

IN THEIR OWN WORDS: AFFIRMATIONS OF THE FOUNDERS,
FRAMERS, AND EARLY JUDICIARY CONCERNING THE BINDING
NATURE OF THE CUSTOMARY LAW OF NATIONS

*Jordan J. Paust**

I.	INTRODUCTION.....	205
II.	ACTUAL TRENDS IN EXPECTATION AND DECISION	208
	<i>A. The People Are Bound by International Law</i>	208
	<i>B. Congress Is Bound By the Law of Nations</i>	217
	<i>C. The Law of Nations Is Part of the Laws of the United States ..</i>	231
	<i>D. The President Is Bound by Customary International Law.....</i>	240
	<i>E. The States Are Bound by Customary International Law</i>	245
III.	CONCLUSION	253

I. INTRODUCTION

A number of “originalist” and other writings have paid merely partial attention to views of the Founders and Framers concerning currently important questions regarding the reach and constitutional bases for incorporation of the customary law of nations. Are individuals, Congress, the President, and the states bound by customary international law? Is the law of nations part of the laws of the United States, especially for identification, clarification, and application by the federal and state judiciary?

Awareness of actual trends in judicial decisions, views of the Founders and Framers, and early opinions of U.S. attorneys general is often critical for appropriate answers to such questions. Yet, too often, writers with an apparent ideological mission and even a pretense of deference to “originalism” ignore the cases and the majority of relevant views of the Founders and Framers. Too often, they seem fond of citing merely their fellow authors on such critically important questions as whether the President of the United States can lawfully authorize violations of the customary and treaty-based laws of war and can ignore any inhibiting domestic legislation.¹ It is the purpose of this article to provide the most

* Mike & Teresa Baker Law Center Professor, University of Houston.

¹ See, e.g., Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations*

thorough exposition to date of actual trends in early expectation and judicial decision that are relevant to whether the people, Congress, the President, and the states are bound by customary international law and whether the law of nations is part of the laws of the United States.²

For this purpose, I focus at times on one of the most recent law review articles to actually address certain relevant early historic trends. J. Andrew Kent's article on *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*³ primarily addresses the role of congressional power to define and punish offenses against the law of nations and offers occasional views with respect to the general questions explored in this article. It provides an interesting explanation of a probable dual nature of the constitutionally-based power of Congress to define and punish offenses under customary international law, one that has operated with respect to congressionally-authorized sanctions against individual perpetrators since the Founding. Such a congressional power can also operate against states within the United States and foreign states that violate customary international law.⁴ Professor Kent's article also provides important insights

Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power, 2007 UTAH L. REV. 345, 397-99 & nn.139-141 (2007); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1451, 1453, 1458-61, 1466, 1470-72 (2006). A similar pattern emerges among some writers with respect to other questions addressed in this article. See, e.g., *infra* note 133. An open attempt to avoid relevant views of the Founders and Framers is favored by certain "textualists" who allege that they can divine original meaning by ignoring actual views of the Founders and Framers. A suspiciously specious claim is that such views might not have reflected generally shared meaning. See, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1555 (2002); D.A. Jeremy Telman, *The Foreign Affairs Power: Does the Constitution Matter?*, 80 TEMP. L. REV. 245, 260-61 (2007). The argument is especially questionable when elite views were uniform or nearly uniform, often publicized at some point, and later mirrored in early judicial decisions.

Markedly different approaches to "original understanding" also address early patterns of judicial expectation. See, e.g., William Michael Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. POCKET PART 218 (2007) (recognizing that with respect to one issue "the critical evidence . . . involves [early] judicial practice"), available at <http://thepocketpart.org/2007/01/09/treanor.html>.

² Such detailed exposition is either provided in the article or in some of the writings cited in relevant footnotes.

³ J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

⁴ See *id.* at 852, 882-99, 909, 911. Congressional use of economic sanctions against foreign states is often justified under the commerce clause. U.S. CONST., art. I, § 8, cl. 3. See, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 66 (2 ed. 1996). Additionally, economic sanctions are justified under the necessary and proper clause when Congress implements treaty-based sanctions. U.S. CONST., art. I, § 8, cl. 18. See HENKIN, *supra*.

concerning what in earlier U.S. history had been an undoubted congressional authority to initiate, and in significant ways control, the use of armed force abroad and, thus, to limit certain aspects of the President's commander in chief power.⁵ This substantial congressional authority *vis-a-vis* the commander in chief power is clearly of current importance and has been documented far more fully in another recent article.⁶ With respect to other

Therefore, the relevance of the define and punish clause to sanctions against foreign states seems to be largely of historic interest. However, the reach of congressional power under the define and punish clause to states within the United States has potential importance, given cutbacks in the reach of congressional power under the commerce clause *vis-a-vis* the power of U.S. states in cases that did not address the additional power of Congress to implement international law. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). In any event, the reach of congressional legislation implementing international law is uninhibited by state authority and has been justified under the commerce, define and punish, and necessary and proper clauses. *See, e.g.*, *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *United States v. Arjona*, 120 U.S. 479, 483, 487 (1887); *United States v. Haun*, 26 F. Cas. 227, 230-32 (C.C.S.D. Ala. 1860) (No. 15,329) (adding: "the domain of international law . . . belongs to the jurisdiction of congress"); *Knoefel v. Williams*, 30 Ind. 1, (Ind. 1868) (noting that although there would be a limit "imposed by the law of nations," congressional act confiscating property consistently with law of war is binding on the states and "[r]esort may be had to any means known and recognized by the laws of war.").

⁵ *See* Kent, *supra* note 3, at 854, 912, 915, 917-19, 921 & n.349. Some quote merely partial language from *The Prize Cases* to argue that the President has a power unilaterally to respond to armed attacks on or invasions of the United States. However, the argument involves a misread of the *Prize Cases* by ignoring the fact that immediately before language that is only partly quoted the Supreme Court expressly referred to two early federal statutes that "authorized . . . [and] bound" the President to use armed force, demonstrating the existence of another form of congressional war power. *See* *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("by the Acts of Congress of February 28th, 1795, and 3d March, 1807, he is authorized to . . . use the military and naval forces of the United States in case of invasion by foreign nations. . . . [Thus, i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force." (emphasis added)); *see also id.* at 691 (Nelson, J., dissenting) (regarding the Acts of 1792 and 1795). The Court also expressly affirmed that the President "has no power to initiate or declare a war," "is bound to take care that the laws be faithfully executed," and "[t]he right of . . . capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations." *Id.* at 666. Curiously, Professor Kent assumes that the President has an inherent constitutional power "to 'repel sudden attacks.'" Kent, *supra* note 3, at 923. But it seems that the viewpoint of two Founders that he cites did not prevail, and that it was deemed necessary that Congress enact relevant legislation in 1792, 1795, and 1807 to provide such a competence. Today, presidential power to respond to armed attacks is also based in Article 51 of the United Nations Charter and presidential authority to faithfully execute the laws (including international law) based in Article II, Section 3 of the Constitution. *See, e.g.*, Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 533-36, 553-54 (2002); *see also* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 12-13, 180 n.2 (2nd. ed. 2003) (addressing statements of Peter Duponceau, Alexander Hamilton, John Jay, James Madison, and John Marshall), 480-81 n.62 (regarding presidential authority to execute U.N. Security Council authorizations).

⁶ *See* Paust, *supra* note 1, at 345, 381-92 (2007). *See also* Stephen I. Vladeck, *Congress*,

questions addressed in Professor Kent's article, some of the conclusions proffered do not follow logically from the historical research that is set forth and, at times, the historical inquiry is noticeably incomplete, especially concerning relevant trends in judicial decision. Nonetheless, his attention to history places his article clearly outside those of writers who merely offer anti-historical or episodically historical theoretic prattle.

II. ACTUAL TRENDS IN EXPECTATION AND DECISION

A. *The People Are Bound by International Law*

The understanding of the Founders and Framers that all persons are bound by the law of nations provides an important basis for recognition that the United States Congress, the executive branch, and the states are also bound by the law of nations. First, it was well understood that our federal and state governments possess limited authority and merely the powers that have been delegated by the people of the United States, whether or not such powers are exercised within the United States or abroad.⁷ This fundamental recognition and related expectations have often been reaffirmed by the judiciary.⁸ Second, it was well known that the people are bound by

the Commander-in-Chief, and the Separation of Powers After Hamdan, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 933 (2007).

⁷ See, e.g., U.S. CONST., pmbl. ("We the People . . . do ordain and establish this Constitution for the United States of America"), amnd. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people"); PAUST, *supra* note 5, at 68, 83 n.34, 169, 171, 247 n.90, 326, 328-31, 333-35, 469, 487-90, 493-95, 497-99, 502-03. As James Wilson remarked, the government "is founded upon the power of the people . . . in their name and their authority." James Wilson, Speech, Dec. 11, 1787, in 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 497-98 (Jonathan Elliot ed., 1937) [hereafter *ELLIOT'S DEBATES*].

⁸ See, e.g., *Reid v. Covert*, 354 U.S. 1, 5-6, 12, 35 n.62 (1957) (the United States "is entirely a creature of the Constitution. . . . Its power and authority have no other source. It can only act [at home or abroad] in accordance with all the limitations imposed by the Constitution"); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974), quoting *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953) ("there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law as guaranteed by the Constitution of the United States"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (the President's power "must stem either from an act of Congress or from the Constitution itself"); *id.* at 646, 649-50 (Jackson, J., concurring) (the President's power to execute law "must be matched against words of the Fifth Amendment" and the Founders omitted "powers *ex necessitate* to meet an emergency"); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("Congress and the President . . . possess no power not derived from the Constitution"); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (recognizing that "[t]he Constitution of the United States is in force . . . wherever and whenever the sovereign power of

international law and are subject to criminal sanctions for violations of international law⁹ here or abroad under the principle of universal

that government is exerted,” but the “real issue” is “which of its provisions were applicable,” and finding that the requirements of due process apply); *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting) (the “written constitution . . . protects the people against the exercise of arbitrary, unlimited power, and the limits of that instrument may not be passed by the government it created, or by any branch of it. . . . Congress . . . has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. . . . By whomsoever and wherever power is exercised in the name of and under the authority of the United States, or of any branch of its government, the validity or invalidity of that which is done must be determined by the Constitution.”); *United States v. Lee*, 106 U.S. 196, 200 (1882) (“No man in this country is so high that he is above the law. . . . All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office . . . is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.”); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection *all classes of men*, at all times, and *under all circumstances*.”) (emphasis added); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736-37 (1836) (“The government of the United States . . . is one of limited powers”); *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 393-94 (Chase, Circuit Justice, C.C. D. Pa. 1798) (“government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner that is there prescribed”); *United States v. Robins*, 27 F. Cas. 825, 828-29 (D.C.D. S.C. 1799) (No. 16,175) (Col. Moultrie) (argument of counsel) (“the constitution . . . is the compact by which our government was formed, and under which alone it exists; and that from this compact, all civil power and authority, and every constitutional branch of our society, as a nation, was derived, and is exercised” and rights “not given up, formed a sacred residuum in the hands of the people, and which are unalienable by any act of legislation.”); *United States v. Tiede*, Crim. Case No. 78-001A, 86 F.R.D. 227 (U.S. Ct. for Berlin, Mar. 14, 1979); S. REP. NO. 56-249, at 11 (1900), addressed in J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 479 n.87 (2007). See also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (“the Executive is bound to comply with the Rule of Law”); *id.* at 2800 (Kennedy, J., concurring in part) (addressing the need for congressional statutes operative abroad to be “in conformance with the Constitution and other laws” and recognizing that trial of aliens by military commission abroad “raises separation-of-powers concerns of the highest order” and results in “an incursion [into] the Constitution’s three-part system.”).

⁹ See, e.g., PAUST, *supra* note 5, at 7-8, 11-12, 23-25 n.14, 169, 171-72, 180 n.2, 181 nn.7, 14, 202 (noting an 1806 annual address by President Jefferson before Congress in which he recognized that citizen “violations of human rights” had occurred), 421-22, 446; Kent, *supra* note 3, at 929 nn.382 & 385 (treaties are binding on the citizenry), 934 n.402 (quoting Nicholas: “binding on all”); Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 250, 256-57 (“a community bound by the law of nations, was one of the leading objects of uniting under the Constitution” and “Jeffersonian Republicans in the 1790s believed that the law of nations . . . [was] a set of rules that every citizen must obey” and set forth “their duties”), 262-64 (“binding on American citizens”) (1997); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT’L L. 1229, 1237-39 (2004) (documenting numerous cases and opinions of attorneys general affirming that “[i]n the United States, there

jurisdiction.¹⁰ Civil sanctions were also available.¹¹ It follows necessarily

had been early attention to a significant number of international crimes that can be committed by private perpetrators and provide universal jurisdiction for criminal or civil sanctions, including piracy; war crimes; breaches of neutrality, territorial infractions, ‘aggression,’ and other crimes against peace; unlawful capture of vessels; the slave trade; violence against foreign ministers and other officials; poisoners, assassins, and incendiaries; counterfeiters of foreign currency; banditti and brigands; terroristic publications; violation of passports; violation of safe-conducts; and more generally ‘all . . . trespasses committed against the general law of nations’ and treaties of the United States.” [hereafter Paust, *Private Rights and Duties*]; *infra* note 10; *see also* Hoare v. Allen, 2 U.S. (2 Dall.) 102, 103 (Pa. 1789) (person would not have paid money to enemy alien during war “without a violation of . . . the law of nations”); 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, 465 n.56 (2000) (quoting James Wilson: “the law of nations . . . is indispensably binding upon the people, in whom the sovereign power resides . . .”). Concerning violations of treaties as offenses against the law of nations, *see also* Kent, *supra* note 3, at 929. On the civil side, human rights and “denial of justice” to aliens were of fundamental concern. *See infra* note 116. There were also various other matters under customary international law that were of interest. *See, e.g.*, PAUST, *supra* note 5, at 11-12. The Court in *Sosa* did not seem to realize that the list of identifiable infractions was so extensive. *Compare* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-24 (2004) (*cf. id.* at 762 (Breyer, J., concurring in part and concurring in judgment) (recognizing that war crimes and other infractions are actionable)) with Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 848-51 (2005). Additionally, the statement in *Sosa* that “the general norms [of customary law] governing the behavior of national states with each other” “occupied the executive and legislative domains, not the judicial” should not be misread to conclude that no norms of customary law were used by the judiciary as law of the United States binding either individuals or foreign states – a necessarily false assumption disproved in material cited above and in much of this article. *Sosa*, 542 U.S. at 714. *See also Sosa*, 542 U.S. at 730 (“It would take some explaining to say now that federal courts must avert their gaze . . . from any international norm intended to protect individuals”). *But cf.* Kent, *supra* note 3, at 932 (also wrongly asserting that “on the international level, the law [of nations] is not actually enforced by anyone or anything except other independent states”).

¹⁰ Concerning early recognition of universal jurisdiction over violations of the customary law of nations, *see, for example*, *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820) (piracy “is against all, and punished by all . . . within this universal jurisdiction”); *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 147-48 (1820) (piracy “is an offense against all. It is punishable in the Courts of all. . . . [Our courts] are authorized and bound to punish”); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 156 (Paterson, J.), 159-61 (Iredell, J.) (1795) (“all . . . trespasses committed against the general law of nations, are inquirable, and may be proceeded against, in any nation”; an offense “against the law of nations . . . [is], of course, cognizable in other countries”); *United States v. Robins*, 27 F. Cas. 825, 829 (Col. Moultrie) (argument of counsel) (“the offence . . . was against the law of nations, which style a pirate *hostis humani generis*, (the enemy of mankind,) and over whom all nations claim a criminal jurisdiction equally”); 1 Op. Att’y Gen. 509, 515 (1821) (“crimes against the human family” are engaged in by “enemies of the whole human family” who are subject to the jurisdiction of “[a]ll nations”); 1 Op. Att’y Gen. 509, 513 (1821) (“crimes against mankind” are subject to universal jurisdiction); 1 Op. Att’y Gen. 68, 69 (1797) (regarding “an offence against the law of nations . . . , it is the interest as well as the duty of every government to punish”); PAUST, *supra* note 5, at 421-22, 434-35 nn.53-68. *See also* *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 163

that the people could not delegate to the U.S. Congress, federal executive, or the states a power that they themselves did not possess to violate or compromise such law. Professor Kent does not understand that individuals had obligations directly under the customary law of nations, especially since they were often prosecuted for violations of the law of nations without a congressional exercise of the define and punish clause.¹² The many cases

(1820) (“an offence against the universal law of society”); *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792) (“universal law”); *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 113, 115 (Pa. 1784) (“crime against the whole world,” “crime against . . . all other nations”); *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847-51 (C.C.D. Mass. 1821) (No. 15,551) (recognizing “an offence against the universal law of society” and that “no nation can rightly permit its subjects to carry it on, or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations”).

