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Congress's Under-Appreciated Power to Define and Punish Offenses against the Law of Nations

Andrew Kent

Fordham University School of Law, akent@law.fordham.edu

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Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations

J. Andrew Kent*

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* Climenko Fellow and Lecturer on Law, Harvard Law School; Associate Professor of Law Designate, Fordham University School of Law. Thanks to Martin Flaherty, Jack Goldsmith, Ryan Goodman, Carissa Hessick, Eugene Kontorovich, Thomas Lee, Martha Minow, Gerald Neuman, Michael Ramsey, Jed Shugerman, and Ben Zipursky for comments on earlier drafts. Thanks also to participants in the Climenko Fellowship and Harvard faculty workshops.

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Perhaps no Article I power of Congress is less understood than the power to “define and punish . . . Offences against the Law of Nations.”¹ There are few scholarly works about the Clause; Congress, the Supreme Court, and the Executive Branch have seldom interpreted the Clause, and even then they have done so in a cursory and contradictory manner. Relying on textual analysis and Founding-era history and political theory to read the Clause in a different manner than previous commentators, this Article seeks to rescue the Clause from obscurity and thereby enrich current foreign affairs debates. Not only is the Clause a power to civilly or criminally regulate individuals when their conduct violates customary international law—as previous commentators have assumed—but it is also a power to punish states, both foreign and U.S. states, for violations of international law. This dual meaning of the Clause—operating on both individuals and states—results from the fact that the eighteenth-century law of nations was founded on an analogy between individuals and states. Relations between states in the international system were analogized to relations between individual people in the putative state of nature—made famous by Locke, Hobbes, Rousseau, and others—where mankind allegedly lived before entering civil society. In eighteenth-century thought, not only individuals but also states were capable of committing “offences against the law of nations.” And states, not just individuals, were liable to “punish” and be punished for such offenses. There are important implications of this dual reading of the Constitution’s Law of Nations Clause for current debates about the constitutional status of international law and the Constitution’s textual division of war and foreign policy powers between Congress and the President.

1. U.S. CONST. art. 1, § 8, cl. 10.

I. Introduction

Some of the most contested issues in U.S. foreign relations law today concern whether and, if so, how international law either restrains or empowers the federal and state governments of the United States. Consider the following questions, which may seem unrelated but, as will be discussed below, raise a common constitutional issue—the proper interpretation of the Article I grant to Congress of “Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”.²

- May Article III civilian courts bind military or other federal Executive Branch officials to standards of conduct found in treaties or customary international law when, for example, they try suspected terrorists in military commissions outside the borders of the United States?³
- May the President deploy U.S. military forces abroad, without ex ante congressional authorization, to stop a foreign government's commission of genocide or ethnic cleansing in violation of treaties and customary international law?⁴
- May Congress direct the President to take coercive diplomatic actions against a foreign government that is committing genocide in violation of treaties and customary international law?⁵
- May U.S. federal courts prohibit state governments from executing persons who committed capital crimes as juveniles on the ground that doing so violates customary international law?⁶

Customary international law is the unwritten “law” of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁷ Today's customary international law is the closest modern analogue of the eighteenth-century “law of nations.”⁸ This Article will use the term “customary international

2. *Id.*

3. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2755 (2006); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 31 (D.D.C. 2006); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 479 (D.D.C. 2005).

4. *See* Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11 (2000) (discussing the legality of NATO's Kosovo deployment); Abraham D. Sofaer, *The War Powers Resolution and Kosovo*, 34 LOY. L.A. L. REV. 71 (2000) (same); *see also infra* note 92.

5. *See* Sudan Peace Act of 2002, Pub. L. No. 107-245, §§ 2(10), 4, 6(b)(2), 116 Stat. 1504, 1505, 1506, 1507–08 (2002) (codified at 50 U.S.C. § 1701 note (Supp. III 2003)).

6. *See* Brief for the Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

7. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

8. *See, e.g., Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 154 & n.22 (2d Cir. 2003); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 237 (2d ed. 1996); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique*

law” when discussing the present and recent past and the term “law of nations” when discussing the eighteenth-century Founding era. This unwritten international law differs in important respects from treaties. Because all states of the world, and perhaps various kinds of nonstate actors as well,⁹ participate in making customary international law, its substantive content can often be little controlled by the political branches of the U.S. federal government, much less by U.S. state governments.¹⁰ The content of customary international law is often said to be overly indeterminate and malleable.¹¹ The Constitution mentions customary international law or the law of nations in only one place, in the clause giving Congress power to “define and punish . . . Offences against the Law of Nations.”¹² Because the Constitution gives the democratically accountable political branches the power to decide which substantive rules will be embodied in treaties,¹³ treaties are far less controversial as restrictions or enlargements of government power than customary international law or the law of nations.

The nature of customary international law and its relative freedom from substantive control by the U.S. government has implications for thinking about customary international law as both a restriction on government power and a source of government power. First, holding that this somewhat esoteric unwritten law of all nations binds and limits the political branches of the state or federal governments as a matter of domestic U.S. law potentially conflicts with deep-seated constitutional values, such as federalism, separation of powers, popular sovereignty, and the maintenance of a flexible

of the Modern Position, 110 HARV. L. REV. 815, 819 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]. As discussed below, the eighteenth-century law of nations differed from today’s customary international law in that it was comprised of natural law in addition to rules derived from the practices of states followed by them from a sense of legal obligation. See *infra* notes 29–31, 217–18, 439–41 and accompanying text. For a recent treatment of the similarities and differences between customary international law and the law of nations, see Harold J. Berman, *The Alien Torts Claim Act and the Law of Nations*, 19 EMORY INT’L L. REV. 69 (2005).

9. See Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT’L L. 211, 227–34 (1991) (suggesting that nonstate actors, in addition to states, should have a leading role in creating customary international law).

10. While theoretically a state can withhold its consent to be bound by a rule of customary international law and therefore escape legal obligation to follow that rule, the criteria for being considered a “persistent objector” to a rule are demanding, and some question whether persistent objector status is ever actually available, especially regarding so-called *jus cogens* rules of international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmts. b, d, k (1987); Jean-Marie Henckaerts, *Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law*, 13 HUM. RTS. BRIEF 8, 9 (2006).

11. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of Human Rights Litigation*, 66 FORDHAM L. REV. 319, 325–31 (1997); Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT’L L. 5, 5–7 (2003); J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT’L L. 129, 150–51, 160–61 (1989).

12. U.S. CONST. art. 1, § 8, cl. 10.

13. See *id.* art. II, § 2, cl. 2 (stating that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

and powerful national security and defense capacity. Because customary international law, unlike treaties,¹⁴ is not mentioned in either the Supremacy Clause of the Constitution or Article III's judiciary provisions, it is textually problematic to maintain that the federal Judiciary should be able to discover and apply this unwritten law to bind state governments or the political branches of the federal government. Second, because the Constitution created a government of limited and enumerated powers, it seems potentially problematic that Congress's regulatory powers under the Law of Nations Clause¹⁵ could change or expand as a concomitant of expanding or changing understandings of what today constitutes customary international law or punishable "offences" against that law.

Given the stakes and the great uncertainty about the constitutional status of customary international law or the law of nations, one would expect that the clause containing the Constitution's sole mention of it would be extensively studied and heavily theorized. Instead, the opposite is the case. Among Congress's powers, there is probably none less understood or subject to such widely varying interpretations as the Law of Nations Clause. According to scholars, the Clause is "understudied,"¹⁶ "not clear,"¹⁷ and even "obscure."¹⁸

14. See *id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."); *id.* art. VI, cl. 2 ("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.").

15. Many scholars refer to the second part of this Clause as the "Define and Punish Clause." E.g., Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 [hereinafter Bradley, *Universal Jurisdiction*]; A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 406 n.116 (1997). Because that phrase fails to distinguish between the first and second parts of the Clause, I call the first part the "Piracies and Felonies Clause" and the second part the "Law of Nations Clause." Others prefer "Offences Clause" instead of "Law of Nations Clause." E.g., Jason Jarvis, *Constitutional Constraints on the International Law-Making Power of the Federal Courts*, 13 J. TRANSNAT'L L. & POL'Y 251, 251 (2003); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 449 (2000). I use the latter because the central import of the Clause is its grant of power over the law of nations.

16. Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 860 (2005).

17. Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 915 n.26 (1959).

18. Peter J. Spiro, *Foreign Relations Law*, 70 U. COLO. L. REV. 1223, 1273 n.185 (1999).

The lack of in-depth scholarship about the Clause¹⁹ and the inherent difficulties that the Clause presents for interpreters have led courts, legislators, Executive Branch officials, and scholars to claim that it means a dizzying array of things. At one extreme, a few maintain that the Clause incorporates all of customary international law into domestic U.S. law as binding on and enforceable against the U.S. government.²⁰ Phrased differently, this is a claim that the Law of Nations Clause makes all of customary international law “self-executing” against the U.S. government. In its most ambitious form, this is a claim that it is unconstitutional for the President or Congress to violate certain rules of international law.²¹ At another extreme, a few—including a prominent federal judge and the U.S. Department of Justice in a recent amicus brief—suggest that the Clause might prevent U.S. courts from defining and applying rules of customary international law unless and until Congress has authorized it by legislation.²² Phrased differently, this is a claim that the Law of Nations Clause makes all of customary international law non-self-executing. Modern congresses have not considered these divergent possibilities, but instead have cited the Clause as authority to do everything from retroactively naturalizing a Holocaust survivor and banning terrorist fundraising to implementing a treaty barring bribery in foreign commercial transactions and prohibiting political protests near embassies in Washington, D.C.²³

19. There are only a handful of law review articles and student notes containing extensive discussions of the Clause. See Jarvis, *supra* note 15; Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain*, 2004 CATO SUP. CT. REV. 209, 223–26; Charles D. Siegal, *Deference and Its Dangers: Congress' Power to Define "Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 867 (1988); Stephens, *supra* note 15; Howard S. Fredman, Comment, *The Offenses Clause: Congress' International Penal Power*, 8 COLUM. J. TRANSNAT'L L. 279, 279 (1969); Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 111 (2002); Note, *The Offences Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378, 2378 (2005) [hereinafter Harvard Note]; Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1305 (1999).

20. See WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 295 (1924); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1092–94 (1985); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 78–81 (1990). Willoughby qualifies his claim by granting that Congress by statute or the Senate and President by treaty may derogate from international law. See WILLOUGHBY, *supra*, at 295–96.

21. See, e.g., Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 416–43 (1988) (arguing that, in the case of unavoidable clashes between customary international law and federal statutes, customary international law prevails).

22. *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd on other grounds*, *Rasul v. Bush*, 542 U.S. 466 (2004); Brief for the United States as Amicus Curiae Supporting Petitioner at 32, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) [hereinafter U.S. *Sosa* Brief]; Jarvis, *supra* note 15, at 252.

23. See *infra* notes 69–85 and accompanying text.

Notwithstanding this diversity of views about the Clause, there is in fact a conventional wisdom in the legal academy about its meaning. The Law of Nations Clause is viewed by the majority of academic commentators as a rather limited power to either enact regulatory statutes governing the conduct of individual persons who violate international law, or to constitute tribunals to adjudicate the conduct of such individuals.²⁴ I call this the individual conception of the scope of the Law of Nations Clause. The individual conception is so entrenched that current academic debates about the Clause generally assume its correctness.²⁵

It may seem somewhat counter-intuitive that the Constitution's sole mention of the law of nations would be assumed to be a domestic power to regulate the conduct of individuals, because until the aftermath of World War II and the growth of individual human rights, customary international law "primarily governed only interstate relations."²⁶ As an American judge put it in 1788, the law of nations "regulates the conduct of independent states toward each other."²⁷ Individual persons were simply not subjects with international legal personality.²⁸ Yet while state-centric positivism—which saw customary international law as derived only from state practice and binding only between states—was the norm in the nineteenth and early

24. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 6, § 404 reporters' note 1 (1987); CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 153–54, 521 (2d ed. 2006); HENKIN, *supra* note 8, at 68–70; H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 114 (2002); OLIVER SCHROEDER, *INTERNATIONAL CRIME AND THE U.S. CONSTITUTION* 11 (1950); Bradley, *Universal Jurisdiction*, *supra* note 15, at 345 & n.101; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 472, 477 (1989); Robert J. Delahunty, *Presidential Power and International Law in a Time of Terror*, 4 REGENT J. INT'L L. 175, 189 (2006); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 834 n.74 (1989); Louis Klarevas, *The Surrender of Alleged War Criminals to International Tribunals: Examining the Constitutionality of Extradition via Congressional-Executive Agreement*, 8 UCLA J. INT'L L. & FOREIGN AFF. 77, 119–24 (2003); Charles Pergler, *Constitutional Recognition of International Law*, 30 VA. L. REV. 318, 325 (1944); Michael Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1249 n.148 (2005) [hereinafter Ramsey, *Torturing*]; Siegal, *supra* note 19, at 867; Quincy Wright, *War Crimes*, 39 AM. J. INT'L L. 257, 261 (1945); Fredman, *supra* note 19, at 279; Morley, *supra* note 19; Harvard Note, *supra* note 19, at 2379, 2388; Teachout, *supra* note 19, at 1310, 1317.

25. The debates concern, first, whether Congress may punish individuals only by authorizing criminal penalties, or whether it may also use civil remedies, and second, whether Congress may punish individuals' violations of the law of nations as the law existed when the Constitution was adopted or as it has evolved over time. See generally Bradley, *Universal Jurisdiction*, *supra* note 15, at 345 & n.101; Stephens, *supra* note 15, at 453–54.

26. Bradley & Goldsmith, *Customary International Law*, *supra* note 8, at 831.

27. *Charge of His Honour the Mayor of New York, Delivered to the Grand Jury at the Opening of the General Sessions of the Peace, for the City and County of New York* (May 6, 1788), in THE AMERICAN MUSEUM, OR REPOSITORY OF ANCIENT & MODERN FUGITIVE PIECES, 530, 532 (June 1788) [hereinafter *Charge of His Honour*].

28. See, e.g., Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1032–33 (2002). Generally speaking, individuals could only interact internationally through the mediation of one's home state government; individuals lacked direct international rights under the law of nations. See *id.* at 1032–34.

twentieth centuries,²⁹ it had not fully taken hold by 1787, when the Constitution was written.³⁰ At that time, the law of nations was thought to be based primarily on natural law, supplemented in some particulars by norms derived from customary state practice.³¹ Natural law thus imposed obligations equally on states and on individual persons. And although individuals lacked international legal personality, the eighteenth-century law of nations held that, domestically, individuals were obliged to refrain from certain conduct which might have international repercussions for one's government.³² Hence the same judge who stated that the law of nations "regulates the conduct of independent states toward each other" contemporaneously instructed a grand jury that the law of nations protected the household of a foreign ambassador in New York City against violation by an American policeman.³³ The received history of the events leading to the inclusion of the Law of Nations Clause in the Constitution—as interpreted in the currently extant scholarship about the Clause—emphasizes violations of the law of nations by individuals like this policeman.³⁴ As a result, an individual conception of the Law of Nations Clause, which sees it as speaking to the obligations of individuals to their own government, is not truly counter-intuitive at all. And indeed it is the conventional wisdom among scholars.

The central claim of this Article is that this individual conception of the Law of Nations Clause is correct as far as it goes, but it is not the whole story. While the Clause was certainly intended to allow Congress to regulate domestically the conduct of individuals, and while Congress, the Supreme Court, and the Executive Branch have often interpreted it that way, the Clause's text supports much broader meanings as well. These broader meanings result from the fact that the eighteenth-century law of nations was founded on an analogy between individual persons and states.³⁵ States were seen as individual people writ large. Relations between states in the international system were analogized to relations between individual people in the putative state of nature—made famous by John Locke, Thomas Hobbes, Jean Jacques Rousseau, and others—where mankind allegedly lived before entering civil society. In both states of nature (domestic or international), the law (either the law of nature or the law of nations, respectively) was enforced not by a common sovereign, for one did not exist, but by each affected individual person or state punishing anyone who

29. See, e.g., Bradley & Goldsmith, *Customary International Law*, *supra* note 8, at 831.

30. *Id.* at 822–23.

31. See *infra* notes 217–18, 439–41 and accompanying text.

32. See, e.g., *Henfield's Case*, 11 F. Cas. 1099, 1105–09 (C.C.D. Pa. 1793) (No. 6,360) (grand jury charge of Wilson, J.) (instructing that any private citizen who assisted France in fitting out privateers in U.S. ports, without authorization from the U.S. government, has offended against the law of nations and hence the law of the United States).

33. See *Charge of His Honour*, *supra* note 27.

34. See *infra* subpart III(A).

35. The ideas in this and the following paragraph are developed *infra* in subpart III(B).

offended against the law. In the eighteenth century, individuals as well as states were thought capable of committing “Offences against the Law of Nations.” And states, not just individuals, were liable to “punish” and be punished for such offenses.

This theory was advanced by thinkers with significant influence on the legal and political thought of the American Founding generation. William Blackstone, for example, in his hugely influential *Commentaries on the Laws of England*, discussed both individual and state offenses against the law of nations but made clear that the primary signification of the term was on the international plane. In a chapter entitled, “Of Offences Against the Law of Nations,” he wrote that “offences against this law [the law of nations] are principally incident to whole states or nations: in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another.”³⁶ Emmerich de Vattel’s *The Law of Nations* also had great influence on the American Founding generation. Vattel wrote about states which “offend[] against the law of nations”³⁷ and called the right of “punishing those who offend” the nation “the right of the sword,” which can be exercised through war.³⁸ Speaking of the international realm governed by this law of nations, Vattel wrote that “[a]ll nations have then a right to repel by force, what openly violates the laws of the society which nature has established among them, or that directly attacks the welfare and safety of that society.”³⁹ For Vattel and other theorists, states punishing other states for offenses against the law of nations is what makes international relations lawful in any recognizable sense of the word.

These ideas were widespread and influential at the time the Constitution was drafted and provide important context for understanding the Law of Nations Clause. These ideas are found in two major places: the influential theoretical works and law treatises of John Locke, Hugo Grotius, Jean Jacques Burlamaqui, Thomas Hobbes, Thomas Rutherford, Montesquieu, Blackstone, Vattel, and other seventeenth- and eighteenth-century writers who discussed the law of nations, the law of nature or the structure of government; and the Founding-era writings and speeches of American pamphleteers, essayists, statesmen, politicians, lawyers, and judges. The second type of source has obvious relevance for understanding the views of the American Founders. And modern historians and constitutional theorists almost uniformly maintain that understanding the Constitution’s treatment of war and foreign affairs issues requires an understanding of the great

36. WILLIAM BLACKSTONE, 4 COMMENTARIES *67–68.

37. 4 EMMERICH DE VATTEL, THE LAW OF NATIONS § 63, at 668 (Dublin, 1792) (1758).

38. 1 *id.* § 169, at 138; *see also* 3 *id.* § 28, at 454 (discussing war waged “to punish the offender”).

39. 1 *id.* § 22, at 10.

intellectual debts the Founders owed to the above-mentioned theorists and treatise writers.⁴⁰

Based on these sources, this Article claims that an eighteenth-century audience could well have understood Congress's Law of Nations Clause power to be available not only to punish individuals by enacting domestic regulatory statutes, but also to do two other things: punish foreign nations by deploying a wide range of national coercive powers, and "punish" American states by codifying international legal obligations and making them enforceable through the federal courts. Mirroring the duality of the analogy between individual and state, the power to punish offenses against the law of nations was also dual: a power to regulate both individuals and states (foreign or American). Thus I do not reject the individual conception. My claim is that the text of the Law of Nations Clause is ambiguous because it is consistent with the individual conception, an international or "state-to-state" conception, or both at once.⁴¹ Using abbreviated terminology for efficiency

40. On the authority of the law of nations and law of nature theorists (e.g., Vattel, Grotius, Burlamaqui, Rutherford, Wolff, Pufendorf, Hobbes, and Locke), the famous common lawyers (e.g., Blackstone), and the unclassifiable Montesquieu for understanding the U.S. Constitution generally, see BERNARD BAILY, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27–31 (1967); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 14–15 (4th ed. 1957); DONALD S. LUTZ, *A PREFACE TO AMERICAN POLITICAL THEORY* 113–40 (1992); FORREST MCDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 7, 60, 80 (1985) [hereinafter MCDONALD, *NOVUS*]; and GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 259–305 (2d ed. 1998). For the proposition that many Founding-era American lawyers and statesmen studied and were influenced by these thinkers, see PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 197–99 (1939); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814*, at 11 (1993); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 163, 181–82 (1911); and Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 859–65 (1978). On the use of these thinkers for understanding the Constitution's provisions regarding war, foreign affairs, and international law, see David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *STAN. L. REV.* 1697, 1703–06 (2003); Jay, *supra* note 24, at 823; J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 *GEO. L.J.* 463, 466 (2007); Lee, *supra* note 28, at 1061–62; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 689–94 (1972); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 266–72 (2001) [hereinafter Prakash & Ramsey, *Executive Power*]; and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CAL. L. REV.* 167, 199, 204–08, 242–43 (1996) [hereinafter Yoo, *Continuation*].

41. A few scholars have previously suggested without elaboration that the Law of Nations Clause might allow congressional action directed against foreign states or is otherwise a coercive international power, but they have not presented any historical, textual, theoretical, or other justification for this suggestion. See EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 115 (1917) (suggesting that the Law of Nations Clause gives Congress power to terminate treaties because the Clause, "it has been generally held," includes a "power to define International Law"); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 7, 31–32 (2d ed. 2004) [hereinafter FISHER, *PRESIDENTIAL*] (implying that the Law of Nations Clause is a war or foreign policy power of Congress); 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 169–70 (New York, O. Halsted 1826) [hereinafter KENT, *COMMENTARIES*] (beginning a lecture entitled "Of Offences Against the Law of Nations," which covered individual offenses, by making clear that both nations and individuals commit offenses against the law of nations and are punished for them: "No nation can

purposes, I call this third possibility—a two-fold understanding of the Clause that sees it as referring to both individuals and states—the dual conception. The dual conception of the Clause is more faithful than the individual conception (or state-to-state conception) to the textual, structural, and historical evidence of the Clause's eighteenth-century meaning and its fit within the larger framework of the U.S. Constitution.

After setting out proof of these claims and discussing objections to them, this Article draws out several potential implications for current debates. This discussion of implications must necessarily remain tentative. In order to make unqualified conclusions about implications for contemporary debates on the basis of claims about the original eighteenth-century understanding of a constitutional provision, one would need to defend the proposition that some form of "originalism" should be dispositive of constitutional disputes. As discussed below, I do not defend that maximalist proposition. To make unqualified conclusions, one would also need to present a fully complete history of the Law of Nations Clause and its context. This Article is intended to "jar current understandings" of the Clause by presenting substantial evidence of its duality or textual ambiguity and therefore potentially broader and different original eighteenth-century meanings, but it does not claim to be a "final history."⁴² Nor does this Article assert that textually based original meanings should necessarily displace current institutional arrangements and understandings among the Executive, Congress, and the courts that depart from the Founders' original vision. Accordingly, the reader should take the Article's discussion of implications in the provisional sense in which they are offered. To the extent one agrees that original meanings have relevance for constitutional interpretation and that the best textual, structural, and historical evidence suggests that the Law of Nations Clause would have had a dual meaning for the Founding generation, a number of potential implications follow; these potential implications help illuminate important contemporary debates in surprising and, I hope, interesting ways.

violate public law, without being subjected to the penal consequence of reproach and disgrace, and without incurring the hazard of punishment, to be inflicted in open and solemn war by the injured party"); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 2 (1976) ("Congress is to declare war. Even military actions short of war—such as *marque* and reprisal, captures on land and sea, the definition and punishment of piracy, and 'offences against the law of nations'—are placed in Congress's control."). A few other scholars have suggested—again, without elaboration—that the Clause allows congressional regulation of U.S. state governments. See Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1224–25 (1993) (suggesting that the Clause could be used to prohibit "violations of international law by [U.S.] state governments"); Stephens, *supra* note 15, at 552–53 (suggesting that the Clause could potentially allow Congress to bar U.S. state governments from executing persons who committed crimes as juveniles); *cf. id.* at 540 (the Clause "makes clear Congress's power to determine the domestic significance of international law").

42. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 13 n.47 (1994) (describing the scope of their historical project).

First, there are potential implications for the long-running debate about the relative constitutional powers of Congress versus the President in the areas of war and foreign affairs. Under the state-to-state conception advanced in this Article, the Law of Nations Clause gives Congress the power to decide how to respond to violations of international law by other states. A wide range of state behavior can be said to violate principles of international law; when the United States decides whether to “punish” these offenses by using national coercive means such as sanctions or limited uses of force, the Law of Nations Clause authorizes Congress to take the lead. The Clause is thus a “lesser war” power of Congress as well as a power to initiate what modern international lawyers term “countermeasures,”⁴³ nonviolent punitive sanctions against other states.

Debates about the Constitution’s allocation of war and foreign policy powers between the Congress and President have taken on a new urgency of late, as the administration of President George W. Bush has frequently asserted that the President has inherent constitutional authority to disregard congressional statutes which allegedly impinge on powers given to the President by the Commander-in-Chief Clause or by the so-called Vesting Clause of Article II (“The executive power shall be vested in a President of the United States of America.”). The President has made these assertions regarding statutes which appear to be well within Congress’s power under both the individual⁴⁴ and state-to-state⁴⁵ conception of the Law of Nations Clause. It is therefore important to understand precisely the nature and scope of Congress’s Law of Nations Clause power, because if a congressional statute directly implements a power specifically given to Congress by the text

43. For discussions of the modern international law concept of countermeasures, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987) and David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817 (2002).

44. For instance, Congress has codified international law banning torture with a criminal statute. See 18 U.S.C.A. §§ 2340–2340A (West 2006). The Executive Branch has argued that “[a]ny effort to apply [the statute] in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants . . . would be unconstitutional.” Jay S. Bybee, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002), in THE TORTURE PAPERS 172, 200 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

45. For instance, the Sudan Peace Act of 2002 condemned Sudanese genocide as a violation of international law and directed the President, should he find that Sudan was not negotiating in good faith to end its civil war, to oppose international financial assistance to Sudan, “consider downgrading or suspending diplomatic relations,” “deny the Government of Sudan access to oil revenues,” and “seek a United Nations Security Council Resolution to impose an arms embargo.” Pub. L. No. 107-245, §§ 2(10), 4, 6(b)(2), 116 Stat. 1504, 1505, 1506, 1507–08 (2002) (codified at 50 U.S.C. § 1701 note (Supp. III 2003)). President Bush, upon signing the act, declared that the Executive Branch would “construe . . . as advisory” provisions purporting to direct foreign policy choices “because such provisions, if construed as mandatory, would impermissibly interfere with the President’s exercise of his constitutional authorities to conduct the Nation’s foreign affairs, participate in international negotiations, and supervise the unitary executive branch.” Statement by President George W. Bush on Signing the Sudan Peace Act, 2 PUB. PAPERS 1852–53 (Oct. 21, 2002).

of the Constitution, it is difficult, though not impossible, to claim that it impermissibly infringed inherent constitutional powers of the President.⁴⁶

Reading the Law of Nations Clause to have a state-to-state coercive component, and viewing it alongside Congress's express constitutional powers to declare war, raise and maintain armies and navies, grant letters of marque and reprisal, institute commercial embargoes and other economic sanctions, make rules for captures on land and water, and call out the militia to repel invasions,⁴⁷ helps solidify the textual basis for seeing that Congress is given the vast bulk of the international coercive powers of the national government. Once the full picture of Congress's international coercive powers is completed through the new understanding of the Law of Nations Clause offered in this Article, it should no longer be to claim, as some do, that Congress has only a few coercive powers as exceptions to the otherwise near-complete vesting of them in an awesome Presidency.⁴⁸

The second implication of the state-to-state conception of the Clause involves the status of international law under the Constitution. The Clause shows how the Constitution envisioned that international law would be enforced—by the affected state punishing the offending state in the international state of nature. There are potential implications of this view on two levels concerning the constitutional status of international law in relation to the political branches of the federal government and the American states.

First, on the international level, it was precisely the power to coercively punish other states for violating international law that made international relations lawful in any sense of the word. In terms of modern international relations theory, the Law of Nations Clause might be said to embody a horizontal enforcement model which sees the threat of punishing sanctions as the key to states' compliance with international law.⁴⁹ As a colonial Boston preacher put it, in discussing the power to punish violations of the law of nations, "[f]ighting may be as necessary as Laws themselves; for what

46. The most widely accepted modern doctrinal framework for understanding the relationship between presidential and congressional constitutional power sees presidential power as weakest when it is deployed in an area of congressional competence and in a manner "incompatible with the expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

47. See U.S. CONST. art. I, § 8, cls. 3, 11–15 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, . . . declare War, grant Letters of Marque and Reprisal, [] make Rules concerning Captures on Land and Water, . . . raise and support Armies, . . . provide and maintain a Navy, . . . make Rules for the Government and Regulation of the land and naval Forces, [and] provide for calling forth the Militia to . . . repel Invasions.").

48. See, e.g., JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005) [hereinafter YOO, *POWERS*] (arguing that the bulk of war and foreign affairs power is vested in the Executive but that Congress has a say through its control of spending and legislative confirmation of treaties before they have domestic effect).

49. See generally William Bradford, *International Legal Compliance: Surveying the Field*, 36 *GEO. J. INT'L L.* 495 (2005) (discussing the enforcement model and other models of compliance with international law).

signify Laws without Sanctions.”⁵⁰ The Law of Nations Clause is therefore not only a foreign affairs power of Congress, it is also an important lens for understanding the status of international law under the U.S. Constitution. Direct state-to-state contention and coercion, not litigation, was the primary way that international law was to be enforced in the international realm. While the Constitution, in the Law of Nations Clause, allows the political branches to “punish” violations of the law of nations by individuals or other states, it makes no explicit provision for the United States or its political branches to *be punished* by courts or otherwise for violations of the law of nations it may commit.⁵¹ The Clause suggests that the courts may not have independent authority to bind the political branches to a judicial interpretation of the law of nations or customary international law in favor of a foreign state or individual.

Second, on the domestic level, the Law of Nations Clause read in conjunction with the Supremacy Clause—which notably fails to mention the law of nations in its list of supreme law binding on the U.S. states—suggests that the federal courts do not have a self-executing power to enforce the law of nations against U.S. states. Instead, Congress has power through the Law of Nations Clause to codify customary international legal obligations for subsequent application by statute against the U.S. states. Because the Founders believed that the prerogatives of state governments were protected by the Article I procedures for domestic lawmaking and the composition of the Senate, the Law of Nations Clause thus has a federalism component as well.

This Article proceeds in three Parts. First, I discuss interpretations of the Law of Nations Clause by the Supreme Court, Congress, and the Executive Branch. If the individual conception were deeply entrenched in current Supreme Court doctrine or political branch usage, some might see it as mere antiquarianism to suggest, as I do, that evidence of eighteenth-century understandings supports the dual conception instead. But the Court and the political branches have interpreted the Law of Nations Clause in a cursory and contradictory manner. While the individual conception has been the dominant assumption since 1787, there have always been hints that the Clause has a broader state-to-state meaning as well.

After establishing that doctrine and usage do not provide a consistent and satisfactory account of the Clause, I, like previous commentators on the Clause, turn to text and eighteenth-century, Founding-era historical understandings. I find that previous commentators have focused too exclusively on evidence supporting the individual conception and missed important evidence for the state-to-state conception of the Clause. My

50. MATHER BYLES, *THE GLORIES OF THE LORD OF HOSTS, AND THE FORTITUDE OF THE RELIGIOUS HERO: A SERMON PREACHED TO THE ANCIENT AND HONOURABLE ARTILLERY COMPANY 28* (Boston, Thomas Fleet & Joseph Edwards 1740), *microformed on* Early Am. Imprints, 1st Series, No. 4482 (Readex Microprint).

51. See Kent, *supra* note 40, at 509.

quarrels with previous scholarship should not be taken as a rejection of the individual conception. My purpose in criticizing the historical claims supporting the individual conception is to show that the individual conception rests on far weaker grounds than previously thought and, therefore, that the Clause likely has additional, different meanings too.

This Article's second major Part is my positive case. I offer a textual-historical reading of the Clause based on seventeenth- and eighteenth-century political and legal theory and linguistic usage, and conclude that a state-to-state conception of the Clause is textually quite plausible. I next turn from the theorists to the practical politics of America in the 1780s, addressing evidence about the meaning of the Law of Nations Clause from the so-called "critical period" after the Revolutionary War but before the Constitution, the constitutional framing convention in Philadelphia in 1787, and the ensuing debates in the several states about ratification of the Constitution. I conclude that evidence supports both the individual and the state-to-state conception of the Clause and that the best reading is the dual conception, which combines the two possibilities. In a third Part I discuss potential implications of the dual conception of the Clause in the two areas discussed above: the foreign policy and war powers of the Congress, and the domestic legal status of customary international law.

* * *

Before proceeding, a few words about interpretive method are appropriate. As noted above, suggesting that the eighteenth-century meaning of a constitutional provision has implications for modern debates assumes a contestable methodological proposition, namely that some form of "originalism" is an appropriate method of understanding the Constitution. This Article is not intended to debate and resolve the many controversial issues regarding constitutional interpretive method. My aims are different and more modest. First, the primary purpose of the Article is to attempt to understand the original public meaning that the precise words of the Law of Nations Clause would have had at the time of drafting and ratification and to fit the Clause into the larger whole of the Founder's Constitution.⁵² There are a variety of practical and philosophical reasons why such an undertaking is difficult,⁵³ but if one's goal is simply to reach a reasonable, good faith

52. Without delving into the nuanced differences between the interpretive approaches of these scholars, my method as to original public meaning largely tracks that described in GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE* 7–12 (2004); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 552–53 (1994); Michael D. Ramsey, *Textualism and War Powers*, 69 *U. CHI. L. REV.* 1543, 1553–57 (2002) [hereinafter Ramsey, *Textualism*]; and Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 *U. CHI. L. REV.* 1685, 1689–90, 1719–20 (2002) [hereinafter Ramsey, *Reply*].

53. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 207–09 (1980) (noting that deep immersion into the thought of a previous society is needed in order to understand uses of language, which are always highly contextual); *id.* at 218–19

judgment about original meaning, it is not unattainable. Second, after suggesting that the Law of Nations Clause likely had broad and interesting meanings in the eighteenth century, this Article suggests potential implications in an attempt to “jar current understandings” of the participants in contemporary debates about the war powers of Congress versus the President and the domestic status of customary international law.

Even if one does not subscribe to the view that original meaning must have normative primacy in order to preserve the link between text and legitimate political authority,⁵⁴ endeavoring to find original meaning is surely important for a number of other reasons. First, as a descriptive matter, contemporary constitutional discourse relies heavily on analysis of original understandings and meanings. Most interpretive methods start with the text and original meanings and purposes of the constitutional provision at issue, even if they ultimately move beyond these moorings and make additional interpretive moves.⁵⁵ When they confront questions about constitutional foreign affairs, the Supreme Court,⁵⁶ Congress,⁵⁷ and the Executive Branch⁵⁸

(arguing that one necessarily changes the past in any attempt to understand it); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEXAS L. REV. 1, 1–2 (1986) (questioning the accuracy of memorializations of the debates in the Philadelphia Convention and state ratifying conventions).

54. See, e.g., Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 111–14 (1989); Keith E. Whittington, *Let's Call the Whole Thing Off?*, 22 CONST. COMMENT. 365, 374–75 (2005) (reviewing DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005)). This is a controversial view on which this Article takes no position.

