded the law of nations as supreme federal law, their account cannot explain why the *Nereide* Court applied the law of nations to uphold the neutral rights of Spain, but refused to apply the law of nations to enforce the rights of the United States against other countries. If the law of nations was part of the supreme law of the land, then courts were obligated to apply all of it unless—as we maintain—the Constitution’s allocation of powers gave primacy on some questions to the political branches.

236. *Id.* at 422–23.

237. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

238. *Id.*

239. *See* Golove & Hulsebosch, *supra* note 4, at 1650.

Golove and Hulsebosch acknowledge that “[t]he courts generally declined to impose remedies for violations of U.S. rights.”²⁴⁰ In their view, however, the judiciary’s refusal to redress wrongs committed by other countries was not based on the Constitution’s allocation of powers to the political branches. Rather, the judiciary took this stance because “the question of what retaliatory measures to adopt—or, in more modern language, which countermeasures, if any, to impose—was not a legal question at all, but instead one of policy.”²⁴¹ In other words, the reason that the Court would not attempt to redress Spain’s violation of U.S. rights in *The Nereide* was that it “was a matter of policy, not law,” and “therefore up to the political branches to decide how to respond to Spain’s noncompliance with the law of nations.”²⁴² This reason sounds a lot like the allocation of powers approach that they seek to downplay in their paper. It is true that redressing Spain’s violation of U.S. rights under the law of nations required a policy judgment, but, as we argue, such judgments were reserved by the Constitution to the federal political branches under their exclusive powers to pursue redress for wrongs committed by other nations against the United States.²⁴³

In sum, the Supreme Court’s early decisions reflect the Founders’ choice to vest important powers implicating the law of nations in the political branches of the federal government. The Founders were well versed in the law of nations, and understood that the conduct of foreign relations would involve delicate—and often dangerous—policy judgments that could lead to war. These early judicial decisions are also consistent with the Supreme Court’s later decisions placing more explicit reliance on recognition.²⁴⁴ Such increased reliance is not surprising in light of the demise of general law and of the fact that by the twentieth century, most violations of the law of nations no longer provided just cause for war. More recent decisions also continued the Court’s refusal to take action against foreign nations for their violations of U.S. rights on the ground that the Constitution reserves such judgments in the first instance to the political branches.²⁴⁵ All of these decisions support the proposition that the Constitution’s allocation of powers requires courts to apply the law of nations when necessary to uphold the authority of the political branches over war and foreign relations.

240. *Id.* at 1647.

241. *Id.* (footnotes omitted).

242. *Id.* at 1648.

243. Justice Johnson addressed both sides of this coin in his opinion in *The Nereide*:

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.

13 U.S. (9 Cranch) at 432.

244. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

245. See *Sabbatino*, 376 U.S. at 412.

CONCLUSION

The status of customary international law in U.S. courts has been intensely debated among judges and academics for decades. In *The Law of Nations and the United States Constitution*, we seek to advance this debate (1) by demonstrating that the Constitution was designed to interact, and in fact has interacted, differently with different branches of the law of nations; and (2) by explaining how the Constitution's exclusive allocation of war and foreign relations powers to the federal political branches bears on the power and duty of U.S. courts to enforce the law of nations.

Professors David Golove and Daniel Hulsebosch raise spirited objections to our understanding of the law of nations and the Constitution. First, they echo the modern position that the Constitution adopted the law of nations as supreme federal law and thus assigned primary responsibility to courts, rather than the political branches, to comply with the law of nations. Their evidence for this proposition, however, is unpersuasive. Although they present ample evidence that members of the founding generation understood the law of nations to form "part of the law of the land" or "part of the law of the United States,"²⁴⁶ they present no evidence that the Founders understood the Constitution to adopt the law of nations as the "supreme Law of the Land," enforceable by courts not only in preference to contrary state law, but also in preference to contrary executive action and possibly even acts of Congress. By design, the Supremacy Clause recognized only three sources of law as "the supreme Law of the Land"—the "Constitution," "Laws made in Pursuance thereof," and "Treaties." Under the Constitution, each of these sources of law can be adopted only with the participation and assent of the Senate (designed to represent the states) or the states themselves. This veto was the price of supremacy exacted by the states during the drafting and ratification of the Constitution. Professors Golove and Hulsebosch acknowledge that the Supremacy Clause did not make the law of nations the supreme law of the land, and they identify no other constitutional provision giving it that status.

Second, while Professors Golove and Hulsebosch overstate the status of the law of nations as supreme federal law, they undervalue the relationship between the law of nations and the Constitution's allocation of powers. Specifically, they contend that the Constitution's allocation of power to the political branches to recognize foreign nations was historically irrelevant to the obligation of U.S. courts to uphold the rights of foreign nations under the law of nations. In the twentieth century, the Supreme Court has expressly relied on recognition to uphold the sovereign rights of foreign nations. Such reliance is largely consistent with historical understandings and practice. Because early federal courts applied the law of nations as general law, they had little need in most cases to spell out the precise relationship between judicial adherence to the law of nations and the exclusive powers of the political branches over war, foreign nations, and recognition. But background understandings of the law of nations suggest that the

246. See Golove & Hulsebosch, *supra* note 4, at 1616–23.

Constitution's exclusive allocation of these powers to the political branches required courts—in the absence of contrary instructions from the political branches—(1) to respect rights of recognized foreign nations under the law of nations and (2) to refrain from enforcing rights of the United States against other nations. Early Supreme Court opinions also suggest that the judiciary's failure to uphold the rights of foreign nations under the law of nations, and the judiciary's unilateral enforcement of U.S. rights against other countries, would usurp the exclusive constitutional powers of the political branches over these matters. In some early cases, when necessary to resolve the dispute at hand, the Court alluded to these points explicitly. The Court's increased reliance on the Constitution's allocation of foreign relations powers to justify these same practices in the modern era rests on the foundation established by early precedent in light of the Constitution's original design.