¹¹ See, e.g., *United States v. The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232, 235 (1844) (regarding piracy over which all states have jurisdiction, both confiscation and compensation in damages are possible remedies under the law of nations); *The Apollon*, 22 U.S. (9 Wheat.) 362, 376-79 (1824) (foreign private plaintiff sued United States for a violation of law of nations involving seizure of foreign ship and received damages, travel expenses to bring suit, and attorney fees. The Court also addressed possible “vindictive” or “aggravated” damages). *Id.* at 374, 377; *Glass v. The Sloop Betsy*, 3 U.S. (3 Dall.) 6, 14 (1794) (noting a district court is “competent to enquire, and to decide, whether . . . restitution can be made consistently with the law of nations and treaties”); *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J.) (noting alien’s individual right “revived at the peace, both by the law of nations and the treaty of peace”); *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1 (1781), (“by the law of nations,” a private person “may pursue and recover” property taken in violation of international law “in whatever country it is found”); 26 Op. Att’y Gen. 250, 252-54 (1907); 3 Op. Att’y Gen. 484, 490 (1839); 1 Op. Att’y Gen. 61, 62 (1796); 1 Op. Att’y Gen. 57, 58-59 (1795); PAUST, *supra* note 5, at 224-27, 422-23; Paust, *Private Rights and Duties*, *supra* note 9, at 1237 n.28, 1238 nn.30-31, 34; Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT’L L. 249, 250-54 (2004); Stephens, *supra* note 9, at 469-71, 508, 518-19; *infra* note 25; *infra* text accompanying note 40. Therefore, Iredell’s statement in 1794 quoted by Professor Kent, *supra* note 3, at 936 n.410, that a violation of the law of nations is supposedly not “a subject of . . . personal complaint” was not one that reflected reality at that time (especially given enactment of Alien Tort Claims Act in 1789, 28 U.S.C. § 1350, originally in 1 Stat. 73, 77 (1789)) or later in U.S. history, and attention to actual trends in decision provides more authoritative recognitions. Iredell even recognized the next year that offenses against the law of nations by private perpetrators *are* inquirable in every country and that “books of very high authority” support a statement that a person wronged by a piratical act “may proceed criminaliter against the . . . [perpetrator], to punish him, and civiliter, to have restitution” See *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (Iredell, J.) (also quoted in part *supra*). Similarly, in *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 496 (1825), *Davison v. Seal Skins*, 7 F. Cas. 192 (C.C.D. Conn. 1835) (No. 3,661), and *Turnbull v. Ross*, 1 S.C.L. (1 Bay 20, 23) 9, 10 (S.C. 1785) (recognizing that a victim of piracy can sue to recover property taken by piratical acts).

¹² Compare Paust, *Private Rights and Duties*, *supra* note 9; *infra* text accompanying note 67; *infra* notes 19, 69-71 with Kent, *supra* note 3, at 849 nn.26, 28, 932. *But cf. id.* at 850 nn.32-33, 878-79, 881, 882 n.184, 897-98 (“the lesson of [*De*] *Longchamps* . . . [was] that nonstatutory prosecutions were a permissible way to handle individual offenses” and “the prevailing idea” was simply to create a national court for direct prosecution of the law of

addressing customary international law without an exercise of the define and punish power provide further recognition that the relevant power of Congress is not an exclusive power that must be exercised before customary crimes can be prosecuted and customary rights can be protected in the courts.¹³

Peter Duponceau, who had argued for the defense in the famous *Henfield's Case* in 1793,¹⁴ expressed shared expectations of his generation that the people and our governments are bound by the law of nations with remarkably relevant clarity:

The law of nations . . . may be said, indeed, to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere *proprio rigore*, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental principles. Whether there is or not a national common law in other respects this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.¹⁵

In 1799, Representative John Marshall had recognized more specifically that Article I, Section 8, clause 10 of the United States Constitution (the define and punish clause) “cannot be considered, as affecting acts which are piracy under the law of nations” and that where,

nations); *id.* at 929.

¹³ See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980); *infra* text accompanying note 67; *infra* notes 69-71. At one point, Professor Kent recognizes that in view of the pattern of direct incorporation of customary international law for criminal sanctions and general approval of that pattern, “the Law of Nations Clause . . . could have been largely superfluous.” See Kent, *supra* note 3, at 878-80. Whether or not it was largely superfluous, it is not an exclusive power in Congress. The existence of this congressional power does not even prevent implementation of customary international law by the states. See *infra* note 159.

¹⁴ *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6, 360).

¹⁵ PETER S. DUPONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 3 (1824), *reprinted in* *Henfield's Case*, 11 F. Cas. at 1122. District Attorney William Rawle also affirmed during *Henfield's Case* that “[t]he rights of man are the rights of all men in relation to each other.” *Henfield's Case*, 11 F. Cas. at 1118.

under customary international law, the people of the United States themselves have no competence to act, “that clause [10] can never be construed to make to the Government a grant of power, which the people making it do not themselves possess.”¹⁶ Thus, Congress has no power to act in violation of the law of nations, nor “consequently . . . [could such power be transferred] to their courts”¹⁷ Marshall added: “[t]he nation was bound” by the law of nations “in like manner, as the nation is now bound” under a treaty and “[t]he duty was the same, and devolved [as well] on the” executive.¹⁸

In 1793, Chief Justice John Jay’s famous charge to the grand jury in Virginia in *Henfield’s Case* with respect to the international crime of breaches of neutrality affirmed some of the Founder and Framers recognitions noted above and several points to follow that are relevant to the constitutional basis and binding nature and reach of the law of nations:

By the constitution and laws, the people of the United States have expressed their will, and their will so expressed, must sway and rule supreme in our republic. It is obedience to their will, and in pursuance of their authority, that this court is now to dispense their justice . . . [regarding] what infractions of their laws have been committed [T]he laws of the United States admit of being classed under three heads of descriptions . . . [the second being t]he laws of nations

As to the laws of nations – they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war On this occasion, it is proper to observe to you . . . that various circumstances and considerations now unite in urging the people of the United States to be particularly exact and circumspect in observing the obligation of treaties, and the laws of nations, which as has been already remarked, form a very important part of the laws of our nation . . .

. . . The proclamation [of President Washington warning individuals that they have duties and can be prosecuted “under the law of nations” for “committing, aiding, or abetting” breaches of neutrality] is exactly consistent with and declaratory of the conduct enjoined by the law of nations

¹⁶ Rep. John Marshall, Speech of Mar. 4, 1799, 10 ANNALS OF CONG. 607 (1800). *See also id.* at 611; *infra* note 46. The U.S. Supreme Court has labeled Marshall’s recognitions as “masterly and conclusive.” *See Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893).

¹⁷ *Id.*

¹⁸ *Id.*

While the people of other nations do no violence or injustice to our citizens, it would certainly be criminal . . . in our citizens, for the sake of plunder, to do violence and injustice to any of them . . .

It is on these and similar principles that whoever shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding or abetting hostilities forbidden by his country, ought to lose the protection of his country against such punishment or forfeiture. But this is not all, it is not sufficient that a nation should only withdraw its protection from such offenders, it ought also to prosecute and punish them

From the observations which have been made, this conclusion appears to result, viz.: That the United States are in a state of neutrality relative to all the powers at war, and that it is their duty, their interest, and their disposition to maintain it: that, therefore, they who commit, aid, or abet hostilities against these powers, or either of them, offend against the laws of the United States, and ought to be punished [This case] must be determined by the laws and approved practice of nations, and by treaties and other laws of the United States¹⁹

Importantly, the word “nation” often refers to a group of people, not necessarily to a “state” as such.²⁰ Thus, when one finds early recognitions that a nation is bound by international law, one should not simplistically conclude that such recognitions are not relevant with respect to duties of a people and individuals.²¹ Chief Justice Jay’s charge to the grand jury notes, in fact, that “nations are bound” by the law of nations and, thus, “the people” are to observe the law of nations. Individuals who violate the law of nations can be prosecuted for engaging in such conduct despite the fact that there was no relevant congressional legislation implementing the law of nations

¹⁹ Henfield’s Case, 11 F. Cas. at 1102-04 (Jay, Circuit Justice, C.C.D. Pa. 1793). Concerning constitutional bases for application of customary international law, see also *infra* text accompanying notes 66-67, 109, 139-40; *infra* notes 91, 109, 129.

²⁰ See, e.g., JORDAN J. PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 14 (2d ed. 2005).

²¹ Professor Kent was aware of such a recognition. See Kent, *supra* note 3, at 934 n.402 (quoting remarks of George Nicholas during debates concerning ratification of U.S. Constitution: “[T]he law of nations . . . implied the consent of all, and was mutually binding on all”). However, he missed the point that the word “all” can include individuals and he missed the point that the fact that the law of nations binds “nations” does not mean that it does not also bind individuals. See *id.* at 934. Clearly, the law of nations was binding on both. See, e.g., *supra* notes 9-10, 15, 18-19.

for criminal sanction purposes at the time (and, thus, no exercise of congressional power under Article I, Section 8, clause 10, to “define” and “punish” offenses against the law of nations).²² Professor Kent also quotes a draft charge to a Virginia grand jury prepared by Chief Justice Jay in 1793 that uses the word “our” while considering individual liability and explaining that “[b]y the Laws of Nations our Conduct relative to other Nations is to be regulated.”²³ The words “our” and “we” had been used similarly by Alexander Hamilton in 1784 when he wrote to the people of New York: “we have taken our station among nations [,] have claimed the benefits of the laws which regulate them, and must in our turn be bound by the same laws.”²⁴

Justice Wilson’s charge to a grand jury in Pennsylvania documented in *Henfield’s Case* reiterated the well known fact that individuals are bound by the law of nations: “[o]n states as well as individuals the duties of humanity are strictly incumbent . . . [and, in this instance, Gideon Henfield has] offended . . . against . . . binding laws . . . , [including] the law of nations.”²⁵ In the same charge to the grand jury in 1793, James Wilson declared:

[At least when it is in the form of the law of nature,] the Law of Nations is the Law of the People [I]t is indispensably

²² See *supra* text accompanying note 19. When Jay was the Secretary of Foreign Affairs during the Confederation, he noted in a 1786 report to the Continental Congress that treaties immediately bound “the whole nation, and superadded to the laws of the land,” and were to be “received and observed by every member of the nation.” PAUST, *supra* note 5, at 148 n.77. Jay’s report was unanimously adopted by the Congress. See *id.* at 181 n.7.

²³ Kent, *supra* note 3, at 888 n.216 (quoting Draft of John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia (1793), reprinted in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 359, 361 (Maeva Marcus ed., 1988) [hereafter DOCUMENTARY HISTORY]). Thus, “our” is related to “nation,” but in view of Jay’s Charge in *Henfield’s Case* 11 F.Cas 1099 (1793) each term can relate to individual responsibility for violations of the law of nations and direct incorporation of customary international law for purposes of criminal prosecution. See *supra* text accompanying note 19.

²⁴ Alexander Hamilton, Second Letter from Phocion to the Considerate Citizens of New York (Apr. 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON 530, 550 (Harold C. Syrett ed., 1961).

²⁵ *Henfield’s Case*, 11 F. Cas. at 1107, 1120 (Wilson, J., Circuit Justice, C.C.D. Pa. 1793). He added with respect to “their crimes, . . . [i]f the offended nation have the criminal in its power, it may without difficulty punish him, and oblige him to make satisfaction. . . . When the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made, or should punish him according to the measure of his offence.” *Id.* During his *Lectures on the Law* in 1790-91, Wilson had recognized: “To every citizen of the United States, this law [of nations] is not only a rule of conduct, but may be a rule of decision.” Edwin D. Dickinson, *The Law of Nations as Part of the Law of the United States*, 101 U. PA. L. REV. 26, 45 n.56 (1952) (quoting 1 WILSON, WORKS 374-81 (Bird Wilson ed., 1804)).

binding upon the People, in whom the sovereign power resides; and who are, consequently, under the most sacred obligations to exercise that power or to delegate it to such as will exercise it, in a manner agreeable to those rules and maxims, which the law of nature prescribes to every state.²⁶

James Kent's recognition in the 1820s that "[t]he law of nations . . . is equally binding... upon all mankind"²⁷ and "enjoins upon every nation"²⁸ evidences a similar connection between nation, mankind, and individuals, as well as the inescapably binding nature of the law of nations with respect to individuals and governments. A symmetrical connection is also apparent from the fact that the formation and dynamic continuance of customary laws of nations were known to be ultimately derived from "the general consent of mankind,"²⁹ the "inhabitants of the world," and "all the people."³⁰

²⁶ Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (July 22, 1793), in DOCUMENTARY HISTORY, *supra* note 23, at 418; JAMES WILSON, OF THE LAW OF NATIONS, *reprinted in* 1 THE WORKS OF JAMES WILSON 153-54 (Robert G. McCloskey ed., 1967); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1091-92 (1985). For Justice Wilson, the indispensable and sacred nature of such laws of nations was related to a universal and eternal quality that was clearly relevant to criminal prosecution of individuals in a contemporary world. In his charge to the grand jury in Henfield's Case, 11 F.Cas. 1099, 1107 (1793) (he had also declared: "Under all the obligations due to the universal society of the human race, the citizens of a state still continue. To this universal society . . . the first degree of this duty is to do no injury Among states as well as among men, justice is a sacred law Let such be held responsible, when they can be rendered amenable for the consequences of their crimes and disorders.").

²⁷ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 3 (New York, O. Halsted 1826).

²⁸ *Id.* at 32.

²⁹ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796); *see also* *United States v. Darnaud*, 25 F. Cas. 754, 760 (C.C.E.D. Pa. 1855) (No. 14,918) ("mankind recognize . . . , mankind concur in . . . , [and] the general sense of mankind"); PAUST, *supra* note 5, at 3-4, 18-19 nn. 3-5.

³⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66 (1765); *see also* *Rhode Island v. Massachusetts*, 39 U.S. (14 Pet.) 210, 225 (1840) (argument of counsel) ("international law" is formed "by common consent of mankind"); *Johnson v. Twenty-one Bales*, 13 F. Cas. 855, 857 (C.C.D.N.Y. 1814) (No. 7,417) ("modified . . . by the tacit or express consent . . . of nations . . . , every civilized people"); *id.* at 860 ("the sanction of the civilized world"); *United States v. Robins*, 27 F. Cas. at 861 (quoting Representative John Marshall: "the practice of every nation in the universe and consequently the opinion of the world"); PAUST, *supra* note 5, at 3, 18 nn.3-4. One should be leery of some of Blackstone's statements, because Blackstone was not to be followed in all respects. Portions of his writings were denounced in particular by Thomas Jefferson. *See, e.g.*, Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 405 (1929).

B. Congress Is Bound By the Law of Nations

As noted, Duponceau had affirmed expectations of the Founders and Framers that all forms of government are bound by the customary law of nations.³¹ The primacy of customary international law and its universal reach was affirmed in a markedly similar manner by George Nicholas when he assured during the ratification debates in Virginia that “the law of nations . . . [is] superior to any act or law of any nation [and is] binding on all.”³² Such a primacy also lay behind John Jay’s affirmation that “[u]nder the national government, . . . the law of nations [will not be violated, but] will *always be* expounded in one sense and *executed* in the same manner.”³³

In 1795, Justice Paterson quoted a resolution of the Continental Congress of March 6, 1779, while recognizing that the Continental Congress had claimed a supreme power (as opposed to that of the states) “of executing the law of nations” and “ultimately and finally [deciding] on all matters on questions touching the law of nations,” especially through a “controll by appeal.” This supreme power was not claimed for the purpose of avoiding the law of nations, but to execute it and to assure that the “legality” of any action taken was (since it “must be”) “determined by the law of nations” and to assure that the Continental Congress could “compel a just and uniform execution of the law of nations.”³⁴ The Continental Congress was concerned that such power exist over the states lest it would “disable the Congress of the United States, from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties, or other breaches of the law of

³¹ See *supra* text accompanying note 15.

³² See George Nicholas, Remarks, in 3 ELLIOT’S DEBATES, *supra* note 7, at 502.

³³ *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (quoting THE FEDERALIST NO. 3, at 98 (John Jay) (Benjamin Fletcher Wright ed., 1961) (emphasis added); *Xuncax v. Gramajo*, 886 F. Supp. 162, 182 n.23 (D. Mass. 1995). Jay had also noted therein that it was “of high importance to the peace of America that she observe the law of nations.” *Finzer v. Barry*, 798 F.2d 1450, 1457 (D.C. Cir. 1986) (Bork, J.) (quoting *Xuncax*, 886 F. Supp. at 13). See also *Lenner*, *supra* note 9, at 251 (the law of nations was understood to be “an inherent component of every government”); *id.* at 256 (“Jeffersonian Republicans in the 1790s believed that the law of nations . . . [was] binding upon the national government”); *id.* at 270 (Republicans William Allen, Edward Livingston, and George St. Tucker claimed in 1798 that, since aliens had rights under the laws of nations and humanity, Alien Friends Act of Congress denying such rights also violated amendments to Constitution); *id.* at 279-80 (law of nations could also enhance congressional power); *infra* note 152 (Jefferson’s recognition was that customary rights of man are binding on federal and state governments).

³⁴ See *Penhallow v. Doane’s Adm’r*, 3 U.S. (3 Dall.) 54, 82-84 (1795) (Paterson, J.) (quoting resolution of Continental Congress of March 6, 1779, reprinted in 14 JOURNALS OF THE CONTINENTAL CONGRESS 635 (Worthington Chauncey Ford ed., 1909). The resolution added that “the law of nations [must] . . . be most strictly observed.” *Id.*; see also *infra* note 55 (regarding letter of Continental Congress of April 13, 1787).

nations.”³⁵ Justice Paterson, reviewing the resolution, found the reasoning “cogent and conclusive.”³⁶ He also noted that the Continental Congress could be “called upon to make atonement and redress” with respect to violations of international law engaged in by persons under color of commission from the Continental Congress. Thus, it should have the authority of “examining” such conduct “and of confirming or annulling” such conduct.³⁷ There was simply no intimation that Congress could avoid executing or violate the law of nations. Indeed, it was expressly recognized that questions of “legality . . . must be determined by the law of nations” and, as the Continental Congress assured, “the law of nations [must] . . . be most strictly observed.”³⁸ As James Kent affirmed, “[d]uring 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.”³⁹

Prior to creation of the Constitution, a court in Pennsylvania had recognized in 1781 that an act of the legislature “cannot change the law of nations” and that “by the law of nations” a private person has the right to “pursue and recover” property taken in violation of the law of nations.⁴⁰ While construing a state statute so as to avoid a conflict with a treaty, a New York court declared in 1784 that the nation:

[M]ust be governed by one common law of nations . . . [and] repeal of the law of nations, or any interference with it, could not have been in contemplation . . . when the Legislature passed

³⁵ *Id.* at 83.

³⁶ *Id.* at 82.

³⁷ *Id.* at 81.

