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## SIDEBAR

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### HISTORICAL PRACTICE AND THE CONTEMPORARY DEBATE OVER CUSTOMARY INTERNATIONAL LAW

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Response to: Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 Colum. L. Rev. 1 (2009).

A.J. Bellia and Brad Clark have performed a valuable service for other scholars interested in foreign relations law and federal jurisdiction by collecting and illuminating—with their usual care and insight—the historical practice of both English and early American courts with respect to the law of nations. Their recent Article, *The Federal Common Law of Nations*,<sup>1</sup> demonstrates that, while American courts have not generally treated customary international law (CIL) as supreme federal law, they have applied such law where necessary to vindicate the “perfect rights” of foreign nations. In so doing, American courts have protected the prerogatives of the political branches to “recognize foreign nations, conduct foreign relations, and decide momentous questions of war and peace.”<sup>2</sup> Although Professors Bellia and Clark disavow any attempt “to settle all questions of how customary international law interacts with the federal system,”<sup>3</sup> they do suggest that their approach represents a middle ground between proponents of the “modern position” that CIL simply is federal common law<sup>4</sup> and critics of that position, who insist that CIL may be applied by American courts only where it is incorporated into the domestic legal system through an affirmative act by the political branches.<sup>5</sup>

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

2. *Id.* at 1.

3. *Id.*

4. See Restatement (Third) of the Foreign Relations Law of the United States § 111 reporters’ note 3 (1987) (noting that “the modern view, is that customary international law is federal law”); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 Sup. Ct. Rev. 295, 295 (1994) (“International law is federal law.”).

5. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal*

This response makes three points. First, I quibble with the historical account offered by Professors Bellia and Clark on two minor, yet at least somewhat significant, grounds: The debate over reception of the common law at the federal Constitutional Convention shows greater early skepticism about judge-made common law than Bellia and Clark suggest; also, the jurisdictional provisions of Article III covering cases implicating foreign affairs were not intended fully to centralize power over such cases in federal courts because they left concurrent jurisdiction in the state courts. Second, I question the extent to which the Founding Era history is directly relevant to contemporary debates about how to treat CIL. Finally, I contend that what does the real work in the Bellia and Clark approach is simply constitutionally-grounded concerns about the separation of powers in foreign affairs cases, not anything about CIL *per se*. Their position thus reduces to the largely uncontroversial claim that federal courts may *make* federal common law to protect these constitutionally-grounded federal interests, and they may sometimes draw the content of federal common law from international law.

### I. JUDICIAL POWER IN THE EARLY REPUBLIC

First, the history. Professors Bellia and Clark argue that the founding generation entertained an “initial assumption that the United States—like the states—had received the common law and thus could prosecute and punish common law crimes, including offenses against the law of nations.”<sup>6</sup> Bellia and Clark acknowledge that this assumption was widely rejected in the course of debates over the constitutionality of the Sedition Act.<sup>7</sup> Indeed, when the Supreme Court definitively interred the doctrine of federal common law crimes in the 1812 case of *United States v. Hudson & Goodwin*, it could say that the question already had long been “settled in public opinion.”<sup>8</sup> Nonetheless, they seem to think that the Framers’ “initial assumption” supports a judicial willingness to enforce the law of nations in other contexts that survived *Hudson & Goodwin*.<sup>9</sup>

A related debate in the early Republic, however, suggests even greater hostility to the idea of federal common lawmaking powers. As

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Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 817 (1997) (“CIL should not have the status of federal common law.”). The middle ground suggested by Professors Bellia and Clark is distinct from—although not inconsistent with—the middle ground that I and others have staked out elsewhere. See generally Arthur M. Weisburd, State Courts, Federal Courts, and International Cases, 20 Yale J. Int’l L. 1, 48–49 (1995) (arguing that CIL is analogous to “the law of a foreign country”); Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int’l L. 365, 369–70 (2002) [hereinafter Young, Sorting] (arguing that CIL should be treated as “general” law and applied “in appropriate cases as determined by traditional principles of the conflict of laws”).