55. See, e.g., Brest, *supra* note 53, at 229 (“For the nonoriginalist, [text and original understanding] are important but not determinative.”); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) (“Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation.”); Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 616 (1999) (“[P]ractically everyone who deals with the Constitution treats the Founding as special and privileged in some sense.”); Jonathan R. Macey, *Originalism as an “Ism,”* 19 HARV. J.L. & PUB. POL’Y 301, 308 (1996) (“[T]he difference between originalists and nonoriginalists is only a matter of degree. Everybody agrees that the Framers’ original design exerts at least some pull.”); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1729 (2003) (“The text and the original understandings unquestionably play a significant role in constitutional law, but it is far from a dominant role.”); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1139 n.39 (2000) (“[M]ost scholars still assume that the original understanding is highly pertinent.”); Whittington, *supra* note 54, at 365 (“[T]here is little question that historical inquiry into original meaning remains a standard (if not decisive) mode of constitutional argumentation.”).

56. See, e.g., *Perpich v. Dep't of Defense*, 496 U.S. 334, 340 & nn.5–6 (1990); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–67 (1990); *Ex parte Quirin*, 317 U.S. 1, 31 & n.9, 39–45 & n.14 (1942); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–18 (1936).

57. See, e.g., War Powers Resolution of 1973, Pub. L. No. 93-148, § 2(a), 88 Stat. 555, 555; S. REP. NO. 96-7, at 18 (1979), as reprinted in 1979 U.S.C.A.N. 36, 53; H.R. REP. NO. 104-642, at 12 (1996) (additional views of Rep. Dellums); 152 CONG. REC. S10, 365 (daily ed. Sept. 28, 2006) (statement of Sen. Levin); Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A “Joint Decision” Solution*, 77 GEO. L.J. 367, 372–74 (1988).

58. See, e.g., *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, Op. Off. Legal Counsel (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>; Proposed Deployment of United States Armed

often consider Founding-era understandings an important part of the constitutional analysis. Originalist scholarship has lately assumed a very prominent position in academic debates about the Constitution's provisions governing foreign affairs. In particular, debates about war powers of the President and Congress,⁵⁹ the constitutional status of American imperial expansion and extraterritorial security actions,⁶⁰ and the domestic U.S. status of international law⁶¹ have been marked in their reliance on originalist claims and counterclaims. The Supreme Court's recent decision in *Sosa v. Alvarez-Machain*,⁶² which relied heavily on the original intentions of the First Congress of 1789 to interpret the Alien Tort Statute,⁶³ will certainly stimulate increased debate in the academy and courts about the Founding generation's understanding of the law of nations and that law's relationship to the powers and duties of the U.S. government. Those seeking to engage on equal terms in a common dialogue within the academy, government, or the courts about constitutional foreign affairs and the law of nations should be prepared to address evidence of the original meaning of the constitutional provisions at issue. Moreover, it is important to carefully investigate the text and original

Forccs into Bosnia, 19 Op. Off. Legal Counsel 327 (1995) [hereinafter OLC Bosnia Opinion], available at <http://www.usdoj.gov/olc/bosnia2.htm>.

59. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 36–47 (1972); Lofgren, *supra* note 40, at 695–97; Ramsey, *Textualism*, *supra* note 52, at 1553–61; William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 706–13 (1997); Yoo, *Continuation*, *supra* note 40, at 176–82; Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 850–64 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)).

60. See, e.g., LAWSON & SEIDMAN, *supra* note 52; Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985); Kent, *supra* note 40; Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871 (1989); Ramsey, *Torturing*, *supra* note 24.

61. See, e.g., Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 590 (2002) [hereinafter Bradley, *Alien Tort*]; Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2099 (1999); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1078 (2000); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2158 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-self-execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1961 (1999) [hereinafter Yoo, *Globalism*].

62. 542 U.S. 692 (2004).

63. The current version of this 1789 statute gives federal courts jurisdiction over civil suits by aliens for torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000).

meanings because they are integral parts of all other constitutional methods⁶⁴ and therefore have a strong effect on the contours and arc of the debates.⁶⁵

This is not to say, of course, that original meaning must be decisive. There have been significant changes since the Founding in both the international military and diplomatic roles of the United States and the absolute and relative powers of the Executive Branch and Congress. The modern Presidency, which has been “entrusted with such vast powers in relation to the outside world,”⁶⁶ would scarcely be recognizable to the Founders. Constitutional analysis of foreign affairs issues often takes account of changed circumstances and the constitutional practices, customs, and arrangements of congresses and presidents meeting the challenges posed by changed circumstances; custom evolved to meet modern exigencies can be a “gloss” on the constitutional text.⁶⁷ As a result, constitutional foreign affairs questions are frequently resolved by reference not to—or not only to—original understandings but by subsequent interpretations and actions of Congress or the Executive Branch as well as judicial doctrine.⁶⁸

Thus a secondary aim of this Article is to begin the process of understanding the practical construction given to the Law of Nations Clause by postratification uses and interpretations of Congress, the Executive, and the courts. While I have reviewed the Supreme Court’s express references to the Law of Nations Clause, it is beyond the scope of this Article to canvas over two hundred years of interactions between Congress and the President that might bear on the branches’ understandings of the Law of Nations Clause. I have presented some evidence of the postfounding practices of the political branches, but this Article will have to be the first word on that issue, not the last. The primary aim of this Article remains to analyze the original

64. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1238–39 (1987) (describing the “numerous interconnections” between textual, original intent-based, doctrinal, theoretical, and normative methods of constitutional interpretation).

65. See Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1639 (1997) (“It obviously helps, in understanding the shape of things, to have a reasonably accurate picture of where they started.”).

66. *Ludcke v. Watkins*, 335 U.S. 160, 173 (1948).

67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–II (1952) (Frankfurter, J., concurring). For discussions of the role of political branch custom in constitutional analysis, see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 70 (1990); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 144–46 (1984); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 355–61 (2006). Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527 (2003) (showing a significant strain of thought among the Founding generation that ambiguous provisions of the Constitution would have their meaning “fixed” by the construction given to them by subsequent interpreters in the courts and political branches).

68. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–36 (2004) (plurality opinion); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–17 (2003); *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring); *Johnson v. Eisentrager*, 339 U.S. 763, 768–77, 784–85 (1950); *Ludcke*, 335 U.S. at 173.

understanding of the Law of Nations Clause and then examine how that understanding clarifies current doctrines and institutional arrangements.

II. Interpretations of the Law of Nations Clause by the Supreme Court, Congress, and the Executive Branch

This Part reviews express interpretations and constructions of the Law of Nations Clause by the Supreme Court, Congress, and the Executive Branch and concludes that none of the three branches has offered a detailed and fully coherent analysis. The individual conception of the Clause has been dominant since 1787, but there have always been suggestions that the Clause has a broader state-to-state meaning as well or instead. By canvassing the infrequent invocations of the Clause by the three branches since the Founding and finding that they have not resulted in a satisfying, settled doctrine, this Part underscores the importance of looking to eighteenth-century materials to attempt to recover the original meaning.

A. *Congressional Interpretations*

Most express congressional uses of the Law of Nations Clause follow the individual conception. Some of these uses seem to stretch the meaning of the Clause, there being no apparent attempt to “punish” anyone or to tie the regulated conduct to any violation of customary international law. In several instances Congress has expressly used the Clause to regulate the conduct of foreign states, which dovetails nicely with the state-to-state understanding of the Clause advanced in this Article. And a few individual legislators have interpreted the Clause to be a foreign affairs power of Congress to coercively punish other states which violate international law. But Congress does not appear to have used the Law of Nations Clause in numerous instances where the state-to-state conception suggests that it could have. And more generally, Congress has frequently acceded to actions by Presidents or courts that, if the state-to-state conception is correct, could be seen as intrusions into Congress’s sphere of control over defining and punishing offenses against the law of nations committed by foreign or U.S. states. I conclude that express congressional invocations of the Clause are inconsistent and under-theorized and that congressional practice is frequently at odds with a state-to-state conception of the Clause.

1. *Regulation of Individual Conduct.*—Under the individual conception, Congress has used the Clause to (1) authorize federal civilian or military court jurisdiction for criminal or civil suits against individuals who have violated international law, including international laws of war; or (2) penalize individual conduct that harms interests recognized by international law or relates somehow to U.S. foreign relations. The first category seems plainly legitimate under the individual conception of the Law of Nations Clause. The second category arguably tests the limits of congressional

power under the Clause. But the U.S. Supreme Court has recognized the validity of both uses of the Clause.

Examples of the first category include the Torture Victim Protection Act of 1991,⁶⁹ the War Crimes Act of 1996,⁷⁰ and congressional action regarding military tribunals discussed in the World War II-era cases *Ex parte Quirin* and *In re Yamashita*.⁷¹ The Military Commissions Act of 2006,⁷² establishing tribunals to try alleged al-Qaeda members for violations of international law, was enacted pursuant to the Law of Nations Clause.⁷³ More remote in time, the Neutrality Act of 1794 and the portions of the Crimes Act of 1790 dealing with piracy, assaults on ambassadors, and violations of safe conducts, are widely seen as exercises of the Law of Nations Clause power.⁷⁴

69. See Pub. L. No. 102-256, § 2, 106 Stat. 73, 73 (1992) (creating a right of action in federal court against “[a]n individual who, under actual or apparent authority, or under color of law of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing,” both of which are crimes under international law); see also S. REP. NO. 102-249, at 5–6 (1991) (citing the Law of Nations Clause and Article III as constitutional authority).

70. See Pub. L. No. 104-192, § 2(a), 110 Stat. 2104, 2104 (1996) (criminalizing certain breaches of the international laws of war by any U.S. national or member of the U.S. armed forces); see also H.R. REP. NO. 104-698, at 7 (1996), as reprinted in 1996 U.S.C.C.A.N. 2166, 2172 (citing the Law of Nations Clause as constitutional authority).

71. *Ex parte Quirin*, 317 U.S. 1, 26–27 (1942) (noting that the Law of Nations Clause, among other provisions, provides constitutional authorization for Congress’s implicit statutory recognition in the 1916 Articles of War that the Executive Branch has power to create military commissions to try offenders who violate the international laws of war); *In re Yamashita*, 327 U.S. 1, 7 (1946) (citing *Quirin* and reaffirming that Congress has constitutional authority in the Law of Nations Clause to provide for trial of enemy combatants by military commission for “offenses against the law of war”).

72. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, and 28 U.S.C.).

73. H.R. REP. NO. 109-664, pt. 1, at 2, 3–4 (2006); H.R. REP. NO. 109-664, pt. 2, at 15 (2006).

74. See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 242–43 (1996) [hereinafter Dodge, *Historical Origins*] (Crimes Act); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 906–07 (1994) (Neutrality Act). Before Congress passed the Neutrality Act, An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 381 (1794), the Washington administration issued the Neutrality Proclamation in 1793, asserting its authority to prosecute individual offenses against the law of nations without statutory authorization. Proclamation of Neutrality by President Washington (Apr. 22, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140, 140 (photo. reprint 1998) (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833) (“I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them.”). A nonstatutory prosecution was soon commenced. See *Henfield’s Case*, 11 F. Cas. 1099, 1109–15 (C.C.D. Pa. 1793) (No. 6,360) (grand jury’s indictment). James Madison wrote a series of pseudonymous newspaper editorials attacking the President’s constitutional authority to issue the proclamation. If Congressman Madison held the individual conception of the Law of Nations Clause, it is curious he neglected to make the “strongest argument against the neutrality proclamation,” namely that the Constitution “empowered Congress, not the President, to ‘define and punish . . . offenses against the law of nations,’ [and] the President was arguably arrogating to himself or to the courts a power the Constitution had placed in Congress.” DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 178–79 (1997).

The second category encompasses congressional actions regulating the conduct of individuals not when that conduct violates customary international law by itself, but when the conduct could impinge on interests either required to be protected by international law (including treaties),⁷⁵ recognized as important by international law,⁷⁶ or, at the least, related to the foreign affairs of the United States.⁷⁷ Statutes falling into category two of my schema are less clearly legitimate uses of the Clause than those in category one; in category two, it is often not clear that there is any “offence” against customary international law or the law of nations or that anything or anybody is being “punished.” That has not been considered a problem by the Supreme Court,⁷⁸ and Congress continues to invoke the Law of Nations

75. On several occasions Congress may have ignored the distinction between a mere rule found in a treaty and a rule of customary international law. Simply because the United States enters a treaty which contains a given rule, that rule does not automatically become part of the law of nations or customary international law. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (requiring “a general and consistent practice of states” to make a rule into a norm of customary international law). For example, Congress amended the Foreign Corrupt Practices Act to make it consistent with a multilateral antibribery convention that included provisions to exercise criminal nationality jurisdiction over U.S. persons or firms who pay bribes in wholly foreign transactions. S. REP. NO. 105-277, at 1-2 (1998). Congress cited the Law of Nations Clause as authorization even though it is not clear that the regulated conduct violates customary international law. *Id.* at 3; see also, e.g., H.R. REP. NO. 49-3198, at 3 (1886) (citing the Clause as authorization for legislation implementing a multilateral treaty making it a crime punishable in domestic courts for an individual to damage undersea telegraph cables). Although I argue below that states are obliged by the law of nations to refrain from violating treaties and that state violations of treaties can therefore be seen as offenses against the law of nations, see *infra* notes 375-90 and accompanying text, the same is not true of individuals. The rule of the law of nations that prohibits violation of treaties—*pacta servanda sunt*, promises must be kept—applies to states, not individuals.

76. For example, after Congress used the Law of Nations Clause to prohibit picketing and other politically motivated expressive conduct near foreign embassies in Washington, D.C., the Supreme Court invalidated the ordinance in part on First Amendment grounds. *Boos v. Barry*, 485 U.S. 312 (1988). But the Court appeared to recognize as proper Congress’s invocation of the Law of Nations Clause, recounting that the long history of protecting diplomats “is grounded in our Nation’s important interests in international relations” and is an “interest” that is “recognized in international law.” *Id.* at 323-24. The Court did not say that the regulated conduct violated international law.

77. A provision of the Antiterrorism and Effective Death Penalty Act of 1996 banning terrorist fundraising was justified in part under the Law of Nations Clause, see H.R. REP. NO. 104-383, at 45 (1995), even though it is not clear that raising money for a group designated as terrorists by the U.S. government violates customary international law.

78. In the nineteenth century, Congress justified a criminal penalty for counterfeiting foreign currency under the Law of Nations Clause, stating that

[p]reservation of the public peace is therefore a principal duty and power of the United States It seems to your committee to be clear that the Constitution vests in Congress power to define and punish as offenses against the law of nations, everything which is done by a citizen of the United States hostile to the peaceful relations between them and foreign nations, or which is contrary to the integrity of the foreign country in its essential sovereignty, or which would disturb its peace and security.

H.R. REP. NO. 48-1329, at 1-2 (1884). The Supreme Court agreed that the United States had an international legal duty to restrain actions by individuals that would have these effects, and that this justified exercise of constitutional power under the Law of Nations Clause. See *United States v. Arjona*, 120 U.S. 479, 485-87 (1887).

Clause loosely in similar circumstances,⁷⁹ likely in reliance on the Necessary and Proper Clause.

2. *Regulation of Relations with Foreign States.*—In recent decades, Congress has used the Law of Nations Clause a few times to regulate the conduct of foreign states, a use that is broadly consistent with the state-to-state conception of the Clause. The primary example is the Foreign Sovereign Immunities Act of 1976 (FSIA), which regulated the circumstances under which foreign states are susceptible to suit in U.S. courts.⁸⁰ The Supreme Court twice noted without discussion that Congress enacted the FSIA under the Law of Nations Clause and other powers.⁸¹ The statute arguably relates to “punishing” a state in two senses. Litigation against a foreign state can be seen as a form of punishment. And because the FSIA covers suits filed in U.S. state courts,⁸² the statute arguably relates to preventing U.S. states (through their courts) from violating international law by impermissibly hearing cases against foreign sovereigns. Another use of the Clause to punish a foreign state occurred in the 1960s, after the Castro government of Cuba expropriated the property of many American firms and individuals.⁸³ In what the Second Circuit deemed a use of the Law of Nations Clause, Congress overruled a Supreme Court decision that had had the effect of insulating Cuban expropriations from judicial review.⁸⁴ Congress has also arguably adopted a state-to-state conception of the Clause by citing it as authority for certain private naturalization bills for individuals harmed by foreign state conduct.⁸⁵

Evidence from late eighteenth- and early nineteenth-century congresses supports a state-to-state conception of the Law of Nations Clause. In two instances, Congress debated who—the President or Congress—had the constitutional authority to set rules for armed retaliation against foreign powers that violated the law of nations by attacking American shipping. In both

79. See Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (authorizing extraterritorial jurisdiction in U.S. military courts over crimes committed by U.S. service members, but not requiring that the crimes be violations of international law); see also H.R. REP. NO. 106-778, pt. 1, at 14 (2000) (citing the Law of Nations Clause).

80. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.).

81. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 n.19 (1983).

82. See 28 U.S.C. §§ 1605(a), 1607 (2000 & Supp. II 2002) (codifying FSIA provisions which limit foreign sovereign immunity in state and federal courts); see also *id.* § 1441(d) (removal provision).

83. See generally ERIC N. BAKLANOFF, *EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE* 2-4, 133-34 (1975).

84. See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182 (2d Cir. 1967).

85. See, e.g., H.R. REP. NO. 105-360 (1997) (citing the Law of Nations Clause in the course of naturalizing an individual harmed by German conduct during the Holocaust); H.R. REP. NO. 105-129 (1997) (granting lawful permanent residence to an individual who had acted as a whistleblower regarding Swiss malfeasance in handling Holocaust claims documents).

instances, legislators urged that the Law of Nations Clause gave this power to Congress. First, in March 1798, as the Quasi-War with France was heating up, President Adams lifted a previous executive ban on arming U.S. merchant vessels to defend against French attacks.⁸⁶ Republicans in Congress feared this measure would lead to war.⁸⁷ James Madison, until very recently a leader of congressional Republicans, wrote to his ally Thomas Jefferson about these events:

The revocation of the instructions is a virtual change of the law, & consequently a Usurpation by the Ex. of a legislative power. It will not avail to say that the law of Nations leaves this point undecided, & that every nation is free to decide it for itself. If this be the case, the regulation being a Legislative not an Executive one, belongs to the former, not the latter Authority; and comes expressly within the power to “define the law of Nations” given to Congress by the Constitution.⁸⁸

Later, in 1810, Madison was President during a prolonged crisis in which warring European nations, principally France and Great Britain, seized neutral American shipping. While the House passed a bill creating a policy of carrots to try to end the attacks, the Senate attached a stick in the form of a clause stating:

That the President of the United States be, and hereby is, authorized to employ the public armed vessels in protecting the commerce of the United States, and to issue instructions which shall be conformable to the laws and usages of nations, for the government of the ships which may be employed in that service.⁸⁹

Representative John Jackson of Virginia argued against the Senate's proposed delegation to the President on constitutional grounds:

The Constitution has declared substantially that Congress shall define the law of nations. It is a very important power, in the exercise of which we may and most probably shall come in collision with the definitions of other nations, and thus be brought into war—and I ask, sir, are you willing to confine this definition to any department of the Government? It is a legislative power, which we cannot transfer; and if we could, it would be inexpedient to do so.⁹⁰

The Senate was persuaded to drop the provision.⁹¹

The state-to-state conception of the Law of Nations Clause is also seen in debates in the 1990s about the authority of President Clinton to deploy troops to the Balkans to stop ethnic cleansing and civil war there. For

86. 8 ANNALS OF CONG. 1271–72 (1798).

87. *See id.* at 1319–33.

88. Letter of James Madison to Thomas Jefferson (Apr. 2, 1798), in 17 THE PAPERS OF JAMES MADISON 104, 104–05 (David B. Mattern et al. eds., 1991).

89. 21 ANNALS OF CONG. 2022 (1810).

90. *Id.*

91. *See* SOFAER, *supra* note 41, at 281.

example, in 1995, Senator Daniel Patrick Moynihan of New York spoke in favor of a Senate bill supporting such a deployment, arguing that this bill was an example of the United States defining and punishing offenses against the law of nations.⁹²

These express references to a state-to-state conception of the Clause appear to be isolated instances. Indeed, on numerous occasions where Congress could cite the Clause if it agreed with the state-to-state conception, it has failed to do so. For instance, during the extensive debates and hearings during the Vietnam War about the constitutional authority of Congress versus the President to decide questions of war and foreign policy—debates which ultimately resulted in the passage of the landmark War Powers Resolution of 1973 over President Nixon's veto—supporters of congressional authority do not appear to have cited the Law of Nations Clause as a state-to-state coercive power.⁹³ To give another example, the Syria Accountability and Lebanese Sovereignty Restoration Act, which imposed sanctions on Syria due to years of egregious violations of international law—by, among other things, supporting international terrorism, occupying Lebanon, and willfully violating U.N. Security Council resolutions⁹⁴—was justified by Congress under the Foreign Commerce Clause and Necessary and Proper Clause,⁹⁵ even though some aspects of the legislation do not concern commerce.⁹⁶ The North Korean Human Rights Act, which condemned North Korean human rights violations, recommended that the United States work through the United Nations to address those violations, and conditioned

92. 141 CONG. REC. 36,803, 36,821–22 (1995). Representative Ernest Istook of Oklahoma later condemned President Clinton for deploying forces to Kosovo without express congressional authorization. Like Moynihan, Istook suggested that offenses against the law of nations were being committed by the warring parties in the Balkans. Istook further argued that only Congress, under the Law of Nations Clause, was authorized to decide whether to punish those offenses by means of military force. See 145 CONG. REC. 7762 (1999); *Hearing on Emergency Supplemental Funding for Kosovo Before the H. Comm. on Rules*, 106th Cong. (1999) (statement of Rep. Istook), 1999 WL 287760. Other members of Congress have, during debates about the President's authority to use the military abroad, mentioned the Law of Nations Clause as one of the "war powers" of Congress. See 144 CONG. REC. 18,067 (1998) (statement of Sen. Durbin); 144 CONG. REC. 13,813, 13,816 (1998) (statement of Sen. Byrd); 139 CONG. REC. 26,508 (1993) (statement of Rep. DeFazio). Another member has suggested that the Clause could allow Congress to devise foreign policy responses to the Iranian embassy seizure. See 131 CONG. REC. 22,671 (1985) (statement of Rep. Gonzalez); 131 CONG. REC. 19,689–93 (1985) (same).

93. See, e.g., S. COMM. ON FOREIGN RELATIONS, 91ST CONG., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA (Comm. Print 1970); H.R. REP. NO. 93-287 (1973).

94. See Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, 22 U.S.C. § 2151 note (Supp. IV 2004).

95. See, e.g., H.R. REP. NO. 108-314, at 11 (2003), as reprinted in 2003 U.S.C.C.A.N. 2202, 2206.

96. See, e.g., Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 § 5 (providing several diplomatic penalties against Syria including a general reduction in diplomatic ties and restriction of Syrian diplomats to within twenty-five miles of Washington, D.C. and the United Nations building in New York City).

certain U.S. aid on improvements in human rights practices,⁹⁷ was justified by Congress solely under the Necessary and Proper Clause.⁹⁸ The Law of Nations Clause, under the state-to-state conception, would appear to authorize these laws, but was not cited by Congress.

The interpretive relevance of the fact that Congress legislates in ways which might implicate the substance of the state-to-state conception of the Law of Nations Clause, but without citing the Clause itself, is difficult to determine. Congress has broad and often overlapping powers and is generally under no external obligation to specify the constitutional basis on which it acts. "By the very nature of its mode of action, Congress seldom produces anything that can be seen as a sustained legal discussion of its powers in relationship to those of the president"⁹⁹ In combination, this means it is often difficult to determine exactly which constitutional powers Congress thought it was invoking. Congress's "declare war" power, the spending power, and the Foreign Commerce Clause could support most of its legislation punishing violations of international law,¹⁰⁰ but not all of it. For instance, the Sudan Peace Act of 2002 condemned Sudanese genocide as a violation of international law and directed the President, should he find that Sudan was not negotiating in good faith to end its civil war, to, among other things, "consider downgrading or suspending diplomatic relations."¹⁰¹ The Iraq Liberation Act of 1998 condemned Iraq's violations of international law and other misconduct and, among other things, declared the sense of Congress that U.S. policy should be to remove the Hussein government and suggested that arming Iraqi opposition groups was the preferred strategy.¹⁰² These provisions are not wholly covered by powers relating to either declaring war, regulating commerce, or expending U.S. funds. They would seem to fall within the Law of Nations Clause, in its state-to-state conception, but Congress failed to cite the Clause.¹⁰³

Without extensive historical research beyond the scope of this Article, the most that can be said is that, in its express invocations of the Law of

97. See North Korean Human Rights Act of 2004, Pub. L. No. 108-333, §§ 3(1), 105(2), 202(b)(2), 118 Stat. 1287, 1291–92, 1294 (codified in scattered sections of 22 U.S.C.).

98. H.R. REP. NO. 108-478, pt. 1, at 20 (2004), as reprinted in 2004 U.S.C.C.A.N. 1186, 1194.

99. POWELL, *supra* note 24, at 13.

100. See, e.g., Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, §§ 2(5)–(6), 3–6, 117 Stat. 864, 864, 865–67 (condemning Burma's violations of international law and other misconduct and directing the President to impose economic sanctions); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 301, 90 Stat. 729, 748 (limiting provision of "security assistance" to governments which engage "in a consistent pattern of gross violations of internationally recognized human rights").

101. Pub. L. No. 107-245, §§ 2(10), 4, 6(b)(2), 116 Stat. 1504, 1508 (codified at 50 U.S.C. § 1701 note (Supp. II 2002)).

102. See Pub. L. No. 105-338, §§ 2(11), 3, 4(a)(2), 112 Stat. 3178, 3178–79 (codified at 22 U.S.C. § 2151 note (2000)).

103. The House Report on the Sudan Peace Act cited only the Necessary and Proper Clause as constitutional authority. See H.R. REP. NO. 107-92, pt. 1, at 6 (2002). Congress did not cite any constitutional authority for the Iraq Liberation Act. See 22 U.S.C. § 2151 note (2000).

Nations Clause, Congress favors the individual conception and sometimes flirts with the state-to-state conception. But it has failed to articulate through its actions or public statements a consistent or detailed view of the scope of the Clause. At times, Congress seems to be searching for a defensible constitutional rationale—beyond the spending, commerce, and “war” powers—for legislation punishing foreign states for violations of international law, but it has not settled on the Law of Nations Clause as the appropriate constitutional hook. There is a marked modern trend toward greater executive control over coercive international legal policymaking and decisions whether to initiate offensive military engagements in situations not amounting to full-scale international warfare. This division of labor is inconsistent with the state-to-state conception of the Law of Nations Clause advanced in this Article. But because, as discussed below in section IV(A)(2), early Presidents—Washington, Adams, Jefferson—understood that Congress had the constitutional authority to make these decisions, deciding what is or is not constitutional today may largely turn on the methodological choice of how much weight to give the original understandings and early governmental practices of the Founding generation.

B. Executive Branch Interpretations

Executive Branch interpretations of the Law of Nations Clause have varied so much over time that it cannot be said that the Executive has any clear view of its meaning. During the late eighteenth and nineteenth centuries, the Executive interpreted the Clause to allow Congress to legislate regarding individual criminal offenses, such as war crimes by Indians¹⁰⁴ or violations of the territorial rights of Spain by armed private Americans who entered Florida to recover runaway slaves.¹⁰⁵ During the Reagan and first Bush administrations, the Office of Legal Counsel within the Department of Justice opined that the Clause was a very limited power to enact domestic criminal legislation governing American citizens.¹⁰⁶ More recently, the Executive Branch has suggested that the Law of Nations Clause allows Congress to regulate individual conduct civilly as well as criminally.¹⁰⁷ Most

104. The Modoc Indian Prisoners, 14 Op. Att’y Gen. 249, 251 (1873).

105. Territorial Rights—Florida, 1 Op. Att’y Gen. 68, 69 (1797).

106. *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 13–14 (1991) (statement of John O. McGinnis, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Department of Justice); *The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act*, 10 Op. Off. Legal Counsel 159, 161 & n.4 (1986).

107. U.S. *Sosa* Brief, *supra* note 22, at 33 n.9; Brief for the United States of America as Amicus Curiae at 25, *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (Nos. 00-56603, 00-56628).

dramatically, the current Bush administration has recently suggested that the Clause makes customary international law non-self-executing.¹⁰⁸

This conflicts with an 1865 Attorney General opinion, which argued that the Law of Nations Clause renders customary international law the self-executing “law[] of the land.”¹⁰⁹ The catastrophic circumstances in which the 1865 opinion was issued undercut its authority: it was written to justify trying in military tribunals individuals involved in the assassination of President Lincoln, even though Congress had arguably legislated inconsistently with the Executive’s right to constitute such tribunals.¹¹⁰ Moreover, the 1865 opinion’s assertion that the Law of Nations Clause “expressly” makes the law of nations the constitutionally-based law of the land is inconsistent with the opinion of the first Attorney General of the United States. In 1792, Edmund Randolph—previously one of the most influential members of both the Philadelphia drafting convention and the Virginia ratifying convention—opined that “[t]he law of nations” was “not specially adopted by the constitution.”¹¹¹ “Indeed,” he wrote, “a people may regulate [the law of nations] so as to be binding upon the departments of their own government, in any form whatever.”¹¹² In other words, the Constitution could have, but did not, make the law of nations binding on the U.S. government. This discrepancy is symptomatic of the Executive Branch’s unsettled and divergent interpretations of the Law of Nations Clause.

C. Supreme Court Interpretations

The Supreme Court has seldom commented substantively on the Law of Nations Clause, and its statements do not support any single uniform view. As noted above, the Court has approved use of the Clause by Congress to authorize the Executive Branch to constitute military tribunals to try war crimes.¹¹³ Recently, in *Hamdan v. Rumsfeld*, the Court suggested that the Law of Nations Clause gives Congress authority to enact substantive criminal legislation to be applied in military commissions trying alleged al-

108. U.S. *Sosa* Brief, *supra* note 22, at 32.

109. Military Commissions, 11 Op. Att’y Gen. 297, 299 (1865) (“The laws of nations are expressly made laws of the land by the Constitution, when it says that ‘Congress shall have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations.’ . . . From the very face of the Constitution, then, it is evident that the laws of nations do constitute a part of the laws of the land.”).

110. See *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 114–16, 121–22 (1866) (holding that Congress had by an 1863 statute specifically failed to grant the Executive Branch the power to institute military commissions applying the international laws of war to try U.S. citizens in arcas of the country where the civil courts were open and functioning).

111. Who Privileged from Arrest, 1 Op. Att’y Gen. 26, 27 (1792). Nevertheless, consistent with his belief that the law of nations was part of the common law, see *infra* notes 170–72 and accompanying text, Randolph opined that the law of nations was “essentially a part of the law of the land,” 1 Op. Att’y Gen. at 27.

112. 1 Op. Att’y Gen. at 27.

113. See *supra* note 71 and accompanying text.

Qaeda members.¹¹⁴ The Court has also approved uses of the Law of Nations Clause to regulate individual conduct even if it does not violate international law but instead only implicates the foreign relations and international law interests of the United States.¹¹⁵ Dicta in opinions by Chief Justice Marshall and Justice Story, as well as opinions by later courts, suggest that the Clause is one of the penal law powers of Congress.¹¹⁶ The individual conception therefore finds strong support in Supreme Court opinions.

On the other hand, the Court noted without disapproval Congress's use of the Law of Nations Clause to regulate foreign state conduct in *Verlinden* and *Amerada Hess*, concerning the FSIA.¹¹⁷ Moreover, dicta in *Fong Yue Ting v. United States* describe the Clause as one of the constitutional powers that makes the United States "a sovereign and independent nation" and vests the national government "with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."¹¹⁸ Other cases refer in dicta to the Clause as a broad-sounding foreign affairs power concerning interactions with foreign nations.¹¹⁹ While these cases provide some support for a dual reading of the Law of Nations Clause, encompassing regulation of both state-to-state and individual conduct, their discussions of the Clause are quite vague and generally in dicta. The opinions of two Justices in a 1796 Supreme Court decision, *Ware v. Hylton*, while not discussing the Law of Nations Clause expressly, indicate in dicta that it is not constitutionally mandatory for Congress to abide by the law of nations, thereby impliedly rejecting the idea that the Clause somehow adopted or incorporated the law of nations as a constitutional rule.¹²⁰

114. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2779–80 (2006).

115. See *Boos v. Barry*, 485 U.S. 312, 323–24 (1988) (recognizing that, as a general principle, the Law of Nations Clause authorizes Congress to take measures to protect foreign emissaries and diplomats in order to preserve peaceful international relations); *United States v. Arjona*, 120 U.S. 479, 483–84 (1887) (holding that Congress may punish an individual who counterfeits another nation's money, as the law of nations requires prevention of "a wrong being done within [a nation's] own dominion to another nation with which it is at peace").

116. See *McGrain v. Daugherty*, 273 U.S. 135, 169 (1927) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 233 (1821)); *Logan v. United States*, 144 U.S. 263, 283 (1892); *United States v. Hall*, 98 U.S. 343, 345–46 (1878); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 535 (1870); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–59 (1820) (Story, J.); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416–17 (1819) (Marshall, C.J.).

117. See *supra* note 81.

118. 149 U.S. 698, 711 (1893).

119. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (referring to the Law of Nations Clause as one of the constitutional provisions concerning "this country's dealings with foreign nations"); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840) (citing the Law of Nations Clause as one of the constitutional provisions supporting the claim that "[a]ll the powers which relate to our foreign intercourse are confided to the general government").

120. See *infra* notes 407, 410 and accompanying text for a discussion of *Ware*. There are other early indications from the Supreme Court that it is not constitutionally mandatory for Congress to follow the law of nations. See *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till such an act [of Congress] be passed, the Court is bound by the law of nations which is a part of the law of the

The Supreme Court's rather muddled views of the Law of Nations Clause were clarified somewhat in the 2004 decision in *Sosa v. Alvarez-Machain*.¹²¹ In *Sosa*, the Court held that the Alien Tort Statute (ATS), enacted by the First Congress in 1789 as part of the Judiciary Act, was a jurisdictional statute giving federal courts jurisdiction over certain civil suits by aliens for torts in violation of the law of nations.¹²² The Court further held that the ATS would have been understood in 1789, and therefore still should be understood today, to give the federal courts common lawmaking power to define and enforce certain individual causes of action in tort for violations of the law of nations.¹²³ As one commentator argued, this holding about a jurisdictional statute assumes that customary international law can have "independent significance in domestic law even before Congress has taken specific action to import it."¹²⁴ The Court may have therefore implied that congressional action to substantively legislate under the Law of Nations Clause is not a required antecedent. In other words, the Court may have rejected the claim—made by the Executive Branch in its *Sosa* amicus brief—that the Law of Nations Clause renders all customary international law non-self-executing in U.S. courts. But this would seem to over-read *Sosa*. The Court's holding that a mere jurisdictional statute allows lawmaking by federal courts was expressly premised on the view that, early in the nation's history, Congress would have assumed and intended that the common law and the law of nations were self-executing in U.S. courts.¹²⁵ Today, after huge changes in our thinking about the power of federal courts and the nature of law, seen most famously in *Erie Railroad Co. v. Tompkins*,¹²⁶ Congress would not and should not assume that enacting a mere jurisdictional statute empowered unfettered federal court lawmaking.¹²⁷ And so substantive congressional legislation under the Law of Nations Clause—by, for example, creating a statutory cause of action—would likely be required. Unfortunately, *Sosa* left all of this very uncertain.

land."); *cf.* *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) (analogizing a rule of the law of nations to "other precepts of morality, of humanity, and even of wisdom," which are "addressed to the judgment of the sovereign"); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

121. 542 U.S. 692 (2004).

122. *Id.* at 713–14.

123. *See id.* at 719–20.

124. Harvard Note, *supra* note 19, at 2385.

125. *Sosa*, 542 U.S. at 725 ("When § 1350 was enacted, the accepted conception was of the common law as a 'transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

126. 304 U.S. 64 (1938).

127. *See Moller*, *supra* note 19, at 228–30. *See generally* Bradley & Goldsmith, *Customary International Law*, *supra* note 8.