³⁸ *Id.* at 83; *supra* note 34. See also 11 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 34, at 486 (Proclamation of May 9, 1778 affirmed that U.S. persons who violate the law of nations will be “condignly punished”); 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 34, at 196 (privateers under commission must not “infringe or violate the laws of nations”).

³⁹ 1 KENT, COMMENTARIES, *supra* note 27, at 1, quoted more fully in Kent, *supra* note 3, at 903 n.283. See also JAMES KENT, COMMENTARY ON INTERNATIONAL LAW 427 (1866) (the Continental Congress showed “great solicitude to maintain inviolate the obligation of the law of nations, and to have infractions of it punished”), citing 7 JOURNALS OF THE CONTINENTAL CONGRESS 181; Ordinance of Dec. 4, 1781, in 7 JOURNALS OF THE CONTINENTAL CONGRESS 185; Lenner, *supra* note 9, at 252, 256; *infra* notes 55, 146. A professed obedience to the law of nations was understandable for several reasons. See, e.g., *supra* note 33; *infra* notes 55, 93, 100. One might have been related to the fact that the customary rights of man were expected to be supreme and unalienable – rights that we had just declared to the world had been violated by the British parliament and Crown. See also *infra* notes 143, 145, 149-52, 154 and accompanying text. We could hardly have expected to create our own legislature with a power to violate customary human rights, and history demonstrates quite clearly that we did not. See, e.g., PAUST, *supra* note 5, at 195-202, 208-09, 323-25, 329-33.

⁴⁰ *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 3-4 (1781).

this statute; and we think ourselves bound to exempt that law from its operation⁴¹

Such language supports the predominant view at the time that domestic legislation cannot obviate the domestic effect of customary international law and that courts have a responsibility to assure that customary law prevails, a responsibility and primacy that was necessarily affirmed in a 1792 opinion of U.S. Attorney General Edmund Randolph:

The law of nations, although not specially adopted by the constitution is essentially a part of the law of the land. Its *obligation* commences and runs with the existence of a nation, *subject to modifications on some points of indifference*
Impliedly . . . the law of nations is considered by the act⁴²

⁴¹ *Rutgers v. Waddington*, N.Y. Mayor's Court 1784, reprinted in SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1784, at 302, 308, 325 (Richard B. Morris ed., 1935) and 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 405, 417 (Julius Goebel, Jr. et al. eds., 1964) [hereafter Goebel]. Thomas Jefferson approved the opinion. See, e.g., *Keppel v. Petersburg R. Co.*, 14 F. Cas. 357, 364-65 (C.C.D. Va. 1868) (No. 7,722); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, The Atlantic World, and the Origins of Judicial Review*, 81 CHIC.-KENT L. REV. 825, 848 (2006).

⁴² 1 Op. Att'y Gen. 26, 27 (1792) (emphasis added). Professor Kent missed the point that although it is not "specially" or expressly "adopted by the constitution," the law of nations has a primary constitutional base in the phrase "laws of the United States." Compare Kent, *supra* note 3, at 869 with Lenner, *supra* note 9, at 267 n.78 (Randolph's view was that "the law of nations had been 'specially adopted by the Constitution'"); *infra* text accompanying notes 67 (Attorney General Speed addressed this very point and noted that although the law of nations is not "specially" adopted, it is binding "from the very face of the Constitution"), 109; *infra* notes 91, 109, 129. There are other constitutional bases. See, e.g., *infra* text accompanying notes 139-41; PAUST, *supra* note 5, at 9, 43-46 nn.53-55, 324-25. Professor Kent also missed the point that "a people may regulate [the law of nations] so as to be binding upon the departments of their own government, in any form whatever" (see Kent, *supra* note 3, at 869) – not to avoid its "obligation," but to assure that the departments comply and, even then, any modification must be "of indifference." 1 Op. Att'y Gen. at 27. See also *infra* text accompanying note 67. Further, Randolph did not say that the law of nations is mere "common law," but that it is "part of the law of the land." *Id.* Importantly, many cases demonstrate that the law of nations was not mere common law, but law of a different and higher transnational status of significant federal concern that is part of our law, the laws of the United States, and the law of the land even though a few had considered the law of nations to be part of common law. See, e.g., PAUST, *supra* note 5, at 9, 39-42 n.50; *infra* notes 95-97, 107. Of related interest is the statement of James Madison that congressional enactment of the Alien Enemy Act, "being conformable to the law of nations, is justified by the constitution" (emphasis added). JAMES MADISON, REPORT OF VIRGINIA HOUSE OF DELEGATES REGARDING THE ALIEN AND SEDITION ACTS (1800), reprinted in 17 THE PAPERS OF JAMES MADISON 321-22 (David B. Mattern, et al. eds., 1991). Madison had also remarked that a congressperson "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." THE FEDERALIST NO. 53, at 369 (James Madison) (1 Bourne ed., 1901).

Necessarily, any modification of the law of nations had to be of indifference, a point evident in contemporary and subsequent judicial pronouncements. For example, in 1791, Justice Wilson's charge to a grand jury noted that the customary law of nations cannot be altered or abrogated by domestic law.⁴³ In 1792, it was affirmed that "municipal law . . . may . . . facilitate or improve . . . [the "law of nations"], provided the great universal law remains unaltered."⁴⁴ In 1818, Justice Johnson emphasized a related point that "Congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts."⁴⁵ While making a similar point, counsel had argued before the Supreme Court in 1825 that a congressional act "cannot increase or diminish the list of offenses punishable by the law of nations."⁴⁶

The primacy of customary international law is also evident in an opinion by Justice Chase in 1800. In *Bas v. Tingy*, Justice Chase recognized that "[i]f a general war is declared [by Congress], its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations"⁴⁷ Therefore, the law of nations (and, in particular, the law of war) necessarily restricts and regulates congressional authorization of war's extent and operations.⁴⁸ In 1798, Albert Gallatin had recognized similarly: "By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and to treaties."⁴⁹ And in 1804, counsel had argued before the Supreme Court that "[a]s far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply."⁵⁰ The restrictive role of the laws of war

⁴³ Justice James Wilson, Charge to the Grand Jury for the District of Virginia, May 23, 1791, reprinted in 2 THE WORKS OF JAMES WILSON 803, 813–14 (Robert G. McCloskey ed., 1967). See also Wilson, *supra* text accompanying note 26.

⁴⁴ *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792).

⁴⁵ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 641–42 (1818) (Johnson, J., dissenting). On this jurisdictional point, see also *supra* text accompanying notes 16–17; *infra* notes 59, 63 and accompanying text.

⁴⁶ *The Antelope*, 23 U.S. (10 Wheat.) 66, 99 n.6 (1825) (argument of counsel, citing House committee reports). The same point appears in *Dole v. New England Mut. Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966) (quoting the argument of Representative Marshall in *United States v. Robins* ("No particular nation can increase or diminish the list of offences thus punishable." 5 Wheat. [18 U.S.] 8, per Marshall, C.J.); *The Chapman*, 5 F. Cas. 471, 474 (N.D. Cal. 1864) (No. 2,602) (same); *United States v. Robins*, 27 F. Cas. 825, 860, 862 (D.S.C. 1799) (No. 16,175) (same).

⁴⁷ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (emphasis added).

⁴⁸ That Congress has the power to limit the extent and operations of war *vis a vis* certain commander in chief powers of the President, see, e.g., Paust, *supra* note 1, at 382–92.

⁴⁹ 8 ANNALS OF CONG. 1980 (1798) (statement of representative Albert Gallatin), quoted in *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 564 (S.D.N.Y. 1946).

⁵⁰ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 77 (1804) (argument

apparently formed the basis for Justice Story's statement in 1814 that conduct under a relevant act of Congress "was absorbed in the more general operation of the law of war" and was permissible "under the *jus gentium*" or law of nations.⁵¹ Although there was no clash between the act and the laws of war, the laws of war recognizably had a higher, "more general" absorbing effect.

More generally, Justice Wilson affirmed in *Ware v. Hylton*⁵² in 1796 that "the United States were . . . bound to receive the law of nations, in its modern state of purity and refinement."⁵³ In 1793, Chief Justice John Jay seemed to evoke the commitment set forth in the 1779 resolution of the Continental Congress that the law of nations would be "strictly observed."⁵⁴ As Chief Justice Jay observed, prior to the Constitution "the United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed."⁵⁵ It could hardly have been expected that some hidden change in the duty to observe the law of nations had occurred and could be delegated under the Constitution to the new Congress in order to authorize violations

of counsel).

⁵¹ *The Sally*, 12 U.S. (8 Cranch) 382, 384 (1814) (Story, J.). See also *Armory v. McGregor*, 15 Johns. 24 (N.Y. Sup. 1818) (argument of counsel) ("If the act of Congress is deemed to be in force . . ., after the declaration of war, it would produce a great inconsistency. In the case of the *Rapid*, Story, J., intimated . . . that the non-importation act was swallowed up in the more extensive operations of the law of war. The same opinion was expressed by him in the S.C. of the United States, in the case of the *Sally*.").

⁵² *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

⁵³ *Id.* at 281 (Wilson, J.), quoted in *Norris v. Doniphan*, 4 Met. 385, 1863 WL 2582 (Ky. App. 1863)).

⁵⁴ See *supra* text accompanying note 34.

⁵⁵ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.). In 1790, Jay has also charged a grand jury that "[w]e had become a nation – [and] as such, we were responsible to others for the observance of the Laws of Nations." Chief Justice Jay, Charge to the Grand Jury for the District of New York, Apr. 4, 1790 [hereafter Chief Justice Jay, 1790 Charge to the Grand Jury], reprinted in N.H. GAZETTE (Portsmouth, N.H. 1790). Earlier, a letter of April 13, 1787 of the Continental Congress sent to Great Britain had expressed a related resolve of the United States:

Our national constitution having committed to us the management of the national concerns with foreign States and powers, *it is our duty to take care that all the rights* which they ought to enjoy within our Jurisdiction *by the laws of nations* and the faith of treaties *remain inviolate*.

32 JOURNALS OF THE CONTINENTAL CONGRESS 177, 177 (Worthington Chauncey Ford ed., 1912) (emphasis added). In 1800, Judge Alexander Addison remarked that congressional power over aliens "is to be regulated . . . by the general law of nations." Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (1800), reprinted in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1072 (Charles S. Hyneman & Donald S. Lutz eds., 1983), addressed in Kent, *supra* note 8, at 529.

of the law of nations. Indeed, no evidence of such a radical change can be found in the text or structure of the Constitution or in the debates and affirmations during the formation and ratification of the Constitution.

Chief Justice Marshall recognized eleven years later in an oft-cited case that an act of Congress must be construed consistently with the law of nations if at all possible.⁵⁶ Although he did not indicate what might follow in every case where an act is unavoidably in conflict, he emphasized that “consequently, [an act of Congress] *can never* be construed to *violate . . . rights . . .* [under the customary law of nations] further than is warranted by the law of nations.”⁵⁷ Thus, the Chief Justice affirmed, *rights* under the customary law of nations must prevail unless a deprivation is “warranted by the law of nations.” Seemingly ideologically motivated writers often attempt to ignore the latter portion of Chief Justice Marshall’s important affirmation of the unavoidable primacy of rights under customary international law when they address *The Charming Betsy*.⁵⁸ Too often also,

⁵⁶ *The Charming Betsy*, 6 U.S. (2 Cranch) (emphasis added).

⁵⁷ *Id.* at 118.

⁵⁸ See, e.g., Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 331-32 (1999). Professor Kent missed the last portion of Marshall’s recognition. See Kent, *supra* note 3, at 871 n.120. Professor Kent (*supra* note 3, at 871 n.120) also misquoted *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), since Chief Justice Marshall addressed mere “usage” and not a rule of “law.” *Id.* at 124, 128. As noted in my treatise:

Chief Justice Marshall stated that mere “usage is a guide which the sovereign follows or abandons at his will.” As noted in other writings, however, mere usage is certainly not the equivalent of international law but is merely a long-term practice, which, of course, is not binding on the United States. As the quoted language actually recognizes, it is merely “a guide which the sovereign” can follow or abandon. Further, in *Brown*, it was also recognized that mere “usage . . . is not an immutable rule of law,” but “is a question rather of policy than of law.” [12 U.S. (8 Cranch) at 128.] The question of “policy” becomes whether one should follow long-term practice in a given case. The claim addressed was actually one that the President should be able to seize property that, by international law, was subject to seizure, not that a President could violate such law. See *id.* at 124. The Court knew that “humane and wise policy of modern times ha[d] introduced into practice” a mitigating “usage,” but that the right of the United States under international law to choose to seize all enemy property, although a “harsh exercise of the rights of war,” cannot be impaired by mere usage and, despite such modern policy and “practice,” that right “remains undiminished . . .” *Id.* at 122–24.

PAUST, *supra* note 5, at 170, 182 n.19. Moreover, in *Brown* Justice Story famously affirmed unanimous expectations and decisions that the executive is bound by the laws of war (12 U.S. (8 Cranch) at 149, 153 (Story, J., dissenting)). See also *infra* note 135. Chief Justice Marshall, who wrote the majority opinion in *Brown* that Congress must authorize the seizure of enemy property in the United States, was already on record that the President is bound by

some ignore Marshall's recognition in 1799 of the strict limitations placed by the laws of nations on the competence of the people, Congress, and the executive branch.⁵⁹ Also of interest is Marshall's recognition in 1835 with respect to an apparent customary and superior nature of the right to property: "[i]ndependent of treaty stipulation, this right would be held sacred . . . never. . . to divest the vested rights of individuals to property The people change their sovereign. Their right to property remains unaffected by the change."⁶⁰ Therefore, for some thirty-five years Marshall seems to have consistently recognized the primacy of rights under customary law. In *Talbot v. Seeman*, Marshall had also noted with respect to "sacred" duties of Congress that, when they are applicable, "the laws of war . . . must be noticed" by the judiciary and, with respect to "common principles and usages of nations," that they are "principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred."⁶¹ Marshall also seems to have recognized that treaties would prevail over acts of Congress when he recognized the authority of treaty law that was seemingly inconsistent with a federal statute and a decision of a Circuit Court applying the statute.⁶²

Later, *United States v. Darnaud*⁶³ declared: "if the Congress . . . were to call upon the courts of justice to extend the jurisdiction of the United

international law. See, e.g., PAUST, *supra* note 5, at 170-71, 180-81 nn.2, 8, 11-12; *supra* text accompanying note 18; *infra* note 135.

A few have even mischaracterized dictum in *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), that merely addressed the lack of an exercise of an exclusive congressional power to order reprisals and did not contemplate a clash between an order for reprisals and the law of nations. See, e.g., *infra* note 90. What the Court noted was that no reprisals had been authorized and that the "court is bound by the law of nations." 13 U.S. (9 Cranch) at 423 ("Till such an act [ordering reprisals against Spain] be passed, the court is bound by the law of nations."). There was no intimation that an order for reprisals would have been inconsistent with the law of nations, but the Court could not recognize the propriety of any alleged reprisals on its own and would have to apply the law of nations that was operative without reprisals authorized by Congress having occurred. See *id.* at 422-23 (also noting before the quoted sentence that "[t]he degree and the kind of retaliation . . . [and whether] to recede from its full rights and not to avenge them at all . . . [involves the] intricate path of politics . . . [and] [i]f it be the will of the government . . . [to engage in reprisals] the government will manifest that will by passing an act for the purpose."); PAUST, *supra* note 5, at 151 n.80.

⁵⁹ See *supra* text accompanying notes 16-18. Professor Kent missed these points as well.

⁶⁰ *Delassus v. United States*, 34 U.S. (9 Pet.) 117, 133 (1835); see also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 346 (1827) (Marshall, C.J.) (the right to property is a "right which every man retains").

⁶¹ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28, 43-44 (1801).

⁶² See *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 108-10 (1801) (declaring "If the law [there, a treaty] be constitutional . . . I know of no court which can contest its obligation.").

⁶³ *United States v. Darnaud*, 25 F. Cas. 754 (C.C.E.D. Pa. 1855) (No. 14,918).

States beyond the limits . . . [set by the “law of nations”], it would be the duty of courts of justice to decline”⁶⁴ Therefore, Congress cannot authorize power or conduct beyond limits set by the law of nations and the judiciary has a duty to enforce limits set by the law of nations in the face of contrary congressional legislation. More generally, an 1859 opinion of the Attorney General reiterated earlier expectations that the law of nations “must be paramount to local law in every question where local laws are in conflict” and that what the president “will do must of course depend upon the law of our own country, as controlled and modified by the law of nations.”⁶⁵

A few years later, an important opinion of Attorney General Speed in 1865 recognized that “the law of nations . . . [is] a part of the law of the land” and declared that “Congress may define those laws, but cannot abrogate them . . . [since] laws of nations . . . are of binding force upon the departments and citizens of the Government” and “Congress cannot abrogate them or authorize their infraction,” and added that “[t]he Constitution does not permit this Government” (*i.e.*, the executive) to do so either.⁶⁶ The 1865 opinion recognized in language worth quoting at length that congressional power under Article I, Section 8, clause 10 is merely to “define” and “punish” offenses against the law of nations, not to “make” or to abrogate such law, and that whether or not Congress exercises that power, the law of nations is binding on the government and individuals:

To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy. 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. But very soon after the organization of the federal government, Mr. Randolph, the Attorney General, said: “The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of indifference.” The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as

⁶⁴ *Id.* at 759-60. With respect to early judicial and Founder attention to customary international law regarding jurisdiction, see also *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808); *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804) (argument of counsel); *United States v. Peters*, 3 U.S. (3 Dall.) 121, 129-32 (1795); *supra* note 10; *supra* text accompanying notes 17, 45.

⁶⁵ 9 Op. Att’y Gen. 356, 362-63 (1859).

⁶⁶ 11 Op. Att’y Gen. 297, 299-300 (1865).

a part of the law of the land. Hence Congress may define those laws, but cannot abrogate them, or, as Mr. Randolph says, may “modify on some points of indifference.”