6. Bellia & Clark, *supra* note 1, at 47–48.

7. *Id.* at 54–55.

8. 11 U.S. (7 Cranch) 32, 32 (1812).

9. Bellia & Clark, *supra* note 1, at 59.

Justice Souter has pointed out, “the founding generation . . . join[ed] . . . an appreciation of its immediate and powerful common-law heritage with caution in settling that inheritance on the political systems of the new Republic.”<sup>10</sup> The colonial and early state governments carefully limited their reception of English common law to those principles that were applicable to local conditions.<sup>11</sup> Citizens of the young Republic often viewed the common law with considerable hostility; after all, they had just fought a revolution to throw off English rule.<sup>12</sup>

This ambivalence played out in debates over ratification of the new national Constitution. All participants seem to have understood that the new federal Constitution did not receive the English common law as part of national law,<sup>13</sup> unlike many of the state constitutions. Opponents of ratification went so far as to complain that the proposed document failed to guarantee common law rights.<sup>14</sup> Federalists responded that receiving the common law into the federal Constitution would trample the diversity of the common law, as received in the several states; even worse, a federal reception would render the common law “immutable” and not subject to congressional revision.<sup>15</sup> Hence, “the Framers chose to recognize only particular common-law concepts, such as the writ of habeas corpus, U.S. Const. Art. I, § 9, cl. 2, and the distinction between law and equity, U.S. Const., Amdt. 7, by specific reference in the constitutional text.”<sup>16</sup> They insisted, however, that any *general* reception of the English common law into federal law would be “destructive to republican principles.”<sup>17</sup>

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10. *Seminole Tribe v. Florida*, 517 U.S. 44, 132 (1996) (Souter, J., dissenting).

11. See *id.* at 132–37; see also Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 *Am. L. Reg.* 553, 554 (1882) (noting that common law has been “imported . . . as far as it was applicable”); Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, in *Political Separation and Legal Continuity* 91, 98 (Harry W. Jones ed., 1976) (describing “selective nature” of use of common law in colonies).

12. James Monroe, for example, urged that “the application of the principles of the English common law to our constitution” should be considered “good cause for impeachment.” Letter from James Monroe to John Breckenridge (Jan. 15, 1802), in 3 Albert J. Beveridge, *The Life of John Marshall* 59 (1919).

13. See, e.g., Letter from John Marshall to St. George Tucker (Nov. 27, 1800), in Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 *U. Pa. L. Rev.* 1231, 1326 app. A (1985) (stating “I do not believe one man can be found” who holds “that the common law of England has . . . been adopted as the common law of America by the Constitution of the United States”).

14. See, e.g., George Mason, *Objections to this Constitution of Government*, reprinted in 2 *Records of the Federal Convention of 1787*, at 637 (Max Farrand ed., 1911) (complaining that, under Constitution as proposed, Americans would not be “secured even in the enjoyment of the benefit of the common law”).

15. See *Seminole Tribe*, 517 U.S. at 139–40 (Souter, J., dissenting) (collecting historical evidence); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 *U. Pa. L. Rev.* 1003, 1056 (1985) (noting states incorporated English common law in different manners).

16. *Seminole Tribe*, 517 U.S. at 137–38 (Souter, J., dissenting).

17. Edmund Randolph, *Remarks at the Virginia Convention* (June 15, 1788), in 3 *Elliot’s Debates on the Federal Convention* 469–70 (1866); see also Letter from Madison

It is important to remember, of course, that the customary international law of the Founding Era was then, as now, a distinct body of law from the common law of England. To the extent that Professors Bellia and Clark use early Federalist support for federal common law crimes as a more general indicator of receptivity to unwritten law like CIL, however, the even earlier—and more broad-based—caution about receiving the English common law pushes in the other direction. More generally, the early American reaction to the common law in both the Federal Constitution and the states suggests a general suspicion of unwritten, judge-defined law and a strong preference for legislative primacy. This is quite consistent, of course, with the Framers' decision explicitly to authorize *Congress* to “define and punish . . . Offenses against the Law of Nations.”<sup>18</sup>

