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Customary International Law in State Courts

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TABLE OF CONTENTS

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I. INTRODUCTION

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . .[1]

Over the past few years, legal scholars have fiercely debated the meaning of this and other statements about the proper status of customary international law in the American legal system. While a majority of scholars support treating customary international law ("CIL") as federal common law,[2] an emerging group of revisionist scholars has sharply challenged this view. These scholars argue that CIL has the status of non-federal law under *Erie R.R. Co. v. Tompkins*[3] and that CIL is not the proper area for federal court lawmaking.[4]

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1. The Paquete Habana, 175 U.S. 677, 700 (1900).

2. Federal common law refers to the federal law interpreted and applied by federal courts that is not specifically authorized by a congressional enactment. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d. (1987) [hereinafter RESTATEMENT (THIRD)] (stating consensus among scholars that customary international law is federal common law); Harold H. Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that customary international law is federal law); *see also* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley & Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (same); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after* Erie, 66 FORDHAM L. REV. 393 (1997) (same); Ryan Goodman & Derek P. Jinks, Filartiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997) (same).

3. 304 U.S. 64 (1938).

4. *See* Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law as federal common law is a "modern" view with no doctrinal or historical justification) [hereinafter Bradley and Goldsmith, *Critique*]. *See also* JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 115 (1999) (arguing that customary interna-

The outcome of this debate will have significant practical consequences. If CIL is federal common law, federal courts could use CIL to preempt inconsistent state law without any official authorization from the President or Congress.[5] For instance, an individual facing the death penalty for committing a crime prior to his eighteenth birthday could challenge his death sentence on the grounds that the state statute authorizing his execution violated federal law as expressed in CIL.[6]

Additionally, a number of federal courts have relied on the understanding that CIL is federal common law in order to adjudicate lawsuits charging violations of international human rights law.[7] If the revisionist view is accepted by the courts, some of the legal basis for this sort of litigation would collapse.[8]

But if CIL is not federal common law, what is it? On this point, revisionist commentators differ. Most prominently, Professors Curtis Bradley and Jack Goldsmith have argued that, in most cases, CIL is not a rule of decision for any courts without statutory authorization but that it can be part of the common law of the states to the extent that individual states choose to incorporate it.[9]

This position is sufficiently disquieting that even their fellow revisionist commentators disagree with this result.[10] Indeed, the idea that CIL could become part of state common law, and that state court interpretations of CIL would bind federal courts sitting in diversity jurisdic-

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tional law cannot always be federal common law); Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995) [hereinafter Weisburd, *State Courts*] (arguing that federal court cases incorporating customary international law as federal common law are wrongly decided).

5. One prominent scholar has suggested that courts should be using international law in this way. *See* Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295 (arguing for application of customary international law to preempt state law).

6. *See id.* at 323-326 (discussing the possible effect of CIL on the juvenile death penalty)

7. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (suit charging human rights violations in Bosnia); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1304, 1308 (C.D. Cal. 2000) (suit charging multinational corporation with human rights violations). The modern wave of international human rights litigation was launched by a decision in the Second Circuit which essentially held that customary international law is federal law. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

8. If the courts adopt the revisionist position, *Filartiga* and its progeny are almost certain to be overruled. *Cf.* Curtis Bradley & Jack Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Illegitimacy*].

9. Bradley & Goldsmith, *Illegitimacy*, *supra* note 8, at 349-51.

10. ROGERS, *supra* note 4, at 115 (arguing that (i) CIL can become federal law if and only if Congress remains silent, (ii) the CIL rule remains within the constitutional powers of Congress, and (iii) the President has acquiesced in this interpretation); *cf.* Weisburd, *supra* note 4, at 51 ("[T]he best way to read Erie is not as woodenly equating general law with state law . . . .").

tion, has been dismissed by highly respected scholars as "bizarre,"[11] "radical,"[12] and "absurd."[13] As one such scholar has confidently written, "even casual reflection compels the conclusion that Bradley and Goldsmith are utterly mistaken."[14]

At the heart of these objections to the revisionist view are two claims about the historical role of state courts in relation to CIL. First, adherents of a "nationalist" view[15] of CIL argue that the Framers of the Constitution intended to allocate control over almost all questions of international law to the federal courts.[16] Second, nationalist scholars have argued that the doctrinal treatment of CIL by federal and state courts supports a dominant, if not exclusive, role for federal courts in the interpretation of CIL questions.[17]

Since national scholars believe that state courts have not played a significant role in the development of CIL, they have asserted that leaving questions of CIL to parochial state courts invites chaos; state courts would develop conflicting rules of CIL and impermissibly interfere in matters of foreign relations.[18] Because this critique of the revisionist position depends in great part on the validity of their understanding of the historical role of state courts, it is surprising that there is almost no commentary examining the historical foundations of these assumptions.[19]

This article seeks to fill this gap by describing the historical role of state courts in the interpretation and development of CIL in the Ameri-

11. Koh, *supra* note 2, at 1850.

12. Stephens, *supra* note 2, at 397.

13. Neuman, *supra* note 2, at 382.

14. Koh, *supra* note 2, at 1827.

15. I refer to scholars favoring the federal status of CIL as adherents of the "nationalist" position. Bradley and Goldsmith coined the term "modern position" to characterize the same view. Bradley & Goldsmith, *Critique*, *supra* note 4, at 816. Because the term "modern position" assumes that the nationalist view is really the product of modern, rather than historical understandings, I use the more neutral term "nationalist."

16. *Cf.* Koh, *supra* note 2, at 1846 (noting that transfer of judicial authority over customary international law from states to federal government occurred "at the beginning of the Republic..."); Stephens, *supra* note 2, at 411-13 (explaining that "[t]he framers' concern about enforcement of the law of nations thus led them to draft a Constitution that guaranteed federal control over the nation's international law obligations.").

17. *See, e.g.*, Neuman, *supra* note 2, at 373-78; Stephens, *supra* note 2, at 413-32.

18. *See, e.g.*, Koh, *supra* note 2, at 1850 (arguing that if customary international law were determined by state courts, the President would have difficulty advising visiting head of states to different immunity rules depending on which states they visit).

19. Only A.M. Weisburd has provided a meaningful discussion of the pre-Erie role of state courts and CIL, but his analysis remains largely focused on the attitude of federal courts to state court decisions rather than on the state courts themselves. *See* Weisburd, *supra* note 4, at 38-41. While he does discuss some modern state court applications of CIL, he does not discuss the historical role of state courts. *See id.* at 13-14.

can legal system. It aims to test the validity of nationalist claims about the role of state courts against the historical and doctrinal record of state courts applying CIL. While I do not purport to offer a definitive historical account, my discussion of the role of state courts in the application of CIL reveals that, at the very least, the revisionist understanding of how CIL has been incorporated into American law has far greater plausibility than nationalist critics have admitted.

I begin by revisiting the complex question of how the Founding Generation viewed the proper role of state courts in the interpretation of CIL. While the Founders clearly sought to limit state court jurisdiction over some kinds of cases involving CIL, it is highly doubtful that the Founders intended to make federal court exclusivity over CIL a *constitutional* requirement. Instead, it is likely that the Founders intended for Congress to use its *political* judgment in deciding how to allocate jurisdiction over CIL between the federal and state court systems. In exercising this judgment, it is revealing that, in some cases, Congress made an effort to preserve an independent role for state courts in the application of CIL.

Next, this article surveys the development of four CIL doctrines in state courts: (1) diplomatic immunity in transit; (2) the irregular abduction of overseas fugitives; (3) sovereign immunity; and (4) restrictions on trading with enemy aliens. As a result of Congress's jurisdictional allocations, the development of these CIL doctrines fell predominantly within the realm of state court decisions. My analysis of these doctrines reveals that, in many cases, state courts acted as the primary judicial fora for originating, developing, and applying rules of CIL. Indeed, in several cases, federal courts explicitly disclaimed any authority to review state court interpretations of these CIL doctrines. My survey confirms that, at least in the case of these CIL doctrines, both federal and state courts have historically treated CIL as general, and not federal, common law.

While discussing the development of these doctrines, this article also highlights the way in which these CIL doctrines eventually became federal law. While it is true that all of these CIL doctrines (with one exception) are understood to be federal questions today, the federalization of these CIL doctrines *never* occurred through unilateral federal court lawmaking. Rather, the political branches of the federal government – Congress and the President – codified these CIL rules through statute, treaty, or executive branch lawmaking.

This regime of CIL interpretation, which permits state courts to develop rules of CIL independently, subject only to revisions by the political branches of the federal government, resonates with my account of

the Founders' intended judicial framework. Though one might expect this messy regime to result in inconsistent interpretations of CIL rules, my discussion shows that state courts rarely disagreed with each other or with federal courts, even though they were not subject to Supreme Court review. To the extent such splits occurred, state courts were just as likely to develop rules of CIL less injurious to foreign interests than the prevailing federal court interpretation.

The ability of state courts to develop uniform interpretations of CIL independently helps explain why federal courts after *Erie* infrequently faced the question of whether federal courts are bound by state court determinations of CIL. Instead, the branches of the federal government most attuned to foreign relations and CIL development – the Congress and the President – would codify nationwide rules of CIL *when they deemed it necessary* as a matter of domestic or foreign policy. Indeed, the political branches would sometimes rely on state court interpretations of CIL as evidence of a developing CIL rule. Until such codification, a rule of CIL remained open to development by *either* a state or federal court.

Finally, I conclude that this historical account of state courts and CIL has at least two important implications for the ongoing debate over the status of CIL in the American legal system. First, it weakens the historical foundations for the nationalist view by demonstrating that, as a matter of original understanding, CIL was not an exclusively federal question. This reading of the Founders' understanding is confirmed by the important role that state courts played in the origination and development of CIL.

Second, my discussion indicates that state courts have shown an ability to interpret, to apply, and sometimes to "create" rules of CIL independent of federal court supervision without causing irreparable damage to U.S. foreign relations. At the very least, the ability of state courts to generate sophisticated and uniform doctrines of CIL weighs heavily against any policy arguments for the practical necessity of federal court control over CIL.

This article proceeds in three parts. First, I review the Founders' views on the proper division between federal and state courts in the interpretation of CIL. Then, I go on to survey the development of four CIL doctrines in state courts and their eventual federalization by Congress and the President. Finally, I examine the implications of my historical account for the ongoing debate over the proper status of CIL in the American judicial system.

II. THE FOUNDERS AND CUSTOMARY INTERNATIONAL LAW

Many members of the Founding generation distrusted the ability of state courts to apply the law of nations, the term used for CIL at that time.[20] Their distrust of state courts in these matters is reflected, to some degree, in Article III of the Constitution, which allocates jurisdiction over several kinds of law of nations cases to the federal courts.[21] Scholars have seized on the Founders' antipathy toward state courts in order to claim that the Founders intended "a Constitution that *guaranteed* federal control over the nation's international law obligations."[22] While the Founding generation sought to limit state court involvement to the interpretation and application of the law of nations, the historical evidence also indicates that the Founders believed that the state courts should have an independent role in applying the law of nations.

The Founders' intellectual framework assumed that both federal and state courts would interpret and apply the law of nations as part of the general common law. Their solution to the problematic state court application of the law of nations, however, was to give federal courts jurisdiction over some, but not all, kinds of law of nations cases. Most importantly, the question of which courts should control interpretation of the law of nations was understood to be a political judgment made by Congress when it created the lower federal courts in the Judiciary Act of 1789.

To support this conclusion, I rely on a variety of historical sources. These sources include statements by influential delegates at the Constitutional Convention and during the ratification period, the actions of the

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20. The "law of nations" is the term used in the 18th century for what is now called international law, RESTATEMENT (THIRD), *supra* note 2, pt. I, ch. 2 introductory note, at 41 ("the law of nations, later referred to as international law"); *see* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 (1988) (explaining that there are two types of international law, customary law and treaty law and that the term law of nations usually referred to customary law).

21. *See* U.S. CONST. art. III, §.2.

22. Stephens, *supra* note 2, at 412 (emphasis added). The view that the Founders, in their allocation of jurisdiction, effectively sought to federalize judicial control of the law of nations, is both widespread and longstanding. *See* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States,* 101 U. PA. L. REV. 26, 38 (1953) ("The Convention was in substantial agreement that there must be a national judiciary and that it must have, at least in the last resort, a paramount authority with respect to the Law of Nations and treaties."); Koh, *supra* note 2, at 1841 (discussing Framers support for federal control over CIL); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV 1071, 1093, 1093 n. 110 (1985) (concluding that framers intended that "international law was to be federal law, enforced by the national judiciary"); Douglas Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 7, 21-32 (1999) (concluding that leading members of early Republic intended to create federal jurisdiction over all matters touching on national concerns and that all cases touching on the law of nations were of national concern).

First Congress in creating the lower federal court system, the legal opinions issued by the Attorney Generals in the first three presidential administrations, and opinions issued by federal and state courts relating to the law of nations during the 1790s. While I do not claim that a historical account based on these sources conclusively determines the "original understanding,"[23] this historical account does at least offer a plausible description of the Founders' understanding of how CIL would be applied by courts.

A. The Problem with State Courts

There is little doubt that the application of the law of nations and treaties in state courts during the Articles of Confederation era caused foreign policy problems for the fledging United States. Even before the successful conclusion of the Revolutionary War, the Continental Congress passed a resolution directing the individual states to comply with the law of nations when determining the legality of captures on the high seas.[24] The Continental Congress was concerned about potential foreign policy problems that might arise if state courts enforced laws against foreign diplomats or awarded prizes to privateers in violation of the law of nations. In 1781, it passed another resolution recommending that states provide punishments for violations of the law of nations.[25] These resolutions did not have much of an effect.

Edmund Randolph, Governor of Virginia and a leading member of Virginia's delegation to the Constitutional Convention, complained that the Continental Congress could not cause infractions of the law of nations to be punished and warned that state court decisions failing to honor treaty obligations and protect foreign diplomats could give foreign countries cause for war.[26] But the Founders were not concerned only about violations of the law of nations. Madison, for instance, also

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23. This article does not take a position on the authoritative force of the original understanding for constitutional interpretation.

24. *See* William Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490 (1986) (*citing* 21 J. CONT. CONG. 1136-37 (1781)).

25. *See id.* at 491-93, 492 n. 143 (describing notorious Marbois affair involving attack on French Ambassador in Philadelphia). *See also* William Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the Originalists*, 19 HASTINGS INT'L & COMP. L. REV. 221, 226-27 (1996) (describing state court violations of the law of nations).

26. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825 n. 25 (1989) [hereinafter *Law of Nations*] (*citing* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 19, 24-25 (M. Farrand ed. 1911) [hereinafter FARRAND]). *See also* John Jay, 34 J. CONT. CONG. 1774-1789 111 ("[T]he foederal [sic] Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of [cases involving foreign diplomats]."

worried that state courts would mistreat foreign citizens in the application of local law, thereby discouraging foreign trade.[27]

B. The Text of the Constitution

It bears emphasizing that the delegates probably did not arrive at the Constitutional Convention fixated on a single solution to the problem of state courts and the law of nations, although a national judiciary was the obvious place to start.[28] At the beginning of the Convention, Randolph proposed the creation of a national judiciary to hold jurisdiction over "all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested . . . and questions which may involve the national Peace and Harmony."[29] Along different lines, Charles Pinckney offered a plan which created no inferior federal courts but gave appellate jurisdiction over state courts to a federal supreme court on questions involving the "Construction of Treaties made by the U.S. – or on the Law of Nations . . . ."[30]

Eventually, the question of federal court jurisdiction was addressed in Article III. An early draft of Article III provided for federal court jurisdiction over cases "which may arise . . . on *the Law of Nations*."[31] For reasons that are not explained in the Convention debates, the phrase "the Law of Nations" was deleted from the final version of Article III.[32] Instead, the judicial power of the federal courts was divided into broad grants of jurisdiction and particularized grants.