That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority.

But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress

Congress can declare war. When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Under the power to define those laws, Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people. . . . Congress, not having defined, as under the Constitution it might have done, the laws of war, we must look to the usage of nations to ascertain the powers conferred in war, on whom the exercise of such powers devolve, over whom, and to what extent do those powers reach, and in how far the citizen and the soldier are bound by the legitimate use thereof.⁶⁷

During formation of the Constitution, James Wilson had also warned 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.”⁶⁸ Nonetheless, Congress was given a nonexclusive power to “define” or at least to clarify offenses against the law of nations in Article I, Section 8, clause 10 of the Constitution. There was no congressional legislation implementing the laws of war as offenses against the laws of the United States until 1916.⁶⁹ Yet, as the 1865 opinion aptly recognized, the laws of

⁶⁷ *Id.*, quoted in part in *Love v. United States*, 29 Ct. Cl. 332 (1894); *Collie v. United States*, 9 Ct. Cl. 431 (1873) (argument of counsel) (citations omitted).

⁶⁸ James Wilson, in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 615 (Max Farrand ed., 1911) [hereafter *FARRAND, RECORDS*]. In partial contrast, Gouverneur Morris had argued that a power to “define is proper when applied to offences in this case; the law of nations being often too vague and deficient to be a rule.” *Id.* at 615.

⁶⁹ See *Ex parte Quirin*, 317 U.S. at 27-30 (noting that Congress incorporated the laws of war as offenses against the laws of the United States “by reference” without identifying each crime, defining them, or setting forth their elements in the Articles of War Act of 1916, ch. 418, § 3, 39 Stat. 650, 652-53, arts. XII, XV). The same form of incorporation of the laws of war as offenses against the laws of the United States exists today in 10 U.S.C. § 818 and 18

war could be prosecuted directly without such an exercise of congressional power because, under the Constitution, the laws of war are part of the laws of the land. In fact, direct incorporation involving prosecutions of violations of the laws of war and other crimes under customary international law had occurred prior to 1916 without congressional implementing legislation,⁷⁰ and the propriety of direct incorporation has been affirmed more generally by the Supreme Court.⁷¹

In view of the unanimity of the Founders, Framers, and early cases and opinions of attorneys general noted above that the people and Congress are bound by the law of nations, the quotations from opinions of Justices Chase and Iredell in *Ware v. Hylton* provided by Professor Kent may seem surprising.⁷² However, upon closer examination the quoted dicta appears to

U.S.C. § 3231, which allows prosecution in federal district courts. See, e.g., PAUST, ET AL., *supra* note 20, at 162; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971).

⁷⁰ See also PAUST, ET AL., *supra* note 20, at 134-50; Kent, *supra* note 3, at 878-79, 881, 898 (noting affirmations by William Bradford, James Duane, James Iredell, John Jay, Thomas Jefferson, Thomas McKean, Edmund Randolph, George Washington, James Wilson, and John Witherspoon that direct incorporation of customary international law for criminal sanctions is permissible); Lenner, *supra* note 9, at 256, 262-64; Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112-18, *passim* (1972); *supra* notes 9, 19; *infra* notes 97-98, 102, 106-107.

⁷¹ See, e.g., *Ex parte Quirin*, 317 U.S. at 27 (“From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy nations as well as of enemy individuals.”); *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826) (recognizing circuit court has jurisdiction, not the U.S. Supreme Court because the victim was not an ambassador, over the defendant for violating the law of nations – the defendant was indicted alternatively for (1) “infracting the law of nations,” and (2) violating a statute); see also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-62 (1820) (responding to the claim Congress must exercise a power to define and punish, the Court stated: “But supposing Congress were bound in all the cases included in the clause under consideration to define the offense” – thus, the intimation is that Congress is not necessarily bound to define and punish); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J., concurring) (quoted in *infra* text accompanying notes 107-108). Of course, Chief Justice Jay and Justices Wilson and Iredell recognized the propriety of direct incorporation in *Henfield’s Case*. See *supra* note 19; *infra* notes 97-98, 102, 106.

⁷² See Kent, *supra* note 3, at 935 n.407. Iredell was addressing primarily the power of a state legislature prior to creation of the U.S. Constitution. See PAUST, *supra* note 5, at 111, 153 nn.94-95, 156 n.99. Two years earlier, Iredell had instructed a grand jury that “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.” Justice Iredell, Charge to the Grand Jury for the District of South Carolina, May 12, 1794, reprinted in GAZETTE OF THE UNITED STATES (Philadelphia, Pa. 1794), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 23, at 467. In any event, ever since *Ware v. Hylton* the supremacy of international law has been complete. See PAUST, *supra* note 5, at 111, 156-57 n.101; Jordan J. Paust, Medellin, Avena, *the Supremacy of Treaties, and Relevant*

stress what has become a generally shared expectation – that in case of an unavoidable clash between the United States Constitution and customary international law, the Constitution will prevail domestically even though the United States and U.S. nationals remain liable to sanctions for violations of international law.⁷³ What both Chase and Iredell stressed was the well recognized view that the Constitution authorizes and limits legislative power.⁷⁴ However, they also averred that if Congress acts within a constitutionally authorized power (“in pursuance of the constitution”⁷⁵ and “within”⁷⁶ limits of the Constitution) the law of nations does not obviate the constitutionally-based authority of Congress.⁷⁷ First, the dicta begs the very question at stake - whether Congress has any constitutionally-based authority to avoid limits set under the law of nations. This is especially problematic since (1) there is no expression of such an abnegative authority in the text of the Constitution, (2) predominant expectations of other Founders and Framers noted above⁷⁸ stand in sharp contrast to the dicta of Chase and Iredell, (3) Justice Wilson, in the same case of *Ware v. Hylton*, based his decision alternatively on the ground that the statute of the state of Virginia was contrary to a rule of the law of nations,⁷⁹ and (4) the binding nature of customary international law and the power of the judiciary to apply customary international law are constitutionally-based.⁸⁰ Second, Justice Chase actually changed his view four years later.⁸¹ Third, as noted in Part II

Executive Authority, 31 SUFFOLK TRANSNAT'L L. REV. (forthcoming 2008); *infra* Part II E.

⁷³ See, e.g., *In re Dillon*, 7 F. Cas. 710, 712 (C.C.N.D. Cal. 1854) (No. 3,914); PAUST, *supra* note 5, at 99, 123-24 n.1; see also *Norris v. Doniphan*, 4 Met. 385, 1863 WL 2582 (Ky. App. 1863) (the law of nations “can not be substituted for the Constitution of the United States in war”). But see *Ex parte Bushnell*, 9 Ohio St. 77, 189 (1859) (“The Constitution of the United States was framed . . . subordinate to, and without violating the fundamental law of nations.”). *Ex parte Bushnell* is actually consistent with the point that the people could not create (*i.e.*, “frame”) a power in the government to violate international law given that they had no such authority themselves.

⁷⁴ See *supra* note 5.

⁷⁵ See *Ware v. Hilton*, 3 U.S. (3 Dall.) 199, 223-24 (Chase, J.).

⁷⁶ See *id.* at 265 (Iredell, J.).

⁷⁷ See *Kent*, *supra* note 3, at 935 n.407.

⁷⁸ In particular, Peter Duponceau, Albert Gallatin, John Jay, Thomas Jefferson, William Johnson, John Marshall, George Nicholas, William Paterson, Edmund Randolph, and James Wilson.

⁷⁹ See *infra* text accompanying note 171.

⁸⁰ See, e.g., PAUST, *supra* note 5, at 9-11, 50-51 n.60; *supra* text accompanying note 67; *infra* text accompanying notes 109, 129.

⁸¹ See *supra* note 47 and accompanying text (noting that Justice Chase recognized the controlling nature of the customary law of nations in *Bas v. Tingy*). Two years after *Ware*, Justice Chase also addressed natural law precepts or “certain vital principles” and “principles of law and reason” as necessary limitations on legislative power. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-88 (1798) (Chase, J.).

Above, the people themselves possessed no power to violate customary international law and, thus necessarily, they could not transfer such a power to the federal government. Justice Iredell recognized that individual citizens are bound by the law of nations when he joined Justice Wilson and Judge Peters in a charge to the grand jury in *Henfield's Case*.⁸² Fourth, there are no known 18th or 19th century cases applying such a viewpoint and there was no known unavoidable clash between the United States Constitution and customary international law. However, dicta in one federal case and one state court opinion during the 19th century support the primacy of the Constitution domestically in case of an unavoidable clash with customary international law and dictum in one state court opinion during that period actually supports the primacy of customary international law.⁸³ In fact, several cases have used customary international law as an aid to clarify constitutional rights, duties, and powers.⁸⁴ Additionally, a primary purpose of the Ninth Amendment to the Constitution was to guarantee customary human rights for the people of the United States.⁸⁵ Fifth, there are several other cases that support the primacy of customary international law over inconsistent acts of Congress, including *Darnaud* (quoted above).⁸⁶ In one

⁸² *Henfield's Case*, 11 F. Cas. 1099, 1119-20 (Wilson, J., on circuit; with whom Justice Iredell and Judge Peters joined). For similar recognitions by Iredell, see *supra* note 10; *infra* text accompanying notes 107-108. In 1790, he had also written that the law of nations "binds all nations on earth." See PAUST, *supra* note 5, at 24 n.14.

⁸³ See *supra* note 73.

⁸⁴ See, e.g., PAUST, *supra* note 5, at 9, 12-14, 49-50 nn.58-59, 153 n.92, 205, 219, 248 n.93, 252 nn.158-62, 275-76 nn.389-93; PAUST, ET AL., *supra* note 20, at 124, 142, 155-57, 221-28, 232-37, 551, 1080-81; Cindy G. Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 B.Y.U. J. PUB. L. 1 (2007); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004); see also Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 489-90 (2005) (addressing the reverse role of U.S. judicial decisions that affect international normative content).

⁸⁵ See, e.g., PAUST, *supra* note 5, at 200-01, 248 nn.92-93, 323-26, 329-40, *passim*.

⁸⁶ See, e.g., *The Schooner Jane*, 37 Ct. Cl. 24, 29 (1901); *The Ship Rose*, 36 Ct. Cl. 290, 301 (1901); *The Schooner Nancy*, 27 Ct. Cl. 99, 109 (1892); *infra* notes 87-89. See also *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722, 747-48 (1931) (United States was not allowed to assert one of its own statutes as a defense); *The Schooner Endeavor*, 44 Ct. Cl. 242, 272 (1909) (act of Congress authorizing American merchant vessels to defend against French depredations did not change the law of nations or impose a new international obligation upon France). For further evidence of judicial support of the primacy of customary international law, see, for example, *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984) (O'Connor, J.) (stating although political branches may terminate a treaty, power "delegated by Congress to the Executive" [presumably by statute] and such a Congress-Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law");

such case, Justice Field, while dissenting in *Miller v. United States* in 1870, affirmed an expectation and constitutional requirement that otherwise went unchallenged.⁸⁷ He recognized in language reminiscent of Justice Chase in *Bas*, the 1865 opinion of Attorney General Speed, and an 1868 state court opinion that “legislation founded [on] the war powers” is subject to “limitations . . . imposed by the law of nations,” adding: “[t]he power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules . . . is . . . subject to the condition that they are within the law of nations. There is a limit . . . imposed by the law of nations, and [it] is no less binding upon Congress than if the limitation were written in the Constitution.”⁸⁸ Some

The Scotia, 81 U.S. (14 Wall.) 170, 187 (1871) (“Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute” can create a different obligation); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 536 (1867); *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 436-37 (1838) (stating obligations of the United States, “were regulated by the law of nations” and a private right to property protected thereunder is “inviolable”); *United States v. Palmer*, 16 U.S. (3 Wheat.) at 641-42 (quoted in *supra* text accompanying note 45); *The Charming Betsy*, 6 U.S. (2 Cranch) at 118 (quoted in *supra* text accompanying note 57); *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 4 (Fed. Ct. App. (Pa.)) 1781 (quoted in *supra* text accompanying note 40); *United States v. Darnaud*, 25 F. Cas. at 759-60 (quoted in text accompanying note 64); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 F. 746, 751 (2d Cir. 1922) (quoting *Miller v. United States*, 78 U.S. (11 Wall.) 268, 315 (1870) (Field, J.)) (regarding “war powers of the government,” the “limitation to which their exercise is subject is the law of nations”); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff’d*, 654 F.2d 1382 (10th Cir. 1981) (establishing “even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law”) That includes custom. *Id.* at 798. In addition, “Congress and the executive department . . . [have a] . . . corollary responsibility to develop methods . . . without offending any . . . fundamental human rights . . . [and] . . . the courts cannot deny . . . protection.” *Id.* at 799-800; *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) (quoting Albert Gallatin in 1798: “By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and to treaties”); *Falstaff Corp. v. Allen*, 278 F. 643, 647 (E.D. Mo. 1922) (the “rights of mankind” cannot lawfully be violated by the states or Congress); *United States v. The La Jeune Eugenie*, 26 F. Cas. at 847-51 (quoted previously, *supra* note 10); *Dole v. New England and Mutual Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966) (Clifford, J., on circuit) (stating that the legislative authority of a state may doubtless enlarge the definition of piracy, but, implicitly, must not “diminish” the prohibition under customary law); *infra* notes 88-89. *But see infra* note 90. For the quoted text from *Darnaud*, see *supra* note 64.

⁸⁷ *Miller v. United States*, 78 U.S. (11 Wall.) 268, 314 (1870).

⁸⁸ *Id.* at 315-16 (Field, J., dissenting). *See also* *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting); *The Charming Betsy*, 6 U.S. (2 Cranch) at 77 (arguing that “[a]s far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply”); *Knoefel v. Williams*, 30 Ind. 1, 1868 WL 2885 (Ind. 1868) (“There is no limit on the war power of the United States, except such only as is imposed by the law of nations” and “[r]esort may be had to any means known and recognized by the laws of war.”).

sixty years later, Justice Sutherland recognized a markedly similar limitation on the congressional war power: “From its very nature, the war power . . . tolerates no qualifications or *limitations*, unless *found in* the Constitution or in *applicable principles of international law*.”⁸⁹ Necessarily, international law imposes limitations on and creates exceptions to the war power. Nonetheless, today there are a few lower federal court cases that have not paid adequate attention to the fact that the people had no power to violate the customary law of nations that could be delegated to Congress. Further, they have not paid attention to the predominant trends in expectation and decision noted above, but that have stated per dictum that Congress is not bound by the law of nations.⁹⁰

⁸⁹ United States v. Macintosh, 283 U.S. 605, 622 (1931) (emphasis added), *overruled on other grounds in* Girouard v. United States, 328 U.S. 61, 69 (1945). See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (“operations of the nation in . . . [“foreign”] territory *must* be governed by treaties . . . and the principles of international law.”) (emphasis added). Several lower court opinions have also quoted or paraphrased *Macintosh*. See PAUST, *supra* note 5, at 49 n.57.

⁹⁰ See, e.g., Munoz v. Aschroft, 339 F.3d 950, 958 (9th Cir. 2003); *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 233 (2d Cir. 2005) (repeating errors evident in *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003)); PAUST, *supra* note 5, at 109-11, 150-51 n.80. Unsupported dictum also appeared in opinions in 1919, 1925, and 1959. See *id.* The opinion in *Yousef* also completely mischaracterized the language in *The Paquete Habana*, 189 U.S. 453 (1903); *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); and *The Nereide*, 13 U.S. (9 Cranch) 388 (1815). Compare *Olivia*, 327 F.3d at 93 with PAUST, *supra* note 5, at 112-14, 189-90 n.67 (with respect to dictum in *The Paquete Habana*); *supra* note 58 (regarding the latter two cases). *Yousef* also claimed that *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) stated “that Congress may enact laws superseding ‘the law of nations’ if ‘the affirmative intention of Congress [is] clearly expressed.’” *Id.* at 21-22. However, the Court made no such statement. It merely quoted the first part of the relevant sentence from *The Charming Betsy* (see *supra* notes 56-58) and indicated that if Congress wanted to extend U.S. jurisdiction when it is normally or “ordinarily” (but certainly not exclusively under international law) left with the flag or state of registry of a foreign vessel in our waters if a matter only involves the “internal affairs” of the vessel, because of a “possibility of international discord” if this normal approach (“long afforded . . . by our State Department . . . [and] Congress) is not followed, and “under such conditions in this ‘delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed’” to extend our jurisdiction. See *McCulloch*, 372 U.S. at 19-22, quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957). *McCulloch* had also cited *Wildenhus’s Case*, 120 U.S. 1, 12 (1888) with respect to the “ordinarily” operative rule, but *Wildenhus’s Case* had recognized that such a rule is a matter of “comity” (*i.e.*, discretion) and that jurisdiction in New Jersey was appropriate over a foreign flag vessel where the conduct “on board [is] of a character to disturb the peace and tranquility of the country to which the vessel has been brought.” *Id.* at 12. See also *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 130-31 (2005) (quoting *Wildenhus’s Case* and noting that it addressed, “as a matter of international comity,” an “exception to the usual presumption” that statutes “apply to conduct that takes place aboard a foreign-flag vessel in United States territory if the interests of the United States or its citizens . . . are at stake”); *United States v. Diekelman*, 92 U.S. 520, 525 (1875) (“As to the general law of nations . . . merchant vessels of one country visiting the ports

C. *The Law of Nations Is Part of the Laws of the United States*

The Founders clearly expected that the customary law of nations was binding, was supreme law, created private rights and duties, and would be applicable in U.S. federal courts.⁹¹ For example, at the time of the formation of the Constitution John Jay had written: “Under the national government . . . the laws of nations, will always be expounded in one sense . . . [and there is] wisdom . . . in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government.”⁹² George Mason wrote that during such time “[t]he most

of another for the purposes of trade subject themselves to the laws which govern the port they visit.”).