My second historical quibble can be stated much more briefly. Professors Bellia and Clark, as well as a number of other participants in debates about federal foreign affairs powers, stress the Framers' provision in Article III for several heads of jurisdiction bearing primarily on cases implicating foreign relations as evidence that the Framers intended for the national government to exercise exclusive control over external affairs.<sup>19</sup> The relevant heads of jurisdiction include jurisdiction over cases affecting ambassadors, admiralty cases, and alienage cases.<sup>20</sup> The problem with inferring any broad principle of federal exclusivity from these provisions is that none of these heads of jurisdiction, even as implemented by Congress, excluded concurrent state court jurisdiction.<sup>21</sup> Even the admiralty grant, which purported to be exclusive in the first Judiciary Act,<sup>22</sup> was rendered effectively concurrent by the “Saving to Suitors” clause permitting state court litigation of cases falling within the maritime jurisdiction.<sup>23</sup> Moreover, it is one thing to think that the Founders wanted to provide access to a federal forum in foreign relations cases, and quite another to conclude that the Founders wanted to federalize the applicable law.

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to Washington (Oct. 18, 1787), in 3 Records of the Federal Constitution, *supra* note 14, at 130 app. A CXXXIV (complaining that common law contained “a thousand heterogeneous & antirepublican doctrines”).

18. U.S. Const. art. I, § 8, cl. 10.

19. See Bellia & Clark, *supra* note 1, at 35–45; see also Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393, 404 (1997) (asserting that “the framers focused on the need to ensure federal control over enforcement of the law of nations”).

20. See U.S. Const. art. III, § 2 (conferring jurisdiction to federal courts).

21. See generally Young, *Sorting*, *supra* note 5, at 423–32 (arguing Framers did not intend to create system of exclusive federal authority).

22. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (1789) (providing that “the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction”).

23. See *id.* § 9, 1 Stat. at 77 (qualifying exclusive grant by “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it”). See generally David W. Robertson, *Admiralty and Federalism: History and Analysis of Problems of Federal-State Relations in the Maritime Law of the United States 18–19* (1970) (describing concurrent maritime jurisdiction).

If these jurisdictional grants “existed to uphold [national] political branch authority,”<sup>24</sup> as Professors Bellia and Clark suggest, then the Framers were fairly tolerant of the possibility that state courts might decide foreign relations cases and/or construe the law of nations after their own lights. As I have suggested elsewhere,<sup>25</sup> the Framers guarded against the possibility of state court abuse by allowing Congress to federalize the law of nations under the “define and punish” clause, but Congress has utilized that power only in isolated areas.<sup>26</sup> The overall structure of concurrent jurisdictional grants to federal and state courts and a legislative power grant to Congress does not bespeak any strong desire to categorically exclude the states from dealing with international law or to confer on federal judges a freestanding power to federalize that law.

## II. HISTORY AND FOREIGN RELATIONS LAW

How much does (should) all this history matter, anyway? Professors Bellia and Clark’s treatment is largely backward-looking. They seek to inform current debates, but they do not appear to argue that the history mandates particular outcomes. This Part argues that their restraint is well-founded. Three sets of historical changes have overtaken any Founding-era case for a federal judicial power to incorporate aspects of the law of nations into domestic law, without action by the national political branches.<sup>27</sup> These changes concern the situation of the United States as an actor on the international stage, the character of international law itself, and the nature and limits of the national lawmaking process.

As Professors Bellia and Clark note, the young American Republic of the Founding Era confronted a hostile world from a position of profound weakness. This prompted, by necessity, a particular attitude

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24. Bellia & Clark, *supra* note 1, at 44.