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27. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 583 (J. Elliott, ed. 1881) ("We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us.").

28. Several commentators have cited a letter by George Mason describing "the most prevalent idea" at the Convention as the establishment of "a judiciary system with cognizance of all such matters as depend upon the law of nations." Letter to Arthur Lee (May 21, 1787) (*cited in* Jay, *Law of Nations, supra* note 26, at 830); *see also* Stephens, *supra* note 2, at 407 n.66. Mason's statement, however, should be given little weight, given that Mason cautions in the same letter that, "I arrived in this city on Thursday evening, but found so few of the deputies here from the several States that I am unable to form any certain opinion on the subject of our mission." 3 FARRAND, *supra* note 26, at 24.

29. 1 FARRAND, *supra* note 26, at 21-22. Randolph made these proposals in the "Virginia Plan." Dickinson, *supra* note 22, at 36 –37 n.31.

30. Dickinson, *supra* note 22, at 37 (*citing* 2 FARRAND, *supra* note 26, at 136).

31. Jay, *Law of Nations, supra* note 27, at 819, 830 n. 57 (*citing* 2 FARRAND, *supra* note 26, at 157).

32. 2 FARRAND, *supra* note 26, at 157 (discussing deletion of the term "law of nations" from a draft of Article III).

The broadest grant included "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," with Article III extending jurisdiction "to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;" and to cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[33]

One commentator has suggested that this deletion shows that the Founders rejected giving federal courts jurisdiction over all cases involving the law of nations.[34] This reading, however, has been seriously questioned.[35] It is possible that the phrase "the law of nations" was deleted for reasons unrelated to issues of federal court control over CIL. In the eighteenth century, the phrase "the law of nations" was sometimes used to encompass areas of law we now consider different, including the law merchant, maritime law, and the law of conflicts.[36] The Founders may not have wanted to federalize jurisdiction over all of these areas of law, especially the "law merchant" because it could create federal jurisdiction over contracts between citizens of the same state.[37] Indeed, the Founders noticed that differing understandings of this phrase created another problem with the "law of nations" that continues to confuse scholars of CIL today. The law of nations, they observed, is often too "vague and deficient to be a rule."[38]

It is also likely that the simple incorporation of the law of nations into Article III did not satisfy those members of the Founding generation who feared state court encroachment into foreign affairs. As Alexander Hamilton explained in the Federalist Papers, Article III's particularized categories of federal jurisdiction – diplomats, admiralty, treaties, and aliens – were intended to extend federal jurisdiction over cases implicating foreign relations but which did not necessarily involve the law of nations.[39] After considering the idea that "cases arising upon treaties and the laws of nations . . . may be supposed proper for the federal jurisdiction, the latter for that of the [s]tates,"[40] he goes on to argue that

33. U.S. CONST. art. III, § 2.

34. *See* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1222-23 (1988) [hereinafter Weisburd, *Executive Branch*].

35. *See* Jay, *Law of Nations*, *supra* note 26, at 830-32.

36. *See id.* at 832.

37. *Id.*

38. 2 FARRAND, *supra* note 26, at 615 (*quoting* Governor Morris in the context of debates over "define and punish" clause).

39. *See* THE FEDERALIST No. 80, at 476-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

40. *Id.* at 476. This particular quotation has been mistakenly used to signify that Hamilton equated jurisdiction over treaties with jurisdiction over the law of nations. *See, e.g.*, Koh, *supra*

Article III's approach is superior because it was "by far most safe and most expedient to refer all those [cases involving foreigners] to the national tribunals."[41]

Hamilton's explanation assumes that the law of nations was not incorporated into the "law of the United States" for the purposes of Article III. But nationalist commentators, and courts following their view, have cited strong statements from John Jay implying that such incorporation had indeed occurred.

> Under the national government, treaties and articles of treaties, *as well as the laws of nations*, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent . . . The wisdom of the convention in committing such questions to *the jurisdiction and judgment of courts appointed by and responsible only to one national government* cannot be too much commended.[42]

Jay's statement, an exposition of the Constitution made during the ratification process, does not make much sense if the Constitution's drafters had explicitly rejected the incorporation of the law of nations into federal court jurisdiction. One way of reconciling his statement with Hamilton's understanding is to read Jay's reference to uniform interpretations of the law of nations cases as a shorthand reference to cases arising under the particularized grants of Article III.

On the other hand, Hamilton and Jay may have simply disagreed. As Chief Justice, Jay also classified the law of nations with treaties, the constitution, and federal statutes as the three components of the "law of the United States" in the context of instructing a grand jury in an indictment charging violations of the law of nations.[43] This statement certainly implies that the law of nations falls within the federal judicial

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note 2, at 1841 (stating that " 'modern position' extends at least as far back as Alexander Hamilton.").

As other commentators have recognized, this is almost certainly a misreading of Hamilton's statement. Hamilton actually used this section to compare the idea of federalizing "the law of nations" with his preferred result: federalizing cases involving aliens, diplomats, and admiralty. *See, e.g.*, Weisburd, *State Courts, supra* note 4, at 35-38. *See also* Jay, *Law of Nations, supra* note 26, at 831. Hamilton's point here is that federalizing all cases involving the law of nations would not be enough to prevent foreign policy problems.

41. THE FEDERALIST No. 80, *supra* note 39, at 477.

42. THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (emphasis added). This passage was cited in *Filartiga*, 630 F.2d at 887, to support the Court's assertion that customary international law is a matter of federal law whether or not Congress acts to define it by statute.

43. Henfield's Case, 11 F. Cas. 1099, 1100-01 (No. 6,360) (C.C.D. Pa. 1793).

power over "all cases, in law and equity, arising under . . . the Laws of the United States . . . ."[44]

Jay may have believed that the law of nations was part of the law of the United States within the meaning of Article III, but Hamilton's disquisition on Article III shows that he did not see things in quite the same way. Neither did James Wilson, a prominent delegate representing Pennsylvania at the convention, an associate justice on the first Supreme Court, and one of the judges giving the jury charge in the same set of prosecutions initiated by Jay's grand jury charge.[45] Wilson traced the law of nations' entry into American jurisprudence through the common law rather than as part of the "laws of the United States."[46] According to Wilson, the common law liberally borrows from other laws and systems when the case requires it.[47] If a question arises under the common law which requires resolution by the law of nations, "By that law she will decide the question. For that law in its full extent is adopted by her."[48]

Wilson's account fits better into the prevailing intellectual framework than the nationalist reading of Jay's views because the Founders still believed in a general common law that could be discovered by judges independent of statutory guidance. Indeed, as Justice Story would famously decide, the general common law was not "the law of the several states" within the meaning of section 34 of the Judiciary Act of 1789.[49] Rather, it was a law independently discoverable and applicable by all American courts, state or federal, with neither system able to overrule the other's interpretation of it.[50] This framework helps make sense of Hamilton's claim, printed below, that the incorporation of the law of nations by the common law of the states means that the law of nations has been adopted by the United States as well.

> The common law of England which was [and] is in force in *each of these states* adopts the law of Nations, the positive equally with the natural, as a part of itself . . . Ever since we have been an Independent nation we have appealed to and

44. U.S. CONST. art. III, § 2, cl. 1.

45. For a useful discussion of the background of Henfield's Case and the other effects of the Neutrality Proclamation, *see* David Currie, *The Constitution in Congress: The Third Congress*, 1793-95, 63 U. CHI. L. REV. 1, 4-15 (1996).

46. *Id.*

47. *Id.*

48. Henfield's Case, 11 F. Cas. at 1107.

49. Swift v. Tyson, 41 U.S. 1, 18 (1838).

50. For an influential discussion of the crucial importance of the general common law to understanding the Founders' attitude toward common law, *see* William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

> acted upon the modern law of Nations as understood in Europe . . . The President's Proclamation of Neutrality refers expressly to the *modern* law of Nations . . . 'Tis indubitable that the customary law of European Nations *is as a part of the common law and by adoption that of the U[nited] States.*[51]

As a part of the common law,[52] any federal or state court that had another basis for asserting jurisdiction could also apply the law of nations. But neither the law of nations, nor the common law of which it was a part, could confer jurisdiction on a court by itself. Therefore, it is not surprising that the Founders could believe that the law of nations would be part of the "law of the land" yet still did not explicitly confer federal jurisdiction over all cases involving the law of nations. The deletion of the phrase "the law of nations" from Article III only confirms this understanding.

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51. Alexander Hamilton, To Defence No. XX (Oct. 23-24, 1795), *in* 19 PAPERS OF ALEXANDER HAMILTON, at 341-42 (Harold Syrett ed., 1973) (emphasis added). An early opinion from the Attorney General concurred with this analysis. *See* Territorial Rights-Florida, 1 Op. Att'y Gen. 68, 69 (Jan. 26, 1797), 1797 WL 419 ("The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land.") (emphasis added).

52. Most commentators, even those advocating the nationalist view, concede that the law of nations was considered part of the general common law. *See* RESTATEMENT (THIRD), *supra* note 2, pt. I, ch. 2 introductory note at 41; *see also* Neuman, *supra* note 2, at 373; Stephens, *supra* note 2, at 400 & n. 34. The Supreme Court also has made this understanding very explicit. *See* Huntington v. Atrill, 146 U.S. 657, 683 (1892) (stating that question of international law "is one of those questions of general jurisprudence . . . .").

A few dissenters, however, continue to misunderstand the significance of the general common law. *See* Koh, *supra* note 2, at 1825 n.8 (*citing* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (emphasis added) ("It seems unlikely that the Chief Justice would have understood the Supreme Court to be 'bound by the law of nations' had that law merely represented the law of the several states.")). But Marshall could feel "bound" by the general common law even though he had no basis as Chief Justice to review state court interpretations of it.

Other scholars plainly reject the general common law view. *See* Jordan J. Paust, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 30 n.34 (1996) [hereinafter Paust, INTERNATIONAL LAW] (arguing that viewing CIL as "mere" common law is simplistic and citing cases implying that the law of nations and the common law are different.). Professor Paust does not offer any analysis of these cited cases, however, and he does not explain how those cases viewed the place of CIL in the legal system if not as part of the common law. Without such an alternative explanation, it is hard to understand why scholars should abandon the "law of nations incorporated by common law" view that many Founders explicitly endorsed.

For example, Professor Paust himself cites Attorney General Lee, *see* Territorial Rights-Florida, *supra* note 51, at 69, for the proposition that the law of nations is part of United States law, but he omits the section in the same opinion where Lee explicitly identifies the "common law" as the vehicle for incorporating the law of nations. *See* Jordan J. Paust, *Customary International Law and Human Rights Treaties* are *Law of the United States*, 20 MICH. J. INT'L L. 301, 301 n.4 (1999) [hereinafter Paust, *Customary International Law*]. This would not be worth noting, except that Professor Paust has himself accused other scholars of making references to phrases like the "law of the land" that are "incomplete and potentially misleading." *Id.* at 309 & 309 n.44 (attacking Professors Bradley & Goldsmith for incomplete citations).

Instead, as Hamilton explained, Article III focuses on grants of federal jurisdiction for particular cases involving not just law of nations issues, but also for cases that might create foreign policy problems for the new nation.[53] Thus, it is important to remember that the Founders saw the problem with state courts as extending beyond their violations of the law of nations. Rather, the state courts were also creating foreign policy problems by unfairly applying local laws against foreigners, thus discouraging trade as well as outraging foreign nations.[54] For this reason, the Founders' efforts to resolve the problem of state courts did not necessarily mean that they intended to federalize jurisdiction over *any* question involving the law of nations. It is more likely that they simply intended to federalize jurisdiction over those cases that might affect foreign relations, whether such a case involved the law of nations or not.

At the very least, the statements by influential delegates to the Constitutional Convention demonstrate that they were not of one mind when it came to allocating jurisdiction to federal courts over cases involving the law of nations. While Jay implied that the law of nations was incorporated into federal court jurisdiction by Article III's reference to the "law of the United States," Hamilton and Wilson thought differently. Indeed, their view that the law of nations was part of the common law would be reflected by subsequent legal opinions by the executive branch and decisions by federal courts.

C. *Congress and the Judiciary Act of 1789*

Article III provides little textual guidance for federal jurisdiction beyond the Supreme Court's original jurisdiction. As many commentators have observed, Article III outlined the limits of federal judicial power, but gave the task of actually allocating most of that jurisdiction to the Congress. The manner in which the first Congress fulfilled this task strongly implied that members of the first Congress did not believe that federal court exclusivity over CIL cases was constitutionally mandated.[55]

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53. *See* THE FEDERALIST No. 80, *supra* note 39.

54. *See* 1 FARRAND, *supra* note 26.

55. It seems clear that the first Congress did not believe, for instance, that the general common law, including the law of nations, was part of the "law of United States" within the meaning of Article III's grant of federal court jurisdiction or Article VI's power to preempt inconsistent state law. In Section 25 of the Judiciary Act of 1789, Congress granted the Supreme Court appellate jurisdiction over state court decisions that involve: (1) the validity of a "treaty, statute of, or an authority exercised under the United States; (2) the validity of a "a statute of, or an authority exercised under any State" that arguably conflicts with the "constitution, treaties or laws of the United States;" (3) the construction of "any clause of the [C]onstitution or of a treaty, or statute of, or commission held under the United States." In Section 34, Congress directs federal courts to

While some commentators persuasively argue that the Convention delegates intended to require Congress to give the federal courts the whole scope of jurisdiction permitted by Article III,[56] the first Congress plainly did not agree.[57] Article III's broad language[58] could certainly be read to provide Congress with substantial discretion in the allocation of jurisdiction. Congress did not hesitate to exercise this discretion when allocating jurisdiction over cases involving the law of nations.

In exercising its *political* judgment as to which cases required exclusive federal court jurisdiction and which cases could remain concurrent or exclusively with the states, the first Congress effectively controlled which courts would hear cases involving law of nations. Given the Founders' obvious skepticism about the ability of state courts to handle cases involving the law of nations, it is hardly surprising that Congress provided federal courts with exclusive jurisdiction over several aspects of the law of nations. What *is* surprising is that despite the well-known problems of state courts applying CIL and the participation of many Convention delegates in the drafting of the Judiciary Act,[59] the first Congress still preserved a role for state courts in law of nations cases.

For instance, it is true that Congress gave the Supreme Court exclusive jurisdiction over lawsuits *against* ambassadors, public ministers, and their domestic servants, but Congress only gave the Court original jurisdiction for suits brought *by* ambassadors, public ministers, or where a consul or vice consul shall be a party.[60] This meant that foreign diplomats could choose between state or federal courts when the foreign diplomat itself chose to bring a suit under the law of nations. Congress made sure that a foreign diplomat could still file a case involving the law of nations in state court.

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apply the common law of the state "except where the constitution, treaties or statutes of the United States shall otherwise require or provide." Thus, for the most part, the Judiciary Act's drafters use the term "statute" when granting federal courts jurisdiction over questions of federal law that is not found in treaties or the constitution. Because the Judiciary Act largely reflects Congress's understanding of the requirements of Article III, the repeated use of the term "statute" instead of "laws of the United States" is a strong indication that the first Congress believed the "laws of the United States" in Article III and Article VI referred to federal statutes rather than to federal statutes and federal common law.

56. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 192 (1999) (citing authorities for mandating of jurisdiction under Article III and explaining that full judicial power theory has never been followed at any point in American history and "seems clearly untenable").

57. *See* David Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 209-10 (1995) (describing debate over Judiciary Act).

58. U.S. CONST, art III, §. 1 ("inferior courts as the Congress may, from time to time, ordain and establish").

59. *See* Currie, *supra* note 57, at 209.

60. *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81-1.