Most of these lower federal court cases have involved congressional control of aliens and arose primarily from a serious misreading in 1985 of one Supreme Court opinion, *The Paquete Habana*, and inadequate attention to shared expectations of the Founders and Framers and to nearly 200 years of judicial recognition as well as the point that the people could not delegate to Congress a power to violate the law of nations that they did not possess. See PAUST, *supra* note 5, at 150-51 n.80, 160 n.113, 174-77, 188-91 nn.66-70.

⁹¹ This and the next three paragraphs are borrowed and revised from Paust, *supra* note 58, at 301-05. For relevant early views, including those of Bee, Bradford (Att’y Gen.), Chase, Duponceau, Hamilton, Ingersoll, Iredell, Jay, Jefferson, Lee (Att’y Gen.), Madison, Marshall, Mason, Nicholas, Paterson, Randolph (Att’y Gen.), Story, B. Washington, Wilson, Wirt (Att’y Gen.), see, for example, PAUST, *supra* note 5, at 7-10, 23-25, 44-46, 50-55, 143-44, 170, 180-81, 208-09, 227, *passim*. See also HENKIN, *supra* note 4, at 234, 510 n.20 (“Framers expected federal courts to enforce state observance of the law of nations.”); Dickinson, *supra* note 25, at 35-38, 43-46, 48-49, 55-56; Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 464-65 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824, 1925, 1841, 1846, 1852 (1998); Lenner, *supra* note 9, at 251-52, 256, 258, 263-64, 267 n.78 (In 1791, Attorney General Edmund Randolph noted that the federal judiciary has cognizance of offenses against the law of nations and Jefferson endorsed that recognition); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 *VA. L. REV.* 1071, 1093 n.110 (1985) (Framers expected that “international law was to be federal law, enforced by the national judiciary.”); Robert C. Palmer, *The Federal Common Law of Crime*, 4 *LAW & HIST. REV.* 267, 276-78 (1986) (“Livermore stated that the only reason why inferior federal courts should be established was to enforce the law of nations.”); Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 *LAW & HIST. REV.* 223, 232 (1986) (the “law of nations” was “within the federal judicial power . . . within the language of Article III” of the Constitution); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 *AM. J. INT’L L.* 727, 727 (1989) (“The Framers’ Constitution anticipated that international disputes would regularly come before the United States courts, and that the decisions in those cases could rest on principles of international law, without any necessary reference to the common law or to constitutional doctrines.”). Professor Kent adds: “A leading purpose of the Constitution was to provide a national government under which treaties and the customary law of nations could be uniformly and fairly applied for the benefit of foreigners.” Kent, *supra* note 8, at 506.

⁹² THE FEDERALIST NO. 3, at 62 (John Jay) (John C. Hamilton ed., 1868).

prevalent idea [was] to establish . . . a judiciary system with cognizance of all such matters as depend upon the laws of nations.”⁹³ Alexander Hamilton also recognized that under the Constitution “cases arising upon . . . the law of nations” will be “proper” before the federal judiciary.⁹⁴ In 1792, Attorney General Randolph affirmed: “The law of nations, although not specifically adopted . . . is essentially a part of the law of the land,”⁹⁵ a point that Alexander Hamilton had reiterated in 1793 while stating: “the laws of the land (of which the law of Nations is a part . . .) [and stating that such law is] part of the law of the land” and “will always be expounded in one sense and executed.”⁹⁶

In 1793, then Chief Justice Jay recognized that “the laws of the United States,” the same phrase found in Article III, section 2, clause 1 and in Article VI, clause 2 of the Constitution, includes the customary “law of nations” and that such law is directly incorporable for the purpose of criminal sanctions.⁹⁷ This point was clearly affirmed in 1793 charges to a

⁹³ Letter from George Mason to Arthur Lee (May 21, 1787), reprinted in 3 FARRAND, RECORDS, *supra* note 68, at 24. Madison had been worried whether certain constitutional drafts “[w]ill prevent those violations of the law of nations & Treaties which if not prevented must involve us in the calamities of foreign wars.” James Madison, in 1 FARRAND, RECORDS, *supra* note 68, at 244, addressed in Dickinson, *supra* note 25, at 38. William Grayson had opposed the fact that the Supreme Court was to have jurisdiction over “all cases depending on the laws of nations.” See William Grayson, remarks during the Virginia Convention, in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1445-46 (John P. Kaminski & Gaspare J. Saladino eds., 1993), addressed in William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 708 (2002).

⁹⁴ THE FEDERALIST NO. 80, at 589 (Alexander Hamilton) (John C. Hamilton ed., 1868).

⁹⁵ 1 Op. Att’y Gen. 26, 27 (1792), quoted in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 453 n.12 (1964) (White, J., dissenting); *Love v. United States*, 29 Ct. Cl. 332 (1894). See also Lenner, *supra* note 9, at 267 n.78 (regarding Randolph’s view that the law of nations was specially adopted by the Constitution); *supra* note 42. Concerning other cases, opinions, and recognitions that the law of nations is part of the “law of the land,” see, for example, PAUST, *supra* note 5, at 44 n.54, 51-52 nn.60-61, 58-59 nn.72-73.

⁹⁶ Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 34, 43 (Harold C. Syrett ed., 1969). See also Alexander Hamilton, *To Defence*, No. XX (Oct. 23-24, 1795) (“the modern law of Nations . . . is . . . by adoption that of the U[nited] States”), reprinted in *id.* vol. 19, at 342 (Harold C. Syrett ed., 1973); Alexander Hamilton, reprinted in 7 THE WORKS OF ALEXANDER HAMILTON 81 (John C. Hamilton ed., 1851) (“our laws . . . of which . . . laws of nations, form a part”); see *supra* text accompanying note 33 (similar remarks by John Jay).

⁹⁷ *Henfield’s Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360); see also *id.* at 1103-04, 1112, 1115; PAUST, *supra* note 5, at 6-8, 34-48, *passim*. In a 1790 charge to a grand jury, the Chief Justice also declared that the law of nations is “part of the laws of this, and of every other civilized nation.” 1790 Charge to the Grand Jury, *supra* note 55. For other cases, opinions, and recognitions that customary international law is “law of the United States,” see, for example, *Finzer v. Barry*, 798 F.2d 1450, 1457 (D.C. Cir. 1986) (Bork, J.) (quoting Dickinson, *supra* note 25, at 55-56); PAUST, *supra* note 5, at 50 n.60; Dickinson, *supra* note

grand jury by Justices Wilson and Iredell and Judge Peters⁹⁸ and evident in President Washington's warning that "prosecutions . . . [were] to be instituted against all persons who shall within the cognizance of the courts of the United States, violate the law of nations."⁹⁹

Also in 1793, the Chief Justice stated that prior to the Constitution:

[T]he United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States, became apparent . . . These were among the evils against which it was proper for the nation . . . to provide by a national judiciary.¹⁰⁰

That same year it was affirmed that the "law of nations is a part of the

25, at 46, 56 ("[T]he Law of Nations . . . was accepted by the framers . . . as a constituent part of the national law of the United States . . .," adding: "the Constitution accepted the Law of Nations as national law. . . ." *Id.* at 48.); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984); Lenner, *supra* note 9, at 251-52, 263-64, 267 n.78 (the law of nations "was incorporated into the 'laws of the United States'" and Jefferson incorporated such into his "understanding of the Constitution."). Today, it is not widely assumed that customary international law is directly incorporable for purposes of criminal sanctions but the possibility remains, especially in view of earlier Supreme Court recognitions that the Court has never abandoned. *See supra* note 71; *see, e.g.*, PAUST, *supra* note 5, at 10, 55-56 n.67; U.S. Dep't of Army, Field Manual FM 27-10, THE LAW OF LAND WARFARE 180-81, para. 505(e) (1956) ("As the international law of war is part of the law of the land in the United States, . . . war crimes are tried directly under international law without recourse to the statutes of the United States."). For cases and opinions of attorneys general addressing prosecution directly under customary international law, *see, for example*, PAUST, ET AL., *supra* note 20, at 148-50; *supra* note 71; *supra* text accompanying notes 19, 67; *infra* notes 98, 102, 106-107.

⁹⁸ *See Henfield's Case*, 11 F. Cas. at 1105-09, 1119-20.

⁹⁹ *See id.* at 1102, quoting President Washington's Proclamation of April 22, 1793, in 1 AM. STATE PAPERS 45.

¹⁰⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.). The Chief Justice added that federal judicial power extends to "all cases affecting Ambassadors, or other public Ministers and Consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority"; and to all cases of admiralty, "because, as the seas are the joint property of nations, whose *rights and privileges* relative thereto, are *regulated by the law of nations* and treaties, *such cases necessarily belong to national jurisdiction.*" *Id.* at 475 (emphasis added). *See Koh, supra* note 91, at 1825, 1828, 1841, 1846.

law of the United States.”¹⁰¹ Justice Wilson also declared that the Supreme Court has original jurisdiction in certain cases addressing such law, but that Congress can nevertheless provide a concurrent jurisdiction in lower federal courts.¹⁰² Chief Justice Jay had also charged a grand jury in Virginia that year in markedly familiar words: “The Constitution, the statutes of Congress, the law of nations, and treaties constitutionally made compose the laws of the United States.”¹⁰³ In that year also, Secretary of State Thomas Jefferson reassured the French Minister Edmund Genet of the centrality of the law of nations as an “integral part” of the law of the land.¹⁰⁴ In his home state of Virginia it was declared in *Page v. Pendleton*: “the legislature . . . admitted, that the law and usages of nations require . . . the legislature could not retract their consent to observe the praecepts of the law, and conform to the usages, of nations”¹⁰⁵

In 1794, the Supreme Court recognized that a federal district court is “competent to enquire, and to decide, whether . . . restitution can be made consistently with the laws of nations.”¹⁰⁶ And in 1795, Justice Iredell addressed the direct incorporation of customary international law and affirmed the fact of incorporation with or without a statutory base in a consistent and telling fashion: “[t]his is so palpable a violation of our own law (. . . of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since that has provided a particular manner of enforcing it,) as well as of the law of nations generally; that I cannot entertain the slightest doubt, but that . . . the District Court has jurisdiction.”¹⁰⁷ With respect to the broad range of matters subject to incorporation and judicial power, he added: “all . . . trespasses committed

¹⁰¹ *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 299 n.* (C.C.D. Pa. 1793).

¹⁰² *Id.* at 298 (Wilson, J.).

¹⁰³ Charge to the Grand Jury for the District of Virginia, May 22, 1793, *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 479 (New York, Henry Johnson ed., 1891).

¹⁰⁴ Letter from Thomas Jefferson, U.S. Secretary of State, to Edmund Genet, French Minister (June 5, 1793) (quoted in part in PAUST, *supra* note 5, at 52 n.61). As Secretary of State, Jefferson also directed U.S. Attorney William Rawle to apprehend and prosecute U.S. citizens who violated the law of nations. *See Henfield’s Case*, 11 F. Cas. at 1099 n.1. *See also* Lenner, *supra* note 9, at 256 (“In fact, Jeffersonian Republicans in the 1790s believed that the law of nations . . . was part of the law of the land . . . a set of rules every citizen must obey.”), 261-64 (addressing expectations of Jefferson, Duponceau, Genet, Madison, Randolph, Rawle, Charles Heatly, William Lewis, Alexander James Dallas, and others).

¹⁰⁵ *Page v. Pendleton*, 1 Va. Rep. (Wythe) 211 (Ch. 1793).

¹⁰⁶ *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 9 (1794).

¹⁰⁷ *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J.). *See also* 1 Op. Att’y Gen. 566, 570-71 (1822) (law of nations is part of “the laws of the country” and “our laws”). For other cases using the phrase “our law,” see, for example, *infra* text accompanying note 121.

against the general law of nations, are enquirable.”¹⁰⁸ An early case had also expressly related the duty to incorporate customary international law to the Constitution: “courts . . . [i]n this country . . . are bound, by the Constitution of the United States, to determine according to treaties and the law of nations, wherever they apply.”¹⁰⁹ Reiterating the widely understood nature of customary international law as law of the United States, Attorney General Lee affirmed in 1797: “the law of nations in its fullest extent . . . [is] part of the law of the land.”¹¹⁰ The same point was made by the Supreme Court in 1815 when affirming that federal courts are “bound by the law of nations, which is part of the law of the land.”¹¹¹ And in 1812 a federal court affirmed that “the laws of the United States (the laws of nations being included in them)” are within judicial power.¹¹² The fact that the law of nations is law within the ambit of judicial power is why a federal court affirmed in 1820 that the law of nations “may be enforced by a court of justice, whenever it arises in judgment,”¹¹³ and why earlier, in 1808, Chief Justice Marshall could affirm that “the law of nations is the law of all tribunals in the society of nations” and, thus, surely is law in our courts.¹¹⁴ More particularly, Marshall affirmed in 1810 that our judicial tribunals “are established . . . to decide on human rights.”¹¹⁵ Importantly, this latter affirmation of judicial power and responsibility by the Chief Justice had echoed a broader purposeful embrace of customary human rights by the Founders and Framers and reflected merely one example of how human rights were part of the

¹⁰⁸ *Id.* at 159-60.

¹⁰⁹ *Waite v. The Antelope*, 28 F. Cas. 1341, 1341 (D.C.D. S. Car. 1807) (No. 17,045). *See supra* text accompanying notes 19, 66-67; *supra* note 91; *infra* note 129 and accompanying text; *see also* *Littlejohn & Co. v. United States*, 270 U.S. 215, 219 (1926) (argument of counsel) (if a congressional resolution confers a “confiscation,” it “is unconstitutional because it violates international law”); *Commonwealth v. Schaffer*, 4 U.S. (4 Dall.) xxvi (Mayor’s Ct. of Phila. 1797) (Ingersoll and Thomas had recognized that a breach of neutrality “was contrary to the law of nations, to the treaty, and against the constitution of the United States”); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (international law is “constitutionally committed” to the judiciary, *quoting* *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)), *cert. denied*, 518 U.S. 1005 (1996); *W.C. Peacock & Co. v. Republic of Hawaii*, 12 Haw. 27 (1899) (U.S. Constitution “must be taken to have been adopted with reference to . . . international law”); *Lenner*, *supra* note 9, at 251-52, 256. Concerning judicial recognition of the duty to identify, clarify, and apply customary international law, *see*, for example, PAUST, *supra* note 5, at 11, 56-59 nn.68-73.

¹¹⁰ 1 Op. Att’y Gen. 68, 69 (1797).

¹¹¹ *The Nereide*, 13 U.S. (9 Cranch) 388, 422-23 (1815).

¹¹² *United States v. The Ariadne*, 24 F. Cas. 851, 856 (D.C.D. Pa.1812) (No. 14,465).

¹¹³ *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15, 551).

¹¹⁴ *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276-77 (1808) (Marshall, C.J.).

¹¹⁵ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.).

constitutional design.¹¹⁶ Furthermore, it is informing that Founders thought of customary rights of man as constitutional rights,¹¹⁷ a primary purpose of the Ninth Amendment to the Constitution was to assure that human rights would be protected.¹¹⁸ In an 1825 Inaugural Address President John Quincy Adams referred to our Union based on the Constitution as “the great result of this experiment upon the theory of human rights.”¹¹⁹

Recognitions that customary international law is part of the laws of the United States would occur throughout our history.¹²⁰ For example, in 1895, *Hilton v. Guyot* reaffirmed predominant early decisions and expectations and emphasized the judicial responsibility to identify and clarify customary international law when declaring:

International law in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.¹²¹

Other acknowledgments of a judicial obligation to identify, clarify, and apply customary international law existed throughout our early history and have reemerged in more recent federal decisions.¹²²

¹¹⁶ That the guarantee and enjoyment of customary human rights were of fundamental concern to the Founders and Framers and early judiciary and were part of the constitutional design. See, e.g., PAUST, *supra* note 5, at 12, 195-205, 208-11, 248 nn.92-93, 324-25, *passim*; *infra* notes 149-54 and accompanying text. See also LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 99-100 (1990) (stating that “universal human rights ideology” prevailed among the Founders). There was also significant concern that there be no “denial of justice” to aliens and, therefore, that aliens have access to federal courts to bring claims for violations of treaties and the law of nations. See, e.g., THE FEDERALIST NO. 80, *supra* note 94, at 589 (“As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”); see also PAUST, *supra* note 5, at 220, 225, 286-89 nn.479, 481.

¹¹⁷ *Id.* at 200-01, 248 n.93.

¹¹⁸ See *id.* at 325, 329-35, 337.

¹¹⁹ *Id.* at 198, quoting John Quincy Adams, Inaugural Address, Mar. 4, 1825, reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 294, 295 (James D. Richardson ed., 1896).

¹²⁰ See, e.g., PAUST, *supra* note 5, at 11, 58-59 nn.70-73.

¹²¹ *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

¹²² See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30 (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations”); *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983); *Municipality of Ponce v. Roman Catholic Church in Porto Rico*, 210 U.S. 296, 318 (1908) (stating that “courts must take judicial notice”); *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (stating that courts are “bound to take notice”); PAUST, *supra* note 5, at 11, 58-59 nn.72-73; *infra* text accompanying note 123. See also PAUST, *supra* note 5, at 4-6, 27-34 ns.17-24;

Nearly fifty years later, the Supreme Court summarized its practice in ascertaining and applying what is a portion of customary international law (*i.e.*, the law of war), with or without a statutory base, in the following relatively famous words:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.¹²³

Additionally, courts must use international law as it has evolved.¹²⁴ Since the founding, the meaning of customary international law and treaties has been understood to be dynamic.¹²⁵ With respect to the required use of customary international law, federal courts have also recognized early in our

Paust, *supra* note 11, at 258-62 (concerning proof of the content of customary international law before the courts).