25. See Young, Sorting, *supra* note 5, at 426.

26. See, e.g., Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)); An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, 3 Stat. 510 (1819) (continued in force by Act of May 15, 1820, ch. 113, 3 Stat. 600) (“That if any person or persons whatsoever, shall on the high seas, commit the crime of piracy, as defined, by the law of nations . . . such person shall . . . be punished with death.”); see also 18 U.S.C. § 1651 (2006) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”).

27. Professors Bellia and Clark do not appear to advance an “originalist” case for federal common lawmaking authority in foreign relations in any strong sense of that term. They do not, after all, argue that the original public meaning of any term in the constitutional text compels recognition of such a power. Rather, their claim seems to be that judicial practice shortly after the Founding recognized this power, and that the power is not inconsistent with the constitutional structure as originally understood. Bellia & Clark, *supra* note 1, at 46–47. I have a great deal of sympathy for that sort of argument, but it is vulnerable to counterarguments that subsequent developments call the functional case for such a power into question.

toward international law: The nation could ill afford actions by private actors or state governments that might give offense to foreign nations, and the need to respond quickly to such crises may have justified a freestanding lawmaking power in the federal courts.<sup>28</sup> Today the United States enjoys peaceful and frequently cordial relations with most nations, participates in a number of powerful alliances, and has a historically unprecedented military advantage over potential adversaries.<sup>29</sup> This seismic shift has implications both for the consequences of violations of the law of nations by domestic actors and for the relationship between the United States and international law.<sup>30</sup> On the one hand, particular breaches of international law by an individual citizen or a state government are unlikely to lead to war; other nations are unlikely to pick a fight with the sole military superpower. On the other, scholars have suggested that weak nations tend to rely on international law to enhance their security to a greater degree than strong nations,<sup>31</sup> and a superpower with worldwide interests and responsibilities may wish to maximize its freedom of action rather than accede to international constraints.<sup>32</sup>

The way in which the nation, its subunits, and its citizens interact with the rest of the world has also changed profoundly. The points of contact between foreign actors and Americans—not only American citizens, but also state and local actors—have proliferated to the extent that it is simply unrealistic to expect federal courts to “control” such interactions.<sup>33</sup> For example, a vast range of state governmental activities—from highway safety regulation to administration of the death penalty to treatment of immigrants—may implicate foreign relations and/or violate international law.<sup>34</sup> As Sarah Cleveland has

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28. See, e.g., 1 Bradford Perkins, *The Creation of a Republican Empire, 1776–1865*, in *The Cambridge History of American Foreign Relations* 54–59 (Warren I. Cohen ed., 1993) (separately paginated work).

29. See Letter from President George W. Bush (Mar. 16, 2006), in *National Security Strategy of the United States*, at i–ii (2006).

30. See generally Thomas H. Lee, *The Relevance of America’s Status in the World in Interpreting the Constitution* 4–5 (Feb. 4, 2009) (unpublished manuscript, on file with the *Columbia Law Review*) (applying international relations theory to derive original meaning of Article III and “the entire ‘foreign affairs Constitution’”).

31. See Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* 8–11 (2003) (discussing U.S. tilt towards unilateralism).

32. See, e.g., Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 *Mich. J. Int’l L.* 445, 446 (2000) (noting U.S. reluctance to join ICC); Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, the United States and the International Criminal Court*, 29 *B.C. Int’l & Comp. L. Rev.* 1, 6–7 (2006) (same).

33. See Jong S. Jun & Deil S. Wright, *Globalization and Decentralization: An Overview*, in *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States* 1, 3–4 (Jong S. Jun & Deil S. Wright eds., 1996) (noting more local participation in “international activities”); see also Earl H. Fry, *The U.S. States and Foreign Economic Policy: Federalism in the “New World Order,”* in *Foreign Relations and Federal States* 122, 125 (Brian Hocking ed., 1993) (observing that “imperatives of complex global interdependence are pushing the non-central governments to be active participants at the international level”).

34. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign*

demonstrated, it is no longer realistic to expect the nation to “speak with one voice” in foreign affairs.<sup>35</sup> The foreign affairs power that Professors Bellia and Clark would reserve to federal courts thus seems completely inadequate to the task of ensuring that neither citizens nor state or local governments will disrupt United States foreign policy. And, in fact, this kind of federal judicial intervention has been highly sporadic.<sup>36</sup>

A second set of changes concerns the character of the law of nations itself. That law once primarily governed the relations of states to one another, but it now also concerns the relations of states to their own citizens,<sup>37</sup> as well as a host of commercial, environmental, and other matters.<sup>38</sup> These concerns extend well beyond the traditional matters of war and peace upon which Professors Bellia and Clark focus, and it is far from clear that the judicial power that Bellia and Clark recognize to incorporate the law of nations ought to extend to the far broader modern sweep of international law. As Bellia and Clark probably recognize, judicial application of this modern international law often will not protect political branch prerogatives, and it may in fact undermine those prerogatives. Moreover, the modern law of nations is formed in quite different ways than the international law known to the Framers. This is true not only of CIL, which is now more a creature of world opinion than a reflection of nations’ actual practice,<sup>39</sup> but also of multilateral treaty-making and international norms promulgated by supranational institutions exercising delegated lawmaking power.

Parallel changes have affected the *enforcement* of international law. Breaches of the modern law of nations may be addressed not simply by the aggrieved nation, but by a variety of multilateral institutions, and the range of possible punishments includes trade sanctions and a variety of other measures short of war. Whatever the felt necessity for federal

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Affairs Exception, 69 *Geo. Wash. L. Rev.* 139, 180–81 (2001) (describing “areas of legitimate (even if not exclusive) state activity [that] have all the attributes that are usually cited in arguing for federal exclusivity”).

35. Sarah H. Cleveland, *Crosby* and the “One-Voice” Myth in U.S. Foreign Relations, 46 *Vill. L. Rev.* 975, 975–76 (2001).

36. The Court suggested in *Zschernig v. Miller*, 389 U.S. 429, 436–41 (1968), that it might attempt to police state activities that interfered with U.S. foreign relations. But since then the Court has not squarely applied *Zschernig* to invalidate state or local action.

37. See, e.g., Gerald L. Neuman, Lecture, *The Nationalization of Civil Liberties, Revisited*, 99 *Colum. L. Rev.* 1630, 1649–50 (1999) (discussing aspects of reciprocal treaties); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *U. Colo. L. Rev.* 1555, 1556–57 (1999) (arguing post-World War II international law “subordinates the role of the sovereign state”).

38. E.g., *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Dec. 10, 1997, 37 *I.L.M.* 22; *North American Free Trade Agreement*, U.S.-Can.-Mex., Dec. 17, 1992, 32 *I.L.M.* 289.

39. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 *Va. J. Int’l L.* 449, 454 (2000) (arguing that CIL norms are “unrelated to actual practice perceived as legally obligatory”); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *Austl. Y.B. Int’l L.* 82, 83 (1988) (describing difficulties of integrating CIL and human rights law).

judicial incorporation of the law of nations when few alternative enforcement mechanisms existed to avoid the use of military force by some other nation, under current circumstances such unilateral judicial action is both less pressing and more likely to complicate the working out of international disputes through other political and legal mechanisms.

Finally, the United States's internal lawmaking processes have undergone changes just as sweeping as those affecting the international arena; both the federal legislature and federal agencies have much more power to fashion federal law in this area. The common law's preeminence has given way to an age of statute.<sup>40</sup> The enumerated limits on national power have largely given way to an elastic Commerce Clause with precious few limits that courts are willing to enforce.<sup>41</sup> The resulting explosion of national lawmaking has fundamentally altered the balance between the nation and the states.<sup>42</sup>

As Professor Clark has brilliantly demonstrated, the political and procedural limitations on national legislation—embodied in Article I's prescription of a difficult lawmaking process in which states are represented—take on particular importance with the expansion of federal legislation.<sup>43</sup> The importance of such safeguards was reflected in *Erie Railroad Co. v. Tompkins*.<sup>44</sup> *Erie* insisted that these political and procedural limitations inherent in the national lawmaking process generally cannot be evaded through *judicial* lawmaking.<sup>45</sup>

Notwithstanding *Erie*'s insistence that *courts* not make federal law, the demise of the delegation doctrine has allowed federal administrative agencies to make federal law without overcoming the procedural hurdles in Article I.<sup>46</sup> Federal law is thus not only broader in potential scope but also easier to produce than in the Founders' day.