As many commentators have noted, Congress also provided jurisdiction to district and circuit courts for "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[61] Less attention has been paid, however, to the text of the original Alien Tort Statute, which provided for concurrent state court jurisdiction over such suits.[62] Again, the structure of the clause essentially allows the plaintiff alien to choose whether to sue in federal or state court, but it is nevertheless striking that the First Congress went out of its way to preserve state court forums for lawsuits that would be completely based upon the law of nations. If, for any reason, an alien brought a case in state court, that court would be responsible for interpreting and applying the law of nations in order to resolve the case. If such a suit went forward, it was possible that the Supreme Court would not be able to review the state court's final judgment because section 25 gives it appellate jurisdiction over state courts only on the ground that the state court's final judgment violates "the constitution, treaties or laws of the United States."[63] As a later court would hold, a question of common law like the law of nations does not fall within the meaning of the laws of the United States for purposes of appellate jurisdiction under section 25 of the Judiciary Act.[64]

Similar stories could be told about the First Congress's insistence on preserving a common law remedy in civil cases in the admiralty and maritime jurisdiction. Much of the law applied in admiralty cases was also drawn from the law of nations.[65] The "saving to the suitors" clause preserved a role for state courts in cases otherwise completely within the admiralty jurisdiction.[66] Again, nothing in Article III requires such an accommodation, but under the reading of Article III followed by the first Congress, nothing prohibited such an accommodation either. Congress plainly sought to preserve a role for state courts in cases involving the law of nations.

In sum, the First Congress exercised its political discretion in the process of creating the federal court system. While Article III seems to authorize exclusive federal jurisdiction in all cases involving diplomats, aliens, and admiralty, Congress insisted on preserving a role for state

61. *Id.* at § 9, 1 Stat. at 77.

62. *See* Casto, *supra* note 24, at 490.

63. Judiciary Act, § 25, 1 Stat. at 85-86.

64. *See* New York Life Ins. Co. v. Hendren, 92 U.S. 286 (1875).

65. *See* Weisburd, *State Courts, supra* note 4, at 30 & 30 nn. 184 & 189 (discussing admiralty law's relationship to the law of nations).

66. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 362-63 (1959) (discussing historical significance of saving to the suitors clause).

courts in these cases. Not only do these actions demonstrate Congress's sensitivity to state court interests, but it also indicates the First Congress did not believe the Constitution requires giving federal courts exclusive control over all cases involving or arising under the law of nations.[67]

This conclusion is hardly controversial. Commentators have long recognized that Congress is not required to grant inferior federal courts the full judicial power contemplated by Article III.[68] It would seem unnecessary even to make this argument were it not for the substantial amount of commentary arguing that the Constitution *requires* exclusive federal court control over cases involving the law of nations.[69]

It bears repeating: nothing in Article III prevents Congress from giving federal courts exclusive jurisdiction over the cases most likely to implicate law of nations concerns, yet the actions of the First Congress plainly indicate the First Congress's belief that such jurisdictional allocations are not constitutionally mandated and fall within Congress's political discretion. Moreover, it used this discretion to preserve a role for state courts even in cases where the Constitution had explicitly allocated jurisdiction to the federal courts.

D. The President and the Law of Nations

The understanding that Congress would dominate the allocation of jurisdiction for cases involving the law of nations is further supported by legal opinions issued by the President's chief legal advisor, the Attorney General. These opinions, usually issued in response to protests by foreign diplomats, reveal the way the first Attorneys General understood the place of the law of nations in the judicial system. First, the Attorneys General assumed that Congress could control how and whether the law of nations should be applied. Second, in the absence of congressional authorization, the Attorney General would advise parties to seek enforcement of the law of nations at common law. Depending on the particular Attorney General's view of the proper scope of federal court common law powers, such a suggestion might require the offended party to seek remedies for violations of the law of nations in state court.

In response to a dispute over the immunity afforded to a Dutch diplomat's domestic servant, Attorney General Randolph admitted that Congress could alter the application of the law of nations by a federal

67. *See* Currie, *supra* note 57, at 210 (observing that Judiciary Act "clearly reveals Congress's conviction that nothing in the Constitution required it to give federal trial courts jurisdiction over all the cases and controversies enumerated in Article III.").

68. *See* CHEMERINSKY, *supra* note 56, at 192,

69. *See, e.g.*, articles cited, *supra* note 22, arguing for nationalist view of the Founding.

court.[70] An officer of the New York state court had entered the Dutch minister's residence to arrest the minister's servant, apparently in violation of the law of nation's guarantee of diplomatic immunity for diplomats and their domestic servants. The Dutch minister protested to the U.S. federal government, requesting that the arresting officer be prosecuted for violating the law of nations.[71]

Randolph acknowledged that the law of nations was not adopted by either the Constitution or by federal statute, but that it was nevertheless "essentially a part of the law of the land."[72] He then notes that "a people may regulate it so as to be binding upon the departments of their own government" but that "with regard to foreigners, every change is at the peril of the nation which makes it."[73] Although the arrest of the diplomat's servant appears to have violated the law of nations,[74] Congress had by statute refused to extend diplomatic immunity to servants who did not fulfill certain registration requirements or who had contracted into debts prior to entering their diplomatic position.[75] Therefore, "Congress appear[s] to have excluded every resort to the law of nations" for the servant's arrest; otherwise, the arresting officer could be prosecuted for violations of the law of nations.[76]

Randolph's analysis is interesting because it reveals an important assumption: a sovereign, in this case "the people," may adjust the law of nations at their own discretion subject only to international sanctions. Most importantly, the opinion presumed that Congress could control the application of the law of nations even though Congress's interpretation may conflict or even violate the law of nations.[77]

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70. *See* Who Privileged from Arrest, 1 Op. Att'y Gen. 26 (1792) (Randolph).

71. This case apparently originated prior to the ratification of the Constitution. SEE JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 310-11 (Paul A. Freund ed., 1971); *see also* Casto, *supra* note 24, at 494.

72. Who Privileged from Arrest, *supra* note 70, at 27. Again, there is every reason to believe that the phrase "law of the land" here refers to the law of nations' inclusion in the general common law and not as part of the law of the United States.

73. *Id.*

74. In his work, Emerich de Vattel appears to require unequivocal immunity for an ambassador's servants, though it is possible that he allowed exceptions for servants who are not entirely dependent on the ambassador. "The persons in an ambassador's retinue partake of his inviolability; his independency extends to every individual in his household . . . [they] immediately depend on him alone, and are exempt from the jurisdiction of the country, into which they would not have come without such reservation in their favour." EMERICH DE VATTEL, THE LAW OF NATIONS 619-20 (Joseph Chitty ed. 1867).

75. Act of April 30, 1790, Ch. 9 §§ 25, 27, 1 Stat. 112, 117-18 (1790).

76. Who Privileged from Arrest, *supra* note 70, at 28.

77. Chief Justice Marshall's observation that the Court is "bound by the law of nations, which is a part of the law of the land" does not contradict this reading of Randolph's opinion. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

One of Randolph's successors as Attorney General, Charles Lee, also revealed his deference to Congress's judgment over the cases involving law of nations, while adding an interesting recommendation for an alternative remedy.[78] Although Lee addressed a slightly different issue in an opinion that responded to a diplomatic protest over a raid into Spanish Florida by private American citizens seeking runaway slaves, the opinion also demonstrated his assumption that Congress's judgment was determinative.[79] Lee readily conceded that the American slave owners had violated the law of nations by violating Spain's territorial integrity.[80] Congress, however, had not passed a law under its authority to punish "[o]ffences against the Law of Nations,"[81] so the Americans were "only liable to be prosecuted in our courts at *common law* for the misdemeanor."[82] He did not specify whether such criminal cases could be prosecuted in federal courts, thus neatly sidestepping the contentious issue of whether federal courts could prosecute common law crimes. What is important for my purposes, however, is that without congressional authorization, Lee immediately turned to the common law powers of courts without specifying that such a prosecution could only be brought in federal court. Lee assumed that violations of the law of nations could be prosecuted at common law in the absence of statutory authorization. Moreover, it is worth noting what he *did not say* in his legal opinion. He *did not say* that such a suit under the law of nations

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Marshall's analysis followed Randolph's assumption that the law of nations was subject to domestic modification, which is again consistent with its status as general common law. A fuller quotation refers to the request by one of the parties that the Court modify the law of nations rule in the way Congress would have wanted, to which Marshall replied:

> If it be the will of the government to apply [the rule] to Spain . . . the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is part of the law of the land.

13 U.S. (9 Cranch) at 434.

78. In response to complaints by the minister of Spain charging libelous publications by a private American citizen, he opined that such a libel could and should be prosecuted by the United States as part of its obligations under the law of nations. *See* Libelous Publications, 1 Op. Att'y Gen. 71 (1797). Lee does not refer specifically to the law of nations for authority, but his discussion of the duties of the United States to prosecute insults against foreign ministers could only have been drawn from the law of nations because he refers to section 25 of the Act of April 30, 1790, authorizing federal prosecutions for infractions against the law of nations. *See id.* at 74.

Interestingly, Lee then went on to analyze whether that prosecution could take place in the Supreme Court. Though "the constitution has given to the Supreme Court a *capacity* to hold criminal jurisdiction in all cases affecting ambassadors," he concluded that "no law exists calling into action this constitutional capacity." *Id.* at 73. Without such a law, the ambassador could not avail himself of Supreme Court jurisdiction. *See id.*

79. *See* Territorial Rights-Florida, *supra* note 51, at 69.

80. *See id.* at 68-69.

81. U.S. CONST. art. I, § 8, cl. 10.

82. Territorial Rights-Florida, *supra* note 51, at 69 (emphasis added).

must be brought in federal court, a statement one might expect if it was understood that law of nations cases always belonged in federal court.

Lee served in the Adams Administration and could not have been unaware of the heated debate between Federalists and Republicans over the power of federal courts to prosecute common law crimes.[83] Put briefly, Republicans strongly opposed the use of federal courts to prosecute common law crimes, claiming that Federalists intended to absorb all state court powers into the federal courts.[84] Thus, it is not surprising that when a Republican administration took over, the new Attorney General, Levi Lincoln, provided a more detailed resolution of the same problem addressed by Lee.[85]

Lincoln issued a response to the Spanish Ambassador's request that the federal government punish U.S. citizens "involv[ed in] a high-handed breach of the peace, an outrageous riot, and an aggravated violation of the law of nations."[86] Like Lee, Lincoln found himself without statutory authorization from Congress to prosecute the violation of the law of nations so he turned to the court's common law powers to apply the law of nations. Unlike Lee, however, Lincoln did not accept that federal courts could adjudicate common law crimes. Therefore, he referred the Spanish Ambassador to *state courts*, pointing out that "the law of nations is considered a part of the municipal law of each State. *Their courts* must be competent to animadvert on the above stated offences . . . . I doubt the competency of the federal courts, there being no statute recognizing the offence."[87]

While one commentator attributes Lincoln's opinion to political posturing and calls it "completely in contradiction" with previous Federalist opinions,[88] it is important to emphasize that this opinion did not really differ in substance from those of his Federalist predecessors. Randolph's opinion indicates that Congress can alter the application of the law of nations by statute and that the Executive is bound to follow

83. For a useful discussion of the historical context for debates over the federal common law crimes, *see* Stewart Jay, *The Origins of Federal Common Law*, 133 U. PA. L. REV. 1231, 1244-46 (1985) [hereinafter *Origins*].

84. *See* Jay, *Law of Nations*, *supra* note 26, at 842. Jay notes that these Republican claims were almost certainly overstated for political effect. *See also* Jay, *Origins*, *supra* note 83, at 1244-46. Still, there seems little reason to doubt the Republicans' sincere concerns about federal courts prosecuting common law crimes.

85. *See* Insult to the Spanish Minister, 5 Op. Att'y Gen. 691 (1804).

86. *Id.* at 692.

87. *Id.* (emphasis added).

88. Jay, *Law of Nations*, *supra* note 26, at n. 115 (noting that this opinion was made shortly after "heated debates in Congress over nonstatutory federal offenses . . . [but] completely in contradiction to earlier opinions by Federalist Attorneys General") (*cited in* Stephens, *supra* note 2, at n. 113).

Congress's explicit instructions even if its instructions require violations of the law of nations. Lee developed an alternative remedy for those diplomats faced with the problem of what to do when Congress makes no authorization. Lee concluded that in the absence of Congressional action, the Executive may prosecute suits under the law of nations at common law only. But if one believes, as the Republican Lincoln almost assuredly believed, that the federal courts should have no power to try common law prosecutions, it makes sense to refer frustrated foreigners to state courts: the remaining forum for adjudicating claims under the common law.

Admittedly, Lincoln's views appear to go beyond his Federalist predecessors by referring foreign diplomats to state courts, but it is worth noting that it was *Lincoln's* view that was eventually vindicated by the Supreme Court. First, the Supreme Court rejected the power of federal courts to prosecute common law crimes in *United States v. Hudson and Goodwin*.[89] Then, in *United States v. Coolidge,* the Court extended *Hudson's* holding to encompass federal court prosecutions under the law of nations.[90] While it is true that the Court was divided on the question of *Coolidge*,[91] it is important to note that neither *Hudson and Goodwin* nor *Coolidge* was ever repudiated.[92]

In sum, the Attorney General opinions reveal that the early presidential administrations deferred to Congress's judgment on the proper application of the law of nations and the allocation of jurisdiction over these types of cases. Moreover, in the absence of congressional action, violations of the law of nations could only be pursued at common law. Under one plausible view of federal court powers, these prosecutions could *only* be brought in state courts. This view was ultimately sustained by the Supreme Court. This analysis is consistent with the idea that Congress's political judgments would dominate the interpretation and allocation of cases involving the law of nations, and that sometimes,

89. 11 U.S. (7 Cranch) 32 (1812).

90. 14 U.S. (1 Wheat) 415, 416 (1816).

91. In *Coolidge*, Justice Story upheld the prosecution under the law of nations in Circuit Court, but the Attorney General refused to appear at the Supreme Court argument claiming that he had been informed that the majority of the Court had already decided to reverse Justice Story's Circuit Court decision and rule that *Hudson* controlled the case. *See* 14 U.S. at 415.

92. Some scholars have claimed that *Hudson and Goodwin* and *Coolidge* should be given little weight because of their highly politicized context. *See* Stephens, *supra* note 2, at n.105 (citing scholarship explaining *Hudson* as result of political factors). I believe that, at the very least, these cases provide the necessary intellectual framework to understand Lincoln's conclusion that law of nations suits at common law could not be brought in federal courts and that they show his conclusion was a plausible outcome in the Founding and post-Founding era.

Congress's failure to act left the application of the law of nations to the state courts.

E. The Courts

The 1790s were a turbulent period in the United States because of ongoing wars in Europe. The problems of dealing with the war, already recognized at the time of the ratification of the Constitution, spawned two lines of litigation involving the law of nations. The first line involved prosecutions related to the Neutrality Proclamation, which was issued by Washington shortly after full-scale war broke out in Europe. The second line involved the infractions against diplomats spurred by war-related passions that were the subject of so many Attorney General opinions. The attitude of federal courts toward the law of nations shows that they did not share the Attorney Generals' level of Congressional deference and reflects the substantial confusion over how much power federal courts can exercise in the absence of Congressional action.

1. Neutrality Cases

Almost immediately after taking office, President Washington issued the Neutrality Proclamation, declaring that the United States would remain neutral in the increasingly furious war between Revolutionary France and the rest of Europe. The Proclamation was not popular because of substantial public sympathy for France, the new nation's erstwhile ally, and because it banned American participation in the war. In particular, this limited the ability of American privateers to profit from seizing British ships on behalf of France.

Prosecutions under the Proclamation immediately raised hard constitutional questions for the newly established federal courts. The most relevant question for the discussion here is whether the President and the Courts, acting together, could prosecute and convict citizens for violating the terms of the Neutrality Proclamation without congressional authorization. Putting aside the President's ability to declare neutrality, the question for federal courts was reduced to whether a federal court had jurisdiction over a violation of the law of nations, as defined solely by the President's Neutrality Proclamation.