Nevertheless, *Sosa* is important to understanding the Law of Nations Clause; indeed, it provides some support for the dual conception of the Clause. The Court discussed in some detail the status of the law of nations in the eighteenth century and concluded that a large part of it, comprising “the general norms governing the behavior of national states with each other,” “occupied the executive and legislative domains, not the judicial.”¹²⁸ Only a narrow “pedestrian element” of the law of nations “[e]ll within the judicial sphere.”¹²⁹ This narrow sphere included the three individual offenses against the law of nations identified by William Blackstone’s famous treatise¹³⁰ and by a 1781 resolution of the Continental Congress:¹³¹ piracy, violations of safe conducts, and assaults on ambassadors.¹³² The *Sosa* Court then suggested that the Founding generation handled these limited individual offenses against the law of nations by creating federal courts and vesting them with civil (ATS) and criminal (1790 Crimes Act) jurisdiction.¹³³ The Law of Nations Clause is not mentioned by the Court. The Court concludes its discussion of the very limited role of the Judiciary in handling law of nations issues in the eighteenth century by quoting Blackstone: “As Blackstone had put it, ‘offences against this law [of nations] are principally incident to whole states or nations,’ and not individuals seeking relief in court.”¹³⁴

While the discussion in *Sosa* cannot be said to be an endorsement of the dual conception of the Law of Nations Clause, it helps frame an important question: if the eighteenth-century law of nations was almost entirely concerned with state-to-state interactions governed by politics, power, and diplomacy, rather than by law courts—and if the Founders’ concerns about preventing individual offenses against the law of nations were adequately handled by creating federal courts with jurisdiction to hear a limited number of civil and criminal cases, with rules of decision provided by the common law, if necessary—what is one to make of a Clause giving Congress power to define and punish offenses against the law of nations? Does it really make sense to think of the Clause as just a very limited—almost superfluous—power to enact substantive rules to regulate individual offenses?

III. Textual–Historical Analysis of the Law of Nations Clause

Neither Supreme Court doctrine nor interpretations of the Law of Nations Clause by Congress or the Executive provides a consistent and

128. *Sosa*, 542 U.S. at 714.

129. *Id.* at 715.

130. WILLIAM BLACKSTONE, 4 COMMENTARIES *68.

131. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1781, at 1136–37 (Gaillard Hunt ed., 1912).

132. *Sosa*, 542 U.S. at 715, 724.

133. *Id.* at 717–19. Regarding the 1790 Crimes Act, see *supra* note 74 and *infra* note 137 and accompanying text.

134. *Sosa*, 542 U.S. at 720 (alteration in original).

coherent account of the meaning of the Clause. Like previous commentators on the Clause, I have turned to textual and historical methods. This Part proceeds in three main subparts. First, I examine and critique the historical analysis of previous individualist commentators on the Law of Nations Clause. In so doing, I discuss historical events during the so-called critical period of the 1780s, which some claim motivated the inclusion of the Clause in the Constitution. Second, I set forth my textual–historical analysis of what the specific words of the Clause would have been understood to mean by an eighteenth-century audience and find that the text of the Clause supports either an individual or state-to-state conception. Finally, I examine the Philadelphia Convention of 1787 and the ratification debates in the states in 1787–1788. I conclude that my dual conception of the ambiguous text of the Clause is more compelling than the individual-only conception.

A. Previous Commentators' Historical Analysis

The several commentators who have analyzed the Clause in depth have emphasized historical sources of its meaning that tie it to the individual conception. In this subpart, I discuss their account of the history of the Clause while offering criticisms of its limitations. Their account properly emphasizes that the Clause has an individual conception. On the other hand, the primary problems with their account are a narrow range of sources, sometimes unconvincing readings of the sources they do identify, and an imprecise fit between their account of the history leading to the Clause and the views of professional historians about the events of the critical period. These limitations led previous commentators to miss the state-to-state dimension of the Law of Nations Clause.

1. *Blackstone, Vattel, and Other Theorists.*—Previous commentators on the Clause point to the writings of Blackstone as the “likely source” of the phrase “offenses against the law of nations,”¹³⁵ noting that his *Commentaries* contained a chapter entitled “Of Offences Against the Law of Nations,” in which Blackstone reported that “[t]he principal offences against the law of nations” that are condemned and punished “by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”¹³⁶ The individualist commentators also note that the first U.S. Congress after the adoption of the Constitution enacted a statute punishing these crimes (the 1790 Crimes Act), suggesting

135. Stephens, *supra* note 15, at 485; see also Siegal, *supra* note 19, at 875 (asserting that the phrase “offenses against the law of nations” came from Blackstone); Fredman, *supra* note 19, at 283–86 (noting that “English concern with continental ideas about offenses against the law of nations can be seen in . . . Blackstone’s synthesis of the subject”).

136. WILLIAM BLACKSTONE, 4 COMMENTARIES *68.

that Congress perhaps viewed the Law of Nations Clause as intended to grant it power over Blackstone's listed offenses.¹³⁷

The quoted passage from Blackstone is undoubtedly significant for the reasons identified by the previous scholarship on the Clause. But a major aspect of Blackstone's discussion has escaped sustained analysis. Before discussing individual offenses against the law of nations, Blackstone made clear that states too commit such offenses, writing that "offences against this law [the law of nations] are principally incident to whole states or nations: in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another."¹³⁸ As suggested by Blackstone, in the eighteenth century an offended state which had suffered a violation of the law of nations was entitled to "punish" the offending state militarily (or otherwise).¹³⁹ This state-to-state coercion, wrote Blackstone, was the "principal[]" aspect of offenses against the law of nations.¹⁴⁰

The same problem exists with reliance by some previous individualist commentary on the writings of the prominent law of nations theorists Emmerich de Vattel and Hugo Grotius.¹⁴¹ Those theorists discuss both state offenses against the law of nations as well as individual offenses,¹⁴² but the commentators have only mentioned the discussion of individual offenses.

2. *The Longchamps Incident.*—Besides the writings of Blackstone, Vattel, and other theorists, a second major antecedent of the Clause identified in the scholarship is an individual offense against the law of nations committed by a Frenchman in Philadelphia in mid-May 1784.¹⁴³ If this incident was truly a spur to the creation of the Law of Nations Clause, that would be important evidence supporting the individual conception. But, as discussed below, there are a variety of reasons to be skeptical of the idea that the incident led to the Law of Nations Clause.

The details of the incident have been repeated many times. In May 1784, an apparently disreputable adventurer named Charles Julian de Longchamps first verbally and then physically assaulted François de Barbé Marbois, the Consul General of France in America and secretary to the

137. See Siegal, *supra* note 19, at 880; Stephens, *supra* note 15, at 490; see also An Act for the Punishment of Certain Crimes Against the United States, §§ 8–12, 25–28, 1 Stat. 112, 113–15, 117–18 (1790).

138. WILLIAM BLACKSTONE, 4 COMMENTARIES *67–68. Individualist commentators note this portion of Blackstone but without examining its significance for understanding the Law of Nations Clause. See Stephens, *supra* note 15, at 488; Fredman, *supra* note 19, at 283–84.

139. See *infra* notes 194–203 and accompanying text.

140. WILLIAM BLACKSTONE, 4 COMMENTARIES *68.

141. See Fredman, *supra* note 19, at 281–83 (citing Vattel and Grotius in a discussion of private acts of individuals as offenses against the law of nations).

142. See *infra* notes 197–98, 200–03 and accompanying text.

143. See Burley, *supra* note 24, at 471–72; Siegal, *supra* note 19, at 874; Stephens, *supra* note 15, at 466; Fredman, *supra* note 19, at 287–88; Teachout, *supra* note 19, at 1319, 1322.

French diplomatic legation.¹⁴⁴ Although the Continental Congress had no courts or prosecutors to handle Longchamps's offense, the Pennsylvania authorities acted quickly in its stead, but not before the Dutch minister to the United States had threatened, in solidarity with Marbois, to leave the country if Longchamps was not swiftly dealt with.¹⁴⁵ In June 1784, Pennsylvania commenced trial of Longchamps for criminal assault and battery in violation of the law of nations.¹⁴⁶ Pennsylvania had no applicable criminal statute; the prosecution's theory, adopted emphatically by the court, was that the law of nations was part of the common law of Pennsylvania and Pennsylvania could initiate nonstatutory prosecutions for common law offenses against the law of nations.¹⁴⁷ Longchamps was convicted by a jury within a few days.¹⁴⁸ Sentencing was delayed until the fall as the judges heard oral argument on an extradition request by France.¹⁴⁹ In October 1784 the court rejected the extradition request, fined Longchamps, ordered him imprisoned for two years, and required that he post a bond for good behavior upon release.¹⁵⁰ Even after this stiff sentence was imposed, France persisted in requesting extradition.¹⁵¹ King Louis ultimately dropped the matter in the summer of 1785, but before that occurred, the American press and private letters of American elites indicated dissatisfaction with France's demands.¹⁵² The

144. For discussions of this incident by legal scholars, see, for example, Bradley, *Alien Tort*, *supra* note 61, at 638–45 and Dodge, *Historical Origins*, *supra* note 74, at 229–30. For a discussion by two historians, see G.S. Rowe & Alexander W. Knott, *Power, Justice, and Foreign Relations in the Confederation Period: The Marbois-Longchamps Affair, 1784–1786*, 104 PA. MAG. HIST. & BIOGRAPHY 275 (1980).

145. G.S. ROWE, THOMAS MCKEAN: THE SHAPING OF AN AMERICAN REPUBLICANISM 211 (1978).

146. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111 (Pa. Ct. Oyer & Terminer 1784) (reporter's summary); Letter from Charles Thomson to Thomas Jefferson (June 18, 1784), in 21 LETTERS OF THE DELEGATES TO CONGRESS, 1774–1789, at 694, 694–95 (Paul H. Smith ed., 1994) [hereinafter LETTERS] (describing the trial).

147. *Longchamps*, 1 U.S. at 116; see generally ROWE, *supra* note 145, at 212–14 (describing the legal arguments).

148. See Letter from Francis Dana to Elbridge Gerry (June 28, 1784), in 21 LETTERS, *supra* note 146, at 701, 701–02 (noting that Longchamps had been convicted prior to the date of the letter).

149. See *Longchamps*, 1 U.S. at 115; see also Letter from Charles Thomson to Benjamin Franklin (Aug. 13, 1784), in 21 LETTERS, *supra* note 146, at 771, 773 (stating that the court heard argument on the question “[w]hether Longchamps can be legally delivered up by the [Pennsylvania Supreme Executive] Council according to the claim made by the late Minister of France” (internal quotation marks omitted)).

150. See *Longchamps*, 1 U.S. at 115, 118.

151. See 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1785, at 314 (John C. Fitzpatrick ed., 1933).

152. See, e.g., *An Independent Patriot*, NEW-YORK JOURNAL & STATE GAZETTE, Feb. 10, 1785 (“Would not a compliance with this cruel, arbitrary request, betray a pusillanimous disposition, and be considered as a surrender of our laws, constitution and liberties?”); *Translation of a Letter from a French Gentleman in Philadelphia*, SALEM (MASS.) GAZETTE, Aug. 24, 1784, at 3 (“[T]he people here view [the extradition request] as a deadly stroke at the root of civil liberty . . .”); see also Letter from James Monroe to James Madison (Nov. 15, 1784), in 22 LETTERS, *supra* note 146, at 18, 19; Letter from John Adams to John Jay (Apr. 24, 1785), in 8 THE WORKS OF JOHN ADAMS 236, 238 (Charles Francis Adams ed., 1853). See generally E. WILSON LYON, THE MAN WHO

American government was most concerned to find a tactful way to refuse the French extradition requests.¹⁵³ In April 1785 the Continental Congress voted to have John Jay, the Secretary of Foreign Affairs, make excuses to Marbois, informing him of “the difficulties that may arise on this head from the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress.”¹⁵⁴ To further placate France, Jay was to inform Marbois that Congress “have resolved instantly to apply to the respective States to pass laws” to further protect ambassadors.¹⁵⁵ In the summer of 1785 the King withdrew his request for extradition.¹⁵⁶ Jay reported to Congress that in the conversation during which that decision was conveyed to him, Marbois asked that

Congress would pass Resolutions asserting the Rights of Ministers &c. and recommending to the States to pass Laws to punish Violations of them in an exemplary Manner. If Congress should think proper to pass such Resolutions a Copy of them might be enclosed to the King of France in a Letter calculated to remove any uneasiness which may remain in his Mind from the Case of Longchamps.¹⁵⁷

In late August 1785, the Congress voted to grant France’s wish.¹⁵⁸

In previous commentary about the Law of Nations Clause and the Longchamps incident generally, it has been suggested that the incident was of such importance that it may have helped spur the Founders to include the Law of Nations Clause in the Constitution, create a federal court system, and add the Alien Tort Statute to the Judiciary Act of 1789, and that it nearly caused a war with France, America’s crucial ally during the Revolutionary War.¹⁵⁹ Individualist commentators on the Law of Nations Clause see the Longchamps incident as highlighting the dangers posed by a supposed

SOLD LOUISIANA: THE CAREER OF FRANCOIS BARBE-MARBOIS 40–41 (1942) (noting that public opinion was opposed to extraditing Longchamps and therefore Pennsylvania politicians took that stance); *id.* at 43 (noting that the Continental Congress “wished to support Pennsylvania, which had public opinion behind it, and at the same time not ruffle France”).

153. *See, e.g.*, Letter from Connecticut Delegates to Matthew Griswold (Feb. 24, 1785), in 22 LETTERS, *supra* note 146, at 213, 214; Letter from Pennsylvania Delegates to John Dickinson (Mar. 9, 1785), in 22 LETTERS, *supra* note 146, at 255, 255.

154. 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1785, at 314 (John C. Fitzpatrick ed., 1933).

155. *Id.* at 315.

156. *See* 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1785, at 651 (John C. Fitzpatrick ed., 1933) (“Whereas the Chargé des Affaires of His Most Christian Majesty has signified to the Secretary to the United States of America for the Department of Foreign Affairs that His Majesty would not persist in his demand that Mr. Longchamps be delivered up to him . . .”).

157. *Id.* at 598–99.

158. *Id.* at 655.

159. *See* Stephens, *supra* note 15, at 466–68, 520; Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 457–58 & n.92 (2002). Other commentators also assert that the Longchamps incident was likely a spur to the creation of the Law of Nations Clause. *See* Siegal, *supra* note 19, at 874; Fredman, *supra* note 19, at 287–88; Teachout, *supra* note 19, at 1322.

“refusal” of state governments to enforce the law of nations,¹⁶⁰ and suggest that, as a result, the purpose of the Law of Nations Clause was to “stop the states from defining and punishing offenses against the law of nations.”¹⁶¹

These views of the Longchamps incident are most likely mistaken. For example, Pennsylvania quickly enforced the law of nations by prosecuting Longchamps and overall handled the incident well.¹⁶² I am not aware of any evidence—except perhaps during the first few weeks in May and June 1784 before Pennsylvania fully got its act together—that national elites believed that the Longchamps incident showed that states had to be ousted from involvement in protecting ambassadors or punishing other law of nations offenses by individuals.¹⁶³ More generally, the importance of the Longchamps incident has been exaggerated. There does not appear to have been any risk of war between France and the United States over the incident.¹⁶⁴ During the incident there were concerns about “coolness” in

160. Stephens, *supra* note 15, at 466.

161. Siegal, *supra* note 19, at 874.

162. See Bradley, *Alien Tort*, *supra* note 61, at 641 (“[C]ontrary to the suggestion of some scholars, neither the Continental Congress nor foreign nations appear to have been particularly unhappy with the way Pennsylvania handled the criminal prosecution [of Longchamps]. Pennsylvania acted quickly to obtain custody of Longchamps, and its courts ultimately convicted him of the offense.”).

163. And indeed the Constitution does not purport to oust states from involvement in law of nations offenses. Cf. U.S. CONST. art. I, § 10 (barring states from many foreign affairs activities).

164. See PETER P. HILL, *FRENCH PERCEPTIONS OF THE EARLY AMERICAN REPUBLIC* 157 (1988) (reporting some irritation and frustration felt by the French government about American handling of the Longchamps incident, but not mentioning any risk of war); LYON, *supra* note 152, at 43 (concluding that the Longchamps incident was resolved amicably between France and the United States); Rowe & Knott, *supra* note 144, at 275–307 (thoroughly reviewing French and American actions during the Longchamps incident and noting some French indignation and frustration, but not mentioning any risk of war). Diplomatic historians of the Confederation period do not mention any threat of war over Longchamps or otherwise. See, e.g., SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 65–85 (5th ed. 1965); ALEXANDER DECONDE, *A HISTORY OF AMERICAN FOREIGN POLICY* 46–48 (1963); LAWRENCE S. KAPLAN, *COLONIES INTO NATION 1763–1801*, at 180–81 (1972). French diplomatic correspondence about the Longchamps incident contains no hint that war was a possibility. See 2 *THE EMERGING NATION: A DOCUMENTARY HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES UNDER THE ARTICLES OF CONFEDERATION* 393–400, 410–14, 423–24, 429–31, 450–52, 466–67, 491–92, 545–46, 624–26, 792–93 (Mary A. Giunta ed., 1996) [hereinafter *EMERGING NATION*]. Thomas Jefferson, the American Ambassador to France during much of the relevant time, reported no trouble. See Letter from Thomas Jefferson to John Jay (Aug. 14, 1785), in 1 *MEMOIR, CORRESPONDENCE AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON* 275, 277 (Thomas Jefferson Randolph ed., 1829) [hereinafter *Letter from Jefferson to Jay*] (reporting that during the summer of 1784, Jefferson had a conversation about Longchamps with the Comte de Vergennes, the foreign minister of the French King: “I explained to him the effect of the judgment against Longchamps. He did not say that it was satisfactory, but neither did he say a word from which I could collect that it was not so. . . . He has never mentioned a word on the subject to me since . . . I have never once heard it mentioned in conversation, by any person of this country, and have no reason to suppose that there remains any uneasiness on the subject”). And war or threats of war would have made no sense for the French. France’s major strategic aim in joining the American side in the Revolutionary War—to regain predominance in continental European affairs by weakening her main rival, Great Britain, by separating Great Britain from the American colonies, which were a major source of financial and military strength, see Edward S. Corwin, *The*

relations between France and America, but as the incident was handled over time, well-placed observers like George Washington, John Jay, Thomas Jefferson, and the Marquis de Lafayette all came to believe that the situation had been resolved satisfactorily.¹⁶⁵ Private French diplomatic correspondence confirms that France was annoyed with the refusal to extradite, but not overly so.¹⁶⁶ Marbois apparently informed Jay that the King had some lingering “uneasiness,” which could be dispelled by a—purely precatory—resolution of Congress requesting that the states legislate against assaults on ambassadorial privileges.¹⁶⁷ Leading works of American historians about American foreign policy in the 1780s and the events leading to the Constitution ignore the Longchamps incident.¹⁶⁸

There are other reasons to be wary of ascribing too much importance to the incident as construed by individualist commentators. During and after *Longchamps*, and likely because of it, many prominent American Founders came to believe that government had a common law power to prosecute offences against the law of nations—a view that could have obviated the need to give Congress authority to enact statutory authorization for criminal prosecutions. This view was shared by Founders directly involved in *Longchamps*¹⁶⁹ and others who were not.¹⁷⁰ President Washington’s

French Objective in the American Revolution, 21 AM. HIST. REV. 33, 59–60 (1915)—would have been vitiated had France immediately started a war with her ally, effectively driving the United States back into the arms of Great Britain.

165. See Letter from George Washington to James McHenry (Aug. 22, 1785), in 9 THE WRITINGS OF GEORGE WASHINGTON 121, 121 (Jared Sparks ed., 1835); Letter from Jefferson to Jay, *supra* note 164, at 277; Letter from Marquis de Lafayette to John Jay (May 11, 1785), in EMERGING NATION, *supra* note 164, at 628, 628–29.

166. See, e.g., Letter of Comte de Vergennes to François Barbé de Marbois (Feb. 8, 1785), in EMERGING NATION, *supra* note 164, at 545, 545–46 (explaining the King of France’s disagreement with Pennsylvania’s verdict against Longchamps but deciding to “be content with it rather than to make new representations”).

167. See *supra* note 157 and accompanying text.

168. See, e.g., DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING (2003); MERRILL JENSEN, THE NEW NATION (1981); DANIEL G. LANG, FOREIGN POLICY IN THE EARLY REPUBLIC (1985); FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL (1986); FORREST McDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776–1790 (1965); McDONALD, NOVUS, *supra* note 40; RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789 (1987); ONUF & ONUF, *supra* note 40; JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS (1979) [hereinafter RAKOVE, BEGINNINGS]; JACK N. RAKOVE, ORIGINAL MEANINGS (1996) [hereinafter RAKOVE, ORIGINAL MEANINGS]; PAUL A. VARG, FOREIGN POLICIES OF THE FOUNDING FATHERS (1963); WOOD, *supra* note 40. While Frederick Marks ignores Longchamps, he does note some concern during the critical period that individuals—as well as U.S. states—were violating the law of nations. See MARKS, *supra*, at 151, 177–78.

169. The *Longchamps* court, which adopted the common law theory, was headed by Thomas McKean, later a prominent supporter of the Constitution in Pennsylvania’s ratification debates. James Wilson, later a leading member of both the Philadelphia drafting convention and the Pennsylvania ratifying convention, was a special prosecutor for *Longchamps*. Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 1017 n.418 (1982). He later espoused the common law theory as a Justice of the Supreme Court. See *Henfield’s Case*, 11 F. Cas. 1099, 1105–09 (C.C.D. Pa. 1793) (No. 6,360) (grand jury charge of Wilson, J.). See generally Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of*

Neutrality Proclamation of 1793 presupposed the existence of such a common law power.¹⁷¹ The Proclamation was approved by the entire cabinet, including such disparate voices as Secretary of State Thomas Jefferson and Secretary of the Treasury Alexander Hamilton.¹⁷²

With such a widespread consensus extending from 1784 through the 1790s, it is far from clear that the Longchamps incident was seen during the constitutional framing period of 1787–1789 as standing for the proposition that the national government needed constitutional authorization to enact statutory authority for prosecutions of individual law of nations offenses such as assaults on ambassadors. If the common law theory was correct—as a large number of prominent Founders believed it was¹⁷³—arguably all that was needed was a federal prosecutor and a federal court forum in which a common law prosecution could be brought. The forum was provided by Articles I and III of the Constitution, which created the U.S. Supreme Court and authorized Congress to create lower federal courts. A forum specifically for prosecutions of offenses against ambassadors was created by Article III,

Crimes in the Early Republic, 4 LAW & HIST. REV. 223, 228 (1986) (noting Wilson's view that the law of nations was part of the laws of the United States based on common law principles). William Bradford, the main Pennsylvania prosecutor in *Longchamps*, see Dodge, *Historical Origins*, *supra* note 74, at 233 n.93, was later, as the second Attorney General of the United States, a supporter of the common law prosecution theory, see 1 Op. Att'y Gen. 57 (1795); 1 Op. Att'y Gen. 52 (1794). John Jay, who was charged with smoothing France's ruffled feathers during the Longchamps incident, indicated soon after adoption of the Constitution and his elevation to Chief Justice that he too believed that the U.S. government possessed this common law power. See *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 27 F. Cas. 714 (C.C.D. Pa. 1793) (No. 16,122a); *John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York*, INDEP. CHRON., May 27, 1790, reprinted in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 29 (Maeva Marcus ed., 1988) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT].

170. See, e.g., Opinion of the Attorney General (May 30, 1793) (Randolph), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 74, at 152, 152 (arguing that an American citizen could be indicted under common law because he violated treaties with foreign nations and hence “disturb[ed] the peace of the United States”); *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, GAZETTE OF THE UNITED STATES, May 12, 1794, reprinted in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 467 (arguing that where the legislature has not proscribed an act, citizens may be prosecuted under the law of nations); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 526–30 (1986) (reprinting draft judicial opinion by Justice Paterson that adopted the theory); see also Preyer, *supra* note 169, at 229, 232 n.33 (noting support for the common law theory from Attorneys General Charles Lee and Edmund Randolph and Supreme Court Justices like Oliver Ellsworth).

171. See *supra* note 74.

172. See CURRIE, *supra* note 74, at 174 (noting unanimous approval but that Jefferson had privately expressed “misgivings” about constitutionality).

173. Cf. Dodge, *Historical Origins*, *supra* note 74, at 232 (“[I]n 1789 neither crimes nor torts in violation of the law of nations required positive legislation to be actionable; both were cognizable at common law.”). Professor Stephens notes that “criminal law codification” of offenses against the law of nations or other crimes “was unnecessary in the early years of the federal government, since it was generally assumed that the federal courts had the power to sanction common law crimes,” Stephens, *supra* note 15, at 490, but does not discuss the implications of this for an individual conception of the Law of Nations Clause.

which extended the federal judicial power to “all cases affecting ambassadors, other public ministers and consuls” and gave the Supreme Court original jurisdiction over “all cases affecting ambassadors, other public ministers and consuls.”¹⁷⁴ The Judiciary Act of 1789 organized the Supreme Court and created a lower federal court system and the post of federal district attorneys for each judicial district.¹⁷⁵ In light of all this, the Law of Nations Clause—in its individual conception as informed by the Longchamps incident—could have been largely superfluous.

Moreover, the primary issue that captured the attention of prominent American politicians and lawyers about the Longchamps incident was not any want of national legislative power to define offenses against ambassadors but rather France’s repeated requests to extradite Longchamps.¹⁷⁶ Insofar as the incident was simply a kerfuffle with France over extradition, it is not likely to have led to the inclusion of the Law of Nations Clause in the Constitution.

But even though the incident was largely a dispute about extradition, and even though Pennsylvania handled the incident well, the Founders still might have wanted to ensure that future incidents of this kind would be within the judicial and prosecutorial purview of the national government.¹⁷⁷ And notwithstanding the prevalence of the common law prosecution theory, the Founders might have reasonably desired to specify in the Constitution that Congress had legislative authority over individual offenses against the law of nations because, as a general matter, the Constitution left criminal regulation (and other local, internal matters) to the states. Therefore, it is possible that the Longchamps incident provided some impetus for the creation of the Law of Nations Clause. But the evidence for the impact of *Longchamps* is not nearly strong enough to say that the individual conception of the Law of Nations Clause was the only conception within the minds of the Founders.

174. U.S. CONST. art. III, § 2, cls. 1 & 2.

175. Judiciary Act of 1789, ch. 20, 1 Stat. 73–93.

176. See MARK W. JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW* 55–56 (2004) (“*De Longchamps* . . . in its own time served as an affirmation of Pennsylvania’s sovereignty. Pennsylvania determined it had the right to try crimes committed on its soil against, but free from the interference of, a powerful European ally.”); Bradley, *Alien Tort*, *supra* note 61, at 641 (noting that “the only major foreign complaint” about the handling of the Longchamps incident concerned the decision not to extradite).

177. See Burley, *supra* note 24, at 478 (“The Supreme Court of Pennsylvania unquestionably did its duty in the *Marbois* case, sentencing the offender particularly harshly because he was guilty of ‘an atrocious violation of the law of nations.’ But Congress could not be sure that other states would follow suit. It was safer to vest at least one set of federal courts with explicit jurisdiction over these cases, in the knowledge that the federal judiciary could be counted on to enforce the law of nations as a national obligation.”); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 694 n.39 (2002) [hereinafter Dodge, *Constitutionality*] (“[T]he fact that Pennsylvania had acquitted itself well did not quell Congress’s fears that the States might handle similar situations poorly in the future.”).

3. *Resolutions of the Continental Congress.*—Besides the Longchamps incident and the writings of Blackstone and law of nations theorists, previous individualist commentary on the Law of Nations Clause has focused on “[t]wo resolutions of the Continental Congress” in the 1780s that allegedly “presaged the wording of the Offenses Clause.”¹⁷⁸ First, a November 1781 report to the Continental Congress by Edmund Randolph, James Duane, and John Witherspoon recommended that states “enact laws for punishing infractions of the laws of nations” because “the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations.”¹⁷⁹ Although a few states did pass such laws against individual offenses,¹⁸⁰ most did not. But, as noted above, the success of the common law prosecution method in *Longchamps* would likely have muted concerns that legislative authorization was needed.¹⁸¹ The second resolution of Congress cited by commentators on the Law of Nations Clause was the August 1785 vote, made at the request of Marbois, as a palliative to the King of France for his decision to drop the extradition request.¹⁸² These circumstances do not support the claim that the Continental Congress truly continued to believe that it was important for the states to enact statutory authorization for law of nations prosecutions; the resolution was a diplomatic face saver.¹⁸³ A few other mentions of individual offenses against the law of

178. Stephens, *supra* note 15, at 468; see also Burley, *supra* note 24, at 477; Siegal, *supra* note 19, at 874–75; Fredman, *supra* note 19, at 286–87.

179. 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1781, *supra* note 131, at 1136. The report recommended that states legislate punishment of violations of safe conduct and passports, infractions of immunities of ambassadors and ministers, and other offenses against the law of nations. *Id.* at 1136–37.

180. See An Act for Securing to Foreigners in this State their Rights According to the Law of Nations, and to Prevent Any Infraction of Said Laws (1782), in ACTS & LAWS OF THE STATE OF CONNECTICUT 82, 82–83 (1784); An Act for Preserving the Privileges of Public Ministers of Foreign Princes and States (1785), in ACTS, ORDINANCES & RESOLVES OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH-CAROLINA 10, 10–11 (1785), *microformed on* Early Am. Imprints, 1st series no. 19250 (Am. Antiquarian Soc’y). Also in 1785 Virginia enacted a statute allowing extradition of persons who violated the law of nations outside, but were captured in, Virginia. See An Act Punishing Certain Offences Injurious to the Tranquility of this Commonwealth, ch. 62, § 2 (1784), in ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA BEGUN OCTOBER 1784, at 14, 14 (1785), *microformed on* Early Am. Imprints, 1st series no. 19348 (Am. Antiquarian Soc’y). It apparently did not enact a statute dealing with assaults on ambassadors, perhaps signaling that it viewed the extradition controversy as the real import of *Longchamps*.

181. Indeed, two of the three authors of the 1781 report later went on record supporting common law prosecutions for law of nations offenses. For the views of Randolph, see *supra* notes 169–70. James Duane, as Mayor of New York City and ex officio judge of the Mayor’s Court, presided over a 1788 common law prosecution of a policeman who violated the law of nations by serving legal process on the servant of the Dutch ambassador. See *Charge of His Honour*, *supra* note 27, at 532. In his capacity as judge of the Mayor’s Court, Duane also issued the famous 1784 decision in *Rutgers v. Waddington*. See *infra* note 190.

182. 29 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 156, at 599–606.

183. The likelihood that the resolution was a face saver perhaps explains why John Jay, though normally so conscientious in his official duties, apparently ignored the resolution’s direction to draft

nations can be found during the preconstitutional critical period.¹⁸⁴ But, in sum, while there is certain evidence to support the individual conception of the Law of Nations Clause, it is not particularly strong.

B. A Textual–Historical Reading of the Words of the Law of Nations Clause

This subpart, the core of my positive case for a dual reading of the Law of Nations Clause, attempts to explain what the text of the Law of Nations Clause would have meant to an eighteenth-century audience, relying on linguistic usage, the works of theorists of great importance to the Founding generation, such as Blackstone, Vattel, Locke, Grotius, Burlamaqui, and Rutherford,¹⁸⁵ and eighteenth century religious sermons, political pamphlets, government documents, lawyers' arguments, and judges' decisions. Based on these sources, this subpart concludes that the text of the Law of Nations Clause would have been ambiguous to an eighteenth-century audience, consistent with an individual conception, a state-to-state conception, or a dual conception.

1. *"Punish" and "Offences."*—The conventional account of text of the Law of Nations Clause is that its key terms ("punish" and "offences") sound in individual criminal law. But in the eighteenth century, these terms were actually used in two other ways, in addition to referring to the criminal justice process.¹⁸⁶ First, these words had a religious signification. The term "offence" was commonly used to refer to sins.¹⁸⁷ And "punishment" was meted out by God as the offender's penalty for sin.¹⁸⁸ Grotius thus expressed

model legislation on this subject for recommendation to the state legislatures. *Cf.* Casto, *supra* note 170, at 493 n.144 (noting the lack of any record that Jay drafted such legislation).

184. *See, e.g.*, Letter from John Adams to John Jay (Apr. 30, 1787), in 5 *DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA* 235, 236–37 (Blair & Rives printers, 1837) (reporting that British officials had advised Adams that an individual's counterfeiting of U.S. currency was "an offence against the law of nations, against commerce, against private and public property, against the whole world, &c.").

185. I will not dwell on the myriad doctrinal differences between and among these thinkers but on the broadly congruent outlines of their theories about punishing offenses against the law of nations. For an extraordinarily rich discussion of the nuances of the theories about the analogy between the nation-state in the international system and individual people in the state of nature, and the right to punish exercised by each state or person, see RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* (1999).

186. For typical use of the words to refer to the criminal justice process, see U.S. CONST. amends. V & VIII; WILLIAM BLACKSTONE, 4 *COMMENTARIES* *6–7.

187. According to Samuel Johnson's dictionary, the meanings of "offence" included an "act of wickedness" or a "transgression." 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (n.p. 1755). The Oxford English Dictionary agrees that offence could mean "a transgression, sin, wrong." 10 *OXFORD ENGLISH DICTIONARY* 724, definition 7.a (2d ed. 1989); *see also, e.g.*, ARTHUR ASHLEY SYKES, *THE SCRIPTURE DOCTRINE OF THE REDEMPTION OF MAN BY JESUS CHRIST* 330 (London 1756) (describing "immorality" as "Offences against the Law of Nature and Reason").

188. The Oxford English Dictionary confirms that "punish" was used to refer to God's chastisement. *See* 12 *OXFORD ENGLISH DICTIONARY* 845 (2d ed. 1989); *see also, e.g.*, S.C. CONST.

a thoroughly conventional dictum when he wrote that God has the power to “punish offences committed against Himself.”¹⁸⁹

But it was not just individuals who committed offenses and therefore opened themselves to punishment. Nation-states were seen as moral persons¹⁹⁰ who, generally speaking, were subject to the same divine and natural laws as individual people.¹⁹¹ As moral persons, states were capable of committing punishable crimes against God's laws¹⁹² or other legal standards.

Thus another important signification of the terms “punish” and “offence” related to international law and international relations. States were frequently said to “offend” or be “offended,” and to give or receive “offence” to or from other states.¹⁹³ Likewise, states “punished” or were punished by

of 1778, art. XIII (“The qualification of electors shall be that every free white man, and no other person, who acknowledges the being of a God, and believes in a future state of rewards and punishments . . .”); 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 347 (n.p. 1787) (referring to “the punishment of offences” by “the offended god”).

189. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES bk. 2, ch. 20, § 44, at 508 (Francis W. Kelsey trans., 1925) (1625).

190. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259 (1796) (Iredell, J.) (“It is undoubtedly true, that each nation is considered as a moral person . . .”); *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 404 (Julius Goebel, Jr. et al. eds., 1964) (“States like the individuals who compose them, are moral persons . . .”); 1 VATTTEL, *supra* note 37, Prelim. at 2 (“[N]ations, or sovereign states, are to be considered as so many free persons, living together in the state of nature;” each state is a “moral person”); 1 THE WORKS OF JAMES WILSON 270 (Robert Green McCloskey ed., 1967) [hereinafter WILSON'S WORKS] (“States are moral persons, who live together in a natural society . . .”).

191. See generally PHILIP BOBBITT, THE SHIELD OF ACHILLES 81 (2002) (stating that human traits of “legitimacy, personality, continuity, integrity, and, most importantly, sovereignty” were “transposed to the State itself”).