¹²³ *Ex parte Quirin*, 317 U.S. 1, 27-28. *See also* *Dooley v. United States*, 182 U.S. 222, 231 (1901) (stating that executive power with respect to a war-related occupation is “regulated and limited . . . directly from the laws of war . . . from the law of nations”); *infra* note 135.

¹²⁴ *See, e.g.*, *Ware v. Hylton*, 3 U.S. 199 (3 Dall.) 281 (Wilson, J.) (stating that the United States is “bound to receive the law of nations, in its modern state”); *Kadic v. Karadzic*, 70 F.3d 232, 238, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J.); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Estate of Rodriguez v. Drummond Co., Inc.*, 256 F. Supp.2d 1250, 1263 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 304 (S.D.N.Y. 2003); *Maria v. McElroy*, 68 F. Supp.2d 206, 233 (E.D.N.Y. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 445; *Jama v. United States I.N.S.*, 22 F. Supp.2d 353, 362 (D.N.J. 1998); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 n.18 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1981); H.R. Rep. No. 102-367, at 3-4 (1991), *reprinted in* 4 U.S.C.C.A.N. 86 (1992) (“norms . . . may ripen in the future into rules of customary international law”); PAUST, *supra* note 5, at 232, 311 n.562; *see also* *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.) (“at . . . [a] subsequent period the principle can be considered as incorporated into the public law of nations”).

¹²⁵ *See, e.g.*, PAUST, *supra* note 5, at 4-5, 61 n.103, 198 (quoting Hamilton), 311 n.562, 388 n.64; Vienna Convention on the Law of Treaties, art. 31 (1), (3)(a)-(c), 1155 U.N.T.S. 331. Professor Kent asks why courts are to use modern international law, given that the people can only delegate authority that they possess. *See* Kent, *supra* note 3, at 847. One answer might be that the people can delegate a power to address international law in its dynamic form and, thus, as it evolves in the future. The Justices in *Ware* perceived no problem regarding such a judicial competence and, as Professor Kent notes, the “Founders . . . did contemplate that the law of nations would evolve.” *Id.* at 942. *See also* PAUST, *supra* note 5, at 193, 337, quoting Alexander Hamilton: “sacred rights of mankind are not to be rumaged for among old parchments or musty records” but “are written . . . in the whole volume of human nature.” ALEXANDER HAMILTON, *THE FARMER REFUTED* (N.Y. 1775).

history that “[t]he subject of treaties . . . is to be determined by the law of nations”¹²⁶ and “[w]henver doubts and questions arise relative to the validity, operation or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations.”¹²⁷

Quite appropriately, the *Restatement of the Foreign Relations Law of the United States* recognizes: “Matters arising under customary international law also arise under ‘the laws of the United States,’ since international law is ‘part of our law’ . . . and is federal law.”¹²⁸ Therefore, the *Restatement* rightly adds, cases “arising under customary international law” are “within the Judicial Power of the United States under Article III, section 2 of the Constitution.”¹²⁹ Such law, “while not mentioned explicitly in the Supremacy clause,” is supreme federal law within the meaning of Article VI, clause 2.¹³⁰ For these reasons, the phrase “laws . . . of the United States” contained in 28 U.S.C. § 1331 gives the district courts original jurisdiction over all civil cases arising under customary international law and provides a general statutory base for judicial incorporation of customary international law.¹³¹ Thus, a general jurisdictional competence exists to address and apply

¹²⁶ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, J.).

¹²⁷ *Henfield’s Case*, 11 F. Cas. At 1101 (Jay, C.J.). Today, it is widely recognized that customary international law is a necessary background for interpretation of treaties. *See, e.g.*, *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890); *United States v. Rauscher*, 119 U.S. 407, 419-20, 429 (1886); *The Pizarro*, 15 U.S. (2 Wheat.) 227, 245-46 (1817) (Story, J.) (“the language of the law of nations, which is always consulted in the interpretation of treaties; *see also* *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 464, 490 (1823).

¹²⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, reporters’ note 4 (1987) [hereafter RESTATEMENT]. *See also id.*, cmt. e; *id.* § 702, cmt. c; cases and materials cited in PAUST, *supra* note 5, at 7-11, 51-52 n.61, *passim*.

¹²⁹ RESTATEMENT, § 111, cmt. e. *See also id.*, reporters’ note 4; *id.* § 702; *Sosa v. Alvarez-Machain*, 542 U.S. at 729-30 (quoted *supra* note 122); *Kadic v. Karadzic*, 70 F.3d at 249 (quoted *supra* note 109); *Waite v. The Antelope*, 28 F. Cas. at 1341 (quoted in *supra* text accompanying note 109); *Henfield’s Case*, 11 F. Cas. at 1102 (quoted in *supra* text accompanying note 19); PAUST, *supra* note 5, at 7-10, 52 n.62, *passim*; *Dickinson*, *supra* note 25, at 48 (“the Constitution accepted the Law of Nations as national law”); *Lenner*, *supra* note 9, at 251-552 (the law of nations “was incorporated into the ‘laws of the United States’” and Jefferson incorporated such into his “understanding of the Constitution”), 256 (“a community bound by the law of nations, was one of the leading objects of uniting under the Constitution” and “Jeffersonian Republicans of the 1790s believed that the law of nations . . . was part of the law of the land”), 267 n.78; *Preyer*, *supra* note 91; *White*, *supra* note 91; *supra* notes 67, 109 and accompanying text.

¹³⁰ RESTATEMENT, § 111, cmt. d. *See also id.*, reporters’ note 2; *id.* §§ 115, cmt. e, 702, cmt. c; *HENKIN*, *supra* note 4, at 157; PAUST, *supra* note 5, at 53-54 n.63, 116, 165-67 nn.134-135, *passim*; *Koh*, *supra* note 91, at 1835 n.59; *infra* Part II E.

¹³¹ *See* RESTATEMENT, § 111, cmt. e and reporters’ note 4; PAUST, *supra* note 5, at 54

customary international law as law of the United States (including “substantive” rights, duties, causes of action, nonimmunity, and rights to remedies thereunder) under 28 U.S.C. § 1331. This competence pertains whether or not other statutes refer expressly to the “law of nations” or to customary international law and, thus, provide additional bases for federal jurisdiction or additional substantive law. To stress a point, customary international law that provides rights or remedies, as law of the United States, is federal substantive law and federal courts have subject matter jurisdiction with respect to such law. Moreover, customary international law is federal law and supreme law of the land whether or not other more technical jurisdictional competencies also pertain (such as diversity or admiralty jurisdiction).

It is also of interest that from the time of the Founders, Congress has known and expected that the federal judiciary will identify, clarify, and apply customary international law in cases otherwise properly before the courts. Such long-term expectations and continued congressional acceptance of judicial power are highly relevant to interpretation of phrases like “laws of the United States” in congressional legislation concerning jurisdictional competence of lower federal courts. They also help to identify an implied will of Congress or continued congressional acceptance relevant to allocated powers concerning international law, especially when Congress has known that the federal judiciary applies customary international law and Congress has not enacted general legislation to restrict such judicial power.¹³²

In view of the above, it is patent nonsense to claim that “[n]o court prior to . . . [1980] ever held that CIL [customary international law] was part of the “Laws of the United States” within the meaning of Article III

n.64; Henkin, *supra* note 97, at 1561; Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 351 (1988); *see also* *Filartiga v. Pena-Irala*, 630 F.2d at 887 n.22 (“We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331.”); *cf.* *Kadic v. Karadzic*, 70 F.3d at 246 (not deciding whether § 1331 “provides an independent basis for subject matter jurisdiction over all claims alleging violations of international law,” but noting that several courts have “upheld section 1331 jurisdiction for international law violations.”), *citing* *Abebe-Jiri v. Negewo*, No. 90-2010 (N.D. Ga. Aug. 20, 1993), *aff’d on other gds.*, 72 F.3d 844 (11th Cir. 1996); *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

¹³² *See also* *Dames & Moore v. Regan*, 453 U.S. 654, 677-80 (1981) (Congress similarly can impliedly delegate or accept allocation of power to the Executive: “Congress has implicitly approved the practice of claim settlement by executive agreement. . . . Over the years, Congress . . . [demonstrated] Congress’ continuing acceptance . . . Just as important, Congress has not disapproved of the action taken here.”).

...¹³³

D. *The President Is Bound by Customary International Law*

Under the United States Constitution, the President is expressly bound faithfully to execute the “Laws.”¹³⁴ In view of such a constitutionally-based mandate and limitation on presidential power, there has been a unanimous and unswerving recognition by Founders, Framers, and the federal and state judiciary that during an armed conflict to which the laws of war apply, the President, despite whatever competence the Commander in Chief power provides, and all persons within the executive branch are bound by the laws of war.¹³⁵

¹³³ *But see* Kent, *supra* note 3, at 931 n.393, relying on and quoting Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 851 (1997). Concerning use of such an error, *see also* David H. Moore, *An Emerging Uniformity for International Law*, 75 G.W. L. REV. 1, 5 n.17 (2006); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 379, 381-84 (2002). Professor Bradley made another patently erroneous and ahistorical claim that customary international law “did not preempt state law” and that its supremacy “has essentially no support in American case law.” Curtiss A. Bradley, *Breard, Our Dualist Constitution and the Internationalist Conception*, 51 STAN. L. REV. 529, 543, 554 (1999); *see also* THOMAS M. FRANCK, MICHAEL J. GLENNON, SEAN D. MURPHY, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 930 (2008); Kent, *supra* note 3, at 942 n.436. *But see* numerous cases addressed *infra* notes 156-58, 165-71 and accompanying text. Whether or not excuses might have existed for missing most of the cases two generations ago, within the last twenty-five years it has not been difficult to find additional early cases when using computer-assisted research even though some relevant cases can still be missed after hours of research. Thus, to claim that no relevant cases existed prior to 1980 with respect to coverage under Article III, Section 2 or that no cases exist with respect to the supremacy of customary international law is, at the very least, astounding.

¹³⁴ U.S. CONST. art. II, § 3 (“he shall take Care that the Laws be faithfully executed”). *See also infra* text accompanying notes 139-41.

¹³⁵ *See, e.g.*, *Dooley v. United States*, 182 U.S. 222, 231 (1901); *The Paquete Habana*, 189 U.S. 453, 464 (1903); *id.*, 175 U.S. 677, 698 (“law of war”), at 700, 708, 711, 714 (1900); *New Orleans v. The Steamship Co.*, 87 U.S. (20 Wall.) 387, 394 (1874) (limits exist “in the laws and usages of war”); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 314-16 (1870) (Field, J., dissenting); *The Prize Cases*, 67 U.S. (2 Black) 635, 667-68, 671 (1863) (The President is bound to see that the laws are executed, including in context the “laws of war,” “*jure belli*”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 149, 153 (1814) (Story, J., dissenting); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (war’s “extent and operations are . . . restricted by the *jus belli*, forming part of the law of nations”); *Vietnam Ass’n for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005); 11 Op. Att’y Gen. 297, 299-300 (1865); PAUST, *supra* note 5, at 7-9, 67-70, 169-73, 175, 488-89, 493-94, and numerous cases, Attorney General opinions, and unanimous views of Founders and Framers cited; Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT’L L. 981 (1994); *see also* *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 318 (1936) (“operations of the nation in . . . [“foreign”] territory must be

governed by treaties . . . [as well as] the principles of international law”); *Herrera v. United States*, 222 U.S. 558, 572 (1912), quoting *Planters’ Bank v. Union Bank*, 83 U.S. (16 Wall.) 483, 495 (1873) (“it was there decided that the military commander at New Orleans ‘had power to do all that the laws of war permitted.’”)” *Herrera* added: “if it was done in violation of the laws of war . . . , it was done in wrong.” *Id.* at 573.; *United States v. Adams*, 74 U.S. 463 (1869) (Argument of Counsel: “The war powers of Congress, and of the President, as commander-in-chief . . . , and, as a necessary consequence, of his subordinate commanding generals . . . , are unlimited in time of war, except by the law of war itself.”); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35, 137 (1852) (illegal orders provide no defense); *Ex parte Duncan*, 153 F.2d 943, 956 (9th Cir. 1946) (Stephens, J., dissenting) (Occupation Commander’s “will is law subject only to the application of the laws of war”); *United States v. American Gold Coin*, 24 F. Cas. 780, 782 (C.C.D. Mo. 1868) (No. 14,439) (The National Government needed to take every possible measure against an enemy, “and at the same time [to use measures] consistent with the laws of war”); *Elgee’s Adm’r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (concerning the “law of nations, . . . no proclamation of the president can change or modify this law”); *United States ex rel. Henderson v. Wright*, 28 F. Cas. 796, 798 (C.C.W.D. Pa. 1863) (No. 16,777) (War Cartel resembles a treaty and “[u]nder the law of nations the president could not [do a particular act], and what the president of the United States cannot do, will not be assumed by the judiciary”); *Johnson v. Twenty-One Bales*, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417) (courts cannot construe executive orders to abrogate a right under the law of war); *Dias v. The Revenge*, 7 F. Cas. 637, 639 (C.C.D. Pa. 1814) (No. 3,877) (Washington, J., on circuit) (concerning improper conduct under the laws of war, the owner of a privateer cannot “shield himself, by saying that the privateer . . . acts under the president’s instructions”); 8 Op. Att’y Gen. 365 (1857) (re: *jus belli*, “[t]he commander of the invading, occupying, or conquering army, rules . . . with supreme power, limited only by international law, and the orders of the Sovereign or Government”); *Bell v. Louisville & N.R. Co.*, 1 Bush 404, 1867 WL 3920 (Ky. App. 1866) (quoting HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* (6 ed. 1855): the “obligation [of belligerents] to observe the common laws of war towards each other is . . . absolute, indispensably binding on both parties”); *State ex rel. Tod v. Court of Common Pleas*, 15 Ohio St. 377, 389-91 (1864) (“There is no limitation placed upon this grant of the power to carry on war, except those contained in the laws of war. . . . If a party bring a suit against the president, or any one of his subordinates, . . . do not questions at once arise, of the extent and lawfulness of the power exercised, and of the right to shield the subaltern acting under orders, and hold his superior alone responsible? And are not these constitutional questions? If so, then, the case is one ‘arising under the constitution’ [for federal courts]. . . . The controversy is merely as to the occasions and manner of its exercise, and as to the parties who should be held responsible for its abuse. In time of war, . . . he possesses and exercises such powers, not in spite of the constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto. . . . And in time of war, without any special legislation, not the commander-in-chief only, but every commander . . . is lawfully empowered by the constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war. . . . The president is responsible for the abuse of this power. He is responsible civilly and criminally”); *In re Kemp*, 16 Wis. 359, 392, 395 (1863) (“His duty is still only to execute the laws, by the modes which the laws themselves prescribe; to wage the war by employing the military power according to the laws of war.”), (“Within those limits let the war power rage, controlled by nothing but the laws of war.”); *Ward v. Broadwell*, 1 N.M. 75, 79 (1854) (quoting President Polk: “‘The power to declare war against a foreign country, and to prosecute it according to the laws of war, . . . exists under our constitution. When congress has declared that war exists with a foreign

Moreover, federal judicial power clearly exists to review the legality of executive decisions and actions taken in time of war, and numerous cases throughout our history demonstrate that the laws of war are decidedly enforceable by the judiciary.¹³⁶ Additionally, many cases recognize that executive views cannot be determinative of the content of international law.¹³⁷ Numerous other cases, opinions of the attorneys general, and

nation, the laws of war apply . . . and it becomes the duty of the president . . . to prosecute it”); citing Message of the President of July 24, 1848, Exec. Doc. No. 70); Alexander Hamilton, *Pacificus No. 1*, *supra* note 96, at 42 (during war, “it belongs to the ‘Executive Power,’ to do whatever else the laws of Nations . . . [and ‘Treaties’] enjoin”); John Jay, Draft Charge to the Grand Jury of the Circuit Court for the District of Virginia (1793), *supra* note 23 (“By the Laws of Nations our Conduct . . . is to be regulated both in peace and in war.”); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 951-54 (2008); Kent, *supra* note 8, at 534 & nn. 406, 408 (quoting remarks of Representatives Philip Barbour and Alexander Smyth of Virginia in 1819 that the “laws of war” and “law of nations or treaties” regulate presidential actions); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURVEY AM. L. 497, 511-17 (2007) (addressing “treaty-based constraints on executive action in wartime” applied in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and *United States v. Laverly*, 26 F. Cas. 875 (D. La. 1812) (No. 15,569A)); *infra* note 146.

¹³⁶ See, e.g., PAUST, *supra* note 5, at 170-73, 175, 488-90, 493-94; Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 514, 518-24, (2003) (addressing numerous relevant cases); *supra* note 135. See also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006) (“there is at least one provision of the Geneva Conventions that applies here . . . Common Article 3 . . . Common Article 3, then, is applicable here”); *id.* at 2797 (the phrase “regularly constituted court” in common Article 3 “must be understood to incorporate at least the barest of those trial procedures that have been recognized by customary international law”); *id.* at 2799 (Kennedy, J., concurring in part) (“the requirement of the Geneva Conventions . . . a requirement that controls here . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation’s armed conflict with al Qaeda in Afghanistan. . . . That provision is Common Article 3. . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law”). *But see* Kent, *supra* note 3, at 938, postulating in error that the law of nations must not have been judicially enforceable against the political branches.