The first test came in the celebrated prosecution of Gideon Henfield, an American sailor who had acted as a privateer on behalf of the French.[93] Because the United States government sought to demonstrate to the anti-French nations that it was committed to prosecuting citizens

93. *See* Henfield's Case, 11 F. Cas. at 1099.

who took sides in the conflict, the grand jury and jury charges became publicly distributed, and probably were drafted for public consumption.

The legal challenge for the prosecutions is the same framework that the Attorney General opinions addressed: when Congress has not acted, where is the authority for a federal court prosecution? The Supreme Court justices who tried Henfield each offered a slightly different theory justifying the prosecution.

In a previous, similar grand jury charge, Chief Justice Jay expressed the broadest possible reading of federal jurisdiction over the law of nations. He categorized the law of nations, along with treaties, the Constitution and federal statutes, as one of the major types of the laws of the United States.[94] Although he did not articulate his precise textual theory, it is possible that Jay understood the law of nations to fall within the phrase "the laws of the United States" in Article III.[95] Under this reading, Jay could then rely on statutes authorizing punishments of crimes "within the cognizance of the courts of the United States."[96] Thus, Jay did not reach the question addressed by Lee and Lincoln – whether federal courts could prosecute a law of nations violation under its common law powers – because he did not see the law of nations as a "part" of the common law.

Even if this is a correct reading of Jay's views, it does not mean that the original understanding necessarily rejects the "law of nations as general common law" theory. After all, in the grand jury instructions of the actual Henfield prosecution, Judge Wilson justified Henfield's prosecution purely on the theory that the law of nations is part of the common law, and the common law is cognizable in federal courts.[97] Explaining that the common law is a "social system of jurisprudence" freely choosing from other sources of law to apply, he includes the law of nations in this latter group.[98] "For that law in its full extent is adopted by [the common law]. The infractions of that law form a part of her code of criminal jurisprudence."[99]

Both Jay and Wilson, however, appeared to have far fewer concerns about acting without congressional authorization than the Attorneys General. Still, the epilogue to this case limits the precedential value of their opinions. The jury refused to convict Henfield, perhaps because, as then Secretary of State Jefferson believed, the jury did not believe it

94. *See* 11 F. Cas. at 1120.
95. *See supra* text accompanying notes 42-48, discussing the implausibility of this view.
96. 11 F. Cas. at 1102.
97. *See id.* at 1107
98. *Id.*
99. *Id.*

proper to convict Henfield for violating a legal rule of which he claimed ignorance.[100] Embarrassed and fearing future judicial disasters involving the law of nations, President Washington immediately sought express Congressional authority to prosecute violations of the Neutrality Proclamation. His request was promptly granted, and Congress enacted the law pursuant to its Article I, section 8 powers, ending the debate over the legality of the Henfield prosecution.[101]

2. Diplomat Cases

Judicial opinions in cases involving diplomats reflect much less disagreement on the respective roles of Congress and the federal courts. In *Ex Parte Cabrera*, the federal circuit court for Pennsylvania received a petition for a writ of habeas corpus in favor of a Spanish diplomat arrested and imprisoned pursuant to a warrant issued by the Governor of Pennsylvania.[102] Justice Washington began by declaring "it . . . cannot be denied, but that he is under the protection of the law of nations; and is not amenable to the tribunals of this country, upon a civil or criminal charge."[103]

This determination, however, did not resolve the harder question of whether a federal court had jurisdiction "to discharge from confinement, any person, no matter what may be his character or privileges; committed by a warrant from the governor, or any judicial magistrate, of this state."[104] Conceding that under federal statute any suit against a qualified diplomat was null and void, the court still refused to issue the writ.[105] Justice Washington's analysis of the problem and his attitude toward the balance between state and federal courts in this sensitive law of nations case is revealing.

> Either . . . the federal circuit or the state court; might entertain jurisdiction of a suit, brought to redress the injury . . . . But, I apprehend, that *neither court can dictate to the other*, the conduct it shall pursue, or interfere in causes there depending, unless properly brought before it, under the provisions of law.[106]

100. *See* David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. Chi. L. Rev. 1, 15 n. 61 (1996) (citing letter from Jefferson); *see also* Henfield's Case, 11 F. Cas. at 1123 n. 7.

101. *See* Currie, *supra* note 100, at 15.

102. Ex Parte Cabrera, 4 F. Cas. 964 (No. 2,278) (C.C.D. Pa. 1805).

103. *Id.* at 965.

104. *Id.*

105. *See id.* at 964.

106. *Id.* at 965-66.

Justice Washington recognized that the lack of federal remedy in such a case seemed a strange result given the admitted violations of the law of nations. However, that was not a decision for the courts. Justice Washington explained: "whether it would have been wise in congress, to have vested in the national courts, the power of deciding, in some way or other, every national question, authorized by the constitution[] is another point."[107] The federal court thus found itself powerless to free a diplomat who is being held in violation of the law of nations.

A few years later, the same justice faced a similar question in a case involving the assault on another Spanish diplomat.[108] Here, the defendant, an American citizen, claimed that he did not know the victim was a diplomat and, therefore, that he did not knowingly violate the law of nations. Accepting that an unknowing assault on a diplomat does not violate the law of nations, the court nevertheless held that the statute – the same statute considered in *Ex parte Cabrera*[109] – criminalized all assaults on foreign diplomats regardless of whether such assaults could be said to violate the law of nations.[110]

Speculating on the importance of federal courts for dealing with questions of "peace and honour," the court guessed that it is "probable" that Congress would occupy as much jurisdiction permitted by the Constitution and leave "no part of the subject of the cognisance [sic] of state tribunals."[111] Though the court ended up proceeding with the case, this analysis supports my broader claim that federal courts still looked to Congress (or Congress's intentions) as the ultimate source for deciding how questions the law of nations will be handled by courts.

If the law of nations were part of a federal court's general powers to adjudicate matters of federal law, it seems odd that a federal court could not free the illegally-held Spanish diplomat in *Ex parte Cabrera*[112] and that the interpretation of a question involving the scope of the law of nations was subordinated to Congress's judgment. It is thus important to recognize that the court's actions in these two cases were inconsistent with a broad federal power to adjudicate any case involving the law of nations.

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107. *Id.* at 966.
108. *See* United States v. Liddle, 26 F. Cas. 936, 937 (No. 15,598) (C.C.D. Pa. 1808).
109. 4 F. Cas. at 964.
110. *See* 26 F. Cas. at 937-38.
111. *Id.* at 938.
112. 4 F. Cas. at 964.

F. Summary

This above discussion suggests that the Founders intended to solve the problem of state courts and the law of nations by giving Congress the authority to create a federal court system with *jurisdictional* competence over certain kinds of cases that implicate foreign relations. It was for Congress to decide, through its statutory incorporation of the law of nations and its manipulation of federal jurisdiction, how the law of nations would be used in the American legal system. When Congress did not act, either through its powers to erect jurisdictional barriers or through its powers to codify the law of nations, a case requiring the application of the law of nations would belong to the state courts.

To be sure, the Founding generation offered conflicting opinions about how the law of nations was to be used in the judicial system. At one extreme, John Jay seemed to believe that the law of nations was incorporated into the system through the Constitution's reference to laws of the United States. Jay's views on this point must be read, however, alongside indications that other members of the Founding generation, not to mention the first Congress and the first Attorneys General, agreed that the law of nations was a part of the general common law. The assumption that the law of nations is part of the general common law, subject to congressional revisions, meant that other members of the Founding generation assumed the law of nations would be a rule for decision in state as well as federal courts but controlled by neither.

Given the disagreements among the Founders, it may be impossible to authoritatively determine the "original understanding" of the place of CIL in the American legal system. The creation of two overlapping court systems was largely unprecedented and it should not surprise us if the Founders themselves did not fully understand the way in which their newfangled judicial system would operate in practice. At the very least, however, the historical sources discussed in this part create strong doubts about the broad claims, made on behalf of the nationalist view, that the Founders' intended to federalize all cases involving the law of nations. As I have argued, the statements of important Founders (like Hamilton), the actions of the first Congress, the legal opinions of the first Attorneys General, and the reasoning adopted by contemporary federal courts strongly suggest otherwise.

III. STATE COURTS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

This part surveys four[113] areas of CIL doctrine: diplomatic immunity in transit, the irregular abduction of overseas fugitives, foreign sovereign immunity and the restrictions on contacts between enemy aliens. Even though these doctrines were (and are) understood to be part of CIL, cases invoking these doctrines often ended up in state courts without the possibility of federal court review. This discussion of how state courts contributed to the development of these doctrines reveals a system alien to the nationalist vision; a regime where state courts often controlled the interpretation, application, and development of CIL.

This regime is significant for at least two reasons. First, the historical existence of a regime dominated by state court interpretations of CIL casts even more doubt on the historical foundations for the nationalist view. While I do not deny the attractiveness of the nationalist view as a matter of modern judicial policy, this part's historical discussion confirms the conclusions of Part I and reveals that there is significantly less historical support for the nationalist view than many scholars have claimed.

Second, the operation of a state-dominated CIL regime offers a model for how the general common law regime succeeded in producing relatively uniform or determinate doctrines of CIL. Though state courts interpretations of CIL doctrines were not subject to federal court review, the general common law CIL regime rarely created splits between different state systems or with the federal system. Instead, the first courts to consider CIL questions relied heavily on international law treatises in reaching their decisions and their interpretations were accorded great deference by other state courts. This resulted in relatively uniform ap-

113. By concentrating on these four doctrines, I do not in anyway imply that these are the only customary international law doctrines that were developed by state courts operating in the general common law regime. My goal by examining these doctrines is to describe a regime in action rather than attempt a comprehensive survey of all CIL doctrines in U.S. and state courts. Other prominent examples of CIL doctrines include property rules governing the transfer of sovereignty, the rights of consular officials to assert estate rights on behalf of resident aliens, and the limitations on an enemy alien's ability to sue. *See, e.g.*, Willard L. Boyd, *Consular Functions in Connection with Decedent's Estates*, 47 IOWA L. REV. 823 (1962) (reviewing law governing consular functions in the several states); Franck C. Sterck & Carl J. Schuck, *The Right of Resident Alien Enemies to Sue*, 30 GEO. L.J. 421, 423-24 n.18 (1942) (reviewing status of the law of war's limits on suits by aliens in the different states); Philip R. Trimble, *A Revisionist View of Customary International Law*, 3 UCLA L. REV. 665, 686 n.72 (1986) (discussing the number of state court cases involving the law of nations governing property rights after the transfer of sovereignty). Nothing in the state court treatment of these doctrines, however, seems to differ substantially with the analysis I provide in this part.

plications of the CIL doctrines that I will discuss. This is not to say that disagreements between courts did not exist. However, my account also shows that representatives of the President or Congress, and not federal court decisions, served as the unifying institution to guide judicial application of CIL.

A. Immunity for Ambassadors and Public Ministers in Transit

It is surprising to find that the development of CIL rules governing diplomats has occurred mainly in state courts. After all, the Founding generation specifically sought to federalize jurisdiction over "all Cases affecting Ambassadors, Public Ministers and Consuls"[114] by granting the Supreme Court original jurisdiction over such cases and granting Congress the authority to give the lower federal courts jurisdiction over these cases. To be sure, Congress immediately acted to give federal courts exclusive jurisdiction over lawsuits and prosecutions brought *against* ambassadors, public ministers,[115] and consuls.[116] But they left a few doors open and litigants pushed their way through.

For instance, the question of whether ambassadors and public ministers, serving in other countries, but traveling in the United States, held diplomatic immunity remained unresolved. The first Congress acted to nullify lawsuits brought against ambassadors and public ministers.[117] The statute specified that it would void process involving ambassadors and ministers "authorized and received as such by the President."[118] Ambassadors and public ministers traveling through the United States en route to other countries were not received and recognized by the President and did not appear to be covered by the statute's protections.[119]

The first reported case of a court wrestling with this apparent loophole arose in New York City. In *Holbrook, Nelson & Co. v. Henderson*,[120] a minister of the then-independent Republic of Texas, ac-

114. U.S. CONST. art. III, §. 2.

115. *See* Judiciary Act, *supra* note 60, at § 13(b).

116. *See id.* at § 9(c).

117. *See* Act of April 30, 1790, *supra* note 75, at § 25 (nullifying "any writ or process" in any federal or state court against an ambassador or public minister "authorized and received as such by the President").

118. *Id.*

119. Curiously, federal law appeared to grant the Supreme Court exclusive jurisdiction over all suits against ambassadors and ministers. The Supreme Court's jurisdiction was limited to suits brought "consistent with the law of nations," but this should not have deprived it of jurisdiction over suits where the law of nation's protections were unclear. *See* Judiciary Act of 1789, *supra* note 60, at § 13.

120. 4 Sandf. 619 (N.Y Sup. Ct. 1839).

credited by both France and England, was held under civil process in a New York court. The record showed that the minister, Henderson, was passing through New York while carrying a treaty from France back to Texas. Henderson claimed that he was immune from process under the federal statute, but the City of New York's Superior Court noted that the Act of 1790 was limited to diplomats serving in the United States.[121]

We might expect that having found that the federal statute did not protect Henderson, the court would have allowed the lawsuit to go forward. But Chief Justice Oakley looked for other sources of law, and like so many jurists of his time, he turned to a leading treatise on the law of nations:

> According to Vattel's opinion, then, the principles of international law on which the rights and privileges of resident ministers rest, apply to a case like the one now before us, so far as to secure to the minister . . . from all restraint of his personal liberty, whereby he may be prevented from discharging his duties to his own sovereign.[122]

What is particularly striking about Oakley's opinion to the modern reader is that he acted without any statutory authority from either Congress or the legislature of New York, and without any precedential guidance from the Supreme Court of the United States or any federal court. He relied entirely on his reading of international law treatises (which he admitted were not in agreement with each other)[123] in order to "create" a rule of CIL for the New York courts.

Although there do not appear to be any reported cases in other states at the time, the judgment could easily have been different in another court because American commentators of the period noted that the question of diplomatic immunity in transit was not settled.[124] In fact, the United States government appeared to take a position different from that of the New York courts in 1855, when the Attorney General issued an opinion in response to criminal charges against a diplomat from Nicaragua, French, who was supposedly on his way to present his credentials

121. *See* 4 Sanf. at 628.

122. *Id.* at 630.

123. Oakley noted that Grotius and Wicquefort, two respected but older authorities on international law, did not believe a minister passing through the territory of a third power had any privileges. *See id.* at 631.

124. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 244 (1866) (noting "[t]he opinion of public jurists appears to be somewhat divided upon the question" of diplomats in transit); THEODORE WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 97 at 245 (6th ed. 1884) (observing a division between treatise writers).

to the President.[125] The opinion explained that because the diplomat had not yet been accredited, "any diplomatic privilege accorded to him is of mere *transit*, and of *courtesy, not of right*. . . ."[126] Therefore, such a courtesy could be withdrawn at any time.[127]

Despite this apparently contrary authority from the Executive Branch (which may not have been widely reported), Oakley's opinion proved sufficiently durable so that a half-century later, the same New York court applied the rule in *Holbrook*[128] not only to quash service of process, but also to vacate a judgment issued against a Venezuelan envoy en route to France.[129] This application of the *Holbrook* rule is arguably more aggressive than either *Holbrook* or Vattel requires. The rationale for Vattel's rule is that a diplomat deserves only the liberty necessary to fulfill his duties, and is not entitled to *all* of the privileges of a resident ambassador. Yet, the *Wilson* court essentially held that a diplomat in transit can avoid all adverse judgments, even those judicial processes that do not necessarily prevent him from making his way through the country.[130]

Another thirty-five years would pass before a New York court returned to the question. In *Carbone v. Carbone*, the manner in which *Wilson* extended *Holbrook* was rejected.[131] In the case, a diplomat of Panama en route to his post in Italy sought to vacate an arrest order and service of summons in an action for divorce. Noting again that federal statutes left the diplomat without protection, the *Carbone* court held that a third country through which a diplomat was passing through in fulfilling his official duties "owes him only the duty not to prevent him from discharging his diplomatic function by restraint on his personal liberty."[132] Thus, while the arrest order was vacated, the court allowed the service of summons to stand on the theory that the diplomat could still fulfill his duties while being sued.[133]

All this time, it appears that no federal courts were involved in developing what can only be called an emerging rule of CIL. The rule was far

125. *See* Diplomatic Privilege, 8 Op. Att'y Gen. 473 (1855).