192. See, e.g., JEAN BODIN, THE SIX BOOKES OF A COMMON-WEALE 603 (Richard Knolles trans., 1603) (describing how God “suffred warres and hatred among nations to punish one by another, and to keepe them all in feare”); DAVID GELLATLY, A SERMON SHEWING THE CAUSE OF WAR 4 (Edinburgh 1794) (“God sends war amongst the nations to punish them for their transgressions.”); 5 JOHN JORTIN, SERMONS ON DIFFERENT SUBJECTS 142 (London 1772) (describing wars “continually waged by Christian nations” as “most notorious offences against this divine commandment, against the Law of Nature, against the Laws of God given by Moses, and against the Christian Religion”).

193. See, e.g., WILLIAM BLACKSTONE, 1 COMMENTARIES *250 (discussing an “offending state” which has denied justice to a foreign subject); *Answer of the Secretary State of his Most Faithful Majesty [Portugal], to the Memorial of the Spanish Ambassador and the Minister Plenipotentiary of France* (Mar. 20, 1762), in BOSTON EVENING POST, July 12, 1762 (declining France and Spain's offer to join an offensive league against England in violation of Portugal's treaties with England and explaining that Portugal “not having received any immediate offence on the part of Great Britain to break the same treaties, [Portugal] could not enter into an offensive league against that court, without being wanting to . . . publick faith, religion, fidelity, and decorum”); *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of New York*, GAZETTE OF THE UNITED STATES, Apr. 6, 1795, reprinted in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 21 (discussing when a “neutral nation is too apt to give offence to one party or the other” to a conflict); Debates in the Federal Convention of 1787 (June 9, 1787), in 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109, 207 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES] (remarks of James Madison) (analogizing the Articles of Confederation to an interstate treaty and

other states, generally through war.¹⁹⁴ Separate political-geographic entities within nation-states could also punish and be punished, offend and be offended.¹⁹⁵ There are many seventeenth- and eighteenth-century examples of referring to states committing punishable offenses against the law of nations. As noted above, Blackstone wrote that “offences against this law [the law of nations] are principally incident to whole states or nations: in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another.”¹⁹⁶ Grotius devoted an entire chapter of his seminal work on the laws of nature and nations to “war waged to inflict punishment.”¹⁹⁷ Sovereigns, wrote Grotius, had the right to impose

referring to a U.S. state which violated the Articles as “an offending member of the Union”); Letter from Sec’y of Treasury Alexander Hamilton to Pres. George Washington (May 2, 1793), in 14 PAPERS OF ALEXANDER HAMILTON 398, 406–07 (Harold C. Syrett ed., 1969) [hereinafter PAPERS OF HAMILTON] (“The conduct of France, in the instances which have been stated, calmly and impartially viewed, was an *offence against Nations* . . .”); *Letters of Pacificus No. 2* [Alexander Hamilton] (July 3, 1793), reprinted in 15 PAPERS OF HAMILTON, *supra*, at 59 (discussing the European war against Revolutionary France and stating that “France is not blameless in the circumstances, which preceded and led to the war with those powers; . . . if she received, she also gave cause of offence”); Madison’s Report on the Virginia Resolutions (1800), in 4 ELLIOT’S DEBATES, *supra*, at 546, 556–57 (stating that the Law of Nations Clause contemplates “[o]ffences for which aliens, within the jurisdiction of a country, are punishable, are—first, offences committed by the nation of which they make a part, and in whose offences they are involved; secondly, offences committed by themselves alone”).

194. See, e.g., RICHARD CUMBERLAND, A PHILOSOPHICAL ENQUIRY INTO THE LAWS OF NATURE 87 (Dublin 1750) (discussing “War (under which the Right of punishing Offences is comprehended)”; 3 VATTEL, *supra* note 37, § 41, at 461 (discussing “[w]hen an offensive war has for its object the punishment of a nation”); Benjamin Franklin, *Against Privateering*, THE AMERICAN MUSEUM, OR, UNIVERSAL MAGAZINE, Feb. 1790, microformed on Am. Periodical Series, 18th Century (Univ. Microfilms) (suggesting that, under the law of nations, war was “punishment of injury”); Alexander Hamilton, Answers to Questions proposed by The President of the United States to the Secretary of the Treasury (Sept. 15, 1790), in 7 PAPERS OF HAMILTON, *supra* note 193, at 37, 57 (advising President Washington during the Nootka Sound Controversy that if British forces entered U.S. territory without permission and refused to make amends the United States should “endeavour to punish the aggression by the sword”); George Washington, Third Annual Address (Oct. 25, 1791), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1907, at 104 (James D. Richardson ed., 1908) [hereinafter RICHARDSON, COMPILATION] (reporting that Washington had used the military against hostile Indian tribes to “punish their depredations”); see also, e.g., WILLIAM BURKE, AN ENQUIRY INTO THE POLICY OF MAKING CONQUESTS FOR THE MAHOMETANS IN INDIA, BY THE BRITISH ARMS 51 (London 1779) (discussing “a war made to punish the remissness of an ally”); MARCHAMONT NEDHAM, CHRISTIANISSIMUS CHRISTIANANDUS: OR, REASON FOR THE REDUCTION OF FRANCE TO A MORE CHRISTIAN STATE IN EUROPE 9 (London 1701) (discussing how France did not have “any cause to make War [against the United Provinces of the Netherlands] to punish any for injuries done”).

195. See, e.g., 3 JOHN GILLIES, THE HISTORY OF ANCIENT GREECE 343 (n.p. 1792) (writing that Sparta’s “rapid punishment of Thebes” would “quash the seditious spirit” of its revolting colony); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 27–31 (1991) (showing that the Coercive Acts of 1774, imposed by Parliament in response to the Boston Tea Party, were described by contemporaries as a “punishment” of Boston and the Massachusetts Bay Colony). See also sources cited *infra* notes 258, 311.

196. WILLIAM BLACKSTONE, 4 COMMENTARIES *67–68.

197. 2 GROTIUS, *supra* note 189, bk. 2, ch. 20, § 38, at 502.

“punishment” with war on those who “excessively violate the law of nature or of nations.”¹⁹⁸ Alberico Gentili, an influential professor of law at Oxford University in the seventeenth century, taught that a war is lawful when its purpose is “to avenge wrongs, to punish the guilty, and to maintain one’s rights,” and he catalogued many instances where violations of the laws of nature and nations could be lawfully punished by war.¹⁹⁹ Vattel also writes of states which “offend[] against the law of nations.”²⁰⁰ For Vattel, states have—by nature and by the law of nations—“the right of punishing” other states that have “offended” against them or injured them.²⁰¹ The injuries or offenses that give rise to the right to use coercive force as “punishment” include violations of the rights that a nation possesses according to nature and the law of nations.²⁰² Vattel calls the external right “of punishing those who offend” the nation “the right of the sword,” which can be exercised through “war.”²⁰³

2. *The Just War Tradition.*—The theme of war as punishment for the offenses of a state would have been salient to an eighteenth-century audience because it invoked the major idea of the influential just war tradition.²⁰⁴ Under just war theory, war without a just cause was both sinful and illegal. International crimes or offenses by states were seen as the leading just cause of warfare by the offended state.²⁰⁵ In this tradition, “the idea of war as a law-enforcement operation was . . . the very essence of just-war thought in its most general sense.”²⁰⁶ Armed conflict was therefore seen as a way of

198. *Id.* ch. 20, § 40, at 504.

199. 2 ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* § 150, at 93 (John C. Rolfe trans., 1933) (1612).

200. 4 VATTEL, *supra* note 37, § 63, at 668.

201. 1 *id.* § 232, at 177.

202. 2 *id.* § 71, at 251; *see also* 1 *id.* Prelim. § 22, at 10 (“All nations have then a right to repel by force, what openly violates the laws of the society which nature has established among them, or that directly attacks the welfare and safety of that society.”).

203. 1 *id.* § 169, at 138.

204. Many of the jurists and commentators who most influenced the American Founders—including Vattel and Grotius—were in turn heavily influenced in their thinking about armed conflict by just war theory. *See* STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 95–97 (2005); *see also* Jonathon Barnes, *The Just War*, in *THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY* 771, 772 (Norman Kretzmann et al. eds., 1982) (locating Grotius in the just war tradition); Robert L. Holmes, *Can War Be Morally Justified? The Just War Theory*, in *JUST WAR THEORY* 197, 201–02, 207–08 (Jean Bethke Elshtain ed., 1992) (same regarding Vattel).

205. *See generally* NEFF, *supra* note 204, at 97 (stating that “defence against an impending or ongoing wrong; action to obtain what is owed; and the infliction of punishment for past wrongdoing” were just causes for war that acquired “virtually canonical status”).

206. *Id.* at 57. Aquinas wrote that a just cause of war arises “when a nation or state has to be punished for refusing to make amends for the wrongs inflicted by its subjects or to restore what it has seized unjustly.” *See* THOMAS AQUINAS, 2 *SUMMA THEOLOGIAE*, ch. 2, question 40 (c. 1265–72), *reprinted in* SAINT THOMAS AQUINAS, *ON LAW, MORALITY, AND POLITICS* 221 (William P. Baumgarth & Richard J. Regan eds., 1988). Broadly speaking, war was just if waged “with the object of securing peace, of punishing evil-doers, and of uplifting the good.” *Id.* In the eighteenth century, Vattel summarized the just war doctrine: “[T]he just and lawful scope of every war” is “to

enforcing the law of nations by punishing international crimes committed by states.

Although eighteenth-century legal and political thought tended to treat war as a natural and inevitable “instrument of . . . policy,”²⁰⁷ the lingering salience of the just war tradition meant that war was typically justified with public rhetoric claiming that it was waged in self-defense or “to punish for wrongs received when redress was refused.”²⁰⁸ Accordingly, it was common practice for sovereigns, before resorting to armed force or other methods of coercion, to state their legal justifications, which typically included a breach of treaties or the law of nations by the other side. This practice would have been familiar to the American Founding generation, for it was used by Great Britain at least twice during the Revolutionary War: to denounce the actions of France and the United Provinces of the Netherlands in concluding alliances to wage war against Great Britain.²⁰⁹ Similar examples abound in eighteenth-century conflicts.²¹⁰

revenge or prevent injury. To revenge signifies here to prosecute the reparation of an injury, if it be of a nature to be repaired; or if the evil is irreparable, to obtain a just satisfaction; or, if requisite, to punish the offender, with a view of providing for our future safety.” 3 VATTEL, *supra* note 37, § 28, at 454.

207. REGINALD C. STUART, *WAR AND AMERICAN THOUGHT* 3 (1982). See generally BOBBITT, *supra* note 191, at 507 (explaining that in the Westphalian constitutional system, “[w]ar was recognized as a legitimate form of resolving conflicts”); Ramsey, *Textualism*, *supra* note 52, at 1580–81 (explaining that notwithstanding theorists who described war “as a system of justice providing a remedy for nations injured by another sovereign,” “European war in the eighteenth century was not primarily about pursuing redress for injuries, but about territorial expansion, commercial advantage, and domestic security from over-powerful neighbors”).

208. STUART, *supra* note 207, at 7; see also THE FEDERALIST NO. 3, at 42–43 (John Jay) (Clinton Rossiter ed., 1961) (“The *just* causes of war, for the most part, arise either from violations of treaties or from direct violence. America has already formed treaties with no less than six foreign nations It is of high importance to the peace of America that she observe the laws of nations towards all these powers . . .”).

209. See Parliamentary Proceedings, House of Lords (Mar. 17, 1778), reprinted as a broadside on May 20, 1778, *microformed on* Early Am. Imprints, 1st series no. 43465 (Am. Antiquarian Soc’y) (quoting King George III of England as stating that the French alliance with America was “contrary to the most solemn assurances, subversive of the law of nations, and injurious to the rights of every sovereign power in Europe”); *Manifesto of George R.*, LONDON GAZETTE EXTRAORDINARY, Dec. 20, 1780, reprinted in AM. J. & GEN. ADVERTISER, Mar. 31, 1781 (quoting King George warning the Netherlands that “[a]n infraction of the law of nations . . . gives the injured State a right to demand satisfaction and punishment”).

210. The March 1744 declaration of war by England against France recited “the notorious Breach of Treaties.” A Copy of the Declaration of War of the King of Great Britain, against the French King (broadside printed by T. Fleet, Boston, Mar. 1744), *microformed on* Early Am. Imprints, 1st series no. 40331 (Am. Antiquarian Soc’y). The May 1756 declaration of war by England against France claimed that France acted “without any regard to the most solemn Treaties and Engagements.” His Majesty’s Declaration of War against the French King (broadside printed by James Parker, New York, 1756), *microformed on* Early Am. Imprints, 1st series no. 7738 (Am. Antiquarian Soc’y). George Washington, on coming out of retirement to assume command of the U.S. military during the Quasi-War with France, railed against the French Directory’s “disregard of solemn treaties and the laws of nations.” Letter from George Washington to Pres. John Adams (July 13, 1798), in 1 RICHARDSON, COMPILATION, *supra* note 194, at 267, 268.

3. *The Individual–State Analogy.*—It would make sense to an eighteenth-century audience that a single clause of the Constitution could invoke both the right to punish individuals with the criminal justice system and the right to punish other states through war or other coercive means. This dual understanding would make sense because the central metaphor of seventeenth- and eighteenth-century theoretical writings on the law of nations and international relations was that nations in the international system were analogous to private individuals in the state of nature.²¹¹ States were personified and seen as moral individuals living in freedom in a state of nature, just as individuals had before societies and government formed. As Vattel put it, “Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature, nations, or sovereign states, are to be considered as so many free persons, living together in the state of nature.”²¹² This analogy and the concepts that flowed from it were not just esoteric intellectual doctrines. American preachers, popular pamphleteers, and political

211. See BOBBITT, *supra* note 191, at 78–81, 529–30; TUCK, *supra* note 185, at 8–9, 95–96, 129, 140, 186, 188; KENNETH WALTZ, *MAN, THE STATE AND WAR* 172–73 (1959); Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 *YALE L.J.* 564, 564 (1917). The analogy continues to be used by contemporary theorists. See, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 265 (4th ed. 1967) (“International law is a primitive type of law resembling the kind of law that prevails in certain preliterate societies, such as the Australian aborigines and the Yurok of northern California.”).

212. 1 VATTEL, *supra* note 37, Prelim. at 2; see also JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 14 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690) (“It is often asked as a mighty objection, [w]here are, or ever were there any men in such a state of nature? To which it may suffice as an answer at present that since all princes and rulers of independent governments all through the world are in a state of nature, it is plain the world never was, nor ever will be, without numbers of men in that state.” (emphasis added) (internal quotation marks omitted)); JEAN-JACQUES ROUSSEAU, *A DISCOURSE UPON THE ORIGIN AND FOUNDATION OF THE INEQUALITY AMONG MANKIND* 139 (London 1761) (“Political Bodies, thus remaining in a State of Nature among themselves, soon experienced the Inconveniencies which had obliged Individuals to quit it.”); 1 WILSON’S WORKS, *supra* note 190, at 270 (“Those, who unite in society, lived, before their union, in a state of nature: a state of nature is a state of equality and liberty . . . States are moral persons, who live together in a natural society, under the law of nations.”); CHRISTIAN WOLFF, *THE LAW OF NATIONS TREATED ACCORDING TO THE SCIENTIFIC METHOD* § 2 (Joseph Drake trans., 1764) (1749) (“Nations are regarded as individual free persons living in a state of nature.”).

speakers instructed their audiences about this subject,²¹³ and judges, lawyers, and statesmen²¹⁴ made use of these concepts in their legal arguments.

The analogy was also present in terms of the law that governed states and individuals in the respective states of nature. Because the individuals' state of nature existed before or apart from organized civil society, it had no human legislature, no man-made laws, and no common sovereign to enforce the law. Instead, the law of nature was thought to govern the relations between individual people in the state of nature.²¹⁵ In the international system, which also lacked a human law-giving and law-enforcing sovereign standing above the states, the law of nations was said to govern international relations.²¹⁶ Drawing on the individual-state analogy, many eighteenth-century thinkers taught that the law of nations was nothing more than the law

213. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS] (statement of Luther Martin) (declaring "that the States like individuals were in a State of nature equally sovereign & free" and citing Locke, Vattel, and Rutherford); Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston* (1773), reprinted in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, at 189 (Charles S. Hyneman & Donald S. Lutz ed., 1983) [hereinafter AMERICAN POLITICAL WRITING] ("[S]tates or communities, as such, have naturally the same liberty which individuals have in the state of nature . . ."); Massachusetts, *To All Nations of Men* (1773), reprinted in 1 AMERICAN POLITICAL WRITING, *supra*, at 210 ("Separate states (all self-governing communities) stand in the same relation to one another as individuals do when out of society; or to use the more common phrasc, in a state of nature.").

214. See, e.g., *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 395 (Phila. Ct. Comm. Pleas, Pa. 1788) (argument of counsel William Rawle) ("[N]ations, with respect to each other, must be considered as individuals in a state of nature."); Draft of John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia (1793), in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 359, 361 ("Nations are with Respect to each other, in the same Situation as independent Individuals in a State of Nature."); *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, *supra* note 170, at 459 ("As among individuals in a rude state of society, before any form of government is established, there are certain rational principles by which each man is bound to regulate his conduct to his fellow-creature man, so among different nations, which have no superior human authority to decide their differences . . ."); Sec'y of State Thomas Jefferson, Opinion on French Treaties (Apr. 28, 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON 219, 220 (Paul Leicester Ford ed., G.P. Putnam's Sons 1895) ("The Law of nations, by which this question is to be determined, is composed of three branches. 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions. The first of these only, concerns this question, that is to say the Moral law to which Man has been subjected by his creator, & of which his feelings, or Conscience as it is sometimes called, are the evidence with which his creator has furnished him. The Moral duties which exist between individual and individual in a state of nature, accompany them into a state of society & the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other; so that between society & society the same moral duties exist as did between the individuals composing them while in an unassociated state, their maker not having released them from those duties on their forming themselves into a nation.").

215. See, e.g., LOCKE, *supra* note 212, § 4.

216. See, e.g., Draft of John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia (1793), in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 359, 361 ("By the Laws of Nations our Conduct relative to other Nations is to be regulated both in peace and in war."); *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, *supra* note 170, at 459 ("The Law of Nations, by which alone all controversies between nation and nation can be determined . . .").

of nature applied to the particular situation of nation-states.²¹⁷ But the law of nations was generally thought to include more than simply natural law derived by reason and experience. There were strong strains of positivism beginning to develop by the late eighteenth century in both theoretical writings and practical discussions of the law of nations, which saw express international agreements and the actual practices of states as constituting part of the law of nations as well.²¹⁸ Nevertheless, the analogy between the law of nature governing the individuals' state of nature and the law of nations governing the nations' state of nature was well established. The persistent identification of states and individual persons would have made it conceptually natural for an eighteenth-century audience to understand the Law of Nations Clause as referring to both individuals and states.

4. *The Lawfulness of International Law.*—Another reason that a state-to-state understanding of the Law of Nations Clause would have made sense to an eighteenth-century audience is that the Clause's invocation of the international right to punish speaks to how international law was enforced. In other words, the language of the Clause does not just describe a power of Congress but also invokes well-known concepts about the enforcement of international law by states.

In both states of nature—the international system and the individual's pregovernment state—there was no common sovereign to enact positive laws and enforce compliance.²¹⁹ And in both states of nature, individual people and nations were naturally free and independent and had a natural right to

217. *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), reprinted in 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 404 (Julius Goebel, Jr. et al. eds., 1964) ("The *primary* law of nations . . . is no other than the *law of nature*, so far as it is applicable to [nations]."); 2 J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 332 (Thomas Nugent trans., 4th ed. 1792) ("[T]he law of *nations* . . . are no more than the laws of nature, which men, considered as members of society, in general, ought to practice towards each other; or, in other words, the law of nations is no more than the general law of *sociability*, applied not to individuals composing a society, but to men, as forming different bodies called *states* or *nations*."); CUMBERLAND, *supra* note 194, at 290 ("[U]pon these ancient Authorities, we, with Truth and Justice, call and understand the *Laws of Nature*, and the *Laws of Nations*, the *very same Laws*."); GEORG FRIEDRICH DE MARTENS, *SUMMARY OF THE LAW OF NATIONS* 2 (William Cobbett trans., Fred B. Rothman & Co. 1986) (1795) ("Each nation being considered as a moral being living in a state of nature, the obligations of one nation towards another, are no more than those of individuals, modified and applied to nations; and this is what is called the *natural law of nations*."); 1 WILSON'S WORKS, *supra* note 190, at 154 ("[T]he law of nations is only the law of nature judiciously applied to the conduct of states."); WOLFF, *supra* note 212, § 3 ("[T]he law of nations is . . . nothing except the law of nature applied to nations."); *Massachusetts*, *supra* note 213, at 211 (equating the law of nature and the law of nations).

218. See *infra* notes 439–41 and accompanying text.

219. WILLIAM BLACKSTONE, 1 *COMMENTARIES* *43; LOCKE, *supra* note 212, § 19; 2 VATTEL, *supra* note 37, § 163, at 300–01; *id.* § 219, at 347; Draft of John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia, *supra* note 216, at 361–62.

protect and preserve themselves²²⁰ and to judge when they had been injured and should respond.²²¹ The laws of nature and nations left most decisions to the discretion of the individual person or state. This again derived from the individual–state analogy. Just as man’s first duty in the state of nature was to protect himself and his property (making self-preservation the most important natural law), so too was the highest duty of the law of nations each state’s duty to protect itself and its members.²²² The rules governing the states of nature were therefore based on the overriding right of self-preservation and imposed only minimally burdensome standards guiding one to achieve self-preservation while living in relative harmony with the other inhabitants of the state of nature.²²³

220. 2 BURLAMAQUI, *supra* note 217, at 333 (“The law of God no less enjoins a whole nation to take care of their preservation, than it does private men. It is therefore just that they should employ force against those, who, declaring themselves their enemies, violate the law of sociability towards them, refuse them their due, seek to deprive them of their advantages, and even to destroy them. It is therefore for the good of society, that people should be able to repress the malice and efforts of those who subvert the foundations of it.”); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 138 (Anne M. Cohler et al. trans., 1989) (1748) (“The life of states is like that of men. Men have the right to kill in the case of natural defense; states have the right to wage war for their own preservation.”); 1 VATTEL, *supra* note 37, § 169, at 137–38 (“The right of punishing, which in a state of nature belonged to each individual, is founded on the right of safety. Every man has therefore a right to preserve himself from injury, and by force to provide for his own security, against those who unjustly attack him. For this purpose he may inflict a punishment on him who has done him an injury.”); Cato’s Letter No. 11 (Jan. 7, 1720), in 1 JOHN TRENCHARD & THOMAS GORDON, *CATO’S LETTERS* 87, 87 (Ronald Hamowy ed., 1995) (“Every man in the state of nature had a right to repel injuries, and to revenge them; that is, he had a right to punish the authors of those injuries Seeing therefore that this right was inherent in every private man, it is absurd to suppose that national legislatures, to whom every man’s private power is committed, have not the same right”).

221. *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77, 78 n. (Phila. Ct. Comm. Pleas, Pa. 1781) (argument of counsel) (“[S]overeigns, with regard to each other, were always considered as individuals in a state of nature, where all enjoy the same prerogatives, where there could be no subordination to a supreme authority, nor any judge to define their rights, or redress their wrongs.”); *Massachusetts v. New York*, *supra* note 213, at 215 (“[W]hereas in a state of nature each judged for himself, what was just or injurious, in society he submits to indifferent arbiters.”).

222. *See, e.g.*, THOMAS HOBBS, *LEVIATHAN* 244 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (“[T]he Law of Nations, and the Law of Nature, is the same thing. And every Sovereign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring his own safety.”); *cf. Letters of Pacificus No. 3* [Alexander Hamilton] (July 6, 1793), reprinted in 15 *PAPERS OF HAMILTON*, *supra* note 193, at 66 (“Self preservation is the first duty of a Nation”); Cato’s Letter No. 11, *supra* note 220, at 87 (“*Salus populi suprema lex esto: That the benefit and safety of the people constitutes the supreme law . . . [is the] primary law of nature and nations.*”).

223. *See* HENDRICKSON, *supra* note 168, at 169 (“[I]n the law of nations . . . there was no expectation that states would or should do anything other than pursue their own interest, subject to the limitations of justice and good faith.”); *see also* Kent, *supra* note 40, at 486–87 & n.115. As Blackstone put it, paraphrasing Montesquieu, “This general law [the law of nations] is founded upon the principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests.” WILLIAM BLACKSTONE, 4 *COMMENTARIES* *66.

By the laws of nature and nations, individuals and nations were required to refrain as far as possible from injuring one another.²²⁴ But self-restraint is never a reliable means of maintaining order and enforcing law. Accordingly, a central project of the seventeenth- and eighteenth-century law-of-nations theorists was to explain how the seemingly anarchic state system—in which there is no common sovereign and each state is left to decide for itself when it has been injured, and how to respond—is actually subject to a semblance of the rule of law.²²⁵ To solve this problem, the law-of-nations theorists turned to classic writings—especially Locke's—on how individual men, in the state of nature, reciprocally enforce and are bound by the laws of nature. According to Locke's *Second Treatise*:

[T]hat all men may be restrained from invading others' rights and from doing hurt to one another, and the law of nature be observed, which wills the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree as may hinder its violation; for the law of nature would, as all other laws that concern men in this world, be in vain if there were nobody that in that state of nature had a power to execute that law and thereby preserve the innocent and restrain offenders.²²⁶

As Locke explains, "In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity . . . and so he becomes dangerous to mankind . . ."²²⁷ As a result of this offense, other individuals in the state of nature have the right to punish the offender in order to protect themselves and uphold the rule of law. As Locke wrote, "[E]very man has a right to punish the offender and be executioner of the law of nature."²²⁸ There can be no doubt that this theory would have reached the American Founding generation; Blackstone, Vattel, English "country" theorists like Trenchard and Gordon, and countless others parroted Locke's views.²²⁹ The law of nations theorists then translated this account of

224. WILLIAM BLACKSTONE, 4 COMMENTARIES *66; 2 VATTEL, *supra* note 37, § 324, at 413; Howard, *supra* note 213, at 187. See generally BOBBITT, *supra* note 191, at 518, 530–33 (emphasizing that for Vattel, Wolff, and Grotius, the state's right of self-preservation was exercised in tandem with a duty to seek cooperation and the common good within the society of states).

225. See, e.g., 1 VATTEL, *supra* note 37, § 13.

226. LOCKE, *supra* note 212, § 7.

227. *Id.* § 8.

228. *Id.* (typeface altered); see also *id.* § 13 ("[I]n the state of nature every one has the executive power of the law of nature . . .").

229. WILLIAM BLACKSTONE, 4 COMMENTARIES *7 ("[T]he right of punishing crimes against the law of nature . . . is, in a state of mere nature, vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them into execution."); 1 VATTEL, *supra* note 37, § 169, at 137–38 ("The right of punishing, which in a state of nature belonged to each individual, is founded on the right of safety. Every man has therefore a right to preserve himself from injury, and by force to provide for his own security, against those who unjustly attack him. For this purpose he may inflict a punishment on him who

how law was enforced from the individual state of nature to the international plane.²³⁰ States enforced the law of nations by punishing other states which offended against them. Indeed, it was precisely this power to punish other states for violating international law that made international relations lawful in any sense of the word. As a Boston preacher put it, in discussing the power to punish violations of the law of nations, “[f]ighting may be as necessary as Laws themselves; for what signify Laws without Sanctions.”²³¹ The power to punish was therefore a plenary sovereign power, not controlled or limited by anyone other than the individual or state’s self-interest and understanding of the (minimal) requirements of the law of nature or nations.²³² International law was “law” not because some body or institution bound states to comply with it; the law would be enforced—and therefore truly counted as law—only insofar as independent sovereign states decided to enforce it against each other through coercive punishment.

5. *The Right to Punish as State Architecture.*—A final reason that a dual individual–state understanding of the Law of Nations Clause would have made sense to eighteenth-century readers of the Constitution is that the dual individual–state right to punish offenses was seen as a foundational part of the creation of the law-enforcement and war powers of government. As they self-consciously went about reading history and political theory in order to craft a “more perfect Union,” the American Founding generation would no doubt have come across these theories.

According to Locke, when individuals left the state of nature by forming societies and governments they necessarily resigned and transferred to the common sovereign their natural right to punish offenses against the law of nature.²³³ Locke’s theory of the transfer of the natural right of punishment

has done him an injury.”); *see also, e.g.*, 2 CHARLES MOLLOY, A TREATISE OF AFFAIRS MARITIME, AND OF COMMERCE 337–38 (9th ed., n.p. 1769); Cato’s Letter No. 11, *supra* note 220, at 87.

230. *See, e.g.*, 1 VATTEL, *supra* note 37, Prelim § 5, at 3 (“[T]he nation has also the same laws that nature has given to men”); *James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania*, GEN. ADVERTISER, Mar. 15–16, 1791, reprinted in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 150 (“[E]very Community hath a Right, by the Rule of Self-defence, to inflict that Punishment upon [the pirate], which every Individual would, in a State of Nature, have been otherwise entitled to do”).

231. BYLES, *supra* note 50, at 28.

232. *See generally* TUCK, *supra* note 185, at 228 (noting that Grotius’s theory of an individual and international state of nature “inhabited by jurally minimalist creatures who were to a greater or lesser extent at war with one another” had become “the characteristic form of a seventeenth- or eighteenth-century political theory”); *id.* at 6 (noting general agreement among seventeenth- and eighteenth-century natural law theorists that individuals in the state of nature are “defined in minimal terms – that is, possessing an extremely narrow set of rights and duties”).

233. LOCKE, *supra* note 212, § 87 (“[T]here, and there only is *political society* where every one of the members has quitted his natural power [to ‘punish the offences’], resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded, the community comes to be umpire by settled standing rules, indifferent and the same to all parties Those who are united into one body and have a common established law and judicature

into the enforcement machinery of the state can be seen in Blackstone, Vattel, Rutherford, English country theorists, and other eighteenth-century thinkers, and is prefigured in the earlier work of Grotius. As Vattel wrote, “when men united in society, that society was from thence forward intrusted with the power of providing for the safety of its members, and for that purpose every one resigned up to it the right of punishment.”²³⁴ Again, these were not elite and esoteric theories. Preachers, pamphleteers, and other popular writers spoke of them frequently.²³⁵

The theorists explained the origins of internal law enforcement and external war powers of government as being based on the transfer of each member of society's natural right to punish and engage in self-defense. According to Blackstone, for example, the state's internal criminal justice legislative and judicial authority derives from the transfer of the individuals' natural right to punish, as does the state's external power of punishing

to appeal to, with authority to decide controversies between them and punish offenders, are in *civil society* one with another”; *id.* § 88 (“[E]very man who has entered into civil society and is become a member of any commonwealth has thereby quitted his power to punish offenses against the law of *nature* in prosecution of his own private judgment”).

234. 1 VATTEL, *supra* note 37, § 169, at 138; *see also* WILLIAM BLACKSTONE, 4 COMMENTARIES *7–8 (“Whatever power, therefore, individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone, who bears the sword of justice by the consent of the whole community.”); 2 GROTIUS, *supra* note 189, bk. 2, ch. 20, § 40, at 504–05 (“For liberty to serve the interests of human society through punishments, which originally, as we have said, rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others but in so far as they are themselves subject to no one.”); 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW, bk. II, ch. 3, at 46 (Cambridge, J. Archdeacon 1756) (“All mankind in the liberty of nature have a promiscuous right of punishing criminal actions. But those, who are united in a civil society, have agreed to put themselves under the conduct of the common understanding, to have their duties regulated, and their rights adjusted by the legislative power of that society.”).

235. Cato's Letter No. 11, *supra* note 220, at 87 (“Every man in the state of nature had a right to repel injuries, and to revenge them; that is, he had a right to punish the authors of those injuries Seeing therefore that this right was inherent in every private man, it is absurd to suppose that national legislatures, to whom every man's private power is committed, have not the same right”); Letter to the Editor, BOSTON GAZETTE, Aug. 1, 1763, *reprinted in* AMERICAN POLITICAL WRITING, *supra* note 213, at 35 (“[T]he great Distinction between Savage Nations and polite ones lies in this, that among the former, every Individual is his own Judge and his own Executioner; but among the latter, all Pretensions to Judgment and Punishment are resigned to Tribunals erected by the Public”); William Whiting, An Address to the Inhabitants of Berkshire County, Mass. (1778), *in* AMERICAN POLITICAL WRITING, *supra* note 213, at 461, 466 (observing that whereas “[i]n a state of nature, each individual has a right . . . to judge and to punish the person who shall make any assault or encroachment . . . upon his person or property,” when “men enter into a state of society” they wholly surrender to society “the right of judging and punishing injuries done to any of the individuals”); Joseph Lathrop, The Reformer No. IV (1786), *reprinted in* AMERICAN POLITICAL WRITING, *supra* note 213, at 671 (“Mankind, by entering into society and coming under government, put the protection of their rights and the redress of their wrongs out of their own hands, and instead of defending or recovering their rights by private force, they agree to submit to the more impartial decision of the society, or of those whom the society has constituted judges.”).

offenses committed by foreigners against itself and its members.²³⁶ This comes directly from Locke, who taught that, internally, the right of punishing violations of law was transferred to the sovereign and became its “legislative” and “executive” powers; whereas the right of executing the laws by punishing violations with regard to “all persons and communities without the common-wealth”—foreign states and persons—is called the “federative” power,²³⁷ or “the power of war and peace.”²³⁸ Although they used somewhat different terminology, Vattel, Rutherford, and others agreed with Locke’s concepts.²³⁹

C. *The Critical Period*

By the mid-1780s, the weakness of the government established by the Articles of Confederation became apparent and American statesmen began to think about constitutional reform. The widely-lamented problems with American government during the postwar Articles period—often called the critical period—are an obvious resource for understanding the solution created at the Philadelphia Convention in 1787. It is a signal weakness of the individual conception of the Law of Nations Clause that its implicit diagnosis of the problems of the critical period leading to the Clause do not sit comfortably with the work of professional historians of the critical period.

236. WILLIAM BLACKSTONE, 1 COMMENTARIES *249 (“[T]he king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power.”); 4 *id.* *8 (regarding transfer of internal coercive powers).

237. LOCKE, *supra* note 212, §§ 145–47.

238. *Id.* § 146. When men give up their “single power of punishing” in the state of nature to a common sovereign, “in this we have the original right of both the legislative and executive power, as well as of the governments and societies themselves.” *Id.* § 127. More specifically, the legislative power of the commonwealth comes from men’s “power . . . of doing whatsoever he thought fit for the preservation of himself and the rest of mankind,” *id.* § 129, while the executive power of the commonwealth comes from each man’s “power of punishing” which he used “in the execution of the law of nature,” *id.* § 130.

239. *See, e.g.*, 2 RUTHERFORTH, *supra* note 234, bk. II, ch. 3, at 50 (discussing how, in regard to other states, the “external” “executive power” is employed “in preventing such injuries from being done, or in procuring reparation or in inflicting punishment for them, after they are done”); *id.* at 54 (“The second branch of executive power, which is called external executive power, or . . . military power, is the power of acting with the common strength or joyn[t] force of the society to guard against such injuries, as threaten it from without; to obtain amends for the damages arising from such injuries; or to inflict punishment upon the authors and abettors of them.”); 1 VATTEL, *supra* note 37, § 169, at 137–38 (“The right of punishing, which in a state of nature belonged to each individual, is founded on the right of safety. Every man has therefore a right to preserve himself from injury, and by force to provide for his own security, against those who unjustly attack him. For this purpose he may inflict a punishment on him who has done him an injury. . . . Now when men united in society, that society was from thence forwarded intrusted with the power of providing for the safety of its members, and for that purpose every one resigned up to it the right of punishment. . . . Hence arises the right of the sword, which belongs to a nation, or to its conductor. When he uses it against another nation, he makes war; when he exerts it in punishing a particular person, he exercises vindictive justice.”).