¹³⁷ See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900); PAUST, *supra* note 5, at 105, 174-75, 184 n.24, 189-90 n.67, 295-96, 387 n.47, 489-90, 493-95; Paust, *supra* note 136 (addressing numerous cases affirming ultimate judicial authority to interpret and apply treaties and customary international law with respect to decisions and conduct of the executive during war); Paust, *supra* note 135 (addressing the Supreme Court ruling that an executive interpretation of customary laws of war proved incorrect, and that executive conduct abroad during war constituted a violation of the laws of war); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Roberts, C.J.) (regarding treaties, “determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’” quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *Clark v. Allen*, 331 U.S. 503, 513 (1947); *Perkins v. Elg*, 307 U.S. 325, 333 (1939); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) (an executive interpretation of a treaty is “not conclusive upon courts”); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (the judiciary has ultimate authority to interpret treaties); *Jordan v. Tashiro*, 278 U.S. 123 (1928) (same); *Asakura v. City of Seattle*, 265 U.S. 332, 341

documented expectations of the Founders have affirmed that the President and all members of the executive branch are bound more generally by the customary law of nations and other forms of international law.¹³⁸ In particular, Alexander Hamilton related the President's duty faithfully to execute international law to the word "laws" set forth in Article II, Section 3, thereby providing affirmation of an additional constitutional mooring with respect to the reach of customary international law. As Hamilton explained

(1924) (same); *Jones v. Meehan*, 175 U.S. 1, 32 (1899) ("The construction of treaties is the peculiar province of the judiciary," and rights under treaties cannot "be divested by any subsequent action of . . . Congress, or of the Executive"); *Reichart v. Felps*, 73 U.S. (6 Wall.) 83, 89 (1867) (same); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239-40, 249, 251, 253-54, 283 (1796); Alexander Hamilton, THE FEDERALIST NO. 78 ("interpretation of the laws is the proper and peculiar province of the courts"); Sloss, *supra* note 135. More generally, *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004) (courts can "exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims"), also *quoting Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions"), and stating that an executive claim to unreviewable power or to power subject only to "a heavily circumscribed role for the courts" cannot comport with the proper separation of powers' since it "serves only to *condense* power into a single branch of government" (emphasis in original), adding "a state of war is not a blank check for the President"); *United States v. Nixon*, 418 U.S. 683, 703, 704 (1974) (*quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "[it] is emphatically the province and duty of the judicial department to say what the law is"), ("any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government"). In *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007), the circuit panel recognized: "The Supreme Court's recent decision in *Hamdi* makes abundantly clear that Omar's challenge to his detention is justiciable" and that his challenge to his transfer seems equally justiciable," even though "a decision on the merits might well have *implications* for military and foreign policy." *Id.* at 10 (emphasis in original).

¹³⁸ *See, e.g.*, PAUST, *supra* note 5, at 169-73; *see supra* text accompanying notes 15, 18, 65-67, 135-37. *See also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 326-27 (2001) (noting that President Washington, Alexander Hamilton, and Thomas Jefferson "assumed that any termination [of treaties with France in 1793] would be done in accordance with the international law of treaties. . . . No one argued that the President could terminate the treaties in violation of international law."). The duty of faithful execution has also been recognized in connection with human rights. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119, 121 (1866) ("By the protection of the law human rights are secured. . . . [T]he President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute . . . the laws"); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 799-800 (D. Kan. 1980) ("an abuse of discretion on the part of the responsible agency officials . . . [exists in violation of customary international law and t]his Court is bound to declare such an abuse and to order its cessation. When Congress and the executive department . . . [so acted, "offending . . . fundamental human rights,"] the courts cannot deny . . . [the victims] protection"), *aff'd on other gds.*, 654 F.2d 1382 (10th Cir. 1981); *see also Runkle v. United States*, 122 U.S. 543, 558 (1887) (*quoting* 11 Op. Att'y Gen. 19, 21 (1864) ("the most sacred questions of human rights" appear to be at stake and need to be addressed during presidential review of military tribunal decisions)).

in 1793:

The Executive is charged with the execution of all laws, [including] the laws of nations, [and t]he President is the Constitutional Executor of the laws, [which include o]ur treaties, and the law of nations It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war [And since o]ur Treaties and the laws of Nations form a part of the law of the land, . . . [the President has both] a right, and . . . duty, as Executor of the laws [He has a duty] to do whatever else the laws of Nations . . . [and “Treaties”] enjoin.¹³⁹

A similar point was made by Attorney General Wirt in 1822:

The President is the executive officer of the laws of the country; these laws are not merely the constitution, statutes, and treaties of the United States, but those general laws of nations which . . . impose on them, in common with other nations, the strict observance of a respect for their natural rights and sovereignties This obligation becomes one of the laws of the country; to the enforcement of which, the President, charged by his office with the execution of all our laws, . . . is bound to look.¹⁴⁰

As James Madison recognized, “the executive is bound faithfully to execute the laws of neutrality It is bound to the faithful execution of these as of all other laws, internal and external, by the nature of its trust and the sanction of its oath.”¹⁴¹

As noted in another article,¹⁴² “one of the causes of our Revolution had involved a British governor’s ‘defiance of the obligation of treaties.’¹⁴³ Additional causes had involved the King’s prosecution of hostilities ‘without regard to faith or reputation’¹⁴⁴ and use of Indians who acted outside the ‘known rule of warfare.’¹⁴⁵ It is inconceivable that the Founders and Framers would have countenanced a commander in chief who claimed a

¹³⁹ See Alexander Hamilton, *Pacificus No. 1*, *supra* note 96, at 33, 35, 38, 40, 43.

¹⁴⁰ 1 Op. Att’y Gen. 566, 569-71 (1822).

¹⁴¹ James Madison, *Helvidius No. 2*, *reprinted in* 2 WRITINGS OF JAMES MADISON 107 (Gaillard Hunt ed., 1906).

¹⁴² Paust, *supra* note 1, at 391-92.

¹⁴³ See Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775, *reprinted in* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 295, 298 (1978).

¹⁴⁴ *Id.*

¹⁴⁵ DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* PERRY, *supra* note 143, at 319, 321. See also PAUST, *supra* note 5, at 198 (the preamble to the 1776 Constitution of Georgia referred to earlier British acts of oppression as being “repugnant to the common rights of mankind”).

right to violate treaties or, more particularly, the laws of war. Unanimous documented views of the era affirm that they did not.”¹⁴⁶ Also significant, as noted in Part II A, is that the people had no power to violate the customary law of nations that could be delegated to a president.

E. The States Are Bound by Customary International Law

As noted in Part II A, Peter Duponceau had affirmed that the customary and directly applicative law of nations “is binding on every people and on every government.”¹⁴⁷ George Nicholas recognized similarly that the law of nations is “superior to any act or law of any nation [and is] binding on all.”¹⁴⁸ Earlier, Samuel Adams had helped to prepare a set of 1772 Declarations of Rights of Men on behalf of the people of Boston that affirmed that individuals were entitled to the customary rights of man “by the eternal and immutable laws of God and nature, as well as by the laws of Nations.”¹⁴⁹ Such an affirmation was later reflected in the Declaration of Independence¹⁵⁰ and was regularly proclaimed by the Founders, Framers, and early judiciary.¹⁵¹ For example, Jefferson affirmed the universal primacy of the rights of man *vis-a-vis* all forms of government when he declared that a bill of rights reflecting the rights of man “is what the people are entitled to against every government on earth, general or particular.”¹⁵² On May 1, 1794, the Democratic and Republican Societies met together in Philadelphia and affirmed a common goal to “preserve and disseminate their principles . . . until the Rights of Man shall become the supreme law of

¹⁴⁶ See, e.g., PAUST, *supra* note 5, at 7-9, 67-69, 169-71, 180-83 nn.1-22. See also *id.* at 195-202, 208-09 (concerning the early, widespread, and fundamental commitment to human rights); Burriss M. Carnahan, *Reason, Retaliation and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83 (1993); Paust, *supra* note 70, at 112-13 (concerning other early adherence to the laws of war and more general laws of nations); Charles M. Wiltse, *Thomas Jefferson on the Law of Nations*, 29 AM. J. INT’L L. 66, 75-81 (1935) (Jefferson, Washington, and others expressed the need for adherence to the laws of war during the Revolutionary War).

¹⁴⁷ See *supra* text accompanying note 15.

¹⁴⁸ See *supra* text accompanying note 32.

¹⁴⁹ See, e.g., PAUST, *supra* note 5, at 197.

¹⁵⁰ DECLARATION OF INDEPENDENCE, *supra* note 145 (“We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable Rights; that among these are life, liberty, and the pursuit of happiness.”).

¹⁵¹ See PAUST, *supra* note 5, at 196-204, 208-211.

¹⁵² Thomas Jefferson, letter to James Madison (Dec. 20, 1787), reprinted in 4 WRITINGS OF THOMAS JEFFERSON 477 (Paul Leicester Ford ed., 1894), and 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 250 (John P. Kaminski & Gaspare J. Saladino eds., 1993). See also DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 153, 158, 168, 176 (1951) (Jefferson sought protection of the rights of man against any governmental power, state or federal).

every land, and their separate fraternities be absorbed in one great democratic society comprehending the human race.”¹⁵³ And in a famous book in 1794, Thomas Paine expressed the widely shared expectation that the “end of all political association is the preservation of the natural and imprescriptible rights of man,”¹⁵⁴ a common view that necessarily stood in contrast to any alleged thought that the states (or the U.S. Congress or federal executive) could lawfully violate customary rights of man.

Indeed, several state constitutions contained provisions similar to the Ninth Amendment to the U.S. Constitution that were designed to assure that the customary rights of man prevailed.¹⁵⁵ Several early state judicial opinions recognized that the customary rights of man were to prevail over state legislative power.¹⁵⁶ In 1817, for example, the Supreme Court of New Hampshire declared that “legislative power” is limited by “the inalienable rights of mankind.”¹⁵⁷ Later, in 1861, the California Supreme Court recognized the inviolability of property rights guaranteed “[b]y the law of nations” and “independent of treaty stipulations.”¹⁵⁸

More generally many state court opinions have recognized that the state judiciary has a shared competence to apply the customary law of nations.¹⁵⁹

¹⁵³ See PAUST, *supra* note 5, at 201-02. Benjamin Franklin had expressed a similar globalist embrace of human rights in 1789: “God grant, that not only the Love of Liberty, but a thorough Knowledge of the Rights of Man, may pervade all the Nations of the Earth” See *id.* at 247 n.88, quoting Benjamin Franklin, letter to S. Moore, Nov. 5, 1789. Later in 1851, Senator Charles Sumner noted: “The influence we now wield is a sacred trust, to be exercised firmly and discreetly, in conformity with the Laws of Nations, and with an anxious eye to the peace of the world, but always so as most to promote Human Rights.” See *id.* at 205. In 1869, he noted: “Beyond all question the true rule under the national Constitution, especially since its additional amendments, is that anything for human rights is constitutional” Quoted in *id.*

¹⁵⁴ See *id.* at 201, 329, quoting THOMAS PAINE, THE RIGHTS OF MAN pt. I, at 8 (1794). Paine had also noted that “[i]mmortal power is not a human right, and therefore cannot be a right of Parliament.” See PAUST, *supra* note 5, at 248 n.95.

¹⁵⁵ See, e.g., PAUST, *supra* note 5, at 198, 244-45 nn.54-61.

¹⁵⁶ See, e.g., *id.* at 202, 208-09, 255-56 nn.197-209.

¹⁵⁷ *Dartmouth College v. Woodward*, 1 N.H. 111, 114 (1817) (Richardson, C.J.).

¹⁵⁸ *Teschmacher v. Thompson*, 18 Cal. 11, 22-23 (1861) (holding private right under customary international law is “inviolable”) (quoting *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 436 (1838)).

¹⁵⁹ See, e.g., PAUST, *supra* note 5, at 208-09, 226-27, 255-56 nn.197-209, 291-92 nn.488-94, 500-01, 294-95 n.503; RESTATEMENT, *supra* note 128, §§ 111, cmt. d (“Questions under international law or international agreements of the United States often arise in State courts. As law of the United States, international law is also the law of every State, is a basis for the exercise of judicial authority by State courts, and is cognizable in cases in State courts.”), 113, cmt. b (“State courts take judicial notice of federal law and will therefore take judicial notice of international law as law of the United States”); *Holbrook, Nelson & Co. v. Henderson*, 4 Sand. Ch. 619, 630 (N.Y. Sup. Ct. 1839) (“international law” regarding diplomatic immunity applied); *Holland v. Pack*, 7 Tenn. 151, 153 (Tenn. 1823) (Indians at war are prisoners of war

In one such case, the Supreme Court of Kentucky addressed a violation of the customary law of war, based in “the law of nations,” and recognized that although there was no state legislation creating a private right of action:

There must be a remedy, and of that remedy the State judiciary has jurisdiction. There is nothing in the Federal Constitution which deprives a State court of power to decide a question of international law incidentally involved in a case over which it has jurisdiction . . . [and to provide] an adequate remedy. To sustain this action, therefore, it is not necessary to invoke any statutory aid.¹⁶⁰

An earlier case involving the direct incorporation of customary international law for criminal prosecution because the “laws of nations . . . form a part of the . . . law of Pennsylvania, . . . part of the law of this state,” was the historic case *Respublica v. De Longchamps*.¹⁶¹ Importantly, a resolution of the Continental Congress did “highly approve the action” of the court in *De Longchamps*.¹⁶² In an even earlier case in 1781, an attorney

under the law of nations and are not criminals under state law or federal statutes); *Blanque v. Peytavin*, 4 Mart.(o.s.) 458, 1816 WL 955 (La. 1816) (a U.S. Supreme Court declaration of the content of the law of nations is binding on the state courts); *Bradwell v. Weeks*, 1 Johns.Ch. 206 (NY 1814) (“By the modern law of nations, and by the law of the land, of which the law of nations is also a part . . .”); *Trezevant v. Osborn’s Estate*, 1 Tread. 61, 1812 WL 576 (So. Car. Const. 1812); *Phoenix Ins. Co. v. Pratt*, 2 Binn. 308, 1810 WL 1312 (Pa. 1810) (“if they have been condemned contrary to the laws of nations, the insured have a right to recover” and “[t]he general law of nations cannot be altered by the arbitrary ordinances of a single nation”); *Wilcocks v. Union Ins. Co.*, 2 Binn. 574, 1809 WL 1427 (Pa. 1809) (“We consider the law of nations as part of our law. It was so determined in the case of *De Longchamps*”); *Taylor v. Sumner*, 4 Mass. 56, 1808 WL 1039 (1808) (“law of nations, which constitutes a branch of the municipal law of every state”); *Scott v. Libby*, 2 Johns. 336 (N.Y. Sup. Ct. 1807) (“right of blockade is derived from the law of nations . . . and the prohibition is as effectual and binding as any law of their own country”); *Avery v. Holland*, 2 Tenn. 71, 1806 WL 240 (Tenn. Superleq 1806) (“The law of nations, which we take to be part of the law of the land”); *Turnbull v. Ross*, 1 S.C.L. (1 Bay 20, 23) 9, 10 (So. Car. 1785) (“laws of nations” did not authorize “individuals to seize and plunder private property” and owners have a right to sue for return of property wherever it is found); *Vos v. United Ins. Co.*, 1 Cai. Cas. 7 (N.Y. Sup. Ct. 1802); *Jackson v. New York Ins. Co.*, 2 Johns. Cas. 191 (N.Y. Sup. Ct. 1801); *Duguet v. Rhinelander*, 1 Johns. Cas. 360 (N.Y. Sup. Ct. 1800); Paust, *supra* note 58, at 316 n.70 (addressing state court decisions recognizing private rights under the law of nations); *supra* text accompanying note 40; *see also* *Chestnut v. Shane’s Lessee*, 16 Ohio 599 (1847) (ex post facto laws violate human rights as well as the state constitution); HENKIN, *supra* note 4, at 422 n.3, 428, 509 n.17; 4 JOHN B. MOORE, DIGEST OF INTERNATIONAL LAW 627 (1906) (addressing a letter of Secretary of State Madison to Governor McKean, May 11, 1802, concerning the fact that the 1802 tearing down of the Spanish minister’s flag was actionable in Pennsylvania as a violation of the law of nations).

¹⁶⁰ *Christian County Court v. Rankin and Tharp*, 63 Ky. 502, 505-06 (1866).

¹⁶¹ 1 U.S. (1 Dall.) 111, 114, 116 (Pa. 1784).

¹⁶² 27 JOURNALS OF THE CONTINENTAL CONGRESS, 1784, at 502-04.

general argued that an English statute reflected the law of nations and was incorporated directly into local domestic law for the purpose of prosecuting “infractors of the laws of nations.”¹⁶³ Also in 1781, the need to treat persons as prisoners of war was affirmed in *Respublica v. Chapman*.¹⁶⁴

Numerous state court opinions have also recognized that the states are bound by the customary law of nations, which is part of the supreme law of the land.¹⁶⁵ As noted above, in 1793, *Page v. Pendleton* recognized that the

¹⁶³ Nathan v. Commonwealth of Virginia, 1 U.S. (1 Dall.) 77, 78 (Common Pleas, Philadelphia County 1781).

¹⁶⁴ 1 U.S. (1 Dall.) 53, 59 (Pa. 1781) (“persons were, accordingly, treated as Prisoners of War.”).