126. *Id.* (emphasis added).

127. The tone of the opinion is rather threatening. It asserts a right to prosecute French for any crimes, but ultimately instructs the local U.S. attorney to drop the charges on the condition that French depart immediately. *See id.* at 474.

128. 4 Sandf. at 619.

129. *See* Wilson v. Blanco, 4 N.Y.S. 714, 1889 N.Y. Misc. LEXIS 1681, **1 (affirming opinion of special term).

130. *See id.* at **3.

131. Carbone v. Carbone, 123 Misc. 656, 657, 206 N.Y.S. 40, 41-42 (1924).

132. *Id.* at 657, 206 N.Y.S. at 41-42.

133. *See id.* at 657, 206 N.Y.S. at 41-42.

from widely accepted overseas.[134] Commentators continued to disagree on the same issue that divided the *Wilson* and *Carbone* courts.[135] In the meantime, the State Department appeared to have adopted the *Holbrook* rule for all unaccredited diplomats. In a letter of March 1, 1906 to the Secretary of Commerce and Labor, the Secretary of State declared that "diplomatic agents, whether accredited or not to the United States, should be exempt from the operation of the municipal law. . ." by virtue of the law of nations.[136] However, this letter failed to describe in detail how much immunity the State Department was prepared to give to diplomats in transit.[137]

Finally, the diplomatic immunity-in-transit question was presented to a federal court in 1946.[138] The treatment of this issue in federal courts is worth discussing in detail because it reveals how the general common law regime came under pressure after the Supreme Court's landmark decision in *Erie v. Tompkins* that declared "there is no general federal common law."[139]

The case involved a suit against Jacques DeSieyes, the accredited French minister to Bolivia, in New York state court. The case was then removed to the U.S. District Court, on the basis of diversity of citizenship. It was there that DeSieyes raised his immunity defense. Like the New York courts, the district court found that no federal statute was controlling because DeSieyes had not been received by the President as a minister.[140]

Although it did not spell out the nature of its authority to declare CIL, the district court appeared to follow the pattern established during the general common law regime. It reviewed a number of different authori-

134. *See* 4 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 402 (1942) (noting 1930 communication indicating British government's uncertainty of whether U.S. Ambassador to Spain would receive immunity from a libel suit in Britain.); 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 398 (H. Lauterpacht ed., 8th ed. 1955) (describing Cuba's 1917 arrest of German diplomat in transit); 4 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW § 644 (1906) (describing problems of acquiring safe passage through Brazil for U.S. diplomats stationed in Paraguay).

135. *Compare* HARVARD LAW SCH., RESEARCH IN INTERNATIONAL LAW, DIPLOMATIC PRIVILEGES AND IMMUNITIES art. 15 (1932) (supporting innocent passage but implying no immunity from civil suits) *and* OPPENHEIM, *supra* note 134, § 385 (same) *with* Convention on Diplomatic Officers, Treaties and Conventions Signed at the Sixth International Conference of American States, February 20, 1928, arts. 19 & 23, Law and Treaty Series No. 34, at 12-13 (making no distinction between diplomats in residence and diplomas in transit.).

136. 4 HACKWORTH, *supra* note 134, §400 at 513.

137. *See id.*

138. Bergman v. DeSieyes, 71 F. Supp. 334 (S.D.N.Y. 1946).

139. 304 U.S. at 78.

140. *See* 71 F. Supp. at 335.

ties on the law of nations, including English common law, international law treatises, American State Department practice, and the trio of New York cases that had considered the issue. It observed that some of the authorities did not fully agree on the extent of diplomatic immunity available in transit. But none of these sources of CIL were considered to be more authoritative than the other. For instance, after reviewing these authorities, the court stated:

> The foregoing seem to be the principal sources to which one must look in his endeavor to ascertain the [l]aw of [n]ations, as it stands today, with reference to the question here involved. The *Magdalena* and *Holbrook* cases are especially important, for they contain very full and well reasoned discussions of the immunities and privileges of foreign ministers and the reasons for their existence.[141]

It is interesting for our purposes that the *Magdalena* case,[142] decided by a British court in 1859, and the *Holbrook* case[143] appeared to have *equal* but not greater persuasive authority. This attitude toward common law authority is characteristic of the general common law regime where each court system looks to others as persuasive but not binding authorities. Under *Erie*, the district court arguably should have been bound by the New York state court decision. However, the district court did not consider this possibility and instead followed the traditional general common law method.

Given the conflict among the authorities, the district court found it difficult to reach a particular outcome. It eventually concluded that a diplomat "is entitled to innocent passage through a third country" and "the *same immunity from the jurisdiction of the courts of the third country* that he would have if he were resident therein."[144] The court recognized that this conclusion went farther than the *Carbone* court, but it relied heavily on the "better considered *Holbrook* case," as well as recent non-binding declarations made during a conference of North and South American states to the same effect.[145] Characteristic of the general common law regime, the court considered both federal political branch statements and persuasive common law decisions to fashion an interpretation of CIL.

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141. *Id.* at 341.
142. Magdalena Steam Navigation Co. v. Martin, 121 Eng. Rep. 36 (1859).
143. 4 Sanf. at 619.
144. 71 F. Supp. at 341 (emphasis added).
145. 71 F. Supp at 341.

The plaintiff appealed and a panel of the U.S. Court of Appeals for the Second Circuit took up the case.[146] Written by Chief Judge Learned Hand, the panel decision recognized the possible collision between the *Erie* doctrine and the general common law regime.[147] It observed that because the federal courts sat in diversity jurisdiction in this case, New York courts' "interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves."[148]

Commentators espousing the nationalist view have criticized Judge Hand's holding in *Bergman*, arguing that it is an isolated decision of limited scope[149] and one of Judge Hand's few mistakes.[150] It is certainly true that Judge Hand dodged the harder issue of "[w]hether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question,"[151] but it is hard to reconcile his approach with the nationalist view. After all, why bother to follow New York law at all if, as many nationalist commentators assume today, CIL is part of federal common law?

Still, Judge Hand's decision hardly settles the question of how federal courts should treat the status of CIL. Finding the state of New York law to be uncertain and other international law authorities to be in conflict, he eventually affirmed the district court decision based more on his own practical reasoning of what New York courts would hold rather than on explicit adherence to New York law.[152]

For my purposes, it is important to emphasize that no less an authority than Judge Hand found state courts to be a useful (and indeed, in this case, potentially authoritative) source of CIL interpretation. Though questions involving diplomatic immunity necessarily implicate foreign affairs, he did not reach for what nationalist commentators would view as the obvious argument for rejecting the state court decisions; he did not argue that federal courts have any greater ability to interpret CIL than state courts due to their position as "national" courts. Instead, he

146. Bergman v. DeSieyes, 170 F.2d 360 (2d Cir. 1948).

147. *See id.* at 361.

148. *Id.*

149. *See* Stephens, *supra* note 2, at 440 n. 243. *See also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1317-21 (1996).

150. *See* Koh's discussion of Bergman, *supra* note 2, at n.46 (*citing* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 410 n.21 (2d ed. 1996)). Although Henkin's pre-eminence as an international law scholar is unquestioned, his analysis of Bergman is not really buttressed significantly by the fact that he once served as Judge Hand's law clerk.

151. 170 F.2d at 361.

152. He reasoned that diplomats in transit actually need more immunity from civil process because they are less likely to fulfill their diplomatic duties if obligated to respond to civil suit in a third country. *See id.* at 363.

limited his analysis to what "the courts of New York would today hold"[153] and relied on the same sources that are characteristic of the general common law regime, such as English common law, international law treatises, and state court decisions.

More significantly, it appears that the political branches afforded Hand's decision no greater weight than the New York decisions. In 1949, the State Department issued an opinion letter on this question that actually relied on the more limited New York rule in *Carbone* without mentioning the much more recent decision by the federal courts in *Bergman*.[154] Opining that a diplomat in transit deserves the right of innocent passage, the Legal Adviser flatly rejected equating the rights of diplomats in transit with the rights of diplomats in residence.[155] Instead, he relied on the more modest ruling in *Carbone* saying "[i]t is believed that the recognized principles of International Law support the conclusion reached by the court."[156]

Eventually, this view was codified as federal law when the United States entered into the Vienna Convention on Diplomatic Relations.[157] Therefore, the issue of how to treat this question of diplomatic immunity was not federalized until the political branches of the federal government acted.

This sketch of the diplomatic immunity in transit rule describes how a question of CIL was developed almost exclusively by state courts without definitive rulings by federal courts or guidance by the political branches. Indeed, the rule began in a state court decision that provided more diplomatic protection than Congress had required by statute and than the President's representatives were prepared to grant. In the general common law regime, the state courts were considered competent to opine on the proper scope of immunity for a diplomat in transit. Even after federal courts entered onto the scene, the federal appellate court's ruling limited itself to stating what it considered to be New York law. Any strong claims of historical support for the nationalist view, therefore, need to take better account of this historical narrative.[158]

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153. *Id.*

154. 7 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW § 10 (1970) (Letter from Legal Adviser, Fisher, to U.S. Attorney General McGrath, Sept. 27, 1949).

155. *See id.*

156. *Id.*

157. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 34, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.S.T.S. 95 (codified as amended at 22 U.S.C. §§ 251-59 (1994).

158. Some nationalist commentators have discussed, and rejected, *Bergman*. *See, e.g.*, Koh, *supra* note 2, at 1833 n. 46; Stephens, *supra* note 2, at 440 n. 243. Neither of these commentators, however, have adequately explained why the rule of diplomatic immunity in transit arose out of New York law in the first place.

The ability of state courts to develop relatively uniform and acceptable rules of CIL is noteworthy. Despite some disagreements between the different New York courts and New York's differences with the position of the political branches, the courts actually provided useful guidance for CIL development that other international law authorities could not. Therefore, it is not surprising that the executive branch eventually relied, in part, upon a New York court's interpretation of CIL to formulate the U.S. government's position internationally and followed New York when it federalized this point of law.

B. Irregular Abduction of Overseas Fugitives: The Ker *Doctrine*

If a defendant is kidnapped or otherwise abducted from a foreign country, the general rule in American courts authorizes courts to exercise criminal jurisdiction if the other jurisdictional requirements have been satisfied. Though not always recognized as such, this rule, often known today as *Ker-Frisbie,*[159] is a doctrine of CIL, as well as one of domestic law because courts considering an abducted defendant must consider whether that abduction violates CIL. If it does, a court must then consider whether CIL confers upon the defendant a judicially-enforced remedy. Defendants challenging their convictions argue that courts cannot assert jurisdiction over a defendant seized in violation of CIL.

Like the diplomatic immunity in transit rule, this doctrine actually originated in a state, rather than a federal, court decision. One of the earliest reported decisions on this subject, in fact, dates from the Supreme Court of Vermont in 1835.[160] I discuss its reasoning in some detail in order to demonstrate its effect on later decisions.

The case involved Brewster, a Canadian subject, who was charged with burglary and stealing leather within the jurisdiction of the State of Vermont. Brewster had fled to Canada shortly after the crime, but he was pursued, forcibly seized, and brought back to Vermont by private citizens of Vermont. Brewster appealed his conviction to the Supreme Court of Vermont, arguing that the manner of his abduction deprived his trial court of proper jurisdiction. The Vermont Supreme Court rejected this argument.

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159. The rule is often referred to as the Ker Frisbie rule because of two important Supreme Court decisions applying this rule. As this section will explain, however, neither Ker nor Frisbie actually originated the rule in American courts. *See* Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952).

160. State v. Brewster, 7 Vt. 118 (1835).

First, the Vermont Supreme Court refused to adopt Brewster's proposed rule of CIL, which confers an immunity from punishment based upon one's refuge in a foreign country.[161] If such immunity from punishment existed, the court reasoned, then a foreign country that voluntarily surrendered an individual sought by another country would also violate CIL.[162] Given the common nature of this practice, the court found no basis for adopting this rule of CIL.[163]

Next, the court pointed out that the alleged offense occurred within the boundaries of the State of Vermont and therefore Vermont courts had jurisdiction over the crime.[164] The court did recognize that had Brewster committed his crime in Canada, "the law of nations would have afforded a protection which this court would be bound to respect."[165]

Finally, the court admitted that Brewster's abduction may very well have constituted a violation of Canada's sovereignty, and therefore, constituted a violation of CIL.[166] But the court held that no *judicial* remedy for such a CIL violation exists because that is a "matter which concerns the political relations of the two countries, and in that aspect is a subject not within the constitutional powers of this court."[167] In other words, not every admitted violation of CIL is judicially enforceable, an important theme in understanding the development of this doctrine.

The holding in *Brewster* was independently reached by the superior court of Buffalo, New York in 1868.[168] In that case, a Buffalo law-enforcement officer, in cooperation with a Canadian officer but without any other official sanction by the Canadian authorities, forcibly dragged a fugitive from the Canadian side of a bridge to the American side. The New York court agreed that the act of forcibly removing the defendant could have violated the sovereignty of Canada. Like the *Brewster* court, however, the *Rowe* court found that the remedy for that possible violation of CIL was "an international one, and cannot arise unless her Majesty's government shall see fit to lay the matter before our government."[169]

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161. *See id.* at 120.
162. *See id.*
163. *See id.* at 121-22.
164. *See id.* at 121.
165. *Id.* at 122.
166. *See id.* at 121.
167. *Id.* at 121-22.
168. *See* 1 JOHN BASSETT MOORE, EXTRADITION AND INTER-STATE RENDITION § 201 (1891) (discussing and quoting from *People of New York v. Rowe*).
169. *Id.*

The Supreme Court of the City of New York followed this holding in 1873.[170] In this case, the New York court had to consider a habeas petition seeking to enforce a claimed violation of the U.S. extradition treaty with France. According to the court, an American fugitive who is extradited by the French authorities for a crime not authorized by the treaty essentially had been "wrongfully seized" and kidnapped.[171] Even though the court had the authority under its habeas powers to discharge the defendant, it cited *Rowe* as authority for affirming the court's criminal jurisdiction.[172] After all, even if the defendant had been kidnapped, his presence within the jurisdiction of the court made him the subject of any otherwise lawful prosecution. Without explicitly saying so, the court found that the extradition treaty did not encompass the type of burglary for which he was indicted.[173] The defendant's only possible claim arose under CIL.[174] Unfortunately for the defendant, the court held that this claim was also subject to the same rule adopted in *Brewster* and *Rowe*, and refused to discharge the defendants.[175]

In 1884, the Supreme Court of the United States finally considered the propriety of the rule announced in *Brewster*. The case involved the irregular abduction of defendant Ker from the Republic of Peru by a private bounty hunter. Ker was brought to Illinois for trial, where he was charged with committing larceny. Ker first sued for a writ of habeas corpus in federal court claiming his abduction deprived the Illinois court of jurisdiction, but he was denied relief.[176] Ker was eventually convicted in trial court and he appealed his conviction on the same irregular abduction theory to the Supreme Court of Illinois and the Supreme Court of the United States.[177]

The *Ker v. Illinois*[178] case is often cited for the proposition that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction."[179] But the *Ker* court did not actually adopt that rule as a matter of federal law. A careful reading of the *Ker* court's holding reveals that CIL was understood to operate simply as another part of the

170. *See id.* § 202 (discussing *In the Matter of Alfred E. LaGrave*).