There is consensus among historians that problems concerning international law under the Articles of Confederation were very important factors in motivating the creation of a stronger national government in 1787. But as noted above, leading works of American historians about American foreign policy in the 1780s and the events leading to the Constitution ignore Longchamps.²⁴⁰ Instead of individual offenses against the law of nations, historians emphasize problems with American states and foreign states concerning international law. For example, historians see as profoundly important the fact that American state legislatures and courts repeatedly violated treaties and the law of nations, in particular the 1783 Treaty of Paris with Great Britain, by discriminating against British subjects and American loyalists, rendering the United States unable to force British compliance with the treaty.²⁴¹ The Articles of Confederation did not directly give Congress power to enforce treaties domestically because there was no national court system or other enforcement system; the Articles also did not expressly make treaties the law of the several states and enforceable by state courts.²⁴² These were seen as major defects with the Articles system.²⁴³ Other problems commonly cited by historians include U.S. states pursuing foreign and Indian treaty negotiations independent of the national government,²⁴⁴ the inability of the United States to formulate national commercial policy through international treaties in order to extract trade concessions from France and Great Britain,²⁴⁵ the inability of the United States to negotiate a treaty with Spain giving the U.S. access to the Mississippi River²⁴⁶ or to stop piracy

240. See *supra* note 168.

241. See, e.g., HENDRICKSON, *supra* note 168, at 200, 213–14; KAPLAN, *supra* note 164, at 164–65; LANG, *supra* note 168, at 74; McDONALD, NOVUS, *supra* note 40, at 151–52, 155–56; MORRIS, *supra* note 168, at 65–66, 143; 1 BRADFORD PERKINS, CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS, 1776–1865, at 56 (1993); RAKOVE, BEGINNINGS, *supra* note 168, at 342–43; RAKOVE, ORIGINAL MEANINGS, *supra* note 168, at 27; WOOD, *supra* note 40, at 457–59; VARG, *supra* note 168, at 59–60. Professor Stephens's article on the Law of Nations Clause notes that problems with state governments violating treaties during the critical period were an important motivator of constitutional reform. See Stephens, *supra* note 15, at 466–67.

242. See, e.g., LANG, *supra* note 168, at 74; MARKS, *supra* note 168, at 3; McDONALD, NOVUS, *supra* note 40, at 155–56; MORRIS, *supra* note 168, at 65–66, 143; 1 PERKINS, *supra* note 241, at 56; RAKOVE, BEGINNINGS, *supra* note 168, at 343–44; RAKOVE, ORIGINAL MEANINGS, *supra* note 168, at 27; WOOD, *supra* note 40, at 457–59; VARG, *supra* note 168, at 59–60.

243. See, e.g., LANG, *supra* note 168, at 75; MARKS, *supra* note 168, at 3; ONUF & ONUF, *supra* note 40, at 126; 1 PERKINS, *supra* note 241, at 58; RAKOVE, BEGINNINGS, *supra* note 168, at 343–44; RAKOVE, ORIGINAL MEANINGS, *supra* note 168, at 27; VARG, *supra* note 168, at 60.

244. See, e.g., HENDRICKSON, *supra* note 168, at 213; KAPLAN, *supra* note 164, at 166; MARKS, *supra* note 168, at 3–4.

245. See, e.g., HENDRICKSON, *supra* note 168, at 200–04; KAPLAN, *supra* note 164, at 160–63; LANG, *supra* note 168, at 75–77; MARKS, *supra* note 168, at 52–95; MORRIS, *supra* note 168, at 139, 149–52, 194; ONUF & ONUF, *supra* note 40, at 94, 117–22; 1 PERKINS, *supra* note 241, at 56–58; RAKOVE, BEGINNINGS, *supra* note 168, at 290, 342–52; VARG, *supra* note 168, at 51–58.

246. See, e.g., KAPLAN, *supra* note 164, at 168–74; LANG, *supra* note 168, at 78–80; ONUF & ONUF, *supra* note 40, at 123–25; RAKOVE, BEGINNINGS, *supra* note 168, at 342, 349–50, 353–54; RAKOVE, ORIGINAL MEANINGS, *supra* note 168, at 27; VARG, *supra* note 168, at 64–65.

against American shipping by the North African Barbary states;²⁴⁷ and the fact that European governments did not trust the United States to be able to enforce treaties against the American states and therefore did not look upon the U.S. as a reliable negotiating partner or ally.²⁴⁸ In addition, during the war some U.S. states had refused to abide by national mandates regarding prize and admiralty jurisdiction.²⁴⁹ In sum, problems relating to international law loomed large during the critical period. But these major problems were caused by and related to foreign states and American states, not individual persons.

D. The Philadelphia Convention and the Text of the Constitution

Once it is understood that punishing offenses against the law of nations is a concept that applies to states as much as to individuals, one is better positioned to interpret evidence of the meaning of the Law of Nations Clause from the Philadelphia Convention, the state ratification debates, and the text of the Articles of Confederation and parts of the Constitution besides the Law of Nations Clause. This subpart argues that, because there is evidence supporting both the individual conception and the state-to-state conception, the dual conception is the most faithful to text and Founding-era understandings.

1. *Drafting History of the Law of Nations Clause.*—The story of drafting the Law of Nations Clause could be said to have started at least a year before the Philadelphia Convention of 1787. Reformers at the national level had long been trying to remedy defects in the Articles of Confederation. A series of important amendments were proposed—without success—in 1786.²⁵⁰ One would have given the Continental Congress power to create a national court to hear appeals from the state courts of cases involving the law of nations.²⁵¹ The idea that the law of nations would be handled by the national government through a national court carried over to the Philadelphia Convention of 1787. Not one of the four major “plans” were introduced at the convention—the Randolph or Virginia plan (largely drafted by Madison), the Paterson or New Jersey plan, the Hamilton plan, or the Pinckney plan—provided an express *congressional* power to deal with the law of nations.²⁵²

247. JENSEN, *supra* note 168, at 211–13, 256; MARKS, *supra* note 168, at 36–45; MORRIS, *supra* note 168, at 141, 161, 217–19.

248. See, e.g., HENDRICKSON, *supra* note 168, at 204; LANG, *supra* note 168, at 76–77; ONUF & ONUF, *supra* note 40, at 102; 1 PERKINS, *supra* note 241, at 56–57.

249. See, e.g., MORRIS, *supra* note 168, at 67–71.

250. 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1786, at 494–98 (John C. Fitzpatrick ed., 1934).

251. *Id.* at 497–98.

252. Although there were no express law of nations powers for the legislature, such powers might have been implicit in broad, general provisions. For instance, the Virginia plan gave the legislature power to act “in all cases to which the separate States are incompetent, or in which the

But each of the plans proposed a federal Judiciary with jurisdiction over subject areas that would likely involve the law of nations. One or possibly two plans specifically mentioned the law of nations in providing for the Judiciary.²⁵³ Others referred to subject areas that all would have understood to implicate the law of nations (piracy, rights of ambassadors, interpretation of treaties, captures, and the rights of foreigners).²⁵⁴ The leading plan, presented by Edmund Randolph of Virginia, proposed giving federal courts jurisdiction over “questions which may involve the national peace and harmony.”²⁵⁵ These matters stood from May until August 1787.

Commentators who adopt the individual conception of the Law of Nations Clause point to the influential speech by Randolph at the opening of the Philadelphia Convention as evidence as to the Clause’s meaning.²⁵⁶ These commentators focus on Randolph’s lament that “[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender.”²⁵⁷ But, like other evidence presented by individualist commentators, Randolph’s speech hints at a state-to-state conception as well. Reading Randolph’s entire statement in context, we see that he was lamenting violations of the law of nations by individuals *and by American states*. He even used the language of offending and punishing to refer to enforcing the law of nations against a U.S. state.²⁵⁸ Moreover, as noted above, Randolph’s Virginia Plan did not propose any provision to give Congress legislative authority over law of nations offenses. It simply proposed creating a court system. This makes sense if one thinks that

harmony of the United States may be interrupted by the exercise of individual Legislation.” 1 FARRAND, RECORDS, *supra* note 213, at 21.

253. Pinckney’s plan proposed a Supreme Court with appellate jurisdiction over state court decisions “in all Causes wherein Questions shall arise . . . on the Law of Nations.” 2 FARRAND, RECORDS, *supra* note 213, at 136. And “although the record is not entirely clear, there is evidence suggesting that the New Jersey Plan would have given the federal judiciary the authority to hear, on appeal, all cases ‘which may arise . . . on the Law of Nations, or general commercial or marine Laws.’” Bradley, *Alien Tort*, *supra* note 61, at 598.

254. One variant memorialization of the New Jersey plan proposed a federal Judiciary be established to consist of a supreme Tribunal . . . [which] shall have authority to hear & determine . . . by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue.

1 FARRAND, RECORDS, *supra* note 213, at 244. Hamilton’s plan proposed a “Court to have original jurisdiction in all causes of capture, and an appellative jurisdiction in all causes in which the revenues of the general Government or the citizens of foreign nations are concerned.” *Id.* at 292.

255. *Id.* at 22.

256. See, e.g., Siegal, *supra* note 19, at 875.

257. 1 FARRAND, RECORDS, *supra* note 213, at 25; see Stephens, *supra* note 15, at 471 (emphasizing this statement).

258. 1 FARRAND, RECORDS, *supra* note 213, at 24–25 (statement of Randolph) (“If a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the Continental Congress] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power.”).

Randolph and others, having internalized the lesson of *Longchamps*, believed that nonstatutory prosecutions were a permissible way to handle individual offenses.

Ultimately, something close to the Law of Nations Clause emerged at the Philadelphia Convention in the Committee of Detail. Working papers of the committee show draft language in Randolph's handwriting proposing that the Legislature have power "[t]o provide tribunals and punishment for mere offences against the law of nations."²⁵⁹ This obviously suggests a court system approach to handling law of nations offenses. But the use of the adjective "mere" is somewhat puzzling. We can discount the possibility that it was used to mean unimportant, because why then would a provision of the Constitution be drafted to cover such offenses. In the eighteenth century, the word "mere" was sometimes used to mean pure and undiluted, referring to wine, for example.²⁶⁰ If Randolph intended this meaning, his metaphorical use could perhaps sound in federalism concerns, specifying that core offenses against the law of nations would be prosecuted in federal court but that offenses which shaded into ordinary crimes would remain the province of the states. Even more intriguing, "inere" also had a specifically legal usage at that time: "Done, performed, or exercised by a person or persons specified without the help of anyone else; sole."²⁶¹ If this was the meaning, we must speculate about why only offenses committed by an individual acting alone would be prosecutable in federal court. It seems unlikely Randolph meant to excuse principals when they acted with accessories or co-conspirators. Perhaps Randolph's phrase was intended to exclude offenses committed by individuals at the instigation or direction of foreign states, because these would be punished at the international level by diplomacy or military force. This possibility (admittedly quite speculative) could suggest that the drafters of what became the Law of Nations Clause were aware of the multiple significations of the terms they used.

Whatever else it shows, the Committee of Detail's draft Law of Nations Clause, read in conjunction with the 1786 reform proposal and the original plans at the Philadelphia Convention, confirms that the prevailing idea about how to handle law of nations problems had been to simply institute a national court. This cuts in favor of an individual conception of what became the Law of Nations Clause. Certainly federal courts could not be used to implement the kind of international coercion suggested by the state-to-state conception of the Clause, although they could implement nonviolent "punishment" against wayward American states. But, on the other hand, the fact that the narrow court-only language was rejected in favor of much

259. 2 *id.* at 143; *see also id.* at 137 n.6 (editor's note stating that paper was in Randolph's handwriting with edits by Rutledge).

260. *See* 9 OXFORD ENGLISH DICTIONARY 628, definition 1.a (2d ed. 1989).

261. *Id.* definition 2.

broader language giving *Congress* power to “punish” cuts in favor of a broader understanding of the Law of Nations Clause.

After “mere” was dropped and other wording changed—for reasons we do not know—the draft Law of Nations Clause reported by the Committee of Detail was paired with the Piracies and Felonies Clause and the power to punish counterfeiting. It provided that Congress shall have power to “declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations.”²⁶² Subsequent discussion mostly focused on the Piracies and Felonies Clause.²⁶³ After the Counterfeiting Clause was moved elsewhere, the language provided that Congress shall have power to “define and punish” piracies and felonies on the seas, but only to “punish” law of nations offenses.²⁶⁴

The difference in wording led to the only recorded debate at Philadelphia specifically concerning the Law of Nations Clause. Gouverneur Morris moved to delete the second “punish” so that Congress could also “define and punish” law of nations offenses.²⁶⁵ James Wilson opposed a change, stating that “[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[] that would make us ridiculous.”²⁶⁶ Morris won the debate, by a vote of 6–5, with the argument 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.”²⁶⁷ Morris’s desire for prior notice and clear definition sounds in the due process and legality principle concerns that we still have today about vague criminal statutes. His comments therefore support the individual conception of the Clause. But in light of the elite opinion approving of common law prosecutions for law of nations offenses, it seems less certain that Morris necessarily assumed the individual conception of the Law of Nations Clause. He might instead have meant that Congress should not be bound by anyone else’s view but its own as to whether an offense had been committed by another state that merited punishment by the United States. Wilson’s comment also provides support for a state-to-state conception of the Clause, for it is far from clear why Wilson would be concerned about ridicule and the appearance of arrogance if all that was contemplated by the Clause was domestic penal legislation. It seems more likely that foreign observers would notice and have reason to ridicule American

262. 2 FARRAND, RECORDS, *supra* note 213, at 181–82.

263. *See id.* at 315 (recording a debate over the propriety of granting Congress the power to declare the punishments for piracies and felonies).

264. *Id.* at 595.

265. *Id.* at 614.

266. *Id.* at 615.

267. *Id.*

arrogance if the United States purported to define and punish law of nations offenses against foreign states on the international plane.

2. *Congress's Other Powers to Punish.*—The breadth of the language ultimately adopted in the Law of Nations Clause can be seen by the contrast with another Article I, Section 8 power of Congress to punish. In Clause 6, Congress is given power to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”²⁶⁸ A similar use of language is seen in Congress’s power in Article III to “declare the Punishment of Treason.”²⁶⁹ The language in these clauses seems a much more natural way to refer to a congressional power to authorize punishment of individuals through judicial process. Conversely, the Law of Nations Clause gives an unmediated and direct power to Congress itself to “punish.” This difference in wording supports seeing the Law of Nations Clause as having a state-to-state dimension.

On the other hand, the individual-only conception of the Law of Nations Clause is buttressed by the fact that the Clause is paired with another that sounds in penal law and courts of justice: the power of Congress to “define and punish Piracies and Felonies committed on the high Seas.”²⁷⁰ An individual conception of the Piracies and Felonies Clause—seeing it as power to constitute tribunals, appoint prosecutors, define individual crimes, or affix punishments—is very plausible in light of the history of attempts to reform the Articles of Confederation. The Articles gave the Continental Congress the power of “appointing courts for the trial of piracies and felonies committed on the high seas.”²⁷¹ Like Congress’s power under the 1787 Constitution to “provide for the Punishment of counterfeiting,” this language in the Articles seems a natural way to describe a legislative power to allow prosecutions of individuals by the Executive and courts. Congress first exercised its power under the Articles of “appointing courts” not by creating a court system but by stipulating that piracies and felonies would be tried by existing state judicial officers in a certain manner.²⁷² There was dissatisfaction because this ordinance necessarily had “a different operation in some of the States,” and therefore offended the notion that “similar crimes should be punished in a similar manner.”²⁷³ John Jay, the Secretary of Foreign Affairs, reported that

268. U.S. CONST. art. I, § 8, cl. 6.

269. *Id.* art. III, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.”).

270. *Id.* art. I, § 8, cl. 10.

271. ARTICLES OF CONFEDERATION art. IX, § 1.

272. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1781, at 354–56 (Gaillard Hunt ed., 1912).

273. 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1785, *supra* note 156, at 682.

the Power given to Congress by the Confederation, is not to declare what is or shall be Felony or Piracy, nor to declare what Shall be the Punishment of either, but merely to *appoint Courts for the Trial of Piracies and Felonies committed on the high Seas*. Whence it seems to follow that the wise End in View viz: The rendering both the Trial and Punishment of those Offences similar in all the States, cannot be accomplished by an Ordinance of Congress in virtue of that Article in the Confederation.²⁷⁴

Jay's report led to a proposed amendment to the Articles of Confederation in 1786, which would have given the Continental Congress "the sole and exclusive power of declaring . . . what Offences shall be deemed piracy or felony on the high Seas and to annex suitable punishments to all the Offences aforesaid respectively."²⁷⁵

In light of this, the Constitution's grant of power to Congress to "define and punish piracies and felonies committed on the high seas" would seem to be a power to define the elements of crimes, constitute courts to try criminals, and affix punishments to result from conviction.²⁷⁶ From this one might infer that the next clause—the Law of Nations Clause—which is preceded by the same "define and punish" language, has a similar import. This argument is compelling, but some caution is required. First, the Law of Nations Clause and the Piracies and Felonies Clause are textually distinct and separated by a comma. They arrived in the same place in the final Constitution by way of separate drafting histories. Moreover, the final language of the Piracies and Felonies Clause is also susceptible of broader readings than simply and only the individual penal-judicial interpretation. For one thing, the Constitution gives Congress power to "punish" piracy, a power which, especially given eighteenth-century understandings of the meaning of that word, would likely have seemed broader than the proposed amendment to the Articles, which had simply recommended that Congress have power to "annex suitable punishments" to piracy. A broader, more militaristic reading of the Piracies and Felonies Clause could have been suggested to an eighteenth-century audience by the fact that pirates were frequently suppressed not with indictments and trials but with violence.²⁷⁷

274. *Id.* at 797.

275. 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1786, *supra* note 250, at 494–98 (proposed Article 19).

276. See THE FEDERALIST NO. 42, at 265–66 (James Madison) (Clinton Rossiter ed., 1961) ("The provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offenses.").

277. And even when pirates were captured instead of killed outright, "they may be immediately executed by the Law of Nature." 2 MOLLOY, *supra* note 229, at 338; see also The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 2, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 140 (remarks of Patrick Henry) ("Those who declare war against the human race may be struck out of existence as soon as they are apprehended. . . . A pirate, an outlaw, or a common enemy to all mankind, may be put to death at any time. It is justified by the laws of nature and nations.").

The Articles of Confederation had expressly contemplated the use of “vessels of war” to deal with pirates.²⁷⁸ And John Jay’s report had reminded Congress that “Piracy is War against all mankind, which is the highest Violation of the Laws of Nations,” and that the “Conduct of the United States towards all their Enemies in open War against them, (whether Nations or Individuals) is to be regulated by their fœderal Government.”²⁷⁹ Jay’s language nicely invokes the idea that states went to war to punish violations of the law of nations. In sum, the placement of the Piracies and Felonies Clause next to the Law of Nations Clause provides support for the individual conception of the Law of Nations Clause. But a broader, dual conception of the Piracies and Felonies Clause is also possible, giving Congress both judicial–penal and war-related powers, and therefore supporting a dual understanding of the Law of Nations Clause. This inference is supported by the textual distinction between Congress’s punishing power over counterfeiting and treason versus piracies, felonies, and the law of nations.

3. *Textual and Structural Objections to the State-to-State Conception.*—If the Law of Nations Clause is, at least in part, a coercive foreign policy power of Congress, one might think that it would have been expressly denied to the U.S. states in Article I, Section 10 of the Constitution. This section bars states—either absolutely or with congressional power to grant an exception—from making treaties, granting letters of marque and reprisal, making trade regulations, “keep[ing] Troops, or Ships of War in time of Peace,” and “engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”²⁸⁰ This list obviously tracks the major congressional foreign policy powers, as well as the President and Senate’s treaty power. The failure to deny to states the power to punish offenses against the law of nations might suggest that it is not a coercive foreign policy power. There are at least two responses, however. First, the language used to bar states’ involvement in armed conflict—“No State shall, without the Consent of Congress, . . . engage in War”—is textually much broader than the congressional power to “declare War.” So a coercive law of nations power for use against foreign nations, granted to Congress in Article I, Section 8, might be denied to the states by this “engage in War” language in Section 10. Second, Section 10 provides that “No State shall, without Consent of Congress, . . . keep Troops, or Ships of War in time of Peace.”²⁸¹ Assuming that the Law of Nations Clause empowers Congress to use coercion and force short of war, any punishing of offenses by Congress would

278. ARTICLES OF CONFEDERATION art. VI, § 5; see also ALFRED P. RUBIN, THE LAW OF PIRACY 122 (1988) (stating that under the Articles of Confederation, piracy “was treated as both a kind of public war and special sort of common crime”).

279. 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1785, *supra* note 156, at 797.

280. U.S. CONST. art. I, § 10, cl. 3.

281. *Id.*

likely take place “in time of Peace.” In time of peace, U.S. states would—according to Section 10—only be allowed to possess citizen militias, not regular soldiers or ships of war; the states would thus lack during peacetime the capacity to project force externally against an offending foreign state.

Another textual objection to finding a state-to-state component to the Law of Nations Clause relates to the transition from the Articles of Confederation to the new Constitution. It was generally understood that, during the Articles period and by virtue of the Articles themselves, the Continental Congress exercised the national coercive powers, up to and including war.²⁸² Why then, if the Law of Nations Clause does have a state-to-state coercive component, do the Articles not mention a power to punish offences against the law of nations? One possible response is that there is evidence that the Continental Congress believed it possessed war powers relating to the law of nations, notwithstanding the lack of an obvious textual hook.²⁸³ Second, the Articles may have textually referenced a Law of Nations Clause-type power under a more general textual provision. Under the Articles, “[t]he united states, in congress assembled,” had “the sole and exclusive right and power of determining on peace and war.”²⁸⁴ This broad power must have included some implied lesser war or coercive powers. Under the Articles, Congress was expressly given the power of “granting letters of marque and reprisal in times of peace.”²⁸⁵ The power to do so during wartime must have been included with “the sole and exclusive right and power of determining on peace and war”²⁸⁶ because it makes no sense to think that Congress would only have power to grant letters of marque and reprisal during peace. In spelling out congressional powers in the U.S. Constitution, the power to issue letters of marque and reprisal during war was described more explicitly because the relevant clause in the Constitution does not limit the

282. See KEITH L. DOUGHERTY, *COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION* 25–26 (2001) (“In simplest terms Congress could be considered the decision-making body at the center of a national war machine.”).

283. See, e.g., 13 *JOURNALS OF THE CONTINENTAL CONGRESS, 1779*, at 134 (Worthington Chauncey Ford ed., 1909) (“That Congress is by these United States Invested with the supreme Sovereign Power of War and Peace. That the power of executing the Law of Nations is Essential to the Sovereign Supreme Power of War and Peacc.”). See generally 1 KENT, *COMMENTARIES, supra* note 41, at 1 (“During the war of the American revolution, congress claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, ‘according to the general usages of Europe.’ By this law we are to understand that code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other.” (footnotes omitted)). On the other hand, there is also evidence that the Continental Congress did not believe it had power to restrain violations of the law of nations by individuals or U.S. states. See Michael A. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Powers*, 42 *WM. & MARY L. REV.* 379, 420–21 (2000).

284. ARTICLES OF CONFEDERATION art. IX.

285. *Id.*

286. Cf. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1170, at 62–63 (n.p. 1833) (“The power to declare war would of itself carry the incidental power to grant letters of marque and reprisal, and make rules concerning captures.”).

power to peacetime.²⁸⁷ So at least one lesser war power of Congress was implied within “the sole and exclusive right and power of determining on peace and war” of the Articles but was then spelled out by the Constitution. This also could have happened with the Law of Nations Clause power.

It might be objected that reading the Law of Nations Clause to allow the “punishment” of U.S. states *qua* states is inconsistent with a deep structural feature of the U.S. Constitution, namely its rejection of coercion of states in favor of judicial coercion of individuals through the Supremacy Clause. As *The Federalist* number 20 put it,

[t]he important truth . . . is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity, by substituting *violence* in place of the mild and salutary *coercion* of the *magistracy*.²⁸⁸

Because of the constitutional aversion to the use of coercion against state governments in their corporate capacity, “punishment” of U.S. states through the Law of Nations Clause would certainly occur primarily through nonviolent and nondiscriminatory means, namely the enactment of general laws enforceable against individuals. But it would be a mistake to read the Constitution as somehow embodying a principle that the targeting of particular state governments or use of national coercion against them is forbidden in all circumstances.²⁸⁹ Reading the Law of Nations Clause to

287. See U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . [t]o . . . grant letters of Marque and Reprisal . . .”).

288. THE FEDERALIST NO. 20, at 138 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that “[t]he great and radical vice” of the Articles of Confederation, remedied in the new Constitution, was “the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist” (typeface altered)). Early on, the Philadelphia Convention rejected resort to force against state governments as a primary mechanism for maintaining the supremacy of federal law. The Virginia Plan initially provided that “the National Legislature ought to be inpowered . . . to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.” 1 FARRAND, RECORDS, *supra* note 213, at 21. Similarly, the Paterson–New Jersey plan provided that “[t]he Acts Treaties &c &c to be paramount to State Laws and when any State or body of men oppose Treaties or general Laws, the Executive to call forth the force of the Union to enforce the Treaty or Law.” *Id.* at 247. After forceful arguments against primary resort to coercion against state governments, see, e.g., *id.* at 47 (statement of Madison); *id.* at 34 (statement of Mason), these proposals were modified to omit that element. For a succinct discussion of this debate, see LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 141–42 (1995).

289. The Constitution seems to contemplate that state governments could act in ways that undermine the foundations of the union and require federal correction. For example, Article IV provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government,” U.S. CONST. art. IV, § 4, and therefore contemplates federal action against unrepudican state governments, see THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) (suggesting that this clause allows “the interposition of the general government” in the event of unrepudican “experiments” produced by “the caprice of particular States, by the

allow the “punishment” of U.S. states is therefore not inconsistent with the overall constitutional design.

Another possible objection to the state-to-state conception of the Law of Nations Clause is that the Constitution may have addressed law of nations violations by U.S. states and foreign states in a provision other than the Law of Nations Clause. For example, there is substantial evidence that the Founders envisioned original jurisdiction in the U.S. Supreme Court over suits by foreign states against U.S. states for their violations of treaties.²⁹⁰ The same solution could in theory be used for violations of the law of nations by U.S. states. But, as explained below,²⁹¹ any method of applying the law of nations against U.S. state governments that circumvents the Congress would likely not have been tolerated by the Founders. It seems more consistent with broader constitutional values to think that “punishing” wayward U.S. states would take place first through the domestic legislative process in which the President, House, and Senate can each exercise a veto, with courts later enforcing a codified version of the law of nations against U.S. states.

E. The Law of Nations Clause During the Ratification Debates

There was very little discussion of the Law of Nations Clause in the ratification debates in the states during late 1787 and 1788. The evidence supports both the individual conception and a state-to-state conception of the Clause, suggesting that a dual understanding of it is preferable.

In essay number 42 of *The Federalist*, Madison referred to the Law of Nations Clause as one of the “class of powers lodged in the general government . . . which regulate the intercourse with foreign nations.”²⁹² This appears to view the Clause as one concerned with direct state-to-state contact (intercourse), rather than simply legislating regarding the domestic behavior

ambition of enterprising leaders, or by the intrigues and influence of foreign powers”). In addition, the Constitution forbids state governments from doing an array of dangerous things without congressional approval, including “engag[ing] in War” or “enter[ing] into any Agreement or Compact with . . . a foreign Power.” U.S. CONST. art. I, § 10, cl. 3. It seems most likely that the Constitution grants Congress ample authority to forcibly restrain state governments that violate these rules through Congress’s Necessary and Proper power and its express authority to “call[] forth the Militia to execute the Laws of the Union [and] suppress Insurrections.” *Id.* art. I, § 8, cl. 15. Increasing federal power to quell or prevent internal violence was a leading purpose of the Constitution. See THE FEDERALIST NO. 3 (John Jay), *supra* note 208, at 42 (arguing in favor of the Constitution because it would provide “security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes”); THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that one of the “principal purposes” of the proposed Constitution was “the preservation of the public peace, as well against internal convulsions as external attacks”).

290. See Thomas H. Lee, *The Supreme Court as a Quasi-international Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765 (2004).

291. See *infra* section IV(B)(2).

292. THE FEDERALIST NO. 42 (James Madison), *supra* note 276, at 264.

of Americans which might impact the foreign relations of the United States. Then Madison wrote:

The power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations belongs with equal propriety to the general government, and is a still greater improvement on the Articles of Confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations.²⁹³

It is entirely possible that Madison was here describing a fear that states might not adequately handle future incidents like *Longchamps* and therefore endorsing an individualist reading of the Clause. But his statement is vague and, notably, his reference to “indiscreet members” obviously refers to American states.²⁹⁴ So he might have been referring to offenses committed by states, not—or not only—individuals.²⁹⁵ This would be consistent with Madison’s important writings just prior to the Philadelphia Convention, in which he lamented violations of the law of nations by state legislatures but never mentioned any individual violations.²⁹⁶ Nevertheless, Madison’s statement that the Articles of Confederation “contain no provision for the case of offenses against the law of nations” seems to suggest that, in this essay at least, he did not view the Clause as applying to international coercion directed against foreign states. But this might be wrong, because the terms of the Articles effectively deny to the Continental Congress any power not “expressly” granted.²⁹⁷ So Madison might only have meant that the Articles contain no *express* provision covering offenses against the law of nations, which is equally true whether one understands the law of nations power in the individual, state-to-state, or dual conception.

In number 3 of *The Federalist*, John Jay appears to state that the national government under the proposed Constitution will be in a position to “prevent or punish” violations of treaties and the law of nations by

293. *Id.* at 265.

294. *Cf.* THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The treaties of the United States under the present Constitution [i.e., the Articles of Confederation] are liable to the infractions of thirteen different legislatures The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.”).

295. *See* RUBIN, *supra* note 278, at 127 (stating that, in this sentence, “Madison seems to have conceived [offences against the law of nations] as not applicable to individuals at all, but possible sources of public conflict if a single state could determine for itself the propriety of its public acts that impinge on the sovereignty of a foreign power”).

296. *See* Letter from James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON 382, 384 (William T. Hutchinson et al. eds., 1977); James Madison, Vices of the Political System of the United States (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON, *supra*, at 348, 349.

297. ARTICLES OF CONFEDERATION art. II (“Each state retains . . . every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”).

individuals or state governments.²⁹⁸ This could be a reference to the Law of Nations Clause²⁹⁹ or, more likely, to the new Constitution's proposals for federal court jurisdiction over cases arising under treaties and a number of areas involving the law of nations (especially admiralty and ambassadors).³⁰⁰

In *The Federalist* number 53, Madison discusses the qualifications that members of Congress should have.³⁰¹ He writes that they should have knowledge of "foreign affairs," U.S. treaties and commercial law, and "ought not to be altogether ignorant of the law of nations; for that, as far as it is a proper object of municipal legislation, is submitted to the federal government."³⁰² This vague language might suggest that Madison viewed the Law of Nations Clause power as a foreign policymaking power. While his reference to "municipal" (domestic) legislation might suggest a focus on regulating conduct of individuals within the United States as opposed to punishing foreign nations, the reference is not determinative because any statute enacted pursuant to the Law of Nations Clause—in either its individual, state-to-state, or dual conception—would be a "municipal" act in the sense that it was domestic law enacted through domestic lawmaking processes.

There are a few mentions of the Clause during the ratification debates that seem clearly to espouse the individual conception. This occurred in several instances where Federalists attempted to refute Antifederalists' claims that the Constitution would take over the internal regulation of the states and subsume domestic matters, including criminal legislation and prosecution.³⁰³ Federalists responded that the Constitution only allows Congress to define and punish a few "crimes," including offenses against the law of nations.³⁰⁴

298. THE FEDERALIST NO. 3 (John Jay), *supra* note 208, at 44.

299. See Siegal, *supra* note 19, at 878 (taking this to be a reference to the Law of Nations Clause); Teachout, *supra* note 19, at 1321 (same).

300. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction [and] to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

301. THE FEDERALIST NO. 42 (James Madison), *supra* note 276, at 332–35.

302. *Id.* at 334.

303. See, e.g., Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 30, 1788), in 4 ELLIOT'S DEBATES, *supra* note 193, at 1, 202–03 (remarks of William Lenoir) ("It appears to me that, instead of securing the sovereignty of the states, it is calculated to melt them down into one solid empire.").

304. *Id.* at 219 (remarks of James Iredell); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 14, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 451 (remarks of George Nicholas); *id.* at 466 (remarks of Edmund Randolph). Another statement that appears to endorse the individual conception occurred at the Virginia ratifying convention. George Nicholas appears to have been referring to the Law of Nations Clause when he stated that the Constitution handles problems like that faced by Great Britain in the early eighteenth century, when it was found that the country lacked a tribunal

Commentators advancing the individual conception of the Law of Nations Clause see a reference to the Clause in a widely circulated letter written in October 1787 by Edmund Randolph. In discussing the defects of government under the Articles, Randolph wrote that, "If we examine the constitution and laws of the several states, it is immediately discovered that the law of nations is unprovided with sanctions in many cases which deeply affect public dignity and public justice."³⁰⁵ He then lamented that the "letter" of the Articles of Confederation "does not permit Congress to remedy these defects," resulting in the "wretched impotency" of the national government to "check offences against this law."³⁰⁶ It is certainly possible that Randolph was referring to the inability of the Articles government—because it lacked courts, prosecutors, and the authority to enact domestic criminal law—to criminally punish individual violators of the law of nations. But this portion of his letter is devoted to the misconduct of state governments and the inabil-

competent to try and punish an assault on the Russian ambassador. *Id.* at 507 (remarks of George Nicholas). There are examples of statements roughly contemporaneous with ratification which describe the Law of Nations Clause as an individual penal power. *See, e.g.*, Attorney General Edmund Randolph's Report on the Judiciary (Dec. 27, 1790), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 21, 22 (photo. reprint 1998) (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834) (stating that the U.S. states had lost their authority to judicially regulate matters on the "open sea" because, among other reasons, "the power given to Congress by the constitution to define and punish piracies and felonies on the high seas, and offences against the law of nations, comprehends the whole of criminal sea law, and warrants that body to assign to the federal courts alone an exclusive jurisdiction therein"); *Remarks on the Amendments to the Federal Constitution*, FED. GAZETTE & PHILADELPHIA EVENING POST (Dec. 30, 1788), at 2 (discussing federal power given in the Constitution to punish "[c]auses of a criminal nature" and citing the Counterfeiting Clause, Piracies and Felonies Clause, and Law of Nations Clause). For later statements by members of the Founding generation that describe the Law of Nations Clause as an individual penal power of Congress, see *United States v. Worrall*, 28 F. Cas. 774, 777 (C.C.D. Penn. 1798) (No. 16,766) (argument of counsel Alexander Dallas); PETER STEPHEN DU PONCEAU, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES 35–36 (Philadelphia 1834); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 104 (Philadelphia 1825); *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of New York*, *supra* note 193, at 19; and Madison's Report on the Virginia Resolutions, *supra* note 193, at 556. For an ambiguous statement of Madison, perhaps viewing the Law of Nations Clause in the individual or state-to-state terms, see Letter from James Madison (Sept. 18, 1828), in 4 ELLIOT'S DEBATES, *supra* note 193, at 600, 600, where Madison declared:

Dear Sir: Your late letter reminds me of our conversation on the constitutionality of the power in Congress to impose a tariff for the encouragement of manufactures, and of my promise to sketch the grounds of the confident opinion I had expressed that it was among the powers vested in that body. The Constitution vests in Congress, expressly, "the power to lay and collect taxes, duties, imposts, and excises," and "the power to regulate trade." That the former power, if not particularly expressed, would have been included in the latter as one of the objects of a general power to regulate trade, is not necessarily impugned by its being so expressed. Examples of this sort cannot sometimes be easily avoided, and are to be seen elsewhere in the Constitution. Thus the power "to define and punish offences against the law of nations" includes the power, afterwards particularly expressed, "to make rules concerning captures, &c., from offending neutrals."