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40. See Guido Calabresi, *A Common Law for the Age of Statutes* 1 (1982).

41. E.g., *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding Congress's Commerce Clause authority includes power to prohibit cultivation of marijuana under California law); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (finding regulation of home-consumed wheat to be within Congress's Commerce Clause power). See generally Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 *Wm. & Mary L. Rev.* 1733, 1783–90 (2005) (describing “concession[s] to the integrated national market” constitutional doctrine has made in Commerce Clause jurisprudence).

42. See Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 495 (5th ed. 2003) [hereinafter *Hart & Wechsler*] (observing that, contrary to the situation a half century ago, “at present federal law appears to be more primary than interstitial in numerous areas”).

43. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1328 (2001).

44. 304 U.S. 64 (1938). On the significance of *Erie* to federalism, see generally Ernest A. Young, *Preemption and Federal Common Law*, 83 *Notre Dame L. Rev.* 1639, 1655–65 (2008) [hereinafter Young, *Preemption*] (describing *Erie* as “the most important federalism case of the twentieth century”).

45. See Young, *Preemption*, *supra* note 44, at 1656–57.

46. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476 (2001) (rejecting proposal to revive nondelegation doctrine).



Under these circumstances, the independent role that Professors Bellia and Clark seem to reserve to federal courts seems both unnecessary and threatening. It is unnecessary because the national government enjoys ample means to protect its foreign relations prerogatives without unilateral judicial action. Congress has broad powers to legislate directly or to delegate authority to the President and the executive agencies; hence, if it wishes, Congress can empower federal actors to respond nimbly to foreign policy crises without depending on the courts to act on their own. Because so few other limits on national power remain, the insistence that Congress in fact *act*—either directly or by express delegation of authority—takes on particular importance. It is one thing for federal courts to make law on occasion within a milieu where federal power is otherwise limited; it is quite another to add unilateral federal judicial lawmaking authority on top of a largely unlimited national legislative power.

### III. SEPARATION OF POWERS AND TRADITIONAL FEDERAL COMMON LAW

At the end of the day, it is far from clear what work the law of nations actually does in Professors Bellia and Clark's conception of foreign relations law. They appear to argue that federal courts must have some authority to apply the law of nations with the force of federal law, without action by the political branches, where such application is necessary to protect political branch prerogatives in foreign affairs—and particularly with respect to matters of war and peace.<sup>47</sup> In such situations, however, it seems likely that federal courts would find power to act with or without the law of nations, deriving that authority directly from the constitutional separation of powers. Such instances are likely to be few and far between, however. Congress has regulated the exercise of foreign affairs powers largely by statute, and in the absence of such advance provision, the Supreme Court has lately been unwilling to take unilateral action even in the face of significant foreign policy consequences.

In *Banco Nacional de Cuba v. Sabbatino*, the Court made clear that its power to fashion federal common law rules to protect the foreign relations prerogatives of the political branches did not depend upon the law of nations.<sup>48</sup> *Sabbatino* recognized the act of state doctrine, which “precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory,” as a principle of federal common law.<sup>49</sup> The Court recognized that the act of state doctrine was *not* part of the law of nations;<sup>50</sup> rather,

It arises out of the basic relationships between branches of

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47. Bellia & Clark, *supra* note 1, at 39.

48. 376 U.S. 398 (1964).

49. *Id.* at 401.