171. *Id.*

172. *See id.*

173. This analysis of the extradition treaty was rejected in a later U.S. Supreme Court decision. *See* United States v. Rauscher, 119 U.S. 407 (1886).

174. *See* MOORE, *supra* note 168, at § 202.

175. *See id.*

176. Ex Parte Ker, 18 F. 167 (1883).

177. Ker v. Illinois, 119 U.S. 436 (1886).

178. *Id.*

179. Frisbie v. Collins, 342 U.S. 519, 522 (*citing* Ker v. Illinois, 119 U.S. at 444 (1886)).

general common law and was accorded no special status even when its interpretations by state courts seemed to implicate foreign relations.

Ker had raised three separate arguments in state court as to why his abduction required the reversal of his conviction. First, he argued that his abduction violated the federal constitution's guarantee of due process. This argument, raising a constitutional question, triggered the Supreme Court's appellate jurisdiction under section 25 of the Judiciary Act and the Court quickly dismissed the constitutional argument by pointing out that due process rights could only be asserted against procedures by which he was tried and convicted, and not against how he was brought within the jurisdiction of the court.[180]

Second, Ker argued that the extradition treaty with Peru gave him the right to be free from arrest by American authorities except through the procedures laid out in the extradition treaty. Because a treaty is also a federal question, the Court found it had appellate jurisdiction over this question as well.[181] It rejected this argument by pointing out that nothing in the treaty confers a private right of "asylum" upon individuals entering a foreign country.[182] After all, those countries could voluntarily surrender any foreigner found within their borders as an exercise of comity.[183]

The Court distinguished *Rauscher,*[184] handed down the same day, which permitted a defendant to assert extradition treaty rights to block judicial process. Unlike the defendant in *Rauscher*, the Court argued, Ker was not surrendered in accordance with a treaty and therefore could not claim the protection of rights guaranteed under the extradition treaty.[185] In other words, the surrender of an individual in accordance with an extradition treaty required a domestic court to comply with that treaty as a matter of self-executing federal law. But simple abduction did not trigger any treaty provisions.

Finally, the Court reached the question for which the decision would be remembered: to what degree could Ker seek judicial remedies for violations of CIL? Its discussion is worth quoting in detail:

> The question of how far his forcible seizure in another country, could be made available to resist trial in the state court for the offense now charged upon him, is one which we do not

180. *See* 119 U.S. at 439-440.
181. *See id.* at 441-442.
182. *Id.* at 442.
183. *See id.*
184. United States v. Rauscher, 119 U.S. 407 (1886).
185. *See* 119 U.S. at 443.

> feel called upon to decide; *for in that transaction we do not see that the constitution or laws or treaties of the United States guaranty him any protection.* There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense. . . .*However this may be, the decision of that question is as much within the province of the state court as a question of common law, or of the law of nations, of which that court is bound to take notice.*[186]

The Court went on to emphasize that, "[a]nd though we might or might not differ with the Illinois court on that subject, *it is one in which we have no right to review their decision.*"[187]

Thus, the *Ker* ruling did not actually endorse the trial of defendants abducted in violation of CIL. Rather, the *Ker* ruling recognized that the question of whether an individual could seek judicial remedies for violations of CIL by his abductors is a question falling within the interpretive authority of the state courts. To be sure, federal courts had tangentially wrestled with the question, but those cases, not surprisingly, all arose in the original admiralty jurisdiction of the federal courts.[188] When a case arises in the original jurisdiction of a state court, however, and even if it implicates questions of CIL and matters of foreign affairs, the result in *Ker* means that the Supreme Court of the United States cannot assert appellate jurisdiction because neither issue is a federal question arising under the treaties, constitution, or laws of the United States.

As odd as this kind of deference to state courts may seem, as a practical matter, the Supreme Court's unwillingness to federalize the rule governing illegal abductions did not cause a rash of inconsistent state interpretations. The Illinois Supreme Court in *Ker*, citing *Brewster*, adopted its reasoning to hold that any violation of CIL caused by the abduction created no judicially enforceable private rights.[189] Rather,

186. *Id.* at 444 (emphasis added).

187. *Id.* (emphasis added). Though other commentators have emphasized this point, the resistance to dealing with the actual holding of the *Ker* decision among nationalist commentators has been strong. No commentators have offered a persuasive explanation of how CIL could be a form of special "national" general common law when the *Ker* court specifically deferred this important CIL determination to the courts of Illinois.

188. *See, e.g.*, Richmond v. United States, 13 U.S. 102, 104 (1815) (refusing to annul admiralty action because ship in question was illegally seized in violation of foreign sovereign's territory).

189. *See* Ker v. Illinois, 110 Ill. 627 (1884) (*citing* State v. Brewster, 7 Vt. 118 (1835)).

dealing with such violations would be left to the executive branch should Peru file a diplomatic protest. The uniformity of this rule's acceptance can be seen in a survey of subsequent state court decisions addressing similar problems.[190] No state court failed to follow the *Ker state court* reading of CIL even though none of these courts were bound by the *Ker federal court* decision.

The idea that state courts could validly determine the proper remedy, or non-remedy, under CIL is consistent with the State Department's views during the general common law regime. On a number of occasions, the abduction of citizens from foreign territory, usually Canada or Mexico, drew angry diplomatic protests. Interestingly, if the officials involved were acting under directions from local or state authorities, the State Department would apologize on behalf of the United States, but it could not guarantee compliance with the complaining foreign government's demands. For instance, in 1850, the British minister in Washington sent an official diplomatic protest to the State Department over a Georgia sheriff's rash abduction of an American fugitive in British territory. He asked the U.S to "give orders for the release of the individual in question, or give me assurance that no punishment will be inflicted upon him" until further notice.[191] The State Department responded by forwarding the letter to the governor of Georgia and requesting that Georgia comply with Britain's request. Similar incidents occurred in New York and Texas and in each case the State Department's sole remedy was to request action by the governor of the state.[192]

This regime seems exceeding strange and ineffective to modern readers (not to mention grossly unfair). Following the rule laid down in *Brewster*, state courts in the general common law era refused to give judicial remedies to admitted violations of CIL involved in the kidnapping, saying that such remedies are left to the political branches.[193] Yet, the political branch the state courts refer to, the President, often had no independent authority to release the prisoners in order to remedy violations of CIL once a court has acquired jurisdiction. The President, therefore, could only apologize, perhaps pay compensation, and then promise to "request" remedies.[194] It would seem that the President should have

190. *See* People v. Garner, 57 Cal. 2d 135, 141 (1961). *See also* 28 A.L.R. Fed. 685 § 7 ("In all the circumstances of several cases, the courts have upheld the jurisdiction of a federal court to try a criminal defendant who alleged that had been brought with the court's territorial jurisdiction illegally because of his abduction from a foreign country.")

191. *See* MOORE, *supra* note 168, at § 198.

192. *See id.* at §§ 197, 199 (discussing cases of British subjects Winslow and Cahill).

193. *See* discussion in text accompanying nn. 171-186.

194. MOORE, *supra* note 168, at § 197. The State Department has long recognized the difficult position that the federal system created for its ability to offer diplomatic remedies for law of na-

authority to remedy violations of CIL committed by constituent states of the Union. But under the general common law regime, the President could not seek a federal court order to release the abducted foreign citizens because CIL was not considered federal law.

However strange such a regime might seem today, Congress does possess the power to provide remedies for violations of CIL. As the Court observed four years later in an extradition case involving abductions between states, Congress *could* provide the federal government, and the President, with such authority to remedy violations of CIL or disputes between the states triggered by irregular abduction.[195] But for whatever reason, Congress chose to do nothing.

> Whether Congress might not provide for the compulsory restoration to the State of parties wrongfully abducted from its territory upon application of the parties, or of the State, and whether such provision would not greatly tend to the public peace along the borders of the several States, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided.[196]

Without such statutory authorization, the court eventually held, the federal courts were powerless.[197]

In contrast to the other CIL doctrines discussed in this article, the political branches never fully codified the rule first announced in *Brewster*, although proposals to reverse this holding through treaty were considered.[198] To some extent, these issues were partially codified by individual extradition treaties. Still, as furor over the Supreme Court's

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tions, but it has often defended it with some relish against foreign critics. In a testy response to the British minister complaining about the comparatively slow American response to demands for a return of abducted subjects, Secretary of State Hamilton Fish lauded the British government's ability to promptly release abducted American citizens, but tartly observed that the British system allowed more political control of courts than was permitted in the American system. *See id.* ("The power so promptly and efficiently exercised by the British government is an evidence of the inherent power to existing in the political department of that government, when it sees fit to exercise it, over the person of the individual, and in control even of the judgments of the courts.")

195. *See Frisbie*, 342 U.S. at 523.

196. Mahon v. Justice, 127 U.S. 700, 705 (1888).

197. *See id.*

198. *See Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 442 (Supp. 1935) (discussing Article 16 that offers the following suggestion: "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures").

1992 decision[199] to uphold an abduction of a Mexican citizen by federal agents demonstrates, the uncodified *Ker-Frisbie* rule is alive and well today.

Indeed, the rule authorizing trials despite admitted illegalities in bringing the defendant to trial has never been fully rejected as a matter of CIL by other nations. In some cases, it was adopted by courts outside of the United States and Britain. As the State Department's official reporter of international law practice noted:

> As a general matter, at least in the absence of objection on the part of the country from which the fugitive was removed, the courts have ruled that the manner in which the accused came or was brought within the jurisdiction of the court is immaterial insofar as the court's jurisdiction to try and punish him is concerned.[200]

Obviously, American courts follow this rule. But interestingly, the reporter also cites the Israeli court's decision to try, convict (and execute) Adolf Eichmann, a Nazi war criminal illegally abducted from Argentina.[201] Thus, it can be said that, in a small way, one of the most important international human rights trials of the century embraced the rule first laid down in this country by the Supreme Court of Vermont.

In any case, it is sufficient to observe that the general common law regime followed a similar pattern in developing a rule for irregular abductions of overseas fugitives as it did in the case of diplomats in transit. A state court, in this case Vermont, announced a doctrine of CIL. After a period of state court development, the Supreme Court specifically disclaims its ability to review the state of Illinois' interpretation of CIL. At the same time, the Supreme Court adopts the rule for cases arising independently under federal court jurisdiction. The political branches are understood to be responsible for providing remedies for these violations of CIL, and they can decide whether or not to create the statutory mechanism to provide remedies for such irregular abductions. In this case, they chose not to completely federalize the irregular abduction regime.

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199. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

200. 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1108 (1963).

201. *See id.* at 1111 (discussing Attorney-General of the Government of Israel v. Adolf, son of Karl Adolf Eichmann, District Court of Jerusalem, Criminal Case No. 40/61, Judgment, Dec. 11, 1961 (unofficial English translation), The American Embassy at Tel-Aviv to the Department of State, despatch No. 444, Feb. 13, 1962, encl. MS. Department of State, file 662.0026/2-1362).

C. *Foreign Sovereign Immunity*

The doctrine of foreign sovereign immunity is based on the absolute equality of sovereign states in the eyes of traditional international law. While the exact scope of foreign sovereign immunity has been the subject of much dispute, modern commentators have recognized that at least some of the immunities granted to foreign sovereigns are requirements of CIL.[202] Moreover, the Supreme Court has recognized that sovereign immunity is a question of general, and not federal law.[203]

Unlike the other two CIL doctrines I have reviewed thus far, foreign sovereign immunity found its first judicial expression in the federal court system. In *Schooner Exchange v. McFaddon*,[204] Chief Justice Marshall announced the doctrine in a libel suit in admiralty against a French naval vessel. As I will explain, Marshall's broadly worded opinion provided little, if any, guidance to three important strands of the foreign sovereign immunity doctrine: (1) the immunity granted to a foreign sovereign's property and corporations; (2) the procedures for recognizing sovereign consent to domestic jurisdiction; and (3) the effect of a foreign sovereign's non-recognition. While federal courts played a more important role in foreign sovereign immunity doctrinal development than in the other two CIL doctrines discussed in this part, state courts nevertheless played a crucial role in formulating these three strands of doctrine, and, in some cases state courts explicitly departed from the interpretations developed by federal courts. The "split" between state and federal courts confirms the status of CIL as "general" rather than federal common law because the ability of federal courts to review state court determinations of federal law is undisputed. It raises questions, however, about the ability of this regime to maintain a uniform approach for CIL.

As this section will explain, the specter of inconsistent state and federal court interpretations of CIL did not occur because of aggressive and frequent interventions by the executive branch. Thus, the evolution of foreign sovereign immunity doctrine in state and federal courts is another example of the general common law regime in action. It is also an example of the willingness of both federal and state courts to defer to

202. *See* 2 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW §169 (1942) (explaining that "[w]hile it is sometimes stated that [exemptions for sovereigns] are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now be said to be based upon generally accepted custom and usage, i.e. international law").

203. Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

204. *Id.*

the executive branch's suggestions on the application of a doctrine of CIL.

1. Marshall and Foreign Sovereign Immunity

Because Marshall's opinion in *Schooner Exchange* lays the foundation for later state and federal court development of the sovereign immunity doctrine, I will review Marshall's reasoning in some detail. While admitting that he was "exploring an unbeaten path, with few, if any, aids from precedents or written law," Marshall did not hesitate to state his principles of law broadly.[205] He began by stating the basic principle of traditional CIL. "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[206] In a "world of distinct sovereignties, possessing equal rights and equal independence," therefore, any exceptions must arise from the consent of the sovereign itself.[207]

A potentially serious conflict arises, however, if one sovereign enters into the territory of another. The receiving sovereign has absolute sovereignty, but the visiting sovereign cannot concede its own absolute sovereignty. To preserve the dignity of both sovereigns, international law will assume that the visiting sovereign "can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."[208]

The hard question, however, is figuring out how to apply this broad principle to specific cases. In particular, in what forms does a sovereign receive such immunity? Marshall noted that the principle of foreign sovereign immunity was already understood to extend to the person of the sovereign, that sovereign's diplomatic representatives, and that sovereign's military personnel.[209] But none of these cases explicitly controlled the question Marshall faced.

The key to understanding the accepted sovereign immunities, Marshall reasoned, is the public purpose served by the sovereign instrumentality.[210] No sovereign would send a diplomatic representative to speak on his own behalf while at the same time subjecting that repre-

205. *Id.* at 136.
206. *Id.*
207. *Id.*
208. *Id.* at 137.
209. *See id.* at 116.
210. *See id.* at 142-46.

sentative to local jurisdiction. Similarly, a sovereign whose naval ships have been forced into a friendly foreign port by poor weather could not have intended to subject his military forces to local jurisdiction.[211] "Such interference cannot take place without affecting his power and dignity."[212] Therefore, Marshall stated, it seems a principle of "public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[213]

Three interesting features of Marshall's opinion are particularly noteworthy. First, the case arose in federal court, not because it involved resolution of questions of CIL, but because it was an admiralty action. As this discussion will show, many, if not most, of the federal cases in the area of foreign sovereign immunity arose in the federal courts' admiralty jurisdiction, while most non-admiralty sovereign immunity cases were handled in state courts. This state of affairs is consistent with my account of the Founders' judicial framework, where courts acquired jurisdiction over matters involving CIL based on particularized grants of jurisdiction rather than federal question jurisdiction.

Second, Marshall refused to resolve the question of whether a foreign sovereign's private property also received immunity from local jurisdiction. He did note that the author of one influential treatise believed that the private property of a foreign sovereign lacked special immunity and that a foreign sovereign himself could be made a party defendant in such cases.[214] But Marshall did not express an opinion on this question. His opinion does emphasize, however, that a sovereign's military forces are much more intimately related to a sovereign's public character than to a sovereign's private property, thus implying that foreign sovereign immunity was not absolute. As we shall see, subsequent courts would struggle to resolve this intimation that sovereign immunity may or may not apply depending on the type of sovereign activity involved.