305. Letter from Edmund Randolph, Esq., to the Speaker of the House of Delegates of Virginia (Oct. 10, 1787), in 1 ELLIOT'S DEBATES, *supra* note 193, at 482, 483.

306. *Id.*

ity of the national government under the Articles to check the states. As Randolph wrote, he is complaining about “the failure of the states,” specifically, their failure to stop squabbling among each other (“inability to maintain in harmony the social intercourse of the states”), to abide by treaties (“infraction of their engagements to foreign sovereigns”), and to deliver up, in response to requisitions by the Continental Congress, “supplies to the federal treasury, or recruits to the federal armies.”³⁰⁷ Given the context of complaints about the insufficiency of the Articles of Confederation to rein in the states, and the fact that the Articles were themselves a “league” among the independent American states³⁰⁸ and thus seen as governed by the law of nations,³⁰⁹ it is certainly possible that Randolph’s letter was not addressing offenses against the law of nations by individuals but rather by American states. This view is rendered more plausible by the fact that Randolph spoke at the Philadelphia Convention about the lack of power under the Articles to punish U.S. states which offended against the law of nations.³¹⁰ Other participants in the drafting and ratification debates used similar language to discuss U.S. states.³¹¹

Another piece of evidence comes from an exchange of public letters initiated in November 1787 by the Antifederalist pamphleteer “Cincinnatus,” who argued that the Law of Nations Clause was dangerously broad and could give Congress the power to enact oppressive internal legislation, like restraints on the liberty of the press, by claiming that doing so was important

307. *Id.*

308. See ARTICLES OF CONFEDERATION art. III (“The said states hereby severally enter into a firm league of friendship with each other . . .”); see also *id.* art. II (“Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”).

309. See The Connecticut Convention (Jan. 4, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 541, 546 (Merrill Jensen ed., 1978) [hereinafter DOCUMENTARY HISTORY OF RATIFICATION] (remarks of William S. Johnson) (noting, with regard to a U.S. state that violated its obligations under the Articles, that “[t]he other states have a right to redress; they have a right by the law of nature and nations to insist upon and compel a performance”).

310. See 1 FARRAND, RECORDS, *supra* note 213, at 19 (discussing law of nations infractions by individuals and U.S. states).

311. Debates in the Congress of the Confederation (June 19, 1787), in 5 ELLIOT’S DEBATES, *supra* note 193, at 1, 207 (remarks of James Madison) (analogizing the Articles of Confederation to an interstate treaty and referring to a U.S. state which violated the Articles as “an offending member of the Union”); A Citizen of Philadelphia, *The Weaknesses of Brutus Exposed* (Nov. 8, 1787), reprinted in 14 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 63, 66 (stating that even the Antifederalist writer “Brutus” likely would “admit it necessary to institute some federal authority . . . to punish any individual or State, who shall violate our treaties with foreign nations, insult their dignity, or abuse their citizens”); Maryland’s Constitutional Convention Delegates Address the State House of Delegates (Nov. 29, 1787), in 14 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 278, 279 (remarks of James McHenry) (recounting the argument that government under the Articles of Confederation was defective because “if a state offends it cannot punish”).

for foreign relations.³¹² This drew a Federalist rebuttal by “Anti-Cincinnatus,” who argued that the Clause merely allowed Congress to punish violations of treaties³¹³ but did not specify whether he meant violations by individuals, states, or foreign nations.

It arguably undercuts the individual conception of the Law of Nations Clause that there were so few complaints during the ratification debates—Cincinnatus’s letter is the only 1 I have found—that the Law of Nations Clause unduly expanded Congress’s power to regulate local matters and therefore infringed the prerogatives of state governments. In the late eighteenth century, the law of nations was widely thought to include the law merchant and general commercial law.³¹⁴ Empowering the federal government to regulate the domestic conduct of U.S. individuals that violated the law of nations would arguably grant a power over general commercial dealings, even between citizens of the same state. This, one would think, should have been controversial³¹⁵ and fodder for Antifederalist propaganda. Antifederalists, after all, vehemently criticized both the treaty power and many legislative powers of Congress on the ground that they usurped the right of states to regulate internal matters.³¹⁶ The lack of mention of the Law of Nations Clause is indirect evidence of a state-to-state conception of the Clause.

312. *Cincinnatus I: To James Wilson, Esq.*, N.Y. JOURNAL, Nov. 1, 1787, reprinted in 13 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 531–32.

313. *Anti-Cincinnatus*, HAMPSHIRE (MASS.) GAZETTE, Dec. 19, 1787, reprinted in 5 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 489–90.

314. See Bradley, *Alien Tort*, *supra* note 61, at 599 (noting that during the Founding period the law of nations “was not limited to the rights and duties of nations [but] also included admiralty law, the law governing conflict of laws, and . . . general commercial law”); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26–27 (1952) (discussing how the law of nations originally encompassed more than public international law, particularly in areas related to maritime or international commerce).

315. Cf. Bradley, *Alien Tort*, *supra* note 61, at 600 (arguing on this ground against reading a general law of nations jurisdiction into Article III) (citing Jay, *supra* note 24, at 832).

316. See, e.g., The Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution (June 17, 1788), in 2 ELLIOT’S DEBATES, *supra* note 193, at 205, 241–42 (remarks of John Williams) (“In forming a constitution for a free country like this, the greatest care should be taken to define its powers, and guard against an abuse of authority. The constitution should be so formed as not to swallow up the state governments: the general government ought to be confined to certain national objects; and the states should retain such powers as concern their own internal police.”); Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 22, 1788), in 4 ELLIOT’S DEBATES, *supra* note 193, at 1, 75 (remarks of Samuel Spencer) (worrying that Congress’s taxing and spending powers will “annihilate the state governments”); Letter XI from the Federal Farmer (Jan. 10, 1788), in 17 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 265, 309 (stating that commercial treaties will “interfere with the laws and internal police of the country”); Letter IV from the Federal Farmer (Oct. 12, 1787), in 14 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 42, 43–44 (worrying that treaties will “abolish all laws and state constitutions incompatible with them”); *An Old Whig III*, PHIL. INDEPENDENT GAZETTEER, Oct. 20, 1787, reprinted in 13 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 426 (worrying that treaties will “be inconsistent with the liberties of the people and destructive of the very being of a Republic”).

* * *

In sum, the evidence from the Philadelphia Convention, the ratification debates, and a textual analysis of the Constitution and the Articles of Confederation is mixed. A good amount of evidence supports the individual conception. But I do not deny that the Clause covered individual conduct; my claim is that it had a state-to-state meaning as well, and therefore was dual. There is evidence to support a dual reading, particularly textual-historical evidence of the meaning that an eighteenth-century audience would have attributed to the words of the Clause. Familiar with Blackstone at least³¹⁷—if not always with Vattel, Grotius, Locke, and other theorists—educated eighteenth-century readers would have been aware that the law of nations primarily “occupied the executive and legislative domains, not the judicial,”³¹⁸ and that, as Blackstone wrote, the “principal” aspect of offenses against the law of nations concerned state-to-state relations on the international plane.³¹⁹ This, coupled with the fact that the most salient problems concerning international law during the critical period of the 1780s had to do with relations between the American national government and foreign states and American states, not with offenses committed by individuals, supports a dual reading of the Law of Nations Clause.

IV. Implications of the Dual Reading of the Law of Nations Clause

This Part discusses some potential implications of understanding the Law of Nations Clause to have a state-to-state component. Reading the Clause in this manner enriches our understanding of how the Constitution handles a number of important and contested questions regarding the distribution of war and foreign policy powers between the President and Congress. It would also help answer difficult questions about the status of customary international law under the Constitution by serving as a kind of lens for reading the Constitution. As discussed above, this Article brackets the interpretive question of the exact weight to be assigned to eighteenth-century original meanings in reaching conclusions about contemporary constitutional meaning³²⁰ and therefore recognizes that implications must necessarily remain provisional.

A. *International Force and Coercion*

There are potential implications of a state-to-state conception of the Law of Nations Clause in three areas where there are currently unresolved

317. See The Virginia Convention (June 18, 1788), in 10 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 1179, 1382 (remarks of James Madison) (referring to Blackstone’s *Commentaries* as “a book which is in every man’s hand”).

318. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

319. See WILLIAM BLACKSTONE, 4 COMMENTARIES *66, *68.

320. See *supra* notes 52–68 and accompanying text.

debates about the relative powers of Congress and the President: (1) control over “lesser war powers,” i.e., uses of force that do not amount to full-scale war; (2) control over the imposition of multilateral coercion, including military force, against foreign states that have violated international law; and (3) termination of U.S. participation in treaties. Linking the eighteenth century’s conception of punishing offenses against the law of nations with the Constitution’s vesting in Congress of substantial powers of initiative regarding coercive international policymaking, it makes sense to interpret the Constitution’s Law of Nations Clause as having a broader state-to-state meaning and allowing Congress to initiate these three types of international coercion.

1. *Lesser War Powers.*—The Law of Nations Clause provides a textual basis for Congress to exercise substantial lesser war powers because it locates with Congress the power to respond to breaches of the law of nations and injuries to the United States’s foreign relations interests. An eighteenth-century audience could well have understood the Law of Nations Clause to give Congress discretion to respond to breaches of international law by calibrating the use of national coercive means, up to full-scale war. (Once the scale of hostilities reached a certain point, Congress’s power to “declare War” would presumably take over.)

Eighteenth-century usage of the terms “punish” and “offence”/“offend” was in no way limited to large-scale international conflicts (“war” in the everyday sense). Many lesser forms of interstate contention and conflict were described with these terms. Vattel made clear that punishment for breaches of the law of nations included a spectrum of national coercive means. At the extreme, “offensive war” may “ha[ve] for its object the punishment of a nation.”³²¹ Warfare for purposes of punishment could be limited or unlimited, greater or lesser in scale and length of time; Vattel and other theorists did not draw distinctions. According to the eighteenth-century theorists, nonviolent means of coercion could also be used: “It is not always necessary to have recourse to arms, in order to punish a nation.”³²² The Law of Nations Clause could thus be seen as authorizing limited and targeted uses of force against foreign states.

321. 3 VATTEL, *supra* note 37, § 41, at 461. “[A] nation is authorized to provide for its safety, and even for that of all other nations, by inflicting on the offender [through offensive war] a penalty capable of correcting him, and serving as an example.” *Id.*

322. 2 *id.* § 340, at 426. For example, a state may, “hy way of punishment” against a state that has injured it, “except from the general permission [given to foreign nationals within its country] a people who have given it a just cause of complaint.” *Id.* § 137, at 286. Thus Congress’s Law of Nations Clause power could perhaps include an incidental power over immigration and deportation. Moreover, in order to punish a state that has offended against the law of nations, “the offended may take from it, by way of punishment, the privileges it enjoys in his dominions, [or] seize, if he has an opportunity, on some of the things that belong to it.” *Id.* § 340, at 426. This potentially points to some congressional power to retract recognition of a foreign government or otherwise legislate regarding the United States’s diplomatic relations with foreign states.

Understanding the Law of Nations Clause to have a state-to-state dimension helps resolve a longstanding debate concerning which branch of government—Congress or the President—has constitutional authority to initiate hostilities short of full-scale war. On presidential initiative, the United States has used military force scores of times since the nineteenth century in limited ways and for limited objectives, without a declaration of war or other formal authorization by Congress.³²³ In the absence of a persuasive textual basis for congressional control over hostilities short of war—except for the now-obsolete form of private naval warfare authorized by the Marque and Reprisal Clause³²⁴—and using all of the structural advantages inherent in the office of the Presidency, Presidents have seized the initiative. Modern Presidents have frequently justified limited uses of the military—in places like Somalia, Haiti, Bosnia, and Kosovo during the 1990s—by arguing, among other things, that the anticipated conflicts will not amount to “war” in a constitutional sense but rather some different and lesser form of hostilities for which express *ex ante* congressional authorization is not required by the Declare War Clause,³²⁵ such as “police action,” “enforcement action,” “humanitarian intervention,” “peace-keeping,” “maintaining order,” or the like. If the Presidents’ constitutional position is correct, it is difficult to see the Law of Nations Clause as having a state-to-state coercive component.

323. See, e.g., Dep’t of State Memorandum, *Authority of the President to Repel the Attack in Korea*, 23 Dep’t St. Bull. 173, 174–78 (July 31, 1950) [hereinafter Dep’t of State Korea Memo] (listing eighty-five such instances).

324. See U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . [t]o grant Letters of Marque and Reprisal . . .”). For a discussion of this clause, see *infra* notes 328–31, 346–48 and accompanying text.

325. See, e.g., Dep’t of State Korea Memo, *supra* note 323, at 173–77 (contending that the invasion of Korea was a violation of the U.N. Charter and a threat to international peace and security that the President as Commander-in-Chief could remedy by military force without congressional authorization and characterizing the deployment as merely “participation in international police action”); OLC Bosnia Opinion, *supra* note 58 (“The Constitution vests in Congress the power ‘[t]o declare War.’ . . . In deciding whether the proposed deployment of ground troops into Bosnia would amount to a ‘war’ in the constitutional sense, considerable weight should be given to the consensual nature and protective purposes of the operation. The deployment is intended to be a limited mission that will ensure stability while the [NATO-brokered] peace agreement is put into effect. . . . We believe that the President has ample authority to undertake the planned operation.”); Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173, 177–78 (1994) (“[The] deployment was characterized by circumstances that sufficed to show that the operation was not a ‘war’ within the meaning of the Declaration of War Clause. The deployment was to have taken place, and did in fact take place, with the full consent of the legitimate government of the country involved. Taking that and other circumstances into account, the President, together with his military and intelligence advisors, determined that the nature, scope, and duration of the deployment were not consistent with the conclusion that the event was a ‘war.’”); Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 16 Op. Off. Legal Counsel 8, 12 (1992) (“[M]aintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest” for the purpose of which the President may deploy U.S. armed forces without congressional authorization).

Recent academic work on constitutional war powers poses problems for the state-to-state conception of the Law of Nations Clause. On one side, presidentialists like Professors John Yoo, Eugene Rostow, and others contend that the U.S. Constitution carried forward much of the British imperial model of executive initiative and dominance in war and coercive foreign policymaking. Advocates of robust presidential war powers contend that controlling the initiation of military and other coercive operations was thought in the eighteenth century to be an “executive” function; that the Constitution in Article II vests the “executive power” in the President (as well as making him Commander-in-Chief); and therefore that any military functions not textually committed to congressional control would fall within the President’s residual executive power.³²⁶ The few exceptions to this translation of the Crown into the President—such as Congress’s express powers to declare war and issue letters of marque and reprisal—are said to be simply powers to formally proclaim and classify the legal status of international conflicts; the President retained the Crown’s ability to initiate actual hostilities, whether large in scale or small.³²⁷ If true, this would be powerful evidence against reading the Law of Nations Clause as having a state-to-state component allowing Congress to decide when to invoke “lesser war” powers to punish international wrongs by foreign states. On the other side, a number of congressionalists contend that the Marque and Reprisal Clause grants Congress control over initiating all lesser forms of hostility not covered by the Declare War Clause.³²⁸ If true, this also would be powerful evidence

326. See, e.g., Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to “Declare War,”* 25 HARV. J.L. & PUB. POL’Y 519, 522–24 (2002); Yoo, *Continuation*, *supra* note 40, at 199–204; John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1640 (2002) [hereinafter Yoo, *Constitutional Text*]; cf. Prakash & Ramsey, *Executive Power*, *supra* note 40, at 271–72 (advancing the “executive power” thesis but not contending that the President’s executive power allows him to choose whether to initiate war with a foreign nation previously at peace with the United States); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1593 (2005) [hereinafter Prakash & Ramsey, *Foreign Affairs*] (same). Professor Ramsey’s view that Congress has the vast bulk of the war initiation power is described in Ramsey, *Textualism*, *supra* note 52.

327. See, e.g., Eugene V. Rostow, “*Once More Unto the Breach: The War Powers Resolution Revisited*,” 21 VAL. U. L. REV. 1, 3–18 (1986); Yoo, *Continuation*, *supra* note 40, at 204–08, 295; Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1375, 1396–1400 (1994) (book review).

328. See, e.g., FISHER, *PRESIDENTIAL*, *supra* note 41, at 6–7 (“The phrase ‘letters of marque and reprisal’ came to refer to any use of force short of a declared war. . . . Any initiation of war, whether by declaration or by marque and reprisal, was reserved to Congress.”); Jules Lobel, “*Little Wars*” and the Constitution, 50 U. MIAMI L. REV. 61, 68–70 (1995) (“Letters of inarque and reprisal were one way of referring to what were known as imperfect wars, special wars, limited wars—all of which constituted something less than full-scale warfare. . . . The early history of the nation also supports a reading of the Marque and Reprisal Clause that provides Congress the power to authorize a broad spectrum of armed hostilities not rising to the level of declared war.”); see also ELY, *supra* note 59, at 66–67 (to the same effect); Lofgren, *supra* note 40, at 695–97, 699–700 (to the same effect).

against reading the Law of Nations Clause as having a state-to-state component.

The best reading of the textual, structural, and historical evidence is that the original meaning of the Constitution is that Congress has control over initiation of both “war” and lesser forms of international hostilities, coercion or contention which might lead to war, and that Congress has these lesser powers by virtue of not only the Marque and Reprisal Clause but also the Law of Nations Clause, as well as other provisions such as the Foreign Commerce Clause. This conclusion is based on both the textual–historical evidence of the original meaning of the Law of Nations Clause, discussed above, as well as the Clause’s fit into the larger constitutional scheme.

Starting first with relatively uncontroversial points, it is generally agreed that, as originally understood, the Marque and Reprisal Clause gave Congress, at the minimum, the power to authorize private parties to seize enemy goods, and that this almost always occurred as recompense for a prior wrong—to the individual or state—and on the high seas by means of private naval raiding (often called privateering).³²⁹ Congress also has enumerated powers to make rules concerning prizes and other aspects of private naval raiding and warfare, to regulate the participants in that activity, and to create courts to hear cases concerning the results of that activity.³³⁰ In the eighteenth century, issuing letters of marque and reprisal often caused or was a prelude to full-scale public war.³³¹ Similarly, search, seizure, or capture of foreign-flagged vessels on the high seas by public naval vessels could easily cause wider warfare to erupt, and control over these sensitive security func-

329. See, e.g., POWELL, *supra* note 24, at 113–14; John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1188 (1999); C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 958–59 (1997).

330. See U.S. CONST. art. I, § 8, cls. 9, 11–12 (Congress has the power to “constitute Tribunals inferior to the supreme Court,” “make Rules concerning Captures on land and water,” and “make Rules for the Government and Regulation of the land and naval Forces”); *id.* art. III, §§ 1–2 (“The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction.”).

331. See WILLIAM BLACKSTONE, 1 COMMENTARIES *250 (stating that the prerogative of granting letters of marque and reprisal “is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war”); CORNELIUS VAN BYNKERSHOEK, 2 QUAESTIONUM JURIS PUBLICI LIBRI DUO 104 (James B. Scott ed., Tenney Frank trans., Carnegie Endowment for Int’l Peace 1930) (1737) (stating that the “controversies that arise out of [letters of marque and reprisal] frequently disturb states and bring them into conflict”); see also *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (Marshall, C.J.) (“To grant letters of marque and reprisal, would lead directly to war.”); EVELYN SPEYER COLBERT, RETALIATION IN INTERNATIONAL LAW 55 (1948) (“[Public reprisals] [a]lmost always . . . were ordered in periods of extreme tension immediately preceding wars and were evidently intended as a method of coercing the prospective enemy and perhaps of gaining desired ends without formal resort to war. . . . Reprisals frequently played an important part in attempts to place the onus of the original declaration of war on the enemy or to postpone declared hostilities until alliances could be solidified.”).

tions are given to Congress by the Constitution.³³² It is likewise uncontroversial that the Constitution's Foreign Commerce Clause, as originally understood, gave Congress the authority to decide whether to institute embargoes and related forms of economic sanctions against foreign states.³³³ Like the issuance of letters of marque and reprisal, embargoes and other aggressive trade restrictions were frequent preludes, causes, or concomitants to full-scale public war.³³⁴ It is uncontroversial that, through the Law of Nations Clause (in its individual conception), Congress has the ability to regulate the issuance of safe conducts to foreigners during peace or war and the treatment of foreign ambassadors.³³⁵ Mistreatment of foreigners, whether private citizens or public ministers, was thought to be a leading cause of warfare in the eighteenth century.³³⁶

A unifying logic of these provisions is that Congress's hugely important power to decide whether or not to engage in war with foreign states must, as a prophylactic measure, be surrounded and protected by congressional control over whether to take coercive or potentially coercive measures—such

332. U.S. CONST. art. 1, § 8, cls. 3, 10, 11, 13, 14 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, . . . define and punish Piracies and Felonies committed on the high Seas, . . . make Rules concerning Captures on Land and Water, . . . provide and maintain a Navy [and] . . . make Rules for the Government and Regulation of the . . . naval Forces . . .”). See generally *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804) (holding “[a] commander of a ship of war of the United States” liable for damages for seizing a foreign vessel under circumstances not covered by Congress’s statutory authorization).

333. See Prakash & Ramsey, *Executive Power*, *supra* note 40, at 349 (“[R]egulation of commerce with foreign nations—including embargoes—was encompassed by Congress’s express Article 1, Section 8 power.”); cf. David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. CHI. L. REV. 1, 19–20 (1996) (“Though the Federalists were to scream constitutional objections to Jefferson’s embargo in 1807, nobody even hinted that an embargo was beyond Congress’s power in 1794.”).

334. *Louisiana v. Texas*, 176 U.S. 1, 27 (1900) (Brown, J., concurring in the result) (“An embargo, though not an act of war, is frequently resorted to as preliminary to a declaration of war, and may be treated under certain circumstances as a sufficient *casus belli*.”).

335. See *supra* notes 135–37 and accompanying text.

336. See, e.g., Bradley, *Alien Tort*, *supra* note 61, at 642–43 (documenting concern by prominent Founders that unpunished offenses against foreign ambassadors could lead to war); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 871–72, 880 (2006) (showing that eighteenth-century international law considered war a proper remedy for breaches of safe conduct). Likewise Congress has an enumerated power to control naturalization of foreigners, U.S. CONST. art. 1, § 8, cl. 4, a subject which, if mishandled, threatened to embroil a country in international conflict, see, e.g., Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 23, 1788), in 4 ELLIOT’S DEBATES, *supra* note 193, at 1, 19 (remarks of William Davie) (“The want of power to establish a uniform rule for naturalization through the United States is also no small defect, as it must unavoidably be productive of disagreeable controversies with foreign nations. . . . A striking proof of the necessity of this power recently happened in Rhode Island: A man who had run off with a vessel and cargo, the property of some merchants in Holland, took sanctuary in that place: application was made for him as a citizen of the United Netherlands by the minister, but, as he had taken the oath of allegiance, the state refused to deliver him up, and protected him in his villany. Had it not been for the peculiar situation of the states at that time, fatal consequences might have resulted from such a conduct, and the contemptible state of Rhode Island might have involved the whole Union in a war.”).

as issuing letters of marque and reprisal, instituting an embargo, or using military force in a limited fashion—which might lead to war. Viewing the Law of Nations Clause as an international coercive power helps to illuminate this constitutional logic and solidify the case for congressional control over lesser war powers.

As noted above, advocates of fulsome presidential war powers contend that some combination of the Commander-in-Chief and Vesting Clauses allow the Executive to initiate certain lesser forms of war and perhaps full-scale war itself. But it makes little sense to think that the Constitution gave Congress express powers to initiate several major types of hostilities short of war (letters of marque and reprisal, embargoes, and high seas seizure or capture of foreign vessels by public naval forces), but left the initiation of other variants of lesser war, and the initiation of full-scale war as well, to the President. Especially regarding the initiation of full-scale war, it is hard to imagine why the President's greater power would not include all of the lesser. The lesser often caused the greater to occur; the greater was often fought using the lesser. It would be quite odd to give these powers to separate branches of government.³³⁷

It is perhaps not surprising, then, that Congress—not the President—was understood by the Founders to have the greater power of initiating full-scale war as well as the lesser power of initiating hostilities short of war which might lead to war. Recent scholarship has shown that the concept of “declaring war” was, in the eighteenth century, much broader than simply proclaiming and classifying the legal status of international conflicts; the term declaring war was often used to mean placing the nation in a state of war by conduct or by formal proclamation.³³⁸ Soon after ratification of the Constitution and creation of the new federal government, a number of the most prominent Founders—now high government officials—clearly stated that Congress, not the President, had authority to initiate warfare.³³⁹ Indeed,

337. See Ramsey, *Textualism*, *supra* note 52, at 1602.

338. See Ramsey, *Reply*, *supra* note 52; Ramsey, *Textualism*, *supra* note 52. No one disputes that the British Crown had the sole legal authority to decide whether to initiate “war” with foreign states by formal proclamation or simple commencement of hostilities. And not infrequently, the Crown’s comprehensive initiating power was described synecdochically as the power to “declare” war. See FRANCIS BACON, *LAW TRACTS* 179 (London 1737) (“The King hath power to declare and proclaim war, and to make and conclude peace and truce at his pleasure.”); JEAN L. DE LOLME, *THE CONSTITUTION OF ENGLAND* 50 (Dublin, 1793) (stating that the King of England “has the prerogative of declaring war, and of making peace”); WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 480 (London 1785) (describing “[t]he power of the king to declare war”); see also *The Debates in the Convention of the State of Virginia, on the Adoption of the Federal Constitution* (June 9, 1788), in 3 *ELLIOT’S DEBATES*, *supra* note 193, at 1, 172 (remarks of Patrick Henry) (equating the British King’s and U.S. Congress’s powers to “declare war” and equating “declaring war” with “enter[ing] into a war” and “engag[ing] in war”).

339. See, e.g., *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.) (stating that “the whole powers of war” are “by the constitution of the United States, vested in congress”); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (“Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time.”); *id.* at 45 (Paterson,

at the time the Constitution was ratified, only Congress had the necessary constitutional means to actually initiate a foreign war. At that time, “the

J.) (“The *United States* and the *French* republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorised by the constitutional authority of our country. . . . As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations.”); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J.) (“Does he [the President] possess the power of making war? That power is exclusively vested in congress [I]t is the exclusive province of congress to change a state of peace into a state of war.”); *Henfield’s Case*, 11 F. Cas. 1099, 1108–09 (C.C.D. Pa. 1793) (No. 6,360) (grand jury charge of Wilson, J.) (“And should the fortunes or the lives of millions be placed in either of those predicaments [war or reprisal] by the conduct of one citizen, or of a few citizens? Humanity and reason say no. The constitution of the United States says no. By that constitution, many great powers are vested in the first executive magistrate: others are vested in him, ‘by and with the advice and consent of the senate.’ But neither he, nor he and they in conjunction, can lift up the sword of the United States. Congress alone have power to declare war, and to ‘grant letters of marque and reprisal.’” (internal citations omitted)); *James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania*, CLAYPOOLE’S DAILY ADVERTISER, Apr. 12, 1796, reprinted in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 111 (stating that “the power of declaring war or authorising any actual hostilities is invested” in “the Congress of the United States”); *James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, *supra* note 170, at 455 (“As the Constitution of the United States entrusted the Congress alone with the authority of declaring war, or permitting any inferior species of hostility, it was evident that until they exercised such an authority, it was the duty of all the citizens of the United States to remain in a state of peace and neutrality with all the hostile powers.”); Draft of John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia, *supra* note 216, at 363 (stating that “[q]uestions of peace and War and Reprizals and the like” are committed exclusively to Congress); Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON 311, 312 (Gaillard Hunt ed., 1906) (“The constitution supposes, what the History of all [governments] demonstrates, that the [executive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied care, vested the question of war in the [legislature].”); Letter from Pres. George Washington to Gov. William Moultrie (Aug. 28, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON 73, 73 (John C. Fitzpatrick ed., 1940) (“The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.”); Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) (“We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body”); *Letters of Helvidius No. 1* [James Madison], in 6 THE WRITINGS OF JAMES MADISON, *supra*, at 140, 148 (“[I]nstead of being analogous to the power of declaring war, [the Commander-in-Chief Clause] affords a striking illustration of the incompatibility of the two powers in the same hands. Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be commenced, continued, or concluded.”); *Letters of Helvidius No. 4* [James Madison], in 6 THE WRITINGS OF JAMES MADISON, *supra*, at 171, 174 (discussing “the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully and exclusively* vested in the legislature” and stating that “[i]n no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department”); *Letters of Pacificus No. 1* [Alexander Hamilton], (June 29, 1793), reprinted in 15 PAPERS OF HAMILTON, *supra* note 193, at 42 (“While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War—it belongs to the ‘Executive Power,’ to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the U[nited] States with foreign Powers. . . . It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War.”).

federal army numbered fewer than 700 men; there was no naval establishment. The state militias accounted for the bulk of the nation's military capability."³⁴⁰ Nevertheless Congress, not the President, was given the power to "provide for organizing, arming, and disciplining, the militia" and "calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions."³⁴¹ Moreover, professional soldiers and sailors could only be raised and armed in the first instance under the authority of Congress.³⁴² As Eugene Kontorovich has pointed out,

[T]he commander in chief, at the time of the founding, had no means with which to start a war without prior action by Congress. It would be odd if the decision about whether to wage war were placed solely on the shoulders of an official so ill-suited to ensuring its success.³⁴³

Further supporting a reading of the Constitution's Declare War Clause as giving Congress the sole power to initiate full-scale war is the work of the most careful scholars of the original understanding of the Constitution's distribution of war powers.³⁴⁴

Once it is understood that Congress has the greater power of initiating full-scale warfare as well as the lesser powers of initiating important types of smaller-scale hostilities such as private naval raiding (letters of marque and reprisal) and embargoes, it begins to seem plausible or even likely that the Constitution also gives Congress the power to initiate any other forms of lesser war or inter-state coercion. There are many statements by leading Founders to support this view. For example, John Marshall spoke of Congress having "the whole powers of war;" George Washington stated that without congressional preauthorization the President could undertake "no offensive expedition of importance;" James Iredell stated that only Congress can "declar[e] war, or permit[] any inferior species of hostility;" Samuel Chase spoke of Congress having the power to wage "limited war;" William Paterson stated that Congress has the power to authorize a "qualified state of hostility;" and James Wilson stated that only Congress has the power to "lift up the sword of the United States."³⁴⁵

340. Eugene Kontorovich, *War Powers*, 136 *POL'Y REV.* 77, 79 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005)).

341. U.S. CONST. art. I, § 8, cls. 15–16.

342. *See id.* art. I, § 8, cls. 12–14 (Congress has the power to "raise and support Armies . . . provide and maintain a Navy [and] make Rules for the Government and Regulation of the land and naval Forces").

343. Kontorovich, *supra* note 340, at 79.

344. *See* FISHER, *PRESIDENTIAL*, *supra* note 41, at 1–16; W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 29–115 (1981); SOFAER, *supra* note 41, at 36–38, 43, 48–49, 56; FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 18–19 (2d rev. ed. 1989); Lofgren, *supra* note 40, at 677–700; Treanor, *supra* note 59, at 740–56; Stromseth, *supra* note 59, at 850–64.

345. *See* sources cited in *supra* note 339.

As noted above, some previous scholarship has attempted to locate the power to initiate all forms of lesser war in the Marque and Reprisal Clause. But while the concept of “reprisal” standing alone had a broad and sometimes uncertain meaning under the eighteenth-century law of nations, seemingly encompassing private or public and violent or nonviolent compensatory retaliations against people or property during war or peacetime,³⁴⁶ the Constitution does not grant Congress a power over reprisal as such, but over the more specific and narrow power to “grant Letters of Marque and Reprisal.”³⁴⁷ The concept of issuing “Letters” or licenses suggests a sovereign’s authorization to private individuals who would otherwise lack legal authority to engage in the conduct. This clause is probably best read as covering only the issuance of legal documents allowing the initiation of privateering and related forms of private retaliatory raiding.³⁴⁸ To date, then, despite the statements of prominent Founders, no one has successfully

346. See WILLIAM BLACKSTONE, 1 COMMENTARIES *258; 3 *id.* *4; 2 BURLAMAQUI, *supra* note 217, at 196–97; 2 VATTEL, *supra* note 37, § 342, at 427; Att’y Gen. Edmund Randolph’s Report on the Judiciary (Dec. 27, 1790), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 304, at 21, 22 (listing reprisal as one of the Government’s methods for protecting the citizens of the United States, in addition to remonstrance, marque, and war); Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 9, 1788), in 2 ELLIOT’S DEBATES, *supra* note 193, at 1, 82 (remarks of James Bowdoin) (referring to a reprisal as a method of reimbursement in which any public or private property of any of the states could be seized and applied to foreign debts); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 21, 1788), in 3 ELLIOT’S DEBATES, *supra* note 193, at 1, 571 (remarks of Edmund Randolph) (noting that “[r]eprisals have been made by the very judiciary of Pennsylvania on the citizens of Virginia” regarding boundary disputes); Fragment of the Debates in the Convention of the State of Connecticut, on the Adoption of the Federal Constitution (Jan. 4, 1788), in 2 ELLIOT’S DEBATES, *supra* note 193, at 185, 189 (remarks of Oliver Ellsworth) (discussing the likelihood that foreign sovereigns would use reprisals, as authorized by the laws of nations, rather than forgive the foreign debt); Letter from Sec’y of Treasury Alexander Hamilton to Pres. Washington (Apr. 14, 1794), in 16 PAPERS OF HAMILTON, *supra* note 193, at 266, 273 (referring, during a confrontation with Great Britain during which Congress was considering imposing various economic sanctions, to the sequestration of debts as one of the strongest forms of “reprisal”); *id.* at 274 (referring to government action “adopted for the express purpose of retaliating or punishing injuries to continue until those injuries are redressed” as being “in the spirit of a reprisal”); see also OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining “reprisal” as “[t]he act or practice of seizing by force the property (or persons) of subjects of another nation, in retaliation for loss or injury suffered from these or their countrymen”).

347. Cf. WORMUTH & FIRMAGE, *supra* note 344, at 37 (“[R]eprisal also has a broader meaning. It is an official act of retaliation on another state, or on the nationals of another state, for some injury for which that state is held responsible. . . . Although the only form of reprisal assigned to Congress by the Constitution is the issuance of letters of marque and reprisal, every act of reprisal is an act of war and therefore requires congressional authorization.”).

348. See Marshall, *supra* note 329. See generally OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining “letters (or commission) of reprisal” as “an official warrant authorizing an aggrieved subject to exact forcible reparation from the subjects of another state: See Marque”); *id.* (“letter of marque . . . Usually pl[ural], *letters of marque (and reprisal)*”: “Originally, a licence granted by a sovereign to a subject, authorizing him to make reprisals on the subjects of a hostile state for injuries alleged to have been done to him by the enemy’s army. In later times this became practically a licence to fit out an armed vessel and employ it in the capture of merchant shipping belonging to the enemy’s subjects . . . and entitled by international law to commit against the hostile nation acts which would otherwise have been condemned as piracy.”).

pointed to textual hooks in the Constitution for assigning to Congress all of the power to initiate lesser forms of hostilities besides private raiding and embargoes.