¹⁶⁵ See, e.g., Thompson v. Doaksum, 68 Cal. 593, 596, 10 P. 199, 201 (1886) (stating that obligation to protect private rights under the law of nations “passed to the new government”); Teschemacher v. Thompson, 18 Cal. 11, 22–23 (1861) (inviolability of property rights exists under the law of nations); Brown v. Union Ins. Co. at New-London, 4 Day 179, 1810 WL 871 (Conn. 1810) (“The law of nations is a rule of conduct obligatory on sovereign, independent states”); Riddell v. Fuhrman, 233 Mass. 69, 73, 123 N.E. 237, 239 (1919) (“International law is a part of our law and must be administered whenever involved in causes presented for determination.”); Territory *ex rel.* Wade v. Ashenfelter, 4 N.M. 93, 148, 12 P. 879 (1887) (New Mexico judicial duty is “to maintain only those principles of law . . . proper for the protection of human rights . . .”); People v. Liebowitz, 140 Misc.2d 820, 822, 531 N.Y.S.2d 719, 721 (1988) (“Even in the absence of a treaty, it is a court’s obligation to enforce recognized principles of international law where questions of right depending on such principles are presented for the court’s determination.”); Republic of Argentina v. City of New York, 25 N.Y.2d 252, 259, 250 N.E.2d 698, 700, 303 N.Y.S.2d 644, 647 (Ct. of App. N.Y. 1969) (action “in this case is mandated by the rules of international law. It is settled that . . . all domestic courts must give effect to customary international law.”); De Simone v. Transportes Maritimos do Estado, 200 A.D. 82, 89, 192 N.Y.S. 815 (S.Ct. N.Y., App. Div., 1st Dep’t. 1922) (“ . . . the court has no jurisdiction and could not disregard the protest and overrule the objection by a claim . . . [under] the municipal law of this State . . . , for by the law of nations an adjudication . . . could not be made”); Griswold v. Waddington, 16 Johns. 438 (N.Y. Sup. Ct. 1819) (“duties and prohibitions are prescribed by the law of nations, and attach, especially to the citizens and subjects of the belligerent nations, as soon as the war commences” and, in this case, “dissolved, *ipso facto*, the then subsisting partnership” of two persons; and “the law of nations must . . . be resorted to as a guide”); Stanley v. Ohio, 24 Ohio St. 166, 174 (1873) (state has concern “to discharge such duties as are imposed upon it by the law of nations”):

[T]he rule is firmly established and uniformly recognized that International law is a part of our law and as such is the law of all States of the Union. . . . The rule has been briefly stated as follows: . . . the law of nations is to be treated as part of the law of the land. The courts of all nations judicially notice this law, and it must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. . . . 30 AM. JUR., INT’L LAW, p. 178 § 7

In essence, the rule appears to be that international law is a part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference, and . . . relevant provisions of the law of

nations are legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce them.

Peters v. McKay, 195 Or. 412, 424, 426, 238 P.2d 225, 230–31 (Or. 1951); Cheriot v. Foussat, 3 Binn. 220, 257, 1811 WL 1500 (Pa. 1810) (“The United States have always considered themselves bound by the law of nations. . . . The nation which makes a penal municipal law, has a right to direct the proceedings under it, in what manner it pleases, provided it does not violate the law of nations.”); Banks v. Greenleaf, 10 Va. 271, 277 (1799) (“Admiralty causes bind all the world; because decided, upon the laws of nations. . . .”); *Ex parte* Holmes, 12 Vt. 631, 636 (1840) (“The law of nations is binding upon us, not as a part of the common law”); State v. Brewster, 7 Vt. 118, 122 (1835) (if there had been a “protection” under “the law of nations . . . this court would be bound to respect it”); State v. Pang, 132 Wash.2d 852, 908, 940 P.2d 1293, 1322 (1997) (“International law is incorporated into our domestic law.”); *see also* Woodworth v. Fulton, 1 Cal. 295, 306 (1850) (“the law of nations. . . , as it is a part of the laws of all civilized countries, forms also a branch of American jurisprudence.”); *People ex rel. Attorney-General v. Naglee*, 1 Cal. 232, 234 (1850) (state has “power to do a given act, which, without a transgression of international law, falls within the scope of powers of any independent nation,” unless transferred to federal government); Hill v. Baker, 32 Iowa 302, 311 (1871) (“execution of the deed . . . was in violation of . . . international law, and is, of consequence void”); Hare v. State, 5 Miss. 187, 198, 1839 WL 1416 (Miss. 1839) (Trotter, J., dissenting) (“right of trial by jury is universally looked upon as the most valuable and effectual bulwark of human rights. And no law which should deprive the citizen of this safeguard . . . could receive the sanction of any court of justice.”); Maryland v. Turner, 75 Misc. 9, 11, 132 N.Y.S. 173, 174 (1911) (“however inclined courts may be to follow the interpretation of such statutes by the courts of the State which has enacted the statute, their interpretation is not conclusive, and . . . the Supreme Court distinctly lays down the rule that the question of international law as to whether the action is to enforce a penalty or not ‘must be determined by the court, State or National, in which the suit is brought.’ The test is not by what name the statute is called by the Legislature or by the courts of the State in which it was passed . . .”); Lehman v. McBride, 15 Ohio St. 573, 607 (1863) (in face of argument that state legislation violates international law and is therefore void, state legislation was construed so as not to be extraterritorial in violation of international law); *Ex parte* Bushnell, 9 Ohio St. 77, 189 (1859) (“The constitution of the United States was framed, and the union perfected, subordinate to, and without violating the fundamental laws of nations . . .”); McArthur v. Kelly, 5 Ohio 139, 143 (1831) (“The law of nations require it.”); Siplyak v. Davis, 276 Pa. 49, 52, 119 A. 745, 746 (Pa. 1923) (“[W]here the general law of nations and those of foreign commerce say the contrary . . . I very much question the power or authority of any state or nation . . . to pass such a law. . . .” (quoting Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 536 (1867))); Manhattan Life Ins. Co. v. Warwick, 61 Va. 614, 651 (1871) (“can it be maintained that this statute . . . shall override the public and universal law of nations[?] . . . The refutation of such a proposition is found in its simple statement. It would be a solecism in law and reason”); Dulany v. Wells, 3 H. & McH. 20, 1790 WL 284 (Md. Gen. 1790) (arguments of two counsel) (“To have made future laws to prevent payment of British debts after the treaty was made, would have been contrary to the law of nations, therefore unlawful” and “The law of nations was introduced to avoid the force of local laws”); Rutgers v. Waddington, *supra* note 41 (N.Y. Mayor’s Ct. 1784) (as a nation, the states “must be governed by one common law of nations”), *reprinted in* Goebel, *supra* note 41, at 405; PAUST, *supra* note 5, at 208-09, 255-56 nn.198-209 (addressing early state court opinions using rights of man, human rights, and rights of mankind); *but see* Porter v. Dunn, 1 Bay 53 (So. Car. 1789) (“taking property from an enemy . . . was not justified by the laws of nations. . . . But the act of assembly of 1784, for

Virginia “legislature could not retract their consent to observe the precepts of the law [of nations], and conform to the usages, of nations.”¹⁶⁶ In 1792, *Ross v. Rittenhouse* affirmed that domestic law can facilitate and improve execution of the law of nations “provided the great universal law remains unaltered.”¹⁶⁷

Several federal court opinions provide the same affirmation of the binding and preemptory reach of customary international law to the states.¹⁶⁸ In 1791, Justice Wilson charged a grand jury that “no state or states can, by treaties or municipal laws, alter or abrogate the law of nations.”¹⁶⁹ In 1796,

indemnifying gen. Sumter, &c. places this case beyond all doubt: it exonerates him, and all persons acting under his authority from any prosecution, or suit, on account of property taken”).

¹⁶⁶ See *supra* text accompanying note 105.

¹⁶⁷ See *supra* text accompanying note 44.

¹⁶⁸ See, e.g., *Skiriotes v. Florida*, 313 U.S. 69, 72–73 (1941) (“International law . . . is the law of all States of the Union.”); *Manchester v. Massachusetts*, 139 U.S. 240, 264, 266 (1891) (states are bound by law of nations in defining their boundaries); *Kansas v. Colorado*, 206 U.S. 46, 97 (1906); *id.*, 185 U.S. 125, 146–47 (1902) (“we apply . . . international law” to state-to-state claims); *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (finding that a state court “is bound to take notice” of the law of nations “as . . . [are] the courts of the United States”); *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 236 (1872) (applicable “rule is universal and preemptory . . . by the law of nations”); *Levy v. Stewart*, 78 U.S. 244, 250 (1870) (same); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 560 (1857) (McLean, J., dissenting) (“our States . . . are independent, . . . subject only to international laws . . .”); *Handly’s Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 379–80 (1820) (use of the law of nations in a state-to-state river boundary dispute); *Ware v. Hylton*, 3 U.S. (3 Dall.) at 281 (Wilson, J.) (under the law of nations, the state of Virginia cannot lawfully confiscate debts of enemies during war); *Falstaff Corp. v. Allen*, 278 F. 643, 647 (E.D. Mo. 1922) (“rights of mankind” cannot be lawfully violated by the states); *Murray v. Chicago & N.W. Railway Co.*, 62 F. 24, 42 (N.D. Iowa 1894) (“no more subject to abrogation or modification by state legislation than are the principles of the law of nations . . .”); *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 686, 692 (D.C.E.D. Pa. 1855) (No. 16,726) (each state “is bound by . . . because of its universal obligation, . . . the ‘law of nations.’ What it could not do if freed from federative restrictions, it cannot do now; every restraint upon its policy . . . binds it still . . .”). See also *Skinner v. Oklahoma*, 316 U.S. 535, 536 (regarding “human rights” violated by state law), 541 (“rights of man”) (1942); *Oliver American Trading Co. v. Mexico*, 264 U.S. 440, 442–43 (1924) (law of nations is “law applicable alike” and “as fully” to “suits in state courts as to those in the courts of the United States,” but the case should be transferred to a federal appeals court); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 516 (1832) (Marshall, C.J.) (dictum: “law of nations” addressed in connection with supremacy); *id.* at 579–82, 595 (McLean, J.) (customary rights are also relevant); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 248 (1830) (relevant “rights” against states “stand upon the more general principles of the law of nations”); *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (right to recover debts sequestered by a Georgia statute “revived . . . both by the law of nations and the treaty of peace”); *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (Paterson, J., on circuit) (the right to property is one of the “unalienable rights of man” that is binding on state legislatures); 5 Op. Att’y Gen. 691, 692 (1802) (“law of nations is considered as a part of the municipal law of each State”).

¹⁶⁹ Justice James Wilson, Charge to the Grand Jury for the District of Virginia, May 23,

Justice Wilson articulated the related point that “[w]hen the United States declared their independence, they were bound to receive the law of nations” and he decided that, under the law of nations, the state of Virginia could not lawfully confiscate debts of enemies during war.¹⁷⁰ Chief Justice Jay had made the same general point about state obligations under the law of nations in 1793.¹⁷¹

It is worth emphasizing that in addition to actual trends in expectation and decision noted above, it is a fundamental first principle of American government that the people could not delegate to the state governments a power that they did not possess to violate or compromise the customary law of nations.¹⁷² In view of such a fundamental principle and the numerous state and federal cases noted in this part, the *Restatement* is clearly on firm ground when recognizing that customary international law is supreme law of the land within the meaning of Article VI, clause 2 of the United States Constitution.¹⁷³

The “dual nature” of the define and punish clause addressed by Professor Kent, allowing Congress to impose sanctions against violations of customary international law by the states, actually supports the predominant trends in expectation and decision noted above that the states have an obligation to abide by the law of nations. If they do not live up to that obligation, they can be subject to congressionally-imposed sanctions and to other forms of sanction engaged in by other actors, for example, through lawsuits in the federal courts, including the exercise of original jurisdiction of the U.S. Supreme Court.¹⁷⁴ Logically, if states did not have an obligation

1791, *supra* note 43.

¹⁷⁰ *Supra* note 53. *But see supra* text accompanying notes 72-81.

¹⁷¹ *Supra* note 55.

¹⁷² *See supra* Part II A.

¹⁷³ *Supra* note 130.

¹⁷⁴ *See also* Kent, *supra* note 3, at 898 (“prevailing idea about how to handle law of nations problems had been to simply institute a national court”), 906-07 (John Jay’s recognition in THE FEDERALIST NO. 3 that the federal government can “prevent or punish” violations of the law of nations “could be a reference to . . . federal court jurisdiction over cases arising under treaties and a number of areas involving the law of nations”). *But see* U.S. CONST., amend. XI (adopted Jan. 8, 1798), providing a partial immunity from private suits in federal courts involving such a sanction effort. “Congress proposed, and the states ratified, the eleventh amendment as a reaction to the Supreme Court’s decision in *Chisholm v. Georgia*” that had involved original jurisdiction over a lawsuit against a state. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 45 (4 ed. 1991). The existence of a judicial sanctions process also demonstrates that the congressional sanction power was not exclusive. At one point, Professor Kent seems to consider that is was. *See* Kent, *supra* note 3, at 939; *cf id.* at 861 (actual “congressional practice is frequently at odds with a state-to-state conception of the Clause.”). Yet, again, he noted that the prevailing idea had been to institute a national court. *Id.* Thus, it is curious that he also speculates that “it does not make much sense . . . [that] the Founding generation would have been content to allow . . . federal judges to independently

Congress would not be able to “punish” them for failing to comply. Moreover, Professor Kent’s documentation of the significant concern of the Founders that sanctions against state violations be available adds to the point that it would have been illogical and policy-thwarting to suppose that states did not have a duty to abide by customary international law after formation of the Constitution.¹⁷⁵ As noted in this article, overwhelming trends in federal and state court opinions demonstrate that such a duty exists.

While contemplating the language of the Supremacy Clause, Professor Kent speculates that “[i]t 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.”¹⁷⁶ However, he misses the point evident in one of his earlier footnotes that the phrase “in pursuance thereof” can mean “consistent with the Constitution.”¹⁷⁷

constrain state governments to obey the law of nations through operation of Article III jurisdiction and the Supremacy Clause.” *Id.* at 940-41. But, as Part II E of this article demonstrates, they apparently were of that viewpoint and, in any event, various Founders, later expectations, and federal and state judicial opinions throughout our history demonstrate that the states are bound by customary international law and that the federal judiciary has recognized this fact. *See also* *United States v. Minnesota*, 270 U.S. 181, 184 (1926) (U.S. Executive can invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of U.S. obligations under a treaty); *Sanitary District v. United States*, 266 U.S. 405, 425-26 (1925) (Executive can choose to sue a state agency to enjoin it and to enforce “treaty obligations” “and no statute is necessary to authorize the suit”); Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679, 681 (1998) (Executive could institute “an independent proceeding in a federal court for an order to the Governor or other state officials to honor the U.S. treaty obligation”); Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States*, 104 COLUMBIA L. REV. 1765, 1768, 1771, 1782, 1829-30 (2004) (“The United States . . . may sue a State without its consent” for violations of “treaty law and the law of nations”; and “historical evidence,” including Framers expectations, demonstrates that the text and structure of the Constitution allow suits by foreign states against U.S. states in the Supreme Court regarding at least treaty-based claims). Professor Lee also quotes Madison, who recognized that suits by foreign states would be “consonant to the law of nations.” *Id.* at 1860, quoting James Madison, remarks at the Virginia Convention (June 20, 1788), in 10 THE DOCUMENTARY HISTORY OF RATIFICATION OF THE CONVENTION 1414-15 (John P. Kaminski & Gaspare J. Saladino, eds., 1993).

¹⁷⁵ Concerning the policies at stake, *see also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-25 (1964) (customary international law “must be treated exclusively as an aspect of federal law . . . [and] rules of international law should not be left to divergent and perhaps parochial state interpretations.”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, at 474 (quoted in text *supra* note 100). James Madison expressed particular concern about “violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars,” noting “[t]he tendency of the States to these violations.” *See* James Madison, remarks, in 1 FARRAND, RECORDS, *supra* note 68, at 316.

¹⁷⁶ Kent, *supra* note 3, at 938 n.420.

¹⁷⁷ *See id.* at 938 n.418 (quoting AKHIL REED AMAR, AMERICA’S CONSTITUTION 178-79

Therefore, customary international law, to be supreme land of the land, must be consistent with the Constitution.¹⁷⁸ This is a point made previously in connection with the primacy of the Constitution in the case of an unavoidable clash between customary international law and a provision of the Constitution.¹⁷⁹ Colonel Moultrie's argument in *United States v. Robins* in 1799 used this approach to the meaning of "in pursuance" when claiming that if a treaty was "contrary to the constitution" or "opposite and repugnant to the constitution" it was not made "in pursuance thereof."¹⁸⁰ In any event, the judiciary has often used the customary law of nations (and human rights in particular) to inform the meaning of various constitutional provisions unburdened by the type of theoretic speculation raised by Professor Kent.¹⁸¹ Additionally, in numerous instances documented in this article or in footnoted material our federal and state courts have used customary international law directly for criminal prosecution and in civil proceedings with respect to various rights, duties, and competencies. In particular, the supremacy of customary international law has had a rich juridic history¹⁸² unburdened by such a theoretic speculation. Further, the Founders and Framers who were not on the bench seem to have been content with such forms of judicial use of the customary law of nations.

III. CONCLUSION

Understanding who we have been can help us to understand who we are and can be. As this article demonstrates, the views of the Founders and Framers, the text and structure of our Constitution, and numerous federal and state judicial opinions affirm that customary international law is part of the laws of the United States within the symmetric ambit of Articles II, Section 3, III, Section 2, and VI, clause 2 of the United States Constitution. Since international law is part of the law of the United States, has constitutional moorings, is relevant to the limits of presidential and congressional power, and can influence the content of constitutional and statutory law, some of the trends in judicial decision identified in this article are of interrelated historical concern. They should also provide a basis for appropriate analysis of executive conduct during actual war and law's limitations on executive power. Indeed, unanimous recognition exists in

(2005)).

¹⁷⁸ Additionally, customary international law is made in a dynamic process of behavioral and attitudinal interaction in which official U.S. actors participate in pursuance of the constitutional authority or powers that they possess.

¹⁷⁹ See *supra* text accompanying notes 73, 83.

¹⁸⁰ *United States v. Robins*, 27 F. Cas. 825, at 829 (argument of counsel).

¹⁸¹ See, e.g., *supra* notes 84-85.

¹⁸² See, e.g., *supra* notes 147-148, 155-159, 165-171 and accompanying text.

federal and state judicial opinions that all persons within the executive branch are bound by the laws of war.

Customary international law has been used directly and indirectly for interpretive purposes in numerous federal and state cases. Overwhelming trends in expectation and decision since the dawn of the United States demonstrate that the people, Congress, the President, and the states must abide by customary international law. Importantly, the fact that the people are bound by the customary law of nations and that the federal government is one of merely delegated powers requires recognition that the people could not delegate to Congress or the federal executive an authority to violate the customary law of nations. As this article demonstrates, several Founders and Framers shared that recognition.