Third, Marshall emphasized that a local sovereign may in fact exercise local jurisdiction over another sovereign by explicitly stating its refusal to waive its absolute sovereignty within its territorial jurisdiction. In other words, Congress and the President may decide to exercise jurisdiction over the visiting sovereign, but that decision would not be made by the courts. In a statement foreshadowing the *Charming Betsy*

211. *See id.*
212. *Id.* at 144.
213. *Id.* at 145-46.
214. *See id.* at 144-45.

doctrine,[215] Marshall stated that "until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise."[216] This statement implies that Marshall assumed that the United States' political branches held the power to violate CIL, even though he had just articulated and applied these rules in his role as Chief Justice.

Marshall's opinion announced the broad principles of foreign sovereign immunity, but many questions remained unanswered. The next two subsections will explain how state courts participated in the important process of answering these questions.

2. *Restrictive Theory of Foreign Sovereign Immunity*

The question of whether all of a sovereign's activities, including commercial and other arguably non-public activities, also received immunity was confronted by the Supreme Court of New York in 1857.[217] The case involved a suit to recover against a private company that had been assigned rights by the government of Nicaragua. Because Nicaragua was involved in the dispute, the plaintiffs joined the State of Nicaragua as a co-defendant. Nicaragua demurred to the complaint pointing out that, as a sovereign state, it could not be sued.[218]

Though the precise relationship of Nicaragua to the plaintiffs is not clear from the opinion, it is more than likely that it involved some kind of commercial dispute. The court did not, however, focus on the significance of the nature of Nicaragua's actions. Rather, it broadly proclaimed: "Undoubtedly, a sovereign . . . cannot be sued in the courts of another state or nation, for the purpose of *enforcing* any remedy against them. In short, they are not subject to the coercive power of any judicial tribunal, except where they may have expressly consented . . . ."[219]

After stating this broad principle, the court then refused to dismiss Nicaragua from the lawsuit because the court did not view being "joined" in a lawsuit to be "necessarily derogatory to the character or

215. The Charming Betsy doctrine instructs courts to construe domestic law with the presumption that it does not violate customary international law. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804). For a powerful argument seeking to limit the scope of this canon, *see* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

216. 11 U.S. at 146.

217. *See* Manning v. Nicaragua & Accessory Transit Co., 14 How. Pr. 517 (N.Y. 1857).

218. *See id.*

219. *Id.* at 517-18.

independence of a state . . . ."[220] Indeed, the court viewed the joinder as an invitation to the state to make an appearance at which point it could decide whether it wanted to withdraw. It found that a dismissal for want of jurisdiction was premature.[221] In other words, the *Manning* court conceded sovereign immunity, and maintained its jurisdiction over the defendant sovereign nonetheless.

This curious decision was cited but not followed in *Hassard v. Mexico*,[222] another case arising out of the Supreme Court of New York. The case involved Mexico's alleged default on its bonds. The plaintiff sought an attachment against the property of the Mexican government in New York state. Citing both the *Schooner Exchange* and *Manning*, the court vacated the attachment stating that "[i]t is an axiom of international law, of long-established and general recognition, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission."[223] This case does not directly confront the question of whether Mexico's bond issues are public or private acts. However, a United States attorney appeared as amicus curiae to remind the court that it had no jurisdiction.[224] The significance of the executive's intervention is uncertain, but the role of the President in cases involving foreign sovereigns would become an increasingly important theme of these cases.

Although both New York decisions involved sovereigns acting in arguably private capacities, the significance of *how* the sovereign activities were being characterized was not directly analyzed. State courts in Massachusetts[225] and Texas[226] first considered this question in cases involving suits by American investors against foreign national railway systems. In both cases, the crucial decision turned on whether the state-owned corporation could be fairly characterized as the sovereign itself. Both the Massachusetts and Texas state courts found that, because the railways were completely controlled by the respective foreign governments, Canada and Mexico, any suit brought against them was essentially a suit against that sovereign.[227] Having reached this point, neither court had much trouble finding that sovereign immunity existed.[228] The efforts by both courts to analyze the role of the government in the cor-

220. *Id.* at 518.
221. *See id.* at 519.
222. 61 N.Y. 939 (1899), *aff'd* 61 N.Y. 940 (per curiam).
223. *Id.* at 939.
224. *See id.*
225. Mason v. Intercolonial Ry. of Canada, 83 N.E. 876 (Mass. 1908).
226. Bradford v. Director General of R.R.s of Mexico, 278 S.W. 251 (Tex. Civ. App. 1925).
227. *See* 83 N.E. at 876; Bradford, 278 S.W. at 251.
228. *See* Mason, 83 N.E. at 876, Bradford, 278 S.W. at 251.

poration and the corporation's broad public purposes, however, is significant. This analysis implies that a state-owned corporation lacking such characteristics might not enjoy such immunity. Significantly, no representative of the executive branch intervened in either suit.

A New Jersey court apparently was the first to chip away at absolute sovereign immunity.[229] A German national sued to recover stock seized by the British government at the outset of World War I. The British government raised a sovereign immunity defense, and the court conceded that the British corporation had acted as an agent of the British government.[230] However, the court refused to provide such immunity where the government's agent was alleged to have exceeded his own government's authority. "An instrumentality of government, whether corporate or not, although created for purposes of the very greatest importance, does not cease to be personally answerable for acts done under color of the authority conferred upon it, but, in fact, in excess of that authority and without legal justification."[231]

In other words, even though the foreign sovereign itself was now seeking to raise a sovereign immunity defense, the New Jersey court would decide for itself whether the agent's acts were truly within the scope of the British government's legal authority. If the acts fell outside this scope, then the agent's act was not for a public purpose, and thus no immunity was required. Like the *Manning* court, the *Pilger* court conceded that if the British agent proved at trial that he was indeed acting within the scope of his government's authority, then the sovereign immunity bar might yet be raised.[232]

The key issue in these decisions was not whether a sovereign was acting in some private capacity undeserving of sovereign immunity. The clear implication from the decisions stretching back to *Schooner Exchange* was that immunity was not available for that purpose. The difficult question facing the state courts, then, was *which institution*—the foreign sovereign, the President, or the courts themselves—should determine whether a particular act, or a particular corporation, could receive immunity. The *Manning* and *Pilger* courts therefore can be understood as supporting a *court's* right to make that complicated determination, even over the explicit objections of the foreign sovereign. The *Mason* and *Bradford* decisions do not contradict this approach; even though the sovereigns in question appeared in those courts

229. *See* Pilger v. United States Steel Corp., 130 A. 523 (N.J. 1925).
230. *See id.*
231. *Id.* at 524.
232. *See id.*

suggesting immunity, the courts themselves decided whether the sovereign's purpose for the corporation was of a sufficiently public nature. The *Hassard* court resolved this problem in a different manner by deferring to the executive branch's judgment as to whether the foreign sovereign's actions deserved immunity.

3. Mexico Default Cases

These different methods for determining the propriety of a sovereign's immunity came together in a series of cases in New York courts arising out of yet another Mexican government default. After a 1922 default involving $500 million in bonds, Mexico and a committee of banks agreed to a repayment plan whereby Mexico would transfer payments to the committee and the committee would distribute the funds to the bondholders. Not surprisingly, the complex plan spawned equally complex litigation in New York courts. The interaction between the state courts and the federal government in these cases illustrates the increasing importance of the executive branch in the general common law regime.

The first notable suit was brought on behalf of bondholders against the committee in 1931, and the Mexican government was joined as a co-defendant.[233] Some, but not all, of the agreed payments had been transferred to the committee and there was substantial disagreement about how and when these funds should be distributed. As a provisional matter, the plaintiffs asked the New York court to place the committee's assets into temporary receivership.[234]

Upon being served with a summons, the Mexican Ambassador appealed to the State Department for relief. As it did in response to protests over irregular abductions, the State Department did not seek a federal court order to block the state court action and it did not, at least initially, appear before the state court. Instead, it sent a letter to the Governor of New York informing him that Mexico was entitled to immunity from New York courts and "request[ed]" that the Governor take appropriate action to dismiss the suit.[235]

The Governor, through his own Attorney General, respectfully disagreed with the State Department's views on the scope of sovereign immunity. Conceding that Mexico was immune from jurisdiction, the Governor nevertheless argued that the committee's property could be validly adjudicated by New York courts in ways that would affect

233. *See* Gallopin v. Winsor, 251 N.Y. 448 (1931).
234. *See* discussion in 2 HACKWORTH, *supra* note 202, § 169 at 393-94.
235. *Id.* at 394-95.

Mexico's interest. New York, therefore, took no action and the New York Supreme Court placed the committee's assets in temporary receivership.[236]

On appeal, the State Department switched tactics and followed the strategy it pursued in *Hassard*. It dispatched the U.S. Attorney for New York to appear before the Appellate Division to explain Mexico's view that the committee's assets were the property of the Mexican government and therefore immune from seizure.[237] This direct approach seemed to do the trick. The Appellate Division held that Mexico was a "necessary party in interest" in the committee's assets and the court therefore had no jurisdiction over the committee's assets.[238]

Unfortunately for Mexico, the litigation over its default dragged on throughout the 1930s. The committee itself brought suit seeking a voluntary accounting of its assets in order to prepare for distribution to bondholders. This time, Mexico took matters into its own hands and made a special appearance to protest the court's jurisdiction. It successfully persuaded the lower court and the appellate division[239] to dismiss the committee's action, based in large part on the authority of *Gallopin*. On appeal, however, the Court of Appeals reversed.[240]

Once again conceding that Mexico was entitled to immunity as a foreign sovereignty for cases in which it was a necessary party in interest, the Court of Appeals observed that "[t]he problem is, primarily, whether the Mexican government is a necessary party, because of its claim that it owns the fund . . . ."[241] Indeed, the issue turned on "whether the courts must accept the assertion of the foreign State though disputed by the appellant and the other parties to the action."[242] In other words, the Court of Appeals was finally reaching the problem first hinted at in *Manning* and directly confronted in *Pilger*: how should a court determine the propriety of a sovereign's claim of immunity? After surveying recent Supreme Court authority,[243] the Court of Appeals decided that

236. *See id.*

237. *See id.*

238. Gallopin v. Lamont, 251 N.Y. 448, 449 (1931).

239. *See* Lamont v. Travelers Ins. Co., 5 N.Y.S. 2d 295 (App. Div. 1938); *rev'd,* Lamont v. Travelers Ins. Col, 24 N.E. 2d 81 (N.Y. 1939).

240. *See* Lamont v. Travelers Ins. Co., 24 N.E. 2d 81 (N.Y. 1939).

241. *Id.* at 83.

242. *Id.* at 84.

243. *See id.* at 85. The Court of Appeals discussed the Supreme Court's decision a year earlier in Compania Espanola de Navagacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938) which held that courts can inquire into the propriety of a foreign sovereign's suggestion of immunity. While it certainly relied on The Navemar decision, there is no indication in the opinion that the Court of Appeals felt "bound" in any legal sense by the Supreme Court's decision.

the court itself could determine the validity of the foreign sovereign's immunity claim.[244]

The Court of Appeals did recognize an alternative method for determining the validity of a sovereign's claim of immunity: the Mexican Government could have sought the intervention of the federal executive branch. If the executive branch determined that sovereign immunity was proper, the Court of Appeals would be bound to obey.[245] But in this matter, the United States attorney representing the executive branch presented Mexico's position while explicitly disclaiming any endorsement of Mexico's sovereign immunity claim. This disclaimer was sufficient for the Court of Appeals to decide that the "court remains free to give to the claim of immunity 'such considerations as the Court may deem necessary and proper.'"[246]

The Court of Appeals indeed borrowed heavily from the Supreme Court of the United States' opinion in *The Navemar* to resolve the case, but at no time did it indicate that it felt bound by that Court's decision. In fact, as a practical matter, the *Traveler's Insurance* case was far more important, in both monetary and foreign policy terms, than the simple admiralty action adjudicated in *The Navemar*. The *Traveler's Insurance* decision was not (and could not have been) appealed to the federal courts, however, and it is worth emphasizing that the Court of Appeals was given the last word on this highly sensitive matter concerning foreign relations and CIL.

4. Waiver

While wrestling with the difficulty of developing a restrictive theory of foreign sovereign immunity, state and federal courts liberally borrowed from each other in fashioning applications of uncertain doctrine. As I have argued, this lack of disagreement is characteristic of a regime where courts seriously considered the persuasive force of decisions that did not legally bind them. However, no system is perfect and this section focuses on the first significant split between federal and state courts in the interpretation of a CIL doctrine. The split arose over the manner

244. *See Traveler's Ins.*, 24 N.E. 2d at 86. The court stated:

> The foreign government does not become a necessary party to the action, unless the issues raised in the action by the *pleadings of the parties* in the action cannot be decided without the presence of the foreign government. No issue is raised merely by the suggestion of a government which refuses to intervene and to present proof to sustain its allegations.

Id. (Emphasis added).

245. *See id.*

246. *Id.*

in which a sovereign will be deemed to have waived its rights to immunity and consented to local court jurisdiction. The different interpretations adopted by federal and state courts confirm that sovereign immunity was considered a part of the general law independently applied by each system of courts. But the disagreements also exposed a troubling breakdown in the regime's ability to maintain uniformity.

This subsection will focus on numerous cases, in state and federal court, surrounding an admiralty and common law action involving a single Portuguese shipping company. Eventually, the courts of New York issued three decisions and the federal courts issued a combined six opinions on issues raised in the sprawling litigation.

The first major pronouncement arose in a New York state court.[247] The defendant raised a series of affirmative defenses, all of which were overruled by the lower court.[248] Among them was a claim that the defendant corporation was a department of the government of Portugal. As such, the defendant argued that it was entitled to sovereign immunity from the lawsuit. The plaintiffs responded that because the defendant shipping company had appeared in court and because it had filed an answer to the merits of the plaintiffs' complaint, the defendant sovereign had consented to the jurisdiction of the court.[249] The Appellate Division disagreed, however, and held that it was proper for a foreign sovereignty to raise an immunity claim as an affirmative defense, even though it had answered other charges on the merits.[250]

Twelve days later, the United States Court of Appeals for the Second Circuit issued its opinion on the admiralty side of the case where the defendant had raised the same sovereign immunity defense and the plaintiffs had raised the same waiver objection.[251] This time, however, the plaintiffs won, and the Second Circuit refused to allow the immunity defense to go forward, for two reasons. First, it held that the defendant, by seeking an affidavit from the Portuguese vice-consul, did not adequately establish its sovereign status for the purposes of the appeal. Second, and more importantly, the Second Circuit claimed that a line of cases "have now clearly held that the immunity of the sovereign, being susceptible of waiver, is lost when the sovereign enters a litigation with a general appearance."[252]

247. De Simone v. Transportes Maritimos De Estado, 191 N.Y.S. 864 (App. Div. 1922).
248. *See id.* at 865.
249. *See id.* at 866.
250. *See id.* at 867.
251. The Sao Vicente, 281 F. 111 (2d Cir. 1922)
252. *Id.* at 114.