A state-to-state conception of the Law of Nations Clause gives Congress a textually based leading role in initiating the “inferior species of hostility.” This would be a departure from the current practice of presidential unilateralism but is consistent with the practice of the first three Presidents, each of whom used limited military force against foreign sovereigns—Indian nations, France, and Barbary states—without formal declarations of war and each of whom stated that Congress had the constitutional authority to decide whether to initiate offensive military force in these situations.³⁴⁹ Although sometimes their constitutional construction seems to have been solely based on the “declare War” clause,³⁵⁰ each of these conflicts could also be

349. Several letters discuss President Washington's conflicts with Indian nations. See Letter from Pres. George Washington to Gov. William Moultrie, *supra* note 339, at 73 (“The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.”); Letter from Sec’y of War Henry Knox to Gov. William Blount (Nov. 26, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 220, 220–21 (Clarence Edwin Carter ed., 1936) (“Whatever may be [President Washington’s] impression relatively to the proper steps to be adopted, he does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.”); Letter from Sec’y of War Timothy Pickering to Gov. William Blount (Mar. 23, 1795), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra*, at 386, 389 (“Congress alone are competent to decide upon an offensive war [against the Creeks], and congress have not thought fit to authorize it.”). For a potential counter-example regarding Washington’s 1790 action against the Wabash Indians, see David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 816 (1994). At the outset of the Quasi-War with France, President Adams stated that it was Congress which had the power “to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations.” President John Adams, President’s Speech (May 16, 1797), in 7 ANNALS OF CONG. 54, 57 (1797). President Jefferson addressed his conflicts with the Barbary powers in a speech to Congress. See President Jefferson, First Annual Message to Congress (Dec. 8, 1801), in 1 RICHARDSON, COMPILATION, *supra* note 194, at 326, 327 (stating that he was “[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense”). Jefferson’s secret military instructions were more unilaterally aggressive than he reported to Congress. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 127–29 (2001). But during an earlier conflict with Algiers, Jefferson recorded an official view that Congress had the sole authority to decide whether to use force. See Thomas Jefferson, Mediterranean Trade (Dec. 28, 1790), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 74, at 104, 104–05 (“Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce. If war, they will consider how far our own resources should be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers.”). Regarding views of the first three Presidents on congressional authority to initiate force, see generally Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1653 (2000), which states: “During these early decades, presidents and executive officials uniformly acknowledged the need to come to Congress for authority to support anything other than purely defensive operations.”

350. Letter from Pres. George Washington to Gov. William Moultrie, *supra* note 339, at 73. Low-intensity retaliation against foreign states was sometimes also said to be within Congress’s power because it was a form of “reprisal.” See, e.g., Opinion of Sec’y of State Thomas Jefferson

conceptualized as a punitive U.S. response to violations of the law of nations.³⁵¹ Each conflict featured comprehensive congressional authorization and involvement, though often in the form of military appropriation statutes.³⁵² Recognition of Congress's right to legislatively regulate these issues, albeit apparently not based on an invocation of the Law of Nations Clause, nevertheless suggests that it is not a departure from the original constitutional structure to view the Clause as granting Congress power over retaliatory uses of U.S. military force short of full-scale war.

In sum, Congress's textual grants of war and other lesser coercive powers are comprehensive and have an interconnected logic. As originally understood the Constitution gave Congress responsibility to initiate war and also to initiate policies of force and coercion against foreign nations which might lead to war. Given this, it makes sense—if the Law of Nations Clause has a state-to-state aspect—that it is a power given to Congress. And because of its fit with the Constitution's overall allocation of coercive state-to-state policymaking powers, this interpretation of the Law of Nations Clause helps make textual-structural sense of the Constitution's allocation of coercive powers, as understood by the Founding generation.

There are three major exceptions to the Constitution's vesting in Congress of coercive state-to-state policymaking, but they do not undermine the point that Congress has the primary role because they are justified by unique functional considerations. The treaty power is the first major exception to the Constitution's vesting in Congress of the primary power to make potentially coercive legal policy regarding other states.³⁵³ During the ratification debates, there were numerous complaints that the House of Representatives should not have been excluded from the treaty-making

(May 16, 1793), *reprinted in* 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 123 (1906) (stating that a reprisal is an act of war and that the Constitution gives the right of reprisal exclusively to Congress).

351. The perception that Indians engaged in a savage, illegal form of warfare was commonplace in the late eighteenth century. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776) (accusing King George of “endeavour[ing] to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions”). President Adams expressly described France's actions during the Quasi-War as “violations of the law of nations.” 7 ANNALS OF CONG. 57 (1797). Conflict with the Barbary states of North Africa was caused by their aggressive support of piracy, which was a clear violation of the law of nations in the eighteenth and early nineteenth centuries. *See, e.g.*, WILLIAM BLACKSTONE, 4 COMMENTARIES *68 (stating that piracy is an offense against the law of nations).

352. *See* FISHER, PRESIDENTIAL, *supra* note 41, at 17–19 (stating that President Washington's uses of force against Indian tribes were “explicitly authorized by Congress” and listing statutes); *id.* at 23–24 (stating that Congress authorized the Quasi-War by enacting “several dozen” statutes); *id.* at 35 (stating that Congress authorized force against Barbary states by enacting “at least ten statutes”).

353. That treaties could be instruments of coercion was well known in the eighteenth century. Vattel wrote that a state may “by way of punishment, in order to punish an unjust aggressor, and to put him out of a condition of easily hurting him afterwards,” “impose the conditions of an unequal treaty” against a state that has injured it. 2 VATTEL, *supra* note 37, § 181, at 313.

power.³⁵⁴ Supporters of the Constitution defended by arguing, among other things, that the House must be excluded because, as a large body not always in session, it was ill-suited to participate in necessarily secret, often lengthy negotiations with foreign powers.³⁵⁵ The President's power to refuse to recognize foreign governments, textually based on a negative inference from his power to "receive Ambassadors and other public Ministers,"³⁵⁶ is the second major exception to the vesting of coercive international legal policymaking in Congress. It too can be explained by the fact that a large legislative body, not always in session and not schooled in the arts of diplomacy, cannot be charged with responsibility for receiving (or not receiving) foreign emissaries. So too the third exception, which is the President's constitutional power to use force to "repel sudden attacks"³⁵⁷ on the United States or otherwise act defensively when time is of the essence and Congress need not or cannot be consulted. Putting aside these exceptions based on functional concerns about the incapacity of a large, part-time legislative body, the Constitution's grant to Congress of the primary role in making coercive policy concerning foreign states provides support for reading the Law of Nations Clause to have a state-to-state component.

It does not undercut a state-to-state conception of the Law of Nations Clause, or the larger constitutional vision of congressional primacy in matters of international coercion, to recognize that the Founders understood that Congress would be disputatious, slow-moving, and often not in session. A twenty-first-century observer might object that deciding whether to punish

354. See, e.g., *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, PA. PACKET, Dec. 18, 1787, reprinted in 2 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 624 (proposing to increase the House's treaty-making role by requiring "[t]hat no treaty which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed, or inade conformable to such treaty"); Brutus, *Letter to the Citizens of New York*, N.Y. J., Nov. 1, 1787, reprinted in 13 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 529 (Brutus II); Cato, *Letter to the People of New York*, N.Y. J., Dec. 13, 1787, reprinted in 14 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 431–32 (Cato VI) [hereinafter *Cato VI*]; George Mason, *Objections to the Constitution of Government Formed by the Convention* (Oct. 7, 1787), in 13 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 348, 349–50; The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 18, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 514 (remarks of Patrick Henry).

355. See, e.g., THE FEDERALIST NO. 64, at 390–93 (John Jay) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 75, at 452–53 (Alexander Hamilton) (Clinton Rossiter ed., 1961); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 2, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 509 (remarks of Francis Corbin); The Pennsylvania Convention (Dec. 11, 1787), in 2 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 321, 562 (remarks of James Wilson); *A Landholder VI* (Oliver Ellsworth), CONN. COURANT, Dec. 10, 1787, reprinted in 3 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 490; see also 2 FARRAND, RECORDS, *supra* note 213, at 538 (statement of Roger Sherman at Philadelphia Convention) (stating that the House needs to be excluded from treaty negotiations because of the need for secrecy).

356. U.S. CONST. art. II, § 3.

357. 2 FARRAND, RECORDS, *supra* note 213, at 318.

violations of the law of nations by other states requires speed and efficiency lacking in a part-time, multi-member, two-chamber legislative body. Presidentialists argue that international coercive powers should be located with the President because “[d]ecision, activity, secrecy, and dispatch” and the like are qualities of a single executive but not a plural legislature and are precisely the qualities necessary to the defense and survival of a government during periods of international crisis or war.³⁵⁸ They also note that a unitary, powerful executive was created by the Constitution in large part to remedy the clumsy war and foreign policy management-by-committee that occurred under the Articles of Confederation during the Revolutionary War. But many Founders hoped the United States could be a commercial republic removed from the wars and disputes of Europe.³⁵⁹ They generally thought of “treaties as the cornerstones in the future structure of American foreign relations;” “few of the framers thought that the executive virtues of ‘energy’ and ‘despatch’ would come into play with quite the frequency or subtlety required of European rulers operating amid an ever-fluctuating balance of power.”³⁶⁰ The Founders were also republicans who profoundly distrusted the concentration of power, especially armed (and hence potentially tyrannical) power.³⁶¹ Indeed a majority of the “executive” prerogatives of the British Crown—not just those related to war—were transferred in the U.S. Constitution to Congress.³⁶²

358. See, e.g., Yoo, *Constitutional Text*, *supra* note 326, at 1676–77 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

359. See ELY, *supra* note 59, at 3 (“The founders assumed that peace would (and should) be the customary state of the new republic . . . and sought to arrange the Constitution so as to assure that expectation.”); HENDRICKSON, *supra* note 168, at 170 (“This vision of a liberal trading regime based on mutual interest and reciprocal benefit, and excluding all ideas of domination . . . was a pronounced feature of the early American outlook.”); cf. ROBERT W. SMITH, KEEPING THE REPUBLIC: IDEOLOGY AND EARLY AMERICAN DIPLOMACY 4–5 (2004) (describing the Founders’ principles of foreign policy as based on the ideas that “preservation of republican government demanded political separation from Europe and neutrality in Europe’s endemic wars” and the use of naval and trade coercion instead of standing armies for defense).

360. RAKOVE, ORIGINAL MEANINGS, *supra* note 168, at 267.

361. See, e.g., 1 FARRAND, RECORDS, *supra* note 213, at 70 (statement of Madison) (“[E]xecutive powers ex vi termini, do not include the Rights of war & peace &c. but the powers shd. be confined and defined—if large we shall have the Evils of elective Monarchies”); 2 *id.* at 319 (statement of Mason) (“Mr. Mason was agst giving the power of war to the Executive, because not <safely> to be trusted with it”); *id.* at 318 (statement of Gerry) (stating he “never expected to hear in a republic a motion to empower the Executive alone to declare war”); The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution (Nov. 20, 1787), in 2 ELLIOT’S DEBATES, *supra* note 193, at 415, 528 (remarks of James Wilson) (stating that the Constitution “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large”).

362. See MCDONALD, NOVUS, *supra* note 40, at 247–48 (listing numerous prerogatives of the British King which were expressly transferred by the Constitution to Congress, including the power to raise and regulate armies, navies, and militia, appropriate money to support the military, declare war, grant letters of marque and reprisal, establish courts, coin money, and institute embargoes and impose other regulations on foreign commerce). The British Crown also had the sole prerogative to make treaties and send ambassadors to foreign governments, *see id.*, but under the Constitution the

2. *Participation in Collective Security Institutions and Informal Coalitions to Punish Violations of International Law.*—A second potential implication of understanding the Law of Nations Clause to have a state-to-state dimension is that Congress should have the lead role in making policy regarding the United States' participation in collective security institutions and informal coalitions designed to punish violations of international law by other states. Some of the most bitter controversies about the relative powers of the President and Congress concern major conflicts involving U.S. forces that were authorized only by the President under the authority of multilateral treaty organizations to which the United States is a party. These deployments by the President, without express congressional authorization, are potentially constitutionally unsound under the state-to-state conception of the Law of Nations Clause because they arguably represent punishment of other states for violations of international law—a power which is given to Congress, not the President alone or the President and Senate acting through the treaty power. The controversies about this issue are perhaps as bitter as they are because current understandings of the Constitution have located no adequate textual basis for deciding whether Congress or the President holds this power.³⁶³

In the last fifty years, Presidents have frequently used military force on a large scale to punish violations of international law pursuant to requests from collective security organizations—but without express congressional authorization. For example, the United States fought a major war in Korea in 1950–1953 pursuant to U.N. Security Council authorization. United States involvement was justified, President Truman explained, because North Korea had violated the U.N. Charter and failed to comply with Security Council resolutions, making it necessary to “put down lawless aggression” in order to support the “establishment of a rule of law among nations.”³⁶⁴ As to the domestic constitutional issue, the administration argued that the President may deploy the military abroad to respond to threats to international peace and security or violations of the U.N. Charter without congressional authorization.³⁶⁵ Other examples of presidential uses of the military to

President can only exercise these powers with the consent of the Senate, *see* U.S. CONST. art. II, § 2, cl. 2.

363. *See* HENKIN, *supra* note 8, at 14 (stating that one of the Constitution's “lacunae” in its textual allocation of foreign relations powers is the power “to address the consequences of the United Nations Charter and other international agreements regulating war”).

364. *President's Message to Congress on the Korean Situation*, 23 Dep't St. Bull. 163, 163–64 (July 31, 1950). The message to Congress was followed by a publicly issued State Department legal opinion which explained that “[b]oth traditional international law and article 39 of the United Nations Charter and the resolution pursuant thereto authorize the United States to repel the armed aggression against the Republic of Korea.” Dep't of State Korea Memo, *supra* note 323, at 173.

365. Dep't of State Korea Memo, *supra* note 323, at 173–75.

punish violations of international law include major hostilities against Serbia in 1999 concerning its depredations in Kosovo.³⁶⁶

Although enforcing international law through military action as part of collective security arrangements may sound like a concept unique to the twentieth and twenty-first centuries—after the creation of the United Nations with its express provisions for collective enforcement of international law³⁶⁷—it was actually a central feature of the work of the law of nations theorists read by the Founders. Vattel, Grotius, Burlamaqui, and other theorists envisioned that international law would be enforced at times through an informal collective security regime.³⁶⁸ As Vattel wrote:

Nations have the greatest interest in causing the law of nations, which is the basis of their tranquility, to be universally respected. If any one openly tramples it under foot, all may and ought to rise up against him; and by uniting their forces, to chastise the common enemy, they will discharge their duty towards themselves and towards human society, of which they are members.³⁶⁹

In addition, Vattel stated: “All nations have then a right to repel by force, what openly violates the laws of the society which nature has established among them, or that directly attacks the welfare and safety of that society.”³⁷⁰ Vattel explains the reason for this doctrine is that all nations have a self-interest in protecting themselves by protecting international society and the

366. This military operation was authorized by NATO, not the U.N. See Kahn, *supra* note 4, at 51. The U.S. Congress did not formally declare war or explicitly authorize the use of force. Nevertheless, some commentators argue persuasively that a combination of actions and inaction by Congress constituted, in sum, authorization for the war. See, e.g., Sofaer, *supra* note 4, at 72–75. The U.S. military deployment was justified by President Clinton as a response to Serbian violations of international law and the threat to peace and stability thereby caused, and as an attempt to stop the Yugoslav Serbs from violating the human rights of Kosovars. See 35 WEEKLY COMP. PRES. DOCS. 527 (1999); *id.* at 514.

367. See U.N. Charter art. 1, para. 1 (“The Purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”).

368. See EDWARD S. CREASEY, *FIRST PLATFORM OF INTERNATIONAL LAW* 45 (n.p. 1876) (stating that Vattel and Grotius taught that every nation has a right to “join in forcibly repressing violations of International law”); C. VAN VOLLENHOVEN, *THE THREE STAGES IN THE EVOLUTION OF THE LAW OF NATIONS* 11–12 (1919) (stating that Grotius taught that “a penal code for states is as natural and as indispensable as a penal code for citizens; that every country may help punish the culprit and that no country may oppose any measures to punish him”); *id.* at 15 (“The right to go to war is but the keystone to [Grotius’s] doctrine of state duties. It is but the right to muzzle by warfare those who infringe this doctrine of duties. It is the right, by war, to definitely protect the peace of nations.”).

369. 1 VATTEL, *supra* note 37, § 283, at 202–03.

370. *Id.* § 22, at 10.

law of nations that constitutes it.³⁷¹ Very similar themes are found in the work of other important law of nations theorists and American politicians.³⁷²

Punishing states which offend against the law of nations through collective security regimes need not always mean war. Vattel taught that mutual-defense agreements, trade sanctions, and other coercive but not violent means should be tried before resorting to force.³⁷³ Congress's power to punish offenses against the law of nations could thus represent a power to invoke a spectrum of coercive means in order to preserve and maintain the law of nations. And using force to punish violations of the law of nations is not limited to use against formal nation-states. The collective enforcement of the law of nations envisioned by Vattel, Grotius, and others included the power to punish through warfare pirates, terrorists, and other sub-state violent groups.³⁷⁴

371. *Id.*

372. *See, e.g.,* 2 BURLAMAQUI, *supra* note 217, at 333 ("The law of God no less enjoins a whole nation to take care of their preservation, than it does private men. It is therefore just that they should employ force against those, who declaring themselves their enemies, violate the law of sociability towards them, refuse them their due, seek to deprive them of their advantages, or even to destroy them. It is therefore for the good of society, that people should be able to repress the malice and efforts of those who subvert the foundation of it."); WOLFF, *supra* note 212, § 627 (arguing that "a right of war belongs to all nations in general against those who, in their eagerness for wars as such, as carried into wars for reasons neither justifying nor persuasive," thereby "despising the natural obligation by which they are bound to other nations"); Letter from Sec'y of Treasury Alexander Hamilton to Pres. George Washington (May 2, 1793), in 14 PAPERS OF HAMILTON, *supra* note 193, at 398, 406–07 ("There is no principle better supported by the Doctrines of Writers, the practice of Nations, and the dictates of right reason, than this—that whenever a Nation adopts maxims of conduct tending to the disturbance of the tranquility and established order of its neighbours, or manifesting a spirit of self-aggrandisement—it is lawful for other Nations to combine against it, and, by force, to controul the effects of those maxims and that spirit. The conduct of France, in the instances which have been stated, calmly and impartially viewed, was an *offence* against Nations, which naturally made it a common cause among them to check her career."); *Letters of Pacificus No. 2* [Alexander Hamilton], *supra* note 193, at 62 ("It is a principle well agreed & founded on the best reasons, that whenever a particular nation adopts maxims of conduct contrary to those generally established among nations calculated to disturb their tranquillity & to expose their safety, they may justifiably make a common cause to oppose & controul such Nation.").

373. 3 VATTEL, *supra* note 37, § 46, at 467 ("But force of arms is not the only expedient by which we may guard against a formidable power. There are others more mild and tranquil, such as are always lawful: the most effectual is a confederacy of other sovereigns less powerful, the junction of whose forces is a balance against the power which gives them umbrage. . . . They may also mutually favor each other, exclusively of him whom they fear, and by allowing various advantages to the subjects of allies, especially in trade, and denying them to those of that dangerous power, they will augment their own strength, and diminish that of the latter, without its having any cause of complaint.").

374. *See id.* § 34, at 457–58 ("Assassins and incendiaries by profession, are not only guilty in respect of the particular victims of their violences, but likewise of the state to which they are declared enemies. All nations have a right to join in punishing, suppressing, and even exterminating these savages."); *see also* 2 GROTIUS, *supra* note 189, bk. 2, ch. 20, § 40, at 505–06 (stating that it is right to wage war against pirates, barbarians, and other groups that violate the law of nature and nations).

All presidential initiatives to work through formal or informal collective security regimes to punish violations of international law are not necessarily unconstitutional in the absence of express congressional authorization. The President has important textually based constitutional powers that bear on these issues, and the constitutional interactions between the treaty power, the executive power, and congressional legislation are notoriously complex. But nevertheless, finding a state-to-state component of the Law of Nations Clause would suggest that Congress should have a much more central role than the practice of recent history suggests.

3. *Treaty Termination*.—A state-to-state component of the Law of Nations Clause provides a textual basis for giving Congress the power to denounce treaties on the international plane when there has been a material breach or other misconduct by the other party. There is no consensus right now as to whether the President acting alone, the President and the Senate together, or the Congress has authority to denounce treaties.³⁷⁵ Previous commentators have understood the constitutional text to be silent on this issue.³⁷⁶ As with many textually and politically unresolved questions of foreign affairs authority, the President has assumed control.³⁷⁷ Recently, Professors Prakash, Ramsey, and Yoo have argued that because treaty termination was, in the eighteenth century, part of the executive power, and because it is not specifically allocated by the constitutional text, it falls into the residual executive power given to the President by the Vesting Clause.³⁷⁸ On the contrary, the Law of Nations Clause could be seen as a textual allocation to Congress.

In the eighteenth century, as today, it was an important rule of the law of nations that treaties must be obeyed.³⁷⁹ This is known as the doctrine of

375. See Randall H. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 889 (1958) (stating that in practice each possible institutional combination (among and between the President, Senate, and Congress as a whole) has been used to terminate U.S. treaties, but that “there has never been any court decision holding [which method is] the constitutional method for bringing about the termination of a treaty”).

376. See HENKIN, *supra* note 8, at 14–15 & n.** (stating that both the President and the Senate have claimed the authority to terminate treaties, but that even “considerable stretching of language, much reading between lines, and bold extrapolation” cannot explain which branch of the government holds that power); cf. John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1319 (2002) [hereinafter Yoo, *Rejoinder*] (“[T]he constitutional text does not specifically address the issue . . .”).

377. See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (approving the President’s unilateral termination of a treaty). On appeal, a plurality of Justices held the issue nonjusticiable. *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring). The earliest comment on the power to terminate treaties by a Supreme Court Justice appears to have been Justice Iredell’s suggestion that “Congress alone” had the authority to terminate a treaty, through its power to declare war. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796).

378. Prakash & Ramsey, *Foreign Affairs*, *supra* note 326, at 1599; Yoo, *Rejoinder*, *supra* note 376, at 1319.

379. See, e.g., 2 BURLAMAQUI, *supra* note 217, at 390 (“[S]overeigns are no less obliged, than individuals, inviolably to keep their word, and be faithful to their engagements. The law of nations

pacta sunt servanda.³⁸⁰ One of the core offenses against the law of nations was violating a treaty. Major law of nations theorists discussed treaty violations in these terms.³⁸¹ American Founders appear to have shared this understanding. It was widely understood that the binding nature of treaties was a rule of the law of nations.³⁸² During the Articles of Confederation period, Congress recognized, at least twice, that violations of treaties were violations or offenses against the law of nations.³⁸³ Edmund Randolph's influential speech at the Philadelphia convention and his widely circulated postconvention letter both discussed infractions of treaties as one of the most important law of nations problems faced by the government under the Articles. During the ratification debates, the "punishment" terminology was used to refer to the need to discipline American states which violated treaties with foreign nations.³⁸⁴ One of the few explicit discussions of the meaning of the Law of Nations Clause during ratification was an essay which argued that the Clause allowed Congress to punish violations of treaties.³⁸⁵

If the breach of a treaty by one party is an offense against the law of nations justifying the other party's termination, surely Congress's Law of Nations Clause power could be used to punish the breach in that fashion.

renders this an indispensable duty . . ."); 2 Vattel, *supra* note 37, § 221, at 347 ("He who violates his treaties, violates at the same time the law of nations; for he despises the faith of treaties, that faith which the law of nations declares sacred.").

380. See BLACK'S LAW DICTIONARY 1133 (7th ed. 1999) (defining *pacta sunt servanda* as "[t]he rule that agreements and stipulations, esp. those contained in treaties, must be observed").

381. Burlamaqui refers to breaking a treaty of peace as an "offence," and states that, if satisfaction is refused, "then the offended hav[e] a right to take up arms, and to treat the offender as an enemy, against whom every thing is lawful." 2 BURLAMAQUI, *supra* note 217, at 414; see also 2 GROTIUS, *supra* note 189, ch. 15, § 15, at 405 (referring to a violation of a treaty as an "offence"); 2 Vattel, *supra* note 37, § 201, at 327 (referring to one injured by a treaty violation as "the offended"); 2 RICHARD ZOUCHÉ, AN EXPOSITION OF FEJIAL LAW AND PROCEDURE, OR OF LAW BETWEEN NATIONS, AND QUESTIONS CONCERNING THE SAME 30 (Thomas Erskine Holland ed., J.L. Brierly trans., Carnegie Inst. of Wash. 1911) (1650) (discussing a treaty violation as "an offense against a convention").

382. See Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 22, 1788), in 4 ELLIOT'S DEBATES, *supra* note 193, at 1, 119 (remarks of William Davie) (contending that treaties are "by the laws of nations . . . the supreme law of the land to their respective citizens or subjects"); The Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution (Jan. 16, 1788), in 4 ELLIOT'S DEBATES, *supra* note 193, at 253, 277, 278-79, 308 (remarks of Charles Cotesworth Pinckney) (quoting writers on the law of nations regarding the binding nature of treaties); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 2, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 342 (remarks of William Grayson) (stating that by the law of nations a violation of a treaty is a cause for war).

383. 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1781, *supra* note 131, at 1136-37; 13 JOURNALS OF THE CONTINENTAL CONGRESS, 1779, *supra* note 283, at 284.

384. See *supra* notes 258, 311 and accompanying text.

385. *Anti-Cincinnatus*, HAMPSHIRE (MASS.) GAZETTE, Dec. 19, 1787, reprinted in 5 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 489-90. Years later, James Kent's lecture "Offences Against the Law of Nations" began by stating that "[t]he violation of a treaty of peace, or other national compact, is a violation of the law of nations." 1 KENT, COMMENTARIES, *supra* note 41, at 169.

Edward Corwin suggested as much.³⁸⁶ The earliest action by the U.S. government to terminate a treaty occurred in 1798 during the Quasi-War crisis, when Congress terminated the 1778 treaties with France.³⁸⁷ There is little recorded debate from which we can determine what congressmen believed was the constitutional source of their power. But it is perhaps noteworthy that the statute had a preamble explaining the termination, which perfectly sounds all of the themes discussed in section III(B)(2) above, used by states to explain that they have been wronged, the law of nations violated, and therefore are taking punitive action.³⁸⁸

The functional reasons justifying the Constitution's exceptional removal of the House of Representatives from participation in concluding treaties—presence and secrecy during extended, sensitive negotiations³⁸⁹—do not apply to termination. Instead, other constitutional values favoring the House's involvement come to the fore. As Senator Charles Sumner argued regarding congressional participation in denouncing a treaty with Denmark, abrogation of a treaty is a hostile act which might lead to war; Congress, charged with declaring war, should be involved in the decision to start down that path.³⁹⁰

B. The Constitutional Status of Customary International Law

By understanding the Law of Nations Clause to speak to the authority of Congress to exercise powers under international law against foreign states and U.S. states, one gains a better understanding of the status of the law of nations under the Constitution. In this sense, I see the Clause as a lens for understanding several of the complicated and hotly contested questions about the constitutional status of customary international law. This subpart outlines potential implications of the state-to-state conception of the Law of Nations Clause for debates about whether and how the customary law of nations binds and is judicially enforceable against American state governments and the political branches of the federal government.

1. Binding on the Political Branches?—Some commentators suggest that the President and perhaps Congress also—even when exercising

386. CORWIN, *supra* note 41, at 115.

387. Act of July 7, 1798, ch. 67, 1 Stat. 578 (declaring the treaties previously concluded with France no longer obligatory on the United States).

388. *Id.* (“Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French government . . . [a]nd whereas, under authority of the French government, there is yet pursued against the United States a system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation . . .”).

389. *See supra* note 355 and accompanying text.

390. CONG. GLOBE, 34th Cong., 1st Sess. 600 (1856). Substantial legislative control over the breach of treaties would likely not have been seen as novel by the Founders. According to Professor Yoo, in the seventeenth and eighteenth centuries the British Parliament used its funding and other powers to force the Crown to “repudiate treaties” with some “regularity.” YOO, POWERS, *supra* note 48, at 51.

constitutionally vested foreign affairs powers—cannot lawfully violate customary international law, and that the Judiciary can enjoin such violations because some rules of customary international law are constitutionally mandatory.³⁹¹ Some of these commentators claim that the Law of Nations Clause is a textual recognition of the incorporation of customary international law into U.S. law and its self-executing and binding nature.³⁹²

The dual conception of the Law of Nations Clause advanced in this Article potentially provides a textual basis to reject these arguments.³⁹³ The Clause alludes to the understanding that, at the international level, the actual lawfulness of international law resulted from the fact that an injured state punished, or held out the threat of punishing, another state that violated the law. This state-to-state punishment occurred not through litigation but coercive diplomacy, trade sanctions, and military conflict. Like individuals in the state of nature, each state has the right to protect itself and enforce the law by using force against other states. There is no common sovereign in the state of nature to require law abiding. To be sure, the law of nations was thought to exert a moral force (because it was based in reason and perhaps God's will, and appealed to and depended on the honor of statesmen), and states had a strong self-interest in following the law based on the desire to avoid conflict with other states.³⁹⁴ But on the international level, the law is not

391. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7–11 (1996) (suggesting that customary international law legally binds and is judicially enforceable against the President and Congress); Lobel, *supra* note 20, at 1075–76 (“Congress and the President jointly should not have the power to violate fundamental international norms, such as the prohibitions on torture, assassination of civilians, aggression, or war crimes. These norms effectively operate as an implicit part of the constitutional limitations on governmental power. Violations of such fundamental rules should be subject to judicial review as long as a proper case or controversy exists.”); cf. David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT’L L. & POL. 363, 378–94 (2003) (arguing that it would be unconstitutional for the President to violate the international laws of war, and raising questions whether it might also be unconstitutional for Congress to do so); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 869 (1987) (“Arguably, the fact that treaties are subject to constitutional limitations does not conclude the issue with respect to customary law. Customary law is general law binding on all nations, and no country should be able to derogate from it because of that country’s particular constitutional dispositions.”).

392. See Lobel, *supra* note 20, at 1092–93 (stating that “[t]he language of the Constitution refers directly to international law in a manner that confirms the limitations on congressional authority in the constitutional framework” and citing the Law of Nations Clause as one textual indication that “international law was to be federal law, enforced by the national judiciary”); Paust, *Customary International Law*, *supra* note 20, at 77–78 (suggesting that the Law of Nations Clause is one of many constitutional provisions which incorporate international law into U.S. law).

393. There are other reasons too, such as judicial doctrine. Cf. Bradley & Goldsmith, *Customary International Law*, *supra* note 8, at 851 (“No court prior to *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)] ever held that CIL [customary international law] was part of the ‘Laws of the United States’ within the meaning of Article III, and to date no court has held that CIL is part of the ‘Laws of the United States’ within the meaning of the Supremacy Clause.”).

394. See WILLIAM BLACKSTONE, 4 COMMENTARIES *68–69 (stating that violations of the law of nations give just cause for war); 1 WILSON’S WORKS, *supra* note 190, at 149 (“The law of nations, as well as the law of nature, is of obligation indispensable . . . [and] of origin divine.”);

actually enforced by anyone or anything except other independent states exerting their coercive power to punish. The independent sovereign power of a state to use force internationally to, for example, punish other states for violations of the law, would be fatally undermined if a domestic judiciary were able to bind the political branches to its view of the law of nations. The Law of Nations Clause arguably tells us that punishment and coercion are the way that international law is enforced between states. The state-to-state conception of the Law of Nations Clause thus confirms the correctness of the Supreme Court's observation that the law of nations comprising "the general norms governing the behavior of national states with each other" "occupied the executive and legislative domains, not the judicial."³⁹⁵

The relatively few discussions of the law of nations during the ratification debates in 1787 and 1788 support this understanding. Virginia's was the only state ratifying convention in which there was extensive, recorded debate about the law of nations. Though the conversation was inconclusive, it suggests that the Law of Nations Clause was not seen as making the law of nations somehow constitutionally self-executing against the U.S. government. Virginia had a strong Antifederalist contingent, including Patrick Henry, George Mason, and James Monroe, which sought to defeat the Constitution by, among other arguments, playing on fears of western delegates (Virginia included what is now Kentucky and West Virginia) that the northern states would dominate the new government and use the treaty power to give away the United States's claimed right to navigate the Mississippi River through Spanish territory. Access to the river was rightly seen as crucial to western expansion and to the ability of western farmers to cheaply get their goods to market. The fear about the treaty power was not unfounded. In 1785 and 1786, the Continental Congress had instructed John Jay to negotiate with the Spanish ambassador Don Diego de Gardoqui to secure access to the Mississippi.³⁹⁶ Gardoqui refused the Mississippi but offered favorable access for U.S. trade in Spanish ports. This offer split Congress along sectional lines because it would have greatly benefited the northern commercial states but hurt the southern and western states, which lacked a carrying industry but needed access to the Mississippi. Under the Articles of Confederation, two-thirds of the states (nine) were required to approve a treaty,³⁹⁷ and so the southern and western bloc could prevent a

Berman, *supra* note 8, at 72–73 (noting the Christian basis of the law of nations); Burley, *supra* note 24, at 481–86 (discussing the Founders' view that they were honor bound to uphold the law of nations).

395. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

396. The story of these negotiations and the political maneuverings in Congress are recounted in MARKS, *supra* note 168, at 25–35; Eli Merritt, *Sectional Conflict and Secret Compromise: The Mississippi River Question and the U.S. Constitution*, 35 AM. J. LEGAL HIST. 117, 118–44 (1991); Charles Warren, *The Mississippi River and the Treaty Clause*, 2 GEO. WASH. L. REV. 271, 272–86 (1934); and Yoo, *Globalism*, *supra* note 61, at 2011–13.

397. ARTICLES OF CONFEDERATION art. IX.

treaty from being concluded. Nevertheless, a simple majority of states could, under the Articles, approve negotiating instructions. So when seven northern states approved Jay's continued negotiation under the new terms offered by Gardoqui, even though a final treaty embodying those terms would never be approved in Congress, many observers, especially in the south and west, saw this as a dangerous abuse by the north.³⁹⁸

In 1787 and 1788, Antifederalists in Virginia seized on concerns raised by this recent episode to suggest that the proposed Constitution's vesting of the treaty power was dangerous.³⁹⁹ George Mason, for example, proposed that three-quarters of Senators, not two-thirds, should be required to approve treaties. He and others also suggested that the House of Representatives—in which populous Virginia would have great weight—be given a formal role in treaty-making. Federalists responded in various ways. One of their arguments was that the law of nations would prevent the Senate and President from concluding a treaty ceding America's "right" to navigate the Mississippi.⁴⁰⁰ Antifederalist William Grayson effectively ridiculed this notion on the ground that the law of nations was not internally binding and enforceable on the U.S. government:

But we are told, in order to make that paper [the Constitution] acceptable to the Kentucky people, that this high act of authority cannot, by the law of nations, be warrantable, and that this great right [to navigate the Mississippi] cannot be given up. I think so also. But how will the doctrine apply to America? After it is actually given away, can it be reclaimed? If nine states give it away, what will the Kentucky people do? Will Grotius and Puffendorf relieve them? If we reason what was done—if seven states attempted to do what nine states ought to have done—you may judge of the attention which will be paid to the law of nations. Should Congress make a treaty to yield the Mississippi, that people will find no redress in the law of nations.⁴⁰¹

398. See Merritt, *supra* note 396, at 132.

399. See generally *id.* at 162–64.

400. See The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 13, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 345–46 (remarks of James Madison) (asserting that the law of nations prohibits the government from ceding territorial rights without consent of the affected population unless wartime necessity absolutely requires it); *id.* at 510–11 (remarks of Francis Corbin) (asserting that the law of nations prohibits a government from ceding territorial rights without an act of the national legislature); *id.* at 356–57 (remarks of George Nicholas) (suggesting that the law of nations bars a government from ever ceding territorial rights).

401. *Id.* at 350 (remarks of William Grayson); see also *id.* at 505–06 (remarks of William Grayson) (distinguishing between the binding effect that the law of nations might have on the international plane, between nations, and the internal effectiveness of the law of nations, and asking rhetorically, "Cannot Congress give the Mississippi also by treaty, though such cession would deprive us of a right to which, by the law of nations, we are inalienably and indefeasibly entitled? I lay it down as a principle that nations can, as well as individuals, renounce any particular right?").