50. See *id.* at 421–22.

government in a system of separation of powers. . . . The doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.<sup>51</sup>

As such, the doctrine had “‘constitutional’ underpinnings.”<sup>52</sup> The act of state doctrine thus reflects precisely the imperatives highlighted by Professors Bellia and Clark. *Sabbatino* underscores the fact, however, that where such imperatives to protect the foreign affairs prerogatives of the political branches are present, federal courts may act with or without the sanction of the law of nations.<sup>53</sup>

Such acts of judicial unilateralism seem progressively unnecessary, however, in a foreign affairs field that is increasingly governed by statutes. Any number of framework statutes and other enactments increasingly act to protect political branch prerogatives and to empower the President to act expeditiously in order to avoid crises.<sup>54</sup> Recognizing this, the Supreme Court has been more and more unwilling to sanction unilateral judicial action to incorporate international law into the domestic legal system. In *Sosa v. Alvarez-Machain*, for example, the Court narrowly construed the Alien Tort Statute to permit only an extremely limited range of customary international law claims.<sup>55</sup> And in *Medellín v. Texas*, the Court refused to enforce a judgment of the International Court of Justice in the absence of federal legislation giving effect to such judgments.<sup>56</sup> Indeed, the *Medellín* Court went so far as to invalidate a presidential directive seeking to enforce the judgment in the absence of

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51. *Id.* at 423.

52. *Id.*

53. See Daniel J. Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int'l L. 513, 534 (2002) (defending federal common lawmaking power in foreign affairs cases on *Sabbatino* model). Professors Bellia and Clark appear to deny that *Sabbatino*'s act of state doctrine is a creature of federal common law at all. See Bellia & Clark, *supra* note 1, at 84 (arguing that “the decision is best understood overall as a consequence of the Constitution’s allocation of foreign affairs powers to the political branches of the federal government”); see also Bradford R. Clark, Domesticating Sole Executive Agreements, 93 Va. L. Rev. 1573, 1651–52 (2007) (attributing act of state doctrine to President’s power to recognize foreign governments). But there has never been a bright line between interpretation of open-ended structural provisions and federal common lawmaking. See, e.g., Martha Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 890 (1986) (defining federal common law to include “any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional” (emphasis omitted)). Most observers have classified *Sabbatino* as a federal common law case. See, e.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citing *Sabbatino* as federal common law case); Hart & Wechsler, *supra* note 42, at 743 (placing *Sabbatino* in chapter on federal common law).

54. See Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair 69–70 (1990) (discussing framework statutes in foreign relations law).

55. 542 U.S. 692, 712 (2004).

56. 128 S. Ct. 1346, 1372 (2008).

congressional authorization.<sup>57</sup> While the Supreme Court may occasionally remain willing to apply CIL on a common law basis to fill in gaps in various foreign affairs statutes,<sup>58</sup> such actions are likely to take a back seat to political branch action for the foreseeable future.

### CONCLUSION

The historical account offered by Professors Bellia and Clark provides valuable background to contemporary debates over customary international law. This response has focused on their suggestion, based on this history, that there remains *some* room for federal courts to fashion supreme federal rules of decision based on the law of nations. Bellia and Clark do not appear to believe that the scope of such judicial lawmaking is broad, and to that extent our disagreement is a narrow one.

All too often, courts perceive a gap in the constitutional text as requiring unilateral judicial action to fill the lacuna. Especially in the modern era, however, Congress and the President have proven more than capable of protecting the nation's foreign policy interests, either through direct legislation or delegated authority, without the need for judicial lawmaking. And where such lawmaking remains necessary, the imperative and authority for it comes from the Constitution, as in *Sabbatino*—not from the law of nations. Whatever historical case can be made for unilateral judicial power in the Founding Era, then, seems largely overtaken by contemporary developments.

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57. See *id.* at 1367–72.

58. See, e.g., Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, Customary International Law, and the Continuing Relevance of *Erie*, 120 Harv. L. Rev. 869, 922–24 (2007) (discussing likely implication of head of state immunity to fill gap in Foreign Sovereign Immunities Act).