Even though this important issue threatened to derail ratification of the Constitution in Virginia, no Federalist retorted that the Law of Nations Clause, or any other part of the Constitution, made the law of nations effectively binding and enforceable, internally, on the U.S. government. The most that they argued was that the law of nations was generally binding between all nations internationally and therefore suggested that national acts inconsistent with the law of nations would not be internationally effective.⁴⁰² Patrick Henry acidly retorted that “We may be told that we shall find ample refuge in the law of nations. When you yourselves have your necks so low that the President may dispose of your rights as he pleases, the law of nations cannot be applied to relieve you.”⁴⁰³ In other words, once Virginia approved a constitution that empowers the President (and Senate) to make and ratify treaties, the law of nations would not somehow supersede the constitution to protect rights given away by treaty. Because Federalists never truly disputed Grayson and Henry’s constitutional interpretation on this point,⁴⁰⁴ I understand these debates to show that the law of nations was not thought to be constitutionally binding and internally enforceable against the U.S. government, through the Law of Nations Clause or otherwise.

Other evidence of Founders’ views of the law of nations comes from comments about international politics. Numerous ratifiers voiced “realist” views about the dominance of violence and power-seeking in international affairs,⁴⁰⁵ while others noted that legal rights on the international plane are

402. This appears to be what George Nicholas meant by his rather cryptic statements. *See id.* at 502 (remarks of George Nicholas) (“[T]he law of nations was permanent and general. It was superior to any act or law of any nation; it implied the consent of all, and was mutually binding on all, being acquiesced in for the common benefit of all.”). And John Jay likewise seems to have argued that the law of nations would, on the international level, void any fraudulent or unauthorized treaties. *See* THE FEDERALIST NO. 64 (John Jay), *supra* note 355, at 395 (stating that a treaty procured by “corruption” of President and Senate “would, like all other fraudulent contracts, be null and void by the law of nations”). I read this statement as referring to the effect of treaties on the international not domestic plane because of its reference to treaties as “contracts,” i.e., agreements between sovereign states, not “laws,” i.e., treaties in their domestic effect under the Supremacy Clause.

403. The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 18, 1788), in 3 ELLIOT’S DEBATES, *supra* note 193, at 1, 502 (remarks of Patrick Henry).

404. Virginia Federalists eventually blunted concerns about the treaty power by suggesting that the House of Representatives would have an informal but decisive restraining influence on the content and domestic effect of treaties. *See* Flaherty, *supra* note 61, at 2142–48.

405. *See, e.g.*, THE FEDERALIST NO. 4, at 46 (John Jay) (Clinton Rossiter ed., 1961) (“[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 6, 1788), in 3 ELLIOT’S DEBATES, *supra* note 193, at 1, 75 (remarks of Edmund Randolph) (stating that “the history of every part of the world, where nations bordered on one another” has “ever been almost a perpetual scene of bloodshed and slaughter”); *id.* at 132 (remarks of James Madison) (stating that the United States risks attack by “[t]hose nations whose interest is incompatible with an extension of our power”).

typically meaningless if not backed by force.⁴⁰⁶ These views are broadly consistent with the state-to-state coercion view of the Law of Nations Clause advanced herein.

Somewhat later evidence of the views of the Founding generation is found in the Supreme Court's landmark 1796 decision in *Ware v. Hylton*. In the course of stating that acts of the Virginia legislature were domestically valid and binding even if they violated the law of nations, both Justices Chase and Iredell also stated in dicta that only the Constitution, and not the law of nations, limited the domestic legislative power of the U.S. Congress.⁴⁰⁷

That the Founders generally did not think that the law of nations was constitutionally binding and internally enforceable against the U.S. government gives necessary context to their many statements to the effect

406. Randolph, for example, discussed Virginia war debt owed to France, which "by the law of nations, [France] will have a right to demand the whole of." The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 6, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 73 (remarks of Edmund Randolph). While France presently had the "power to enforce that right," Randolph predicted that "[i]f we become one sole nation, uniting with our sister states, our means of defence will be greater; the indulgence for the payment of those debts will be greater; and the danger of an attack less probable." *Id.* at 74. Hamilton stated flatly that "[t]he rights of neutrality will only be respected when they are defended by an adequate power." THE FEDERALIST NO. 11, at 87 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Madison argued that the United States needed to increase its national coercive powers if it was ever to be able to enforce against Spain its right—said to exist under international law—to navigate the Mississippi River. See Merritt, *supra* note 396, at 150 (describing Madison's views that a strong national military power is necessary to make the U.S. a respectable nation and thus able to retain rights to navigate the Mississippi); see also The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 13, 1788), in 3 ELLIOT'S DEBATES, *supra* note 193, at 1, 359–60 (remarks of George Nicholas) (regarding the claim that Kentucky had a right by the law of nations to navigate the Mississippi: "If she has a right . . . I ask the gentleman why she does not enjoy the fruits of her right. . . . [The people of Kentucky] want a government which will force from Spain the navigation of that river").

407. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 223–24 (1796) (Chase, J.) ("The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. . . . Suppose, a general right to confiscate British property, is admitted to be in congress, and congress had confiscated all British property within the United States, including private debts, would it be permitted, to contend, in any court of the United States, that congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode and manner."); *id.* at 265 (Iredell, J.) ("The power of the legislatures is limited; of the state legislatures, by their own state constitutions and that of the United States; of the legislature of the Union, by the constitution of the Union. Beyond these limitations, I have no doubt, their acts are void, because they are not warranted by the authority given. But within them, I think, they are in all cases obligatory in the country subject to their own immediate jurisdiction, because, in such cases, the legislatures only exercise a discretion expressly confided to them by the constitution of their country, and for the abuse of which (if it should be abused) they alone are accountable."). A similar sentiment was expressed by Justice Iredell in a 1794 grand jury charge. See *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, *supra* note 170, at 467 ("Even the Legislature cannot rightfully controul [the Law of Nations], but if it passes any law on such subjects is bound by the dictates of moral duty to the rest of the world in no instance to transgress them, although if it in fact doth so it is entitled to actual obedience within the sphere of its authority.").

that the United States is “bound” by the law of nations or that the United States cannot lawfully transgress that law.⁴⁰⁸ Violating the law of nations opened the United States to retaliatory punishment by another state. That retaliation would be (internationally) lawful if the United States had indeed violated the law of nations and in so doing injured the other state. But none of this means that the law of nations is constitutionally mandatory and internally enforceable by courts against the political branches of the U.S. government. That was simply not how things worked. As the first Attorney General of the United States noted, “[t]he law of nations” was “not specially adopted by the constitution.”⁴⁰⁹ Instead, there was a widespread understanding that violations of the law of nations by governments were almost exclusively political questions to be resolved by diplomacy or force.⁴¹⁰

And in fact the Constitution does not leave it to conjecture what kinds of law will be supreme and binding *within* the United States (as opposed to on the international plane). The Supremacy Clause expressly discusses that issue, providing that “[t]his 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.”⁴¹¹ The law of nations is not mentioned, and any sensible textual account of the Constitution must give significance to that omission. This omission, coupled with the express grant to Congress of a plenary-sounding power to both define and punish, is inconsistent with the idea that the law of nations as a whole is self-executing and binding on the political branches.⁴¹²

408. See, e.g., *John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia*, DUNLAP’S AM. DAILY ADVERTISER, July 26, 1793, reprinted in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 382 (“[T]he Laws of Nations . . . are those Laws by which civilized nations are bound to regulate their Conduct towards each other, both in peace and in war.”).

409. *Who Privileged from Arrest*, 1 Op. Att’y Gen. 26, 27 (1792); see also *supra* notes 111–12 and accompanying text.

410. See *James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, *supra* note 170, at 455 (“In whatever manner the Law of Nations is violated, it is a subject of national, and not personal complaint. The nation injured . . . is to apply to that nation from whose government the injury proceeds, or in which it is committed, and if due redress be not given it is a cause of reprisals, and under some circumstances may even justify war.”); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2003); *Ware*, 3 U.S. at 223–24, 229 (Chase, J.); *id.* at 259–60 (Iredell, J.); WILLIAM BLACKSTONE, 4 COMMENTARIES *67–68; Lee, *supra* note 28, at 1032–34.

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

412. See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 543 (1999) (“The Supremacy Clause makes no mention of customary international law (referred to at the time of the Founding as part of the ‘law of nations’). Indeed, the only mention in the Constitution of this law is in Article I, which states that Congress shall have the power to ‘define and punish . . . Offenses against the Law of Nations.’ The constitutional text therefore may suggest that, unlike treaties, customary international law can never be self-executing federal law.”); cf. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. 1321, 1324 (2001) (stating that “[t]he text, structure, and history of the Constitution . . . suggest that [the Constitution’s express federal lawmaking] procedures were meant to be the exclusive means of adopting ‘the supreme Law of the Land’”).

This does not mean, however, that—as some have suggested⁴¹³—the Law of Nations Clause makes all of customary international law non-self-executing; in other words, that the Clause prevents U.S. courts from defining and applying rules of customary international law unless and until Congress has authorized it by legislation. As the Supreme Court noted in *Sosa*, at the time of the Founding a narrow “pedestrian element” of the law of nations did “fall within the judicial sphere.”⁴¹⁴ And indeed the Constitution itself makes a textual exception to the understanding that the law of nations governing international relations was not judicially enforceable or otherwise domestically binding within the United States on the U.S. government. The exception is found in Article III of the Constitution, which extends the federal judicial power “to all cases affecting ambassadors, other public ministers and consuls; [and] to all cases of admiralty and maritime jurisdiction.”⁴¹⁵ Admiralty and ambassador cases were understood by the Founders to be governed largely by the law of nations,⁴¹⁶ and would frequently involve sensitive foreign-relations issues concerning the United States government. Admiralty and ambassador cases could conceivably involve federal government officials as defendants, especially in prize cases. Besides these two express textual exceptions in Article III,⁴¹⁷ the rest of the constitutional text

413. *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (“[It is] abundantly clear that Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts.”), *rev’d on other grounds sub nom. Rasul v. Bush*, 542 U.S. 466 (2004); U.S. *Sosa* Brief, *supra* note 22, at 32–33 (agreeing with Judge Randolph’s analysis); *Jarvis*, *supra* note 15, at 252–53, 278–80 (concluding that federal courts may determine the law of nations in only two instances: where there is a domestic law on point and where Congress delegates its constitutional authority).

414. *Sosa*, 542 U.S. at 715.

415. U.S. CONST. art. III, § 2, cl. 1. Article III also gives federal courts jurisdiction over “controversies to which the United States shall be a party.” But given the eighteenth century’s robust rules of sovereign immunity, in practice this could only apply to cases initiated by the United States or cases in which the United States specifically consented to be sued. Nor should Article III’s grant of alienage jurisdiction be read as an authorization for the federal courts to apply a self-executing law of nations against the United States government through suits by aliens against individual government officials. This would be too inconsistent with the widespread understanding that violations of the law of nations by governments against foreigners were political questions to be resolved by diplomacy or force, not litigation. *See supra* note 410 and accompanying text.

416. *See, e.g.*, The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 18, 1788), in 3 ELLIOT’S DEBATES, *supra* note 193, at 1, 507 (remarks of George Nicholas) (referring to the law of nations as governing ambassador cases); *A Landholder VI*, *supra* note 355, at 490 (referring to the law of nations as governing admiralty cases).

417. The Constitution likely makes these exceptions because of the unique nature of these two issues. With the admiralty law governing prizes of war, an overriding concern was for good title to seized vessels and goods to be established, so that either the captor or the original owner whose rights were restored could later pass title to a buyer. Courts with fair procedures were indispensable to establishing a title that would be universally respected. Similar concerns about reciprocity prevail in the law governing ambassadorial immunity. The United States had a strong interest in robust judicial protection of foreign diplomats under the law of nations because it hoped that its own diplomats abroad would be similarly protected. The common law prosecutions of individuals for law of nations violations initiated by the federal Executive Branch in the 1790s could be seen as

as originally understood suggests that the law of nations was not thought to be internally mandatory and judicially enforceable against the political branches.⁴¹⁸

2. *Binding on the U.S. States?*—One of the most bitter historical debates in foreign relations law concerns whether the customary international law was thought to bind the states in a self-executing fashion through the Supremacy Clause. Prominent academics have argued that customary international law is federal law that, without any political branch authorization, can be applied by federal courts to bind the states.⁴¹⁹ There are solid arguments for rejecting this claim based solely on the text of the Supremacy Clause itself—which mentions treaties but not the law of nations, even though the Law of Nations Clause shows us that the Framers knew how to refer to customary international law.⁴²⁰ And a state-to-state component of

falling within Article III's express provision for cases involving admiralty, ambassadors, or treaties. *See United States v. Ravara*, 2 U.S. (2 Dall.) 297, 27 F. Cas. 714 (C.C.D. Pa. 1793) (No. 16,122a) (involving foreign consul as defendant); *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) (involving privateering in violation of treaties).

418. Article III's grant of federal judicial power over cases arising under "the Laws of the United States" should not be understood to include the law of nations. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."). It would make little sense to carefully dole out bits of law-of-nations jurisdiction throughout Article III (admiralty, ambassadors, etc.) only to include it all anyway in a catch-all phrase. Moreover, the major textual argument favoring inclusion of the law of nations within "the Laws of the United States" is unconvincing. Professor Dodge, among others, compares Article III to the Supremacy Clause (referring to "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof"), and concludes that Article III's broader language suggests that it includes something that the Supremacy Clause does not. *See Dodge, Constitutionality, supra* note 177, at 704–05 ("If one takes the difference in text seriously, one must conclude that there is at least one category of laws that are not 'made in Pursuance' of the Constitution and yet are 'Laws of the United States' for the purposes of Article III. The law of nations is the most obvious candidate."). There is a better explanation for the difference in wording: If federal courts are to exercise judicial review of statutes for constitutionality, they should have jurisdiction to hear all cases arising under the laws of the United States—hence the broad and inclusive phrasing of Article III. But, after reviewing for constitutionality, they would only enforce as the supreme law of the land those laws that are in fact constitutional—that is, made "in pursuance" of the Constitution. *Cf. AKHIL REED AMAR, AMERICA'S CONSTITUTION 178–79* (2005) (reading the Supremacy Clause's "in pursuance" language as stating that "[o]nly congressional statutes consistent with the Constitution . . . were entitled to be treated as part of the supreme law of the land").

419. *See, e.g., Harold Hongju Koh, Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824–27 (1998).

420. The Supremacy Clause provides that "[t]his 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." U.S. CONST. art. VI, § 2. It is almost impossible to imagine that customary international law would have been understood by the Founders—or even today—to be law "made in Pursuance" of the Constitution. *See Bradley & Goldsmith, Customary International Law, supra* note 8, at 850; Michael D. Ramsay, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 195–96 (2001). The law of nations was seen as comprising both natural law, originating in human reason or perhaps God, and the customary practices of the nation-states of the world; neither is "made in Pursuance" of the Constitution. *See Jay, supra* note 24, at 822–24, 832–33.

the Law of Nations Clause which incorporated the idea that U.S. states would be “punished” by Congress for violations of the customary law of nations provides an additional textual reason to reject the claim that the U.S. states are bound by self-executing customary international law.

During the ratification debates, it was agreed by most supporters of the Constitution that the states must be constrained to obey and apply treaties and the law of nations; better enforcement of treaties against the states was in fact an important spur of constitutional reform leading to the Philadelphia Convention.⁴²¹ But there was also serious concern that the legislative supremacy of states over their own internal affairs could be undermined by an excessively nationalizing or “consolidating” Constitution that empowered the federal government to sweep aside state governments and impose national and international legal obligations on them and their citizens.⁴²² As discussed above, Antifederalists vehemently criticized both the treaty power and many legislative powers of Congress on the ground that they usurped the right of states to regulate internal matters.⁴²³ Antifederalists also charged that an aristocratic Senate dominated by financial and merchant elites from the north could use treaties to give away important international interests, such as territory or their “right” (contested by Spain) to freely navigate the Mississippi River.⁴²⁴

A crucial compromise between these two positions—the need to restrain state government violations of treaties while simultaneously protecting the states and the people against excessive nationalization and the unjust imposition of international legal duties—was the organization of the Senate as a body representing state governments. Each state, regardless of size, had equal representation in the Senate, and Senators were elected by state

421. See *supra* notes 248–49 and accompanying text.

422. See generally HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 10–11 (1981) (describing the Antifederalists as concerned about the new Constitution creating “a government with authority extending ‘to every case that is of the least importance’” and capable of “destroying the federal character of the union”); DANIEL WIRLS & STEPHEN WIRLS, THE INVENTION OF THE UNITED STATES SENATE 136 (2004) (classifying “consolidation” of power by the national government at the expense of state sovereignty as one of two principal Antifederalist concerns during the ratification debates); WOOD, *supra* note 40, at 525, 524–32 (describing that the Virginia plan envisioned “a strong *consolidated* union, in which the idea of states should be nearly annihilated,” the precise concern of Antifederalists).

423. See *supra* note 316 and accompanying text.

424. See, e.g., WIRLS & WIRLS, *supra* note 422, at 141 (recounting Virginian William Grayson’s worry that “[i]f the senators of the Southern States be gone but one hour, a treaty may be made by the rest, yielding that inestimable right’ of navigation of the Mississippi”); *Cato VI*, *supra* note 424, at 431–32 (warning of the dangers of bestowing the immense treaty power on the Senate and Executive Branch while leaving the House of Representatives without a means to interfere); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 18, 1788), in 3 ELLIOT’S DEBATES, *supra* note 193, at 1, 503–04 (remarks of Patrick Henry) (suggesting that the President has the power to “most flagrantly” violate state constitutions via the signing of treaties).

legislatures.⁴²⁵ Although many Antifederalists criticized the Senate on various grounds—suggesting, for example, that it would enshrine aristocrat rule over the common people, or that it violated the separation of powers by combining legislative, executive, and judicial functions⁴²⁶—the Senate’s role as a protector of the rights of the states proved a strong argument in favor of ratification of the Constitution. The Senate’s key role in treaty-making provided formal protection for the states; no treaty could be ratified without the consent of the states’ representatives in the Senate.⁴²⁷ The President’s role in treaty-making was also a crucial response to fears about misuse of the treaty power. Many Antifederalists objected that the people’s direct representatives in the House should have been given a formal role in treaty-making in order to assure democratic accountability and popular involvement in the crafting of international legal rules that would bind the people and states.⁴²⁸ And many Federalists worried that the “imbecility” of the Articles of Confederation would be continued because the Senate would allow small but equally represented states to stymie needed diplomatic initiatives.⁴²⁹ For both groups, the involvement of a President who would be “the general Guardian of the National Interests” (in Gouverneur Morris’s words) or “the constitutional representative of the nation” as a whole (in Hamilton’s) was crucial in solidifying support for the compromises embedded in the constitutional text.⁴³⁰ The Constitution’s requirement of direct substantive involvement by both the Senate and the President in making treaties before they could be deemed the “supreme Law of the Land” in the Supremacy Clause, binding on the people and the U.S. state governments, reflects deeply important constitutional values.

Turning from treaties to the unwritten, universal law of nations, it does not make much sense to think that, even though the law of nations was created without the substantive participation of the politically accountable Senate and President (because it was based on some jumble of natural law, reason, and the customary practices of nation-states), nevertheless the Founding generation would have been content to allow—or actually require—federal judges to independently constrain the state governments to obey the law of nations through the operation of Article III jurisdiction and

425. U.S. CONST. art. I, § 3, cl. 1. Direct popular election of U.S. Senators is now mandated by the 17th Amendment, effective in 1913.

426. See, e.g., RAKOVE, ORIGINAL MEANINGS, *supra* note 168, at 271–73; WIRLS & WIRLS, *supra* note 422, at 138–39.

427. See, e.g., THE FEDERALIST NO. 64 (John Jay), *supra* note 355, at 393; THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 355, at 449; WIRLS & WIRLS, *supra* note 422, at 141–42.

428. See sources cited in *supra* note 354.

429. See, e.g., Jack N. Rakove, *Making Foreign Policy—The View from 1787*, in FOREIGN POLICY AND THE CONSTITUTION 1, 11 (Robert A. Goldwin & Robert A. Licht eds., 1990).

430. See, e.g., *id.* at 12, 16.

the Supremacy Clause.⁴³¹ This is especially unlikely because of Founding-era concerns that the law of nations was often too vague to be applied directly domestically⁴³² and that the law of nations was an alien importation of foreign civil law-type values that would infringe American liberties,⁴³³ and because of the overriding importance attached to popular sovereignty and the right of American people to be ruled only by laws made through properly representative, accountable, and constrained government bodies.⁴³⁴

And indeed it does not appear that the Founders envisioned that the law of nations would be applied against the states by the federal Judiciary acting on its own initiative. On my reading of the Law of Nations Clause, under which Congress could “punish” American states for offenses against the law of nations, Congress was given the role of legislatively constraining the states to obey customary international law. The protective roles of the Senate and President were preserved because all domestic laws must, of course, be approved by the Senate and the President (unless his veto is overridden by supermajorities of both houses).⁴³⁵ Understood in this way, the Supremacy

431. See Moller, *supra* note 19, at 224 (“It would make little sense for the Constitution to require agreement between political branches—the executive and the Senate—to ratify treaties, but to permit the judiciary *carte blanche* to incorporate the customary law of nations domestically, without any assent from either political branch.”); cf. Clark, *supra* note 412, at 1328–67 (demonstrating the care with which the Constitution assures that federal law, which will be deemed the “supremc Law of the Land” under the Supremacy Clause, is adopted through the politically accountable lawmaking proccdures established in Article I).

432. See 2 FARRAND, RECORDS, *supra* note 213, at 615 (statement of Gouverneur Morris).

433. See, e.g., JEREMIAH DUMMER, A DEFENCE OF THE NEW-ENGLAND CHARTERS 28–29 (1765), *microformed on Early Am. Imprints*, 1st Series, No. 9960 (Readex Microprint) (contrasting “the laws of the land” which protect rights with the “civil law” or “laws of nations” used in the hated vice-admiralty courts); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 83–84 (3d ed. 1766) (same) (quoting Dummer); A Spectator, FREEMAN’S JOURNAL (July 14, 1784) (decrying, during the Longchamps incident, “barbarous practices” of foreign law and the law of nations, and recommending that Pennsylvania follow instead “republican” values and the liberty-protecting law of nature); *Of the Political and Civil Rights of the British Colonists*, 1 THE NORTH-CAROLINA MAGAZINE, OR UNIVERSAL INTELLIGENCER 209, 209 (Nov. 30, 1764) (decrying as oppressive and contrary to English liberty the practice of trying American colonists in jury-less admiralty courts under the law of nations); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 16, 1788), in 3 ELLIOT’S DEBATES, *supra* note 193, at 1, 523 (remarks of Patrick Henry) (contending that the law of nations power of the government to prosecute offenses against ambassadors needs to be checked by common law liberty safeguards in a written bill of rights).

434. See, e.g., *A Citizen of New Haven*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 524 (“The greatest security that a people can have for the enjoyment of their rights and liberties is that no laws can be made to bind them nor any taxes be imposed upon them without their consent by representatives of their own choosing . . . ; this was the great point contended for in our controversy with Great Britain, and this will be fully secured to us by the new Constitution.”); The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 16, 1788), in 3 ELLIOT’S DEBATES, *supra* note 193, at 1, 84 (remarks of Edmund Randolph) (“[I]f laws be made by the assent of the people, the government may be deemed free.”).

435. It does not undercut my theory that Congress as a whole, rather than just the Senate or the President plus the Senatc, was given the Law of Nations Clause power to bind the states with the customary law of nations. As discussed above, the exclusion of the House from treaty negotiation

Clause's omission of the law of nations from its list of supreme law makes sense. Insofar as the law of nations would be applied against the states on the authority of the federal government, it would be done at the initiative of the political branches, acting through the domestic lawmaking process, as authorized by the Law of Nations Clause.⁴³⁶

But the state government-protecting reading of the Law of Nations Clause can be taken too far. A recent student note argues that the Law of Nations Clause allowed Congress to codify only the law of nations as it was known in 1787–1789, and that this law of nations, covering only a few subject areas, was thought to be unchanging and in fact immutable (because based on natural law).⁴³⁷ The note concludes that very little of modern customary international law fits these requirements, and therefore it cannot be incorporated into domestic law by Congress using the Law of Nations Clause.⁴³⁸ While it is no doubt true that the Founders did not contemplate that the law of nations would come to encompass all of the many areas internal to states that it does today, they did contemplate that the law of nations would evolve, because they understood that the law of nations was based not only on natural law but also on the customs and practices of states. Indeed, in the late eighteenth century there were strong strains of positivism beginning to develop in both theoretical writings⁴³⁹ and practical discussions⁴⁴⁰ of the law of nations, which saw express international

and approval was justified on functional grounds concerning institutional competence. Such concerns have no place regarding the law of nations, which was an unwritten law based on natural law, reason, and customary state practice. So the treaty power is the exception, not the Law of Nations Clause power.

436. This understanding of the Supremacy Clause is supported by evidence from the state ratification debates in 1787–1788: the phrase “Laws of the United States which shall be made in Pursuance” of the Constitution was thought to refer to statutes enacted by Congress. See, e.g., *The Pennsylvania Convention* (Nov. 28, 1787), in 2 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 322, 416 (remarks of Thomas McKean); *The Massachusetts Convention* (Jan. 25, 1788), in 6 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 309, at 1107, 1351 (remarks of Francis Shurtleff). Post-ratification practice yields the same result; in the eighteenth and nineteenth centuries, no decided cases applied customary international law against the states through the Supremacy Clause. See Bradley & Goldsmith, *Customary International Law*, *supra* note 8, at 822–26.

437. Morley, *supra* note 19, at 135–36.

438. *Id.* at 142.

439. See, e.g., WILLIAM BLACKSTONE, 1 COMMENTARIES *43 (the law of nations “depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities”); 1 JACOB FRIEDRICH FREIHERR VON BIELFELD, THE ELEMENTS OF UNIVERSAL ERUDITION 266 (W. Hooper trans., 1771) (“[T]he law of nations . . . consists in a just and rational application of the law of nature (and we may add also, of certain ancient customs universally received) to the affairs and the conduct of nations and sovereigns.”); 1 VATTTEL, *supra* note 37, Preface at xii–xv (suggesting that the law of nations consists of natural law applied to the unique situation of states as well as rules that “proceed[] from the will or consent of nations” and consists of treaties, customs, and usages).

440. See, e.g., *Seizure in Neutral Waters*, 1 Op. Att’y Gen. 32, 34 (1793) (Randolph) (suggesting that “the necessary or natural law of nations” could be changed by “compact or other obligation of the United States”); *id.* at 37–38 (stating that “usages” of nations, once they “shall have grown into principles,” are “incorporated into the law of nations”); *John Jay’s Charge to the*

agreements and the practices of states as constituting part of the law of nations as well.⁴⁴¹ Moreover, given Congress's express power to "define" offenses against the law of nations, it is hard to imagine a legitimate and judicially manageable standard allowing courts to hold that Congress has exceeded its power in attempting to incorporate a particular rule of customary international law. Asserting—ahistorically—that the law of nations was seen as fixed when the Constitution was adopted is not the answer. Perhaps a better answer, in keeping with a political-process view of the Law of Nations Clause and Supremacy Clause as they affect state governments, is that state prerogatives will be protected through the political safeguards of federalism.

V. Conclusion

This Article uses eighteenth-century historical materials and concepts to offer an unconventional reading of the Law of Nations Clause, in which the Clause has a dual meaning: providing Congress with authority to punish offenses against the law of nations by individuals and by states (both foreign states and U.S. states). Its aim is to unsettle and thereby enrich current debates about war powers and the domestic status of international law by sketching the implications for those debates of construing the Clause in a broad fashion, consistent with likely eighteenth-century understandings. Instead of making a one-sided argument, the Article presents the evidence

Grand Jury of the Circuit Court for the District of New York, supra note 169, at 29 ("[T]he Laws of Nations make Part of the Laws of this, and of every other civilized Nation. They consist of those Rules for regulating the Conduct of Nations towards each other, which resulting from right Reason, receive their obligation from that Principle and from general Assent and Practice. To this Head also belong those Rules or Laws which by Agreement become established between particular Nations, and of this kind are Treaties, Conventions, and the like Compacts."); *The Stand No. V* [Alexander Hamilton] (Apr. 16, 1798), reprinted in 21 PAPERS OF HAMILTON, *supra* note 193, at 425 (suggesting that the law of nations would be deemed to have changed if innovative practices of a few states had "the universal consent of nations" or "a course of long practice to give it sanction"); *James Wilson's Charge to the Grand Jury of the Circuit Court for the District of Virginia*, DUNLAP'S AM. DAILY ADVERTISER, Dec. 5, 1791, reprinted in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 169, at 179 ("The law of nations has its foundation in the principles of *natural law*, applied to states; and in *voluntary institutions*, arising from custom or convention."); Letter from Benjamin Franklin to Pres. of Cont. Cong. (Aug. 9, 1780), in 4 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 21, 24 (Francis Wharton ed., 1889) ("The great public event in Europe of this year is the proposal by Russia of an armed neutrality for protecting the liberty of commerce. The proposition is accepted now by most of the maritime powers. . . . [I]t is likely to become the law of nations *that free ships should make free goods* . . ."); Jefferson, Opinion on French Treaties, *supra* note 214, at 220 ("The Law of nations, by which this question is to be determined, is composed of three branches. 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions."). See generally HENDRICKSON, *supra* note 168, at 172 (describing how the Founders sought "reform of the law of nations," particularly with regard to "the conduct of war").

441. See generally WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 349–60 (Michael Byers trans., 2000) (remarking on the increasing positivism of the eighteenth-century law of nations); JANIS, *supra* note 176, at 28–29 (same). This trend also occurred in domestic U.S. law at approximately the same time. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 14–15, 17–20 (1977).

both for and against the dual conception of the Clause in order to stimulate further research and discussion. In addition, the Article flags the need for further research on postfounding practices of Congress and the President which might reflect practical constructions of the Law of Nations Clause.

Besides the specific textual and historical evidence, discussed above, which cuts against this Article's claims about the Clause, there are at least two broader objections, one methodological and the other normative. The methodological objection is that, because most theories of constitutional interpretation "rest on some notion of the consent of the governed," a theory about the Constitution's meaning is unlikely to be correct if it is so novel that it has never occurred to anyone before.⁴⁴² I take this objection seriously, but do not think it applies in this case. First, to the extent that I am correct that the original eighteenth-century public meaning of the Law of Nations had a state-to-state component, this objection essentially disappears. Second, the Law of Nations Clause has been subject to very little sustained scholarly attention. Previous commentary has presented an incomplete picture of the history of the critical period and has failed to fully examine the significance of important theoretical works by writers such as Blackstone, Locke, Grotius, Burlamaqui, and Vattel. Given these circumstances, novelty in constitutional interpretation should not automatically be suspect. Moreover, I am not the first to detect a broader state-to-state meaning of the Clause. Constitutional interpreters like Daniel Patrick Moynihan, Louis Fisher, James Kent, Edward Corwin, and perhaps even James Madison have suggested that the Clause has a broader meaning than previously thought. This Article is an attempt to analyze and explain the textual and historical foundations for the insights of these thinkers.

The second potential objection to my claim about the Law of Nations Clause is normative or perhaps functional. Putting aside questions of the appropriate constitutional method, one might ask why Americans should want to read the Constitution to reach the result that decisionmaking about important national security and military actions is transferred from the President, who embodies all of the "[d]ecision, activity, secrecy, and dispatch"⁴⁴³ we need during these dangerous times, to a slow, vacillating, leak-prone, verbose body of 535 members, which is not even in session at many times of the year. A full answer to that difficult and important question is beyond the scope of this Article. It is perhaps part of an answer that both the Founders' Constitution and our Constitution are quite flexible documents, particularly in the area of war and foreign affairs, and constitutionally sound compromises are often available to meet crises and other exigencies. For example, the Founders thought it important (and, apparently, not dangerous to national security) to vest in Congress the power to decide whether to

442. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 925 (1986).

443. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

impose commercial embargoes on foreign countries.⁴⁴⁴ Modern Congresses, recognizing the functional advantages of the Presidency, have enacted broad delegating statutes that effectively allow the President to decide whether and when embargoes are desirable and will be imposed. The Supreme Court has approved this practice, noting that delegations which aim “to affect a situation entirely external to the United States, and falling within the category of foreign affairs,” are judged under substantially looser standards than delegations affecting domestic matters.⁴⁴⁵ The Supreme Court has specifically approved broad delegations of Law of Nations Clause power to the President.⁴⁴⁶ Similarly, Congress’s exercise of legislative authority under the Declare War Clause creates states of war or armed conflict during which the President lawfully wields vast war powers.⁴⁴⁷ The Law of Nations Clause in the state-to-state conception would operate the same way, allowing Congress to specifically delegate broad powers and otherwise authorize, *ex ante*, presidential uses of coercion and force. So reading the Law of Nations Clause as I do need not unduly hamper speedy and decisive actions by the President, where necessary to protect the national security.

Substantial departure from the original meanings and purposes of a constitutional provision is perhaps most justified when it results from an accretion over time of reality-tested, functionally beneficial adaptations that have achieved widespread political legitimacy and do not undermine other important constitutional values. It is not clear that either (1) the current vesting in the Presidency of the preeminent role in making coercive international policy and deciding whether and when to engage in international conflicts, or (2) substantial federal judicial control over the elaboration and application of customary international law to bind governments or government officials, whether federal, state, or foreign, meet this test. Just looking at the functional considerations underlying decisions about the distribution of war powers, reading the Law of Nations Clause in a way that transfers power from the Presidency to Congress might lead to net functional advantages in the international arena.⁴⁴⁸ It could also have functional benefits at home, for

444. See *supra* note 333.

445. *United States v. Curtiss-Wright Exp. Co.*, 299 U.S. 304, 315 (1936). *But cf.* Rep. of Sen. Henry Clay for Comm. on Foreign Relations, S. REP. NO. 40, 23d Cong., 2d Sess. (Jan. 6, 1835), reprinted in 7 MOORE, *supra* note 350, at 127 (questioning whether it is constitutionally permissible for Congress to delegate to the President its power under the Marque and Reprisal Clause).

446. See *In re Yamashita*, 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

447. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that Congress’s post 9/11 Authorization for Use of Military Force allows the President to detain an American citizen as an enemy combatant). See generally Ramsey, *Textualism*, *supra* note 52, at 1621–22 (discussing congressional delegations of its Declare War power to the President).

448. See Tom Ginsburg & Paul Diehl, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 1 (Ill. Pub. Law & Legal Theory Research Paper No. 06-13, 2006), available at <http://papers.ssrn.com/abstract=931668> (“A proper understanding of both principal-agent theory and the international relations literature . . . cuts against executive dominance in war-making.”). *But see* Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE

example by stimulating more democratic debate about punitive foreign policy actions that could well lead to war or by providing a focal point around which Congress could muster political will to overcome the collective action problems and information asymmetries vis-à-vis the Executive that usually hinder its effective participation in foreign policy.⁴⁴⁹ This seems normatively desirable in modern circumstances, whether one sees the benefits of it in a negative light (reducing the likelihood of ill-considered international conflict) or a positive light (ensuring popular and congressional support, which is so crucial to our success during international conflicts).⁴⁵⁰ Anything beyond these preliminary thoughts is beyond the scope of this Article. These are just a few of the important contemporary controversies that might be enlivened by recovering the eighteenth-century meaning of the Law of Nations Clause and the larger constitutional vision of which it was a part.

L.J. 2512 (2006) (using political science and international relations models to argue for functional advantages of executive-dominated war-making).

449. See generally Eric A. Posner & Adrian Vermeule, *The Credible Executive* 16–17 (Harv. Law Sch. Pub. Law & Legal Theory, Working Paper No. 132, 2006), available at <http://ssrn.com/abstract=931501> (discussing the functional disadvantages which stymie congressional attempts to effectively monitor the Executive Branch and participate in decisionmaking).

450. See generally ELY, *supra* note 59, at 3–5 (1993) (suggesting that these purposes motivated a decision by the Founders to give Congress control over all decisions about the use of offensive military force).