The Second Circuit's ruling prompted the plaintiffs to seek reargument in state court. Less than a month later, the Appellate Division issued another opinion which acknowledged the Second Circuit's contrary holding, but the Appellate Division refused to alter its own ruling.[253] It observed that the Second Circuit's authorities had been considering the domestic sovereign immunity of the states of the Union. Arguing that those same states did not posses identical kinds of sovereign immunities as foreign states, the Appellate Division looked instead to English common law decisions for authority. In a move that would seem strange to a nationalist view, the court then cited an English court decision in order to reject the federal Second Circuit interpretation.[254]

Curiously, the New York court relied on the binding authority of CIL and the importance of sovereign immunity in the conduct of foreign relations in order to reject the federal court's interpretation. Even if the defendant had waived his immunity defenses as a matter of state law, "by the law of nations an adjudication binding the sovereign to pay the judgment could not be made . . . To hold otherwise would allow the courts of this State to endanger the peaceful relations between the United States and a friendly sovereignty . . . ."[255]

Thus, the Second Circuit and New York Appellate Division openly disagreed, in a case involving the exact same set of facts, on the question of how to construe a waiver of sovereign immunity. Consistent with the assumptions of the general common law regime, neither court could impose its reading of the waiver rule on the other even though both had identified the principle of sovereign immunity as a doctrine of CIL. The general common law regime resulted in a split between the federal and state courts. Although the possibility of such a split has been used by nationalist commentators to support their position,[256] these commentators probably could not have predicted that the New York court would adopt a rule more sensitive to foreign relations in the face of directly contradicting federal court authority.

In subsequent cases, the courts took note of this disagreement and most eventually sided with the federal court's views.[257] In 1931, for instance, a California court considered the issue as a matter of first impression and reviewed a broad cross-section of authorities including in-

253. De Simone v. Transportes Maritimos de Estado, 192 N.Y.S. 815 (App. Div. 1922) (De Simone II).

254. *See id.* at 818-19.

255. *Id.* at 820-21.

256. *See* Koh, *supra* note 2, at 1828, 1829.

257. *See, e.g.*, The Sao Vicente, 295 F. 829 (3d Cir. 1924); Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195 (2d Cir. 1929).

ternational law commentators, English courts, as well as the exchange between the New York and federal courts in *De Simone* before siding with the Second Circuit's view.[258] But the very fact that the California court felt a need to weigh the New York against the federal rule confirms the continuing existence of the general common law regime for CIL, even in the 1930s.

5. *Effect of Recognition*

Another split between state and federal courts, less dramatic, but of no less significance, occurred in the cases concerning the effect of non-recognition on a sovereign's claims of immunity. Like the differences in the waiver rules, the split here occurred between New York courts and federal courts sitting in admiralty. The Supreme Court of the United States explicitly refused to review the New York interpretation by further confirming that New York courts have an independent right to interpret the law of foreign sovereign immunity.

The first major non-recognition case arose out of litigation spawned by the Russian Revolution of 1919.[259] The plaintiff sued the new Soviet government in New York courts seeking compensation for the confiscation of his property in Russia. The lower courts permitted this action to go forward on the theory that the Soviet government had no immunity in New York courts until it was formally recognized by the President.[260]

The Court of Appeals reversed and rejected any relation between the concept of recognition and sovereign immunity.[261] The Court emphasized that nation-states exist or do not exist irrespective of other nation's decision to grant them recognition. Sovereign immunity is not merely a matter of comity, the Court ruled. Rather, it is a matter of that sovereign's legal right. "Without his consent, he is not subject" to our laws and not subject to a lawsuit in local courts.[262]

Thus, "whether recognized or not, the evil of such an attempt would be the same."[263] Moreover, "in either case to do so would vex the peace of nations," and tie the State Department's hands.[264] Deferring to the executive branch of the federal government, the Court permitted the

258. *See* United States of Mexico v. Rask, 4 P.2d 981 (Cal. Ct. App. 1931).

259. *See* Wulfsohn v. Russian Socialist Federated Republic, 196 N.Y.S. 959 (App. Div. 1922); Wulfsohn v. Russian Socialist Federated Republic, 195 N.Y.S. 472 (App. Div. 1922).

260. *See id.*

261. *See* Wulfsohn v. Russian Socialist Federated Republic, 138 N.E. 24 (N.Y. 1923).

262. *Id.* at 25.

263. *Id.*

264. *Id.*

diplomatic departments of the governments to handle the dispute over the confiscation of furs.[265]

The plaintiffs appealed the *Wulfsohn* ruling to the Supreme Court of the United States but were turned away with a brief per curiam decision dismissing the case for want of jurisdiction upon the authority of the Act of September 6, 1916,[266] which limited the Supreme Court's appellate jurisdiction over state court decisions to matters involving the federal constitution, federal law, or treaties.[267] The per curiam ruling also cited *Oliver Am. Trading Co. v. Mexico*, a decision where Justice Brandeis held, in a different jurisdictional context, that questions of sovereign immunity raise questions of general law only.[268] In other words, the Supreme Court would not review a state court interpretation of sovereign immunity, even if the state court appeared to base its decision on CIL.[269]

Less than a year after the Court of Appeals decision in *Wulfsohn*, and during the time when the plaintiffs in *Wulfsohn* were seeking Supreme Court review, the District Court for the Southern District of New York was faced with an almost identical legal question.[270] In an admiralty action involving a Turkish ship, the defendants raised the sovereign immunity defense claiming that the ship in question was an instrument of the Turkish government.[271]

The district court ruled against the defendants on several grounds, including a federal precursor of the "commercial activity" exception to sovereign immunity.[272] However, the court based its decision mainly on the fact that "at the time of seizure" the defendant's ship "enjoyed no immunity from such restraint, inasmuch as diplomatic relations between the United States and Turkey were then severed, and that therefore comity and courtesy due from this country to Turkey did not, in the absence of the appropriate suggestion from the State Department of this

265. *See id.* at 24.

266. Wulfsohn v. Russian Socialist Federated Soviet Republic, 266 U.S. 580 (1924) (per curium).

267. *See* Act of September 6, 1916, ch. 448, § 2, 39 Stat. 726 (limiting the Supreme Court's appellate jurisdiction over state court decisions to matters concerning the federal constitution, federal laws, or treaties).

268. *See* Oliver Am. Trading Co. v. Mexico, 264 U.S. 440 (1923).

269. Professor Stephens argues that *Wulfsohn* is wrongly decided because it would have involved state courts in adjudicating sensitive areas of foreign policy. *See* Stephens, *supra* note 2, at 429 n.189. As a historical matter, Professor Stephens' analysis completely fails to account for the innumerable state court decisions involving sensitive sovereign immunity matters.

270. *See* The Gul Djemal, 296 F. 563, 567 (S.D.N.Y. 1922).

271. *See id.* at 567.

272. *Id.*

government, require the extension of such immunity."[273] Once again, the federal courts had adopted a rule less deferential to the foreign sovereign than the rule adopted by state courts. Indeed, the federal court theory views sovereign immunity as merely an act of comity not required by international law.

The district court's decision was affirmed by the Supreme Court on other grounds, so the Court did not face the conflict between the district court's theory and the Court of Appeals' theory of sovereign immunity.[274] Under the general common law theory, however, the Supreme Court could have disapproved, but not reversed, the New York rule. In any case, subsequent New York courts continued to follow *Wulfsohn*, even after they recognized the split between federal and state authority on the very nature of sovereign immunity.[275] For instance, in 1942, the Appellate Division observed that "the rule forbidding suit against a foreign sovereign without his consent does not rest on comity, but is applied because such suits involve claims of a political nature which are not entrusted to the municipal courts."[276] When presented with the contrary authority from *Gul Djemal*, the Appellate Division simply indicated that the theory adopted in *Gul Djemal* is not controlling in New York courts.[277]

As we saw in decisions regarding sovereign immunity waiver, the general common law regime permitted federal and state courts to adopt conflicting rules of sovereign immunity without any possibility of unification by the Supreme Court of the United States. The split between the New York and the federal courts continued as the federal courts continued to reiterate that sovereign immunity is a matter of comity while the New York courts found sovereign immunity to be a requirement of international law.[278] The rise of the executive-led immunity regime ended

273. *Id.* at 569.

274. *See* The Gul Djemal, 264 U.S. 90 (1924). The Court's decision focused on whether the sovereign's claim could be raised by an unofficial representative, and not on the lack of diplomatic relations.

275. *See, e.g.*, Nankivel v. Omsk All Russian Gov't, 142 N.E. 569 (N.Y. 1923); Voevodine v. Gov't of Commander-in-Chief of Armed Forces in South of Russia, 249 N.Y.S. 644 (App. Div. 1931).

276. Telkes v. Hungarian Nat'l Museum, 38 N.Y.S. 2d 419, 423 (App. Div. 1942). Interestingly, the Telkes opinion also distinguished the Supreme Court's affirmance of Gul Djemal by pointing out that the Court affirmed on different grounds not relevant to the case. *See id.* at 432, 424. Its reference to the Supreme Court authority is intriguing, however, because under the general common law regime, the Telkes court should still be free to follow its own rule.

277. *See id.* at 423.

278. *See e.g.*, Nat'l City Bank of New York v. Republic of China, 348 U.S. 356 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). *See also* 25 A.L.R. 3d § 4(b) n. 10 (1969) (pointing out split between federal and New York courts).

the practical significance of this disagreement. But as a matter of historical interest, the fundamental disagreement between the New York and the federal courts on the nature and application of an important doctrine of CIL, or at least an important doctrine affecting foreign relations, further exposes the gap between the nationalist assumptions and the general common law regime.

6. *The Rise of Executive Lawmaking*

After the Mexico debt litigation cases, the Executive Branch began to assert its power to "legislate" sovereign immunity through its "suggestions" to state courts. In a series of decisions, courts in New York, Maine and Pennsylvania all endorsed the new regime whereby courts were bound to follow executive suggestions on whether to grant immunity. Conversely, if the executive presented no suggestion, as was the case in *Traveler's Insurance*, the courts could feel free to apply its own view of foreign sovereign immunity.

Thus, a New York court felt free, due to an executive non-suggestion, to find that a state-owned Polish bank was not entitled to sovereign immunity.[279] A year later, the Supreme Judicial Court of Maine dismissed a lawsuit against a similarly situated Nicaraguan corporation based entirely on the suggestion of the executive.[280] It is interesting that neither state court felt bound by federal court determinations, except perhaps on the broad constitutional question of the extent of the executive's independent authority to suggest immunity. The decisive federal actor in sovereign immunity determinations was unquestionably the President. Eventually, the executive-led regime was formally endorsed by the Supreme Court of Pennsylvania[281] and the New York Court of Appeals.[282]

Thus, the executive could essentially control determinations of sovereign immunity from the end of World War II through the 1970s, at which point, Congress stepped in to codify the doctrine of sovereign immunity as federal statutory law. This discussion reveals, however, that before the President and Congress acted, the task of resolving the hard and difficult questions of sovereign immunity in practice was equally shared by state and federal courts. Consistent with the general common law regime, neither set of courts had the final word on any in-

279. *See* Ulen & Co. v. Bank Gospodarstwa Krajowego, 24 N.Y.S.2d 201 (App. Div. 1940).

280. *See* Miller v. Ferrocarrill Del Pacifico de Nicaragua, 18 A.2d 688, 690 (Me. 1941).

281. *See* F.W. Stone Eng'g Co. v. Petroleos Mexicanos of Mexico, 42 A. 2d 57, 59-60 (Pa. 1945).

282. *See* United States of Mexico v. Schmuck, 56 N.E. 2d 577, 580-81 (N.Y. 1944).

terpretation. But both sets contributed to the groundwork for presidential and congressional codification.

D. Prohibition on Intercourse with Enemy Aliens

The law of nations has historically endorsed the imposition of certain disabilities on enemy aliens during times of war. As Vattel explains:

> When the head of a state or sovereign declares war against another sovereign, it implies that the whole nation declares war against the other, as the sovereign represents the nation, and acts for the whole society. Thus these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other.[283]

Because the declaration of war between sovereigns immediately transforms every individual subject and citizen of those sovereign nations into enemies, the traditional law of nations naturally required that enemy aliens be accorded different legal status than alien subjects hailing from friendly powers. In particular, the treatise writers found that the law of nations imposed severe restrictions on the nature of contacts between subjects of sovereigns at war with each other.

By the time American courts considered these rules, they had become basic tenets of the English common law.[284] Still, American courts recognized the rule's origins in the law of nations. The development of these CIL doctrines provides another useful historical case study of the complex interrelationship between federal and state courts in the application of the law of nations.

Like the doctrine of foreign sovereign immunity, the doctrine prohibiting intercourse with alien enemies was introduced into American law by both state court and federal court opinions, initially stated in the broadest possible terms and then slowly whittled back by a series of later state court opinions.

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283. *See* VATTEL, THE LAW OF NATIONS, bk. 3, ch. 5, §. 70 (Joseph Chitty ed. 1858). Other leading international law treatises stated similar positions. *See, e.g.*, HUGO GROTIUS, THE CLASSICS OF INTERNATIONAL LAW, bk. 3., ch. 3., § 9 (Francis Kelsey trans., James Scott ed. 1925); The leading American treatises also stated the rule as a matter of international law. *See, e.g.*, THEODORE D. WOOLSEY, INTERNATIONAL LAW, § 123 (1883); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, § 309 (3d ed. 1889).

284. *See* The Hoop, 1 C. Rob. 196 (1799); *see also* discussion of English authorities in Griswold v. Waddington, 16 Johns. 438 (N.Y. 1819).

1. War of 1812

Although some early pre-Constitution state courts had made references to the doctrine,[285] the first expansive American statement of the doctrine was made by Justice Story, sitting in his capacity as a circuit judge, in a case arising out of the admiralty jurisdiction. "I lay it down as a fundamental proposition, that strictly speaking, in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity."[286]

Applying this rule, Justice Story upheld the seizure of an American vessel on the high seas because the vessel had been traveling under license from Britain during the War of 1812, even though there was no proof that the ship was engaging in commerce that would benefit Britain. "Every aid," he stated flatly, ". . .is strictly inhibited."[287]

In addition to affirming Justice Story in *The Julia*, the Supreme Court adopted a similarly broad-reaching view of the scope of the doctrine in *The Rapid* which involved a Boston merchant named Harrison who sought to retrieve English goods he had purchased before the outbreak of war with England.[288] On the way back to Boston, the goods were seized by an American privateer, and Harrison argued that, because he had completed his purchase of the goods prior to the war, his retrieval of the goods did not constitute commercial intercourse with the enemy.[289] That doctrine, Harrison maintained, should be limited to prohibiting the negotiation and execution of contracts.[290]

The Court, speaking through Justice Johnson, rejected Harrison's attempt to limit the application of the rule stating that the "object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states."[291] Therefore, "[i]ntercourse inconsistent with actual hostility, is the offence against which the operation of the rule is directed . . . ."[292]

The Supreme Court's statement of the doctrine, as Justice Story admitted, was broader than its typical formulation in the treatises, which

285. *See* Hoare v. Allen, 2 U.S. 102 (Pa. 1789) (applying non-intercourse rule to allow interest on debt to be suspended during wartime); Foxcraft v. Nagle, 2 U.S. 132 (Pa. 1791) (same).

286. The Julia, 12 U.S. 181, 193 (1814) (adopting circuit court opinion of Story, J.).

287. *Id.* at 194.

288. *See* The Rapid, 12 U.S. 155 (1814). The Rapid was handed down during the same term as The Julia.

289. *See id.* at 156.

290. *See id.*

291. *Id.* at 162.

292. *Id.*

usually stated the prohibition in terms of "commercial intercourse."[293] Although the actual "intercourse" in *The Rapid* involved crossing the Canadian border into Nova Scotia in order to retrieve goods that had been purchased before the outbreak of the war, as opposed to the trade between Britain and a non-belligerent country in *The Julia*, the Supreme Court found both activities to be prohibited under the law of nations.[294]

The first lengthy state court foray into this doctrine occurred a few years later in a New York case arising out of the War of 1812. While essentially adopting the Supreme Court's broad formulation of the intercourse doctrine, the manner in which the New York court analyzed the doctrine sheds further light on the non-hierarchical relationship between the federal and state courts.

Griswold v. Waddington involved a commercial dispute between two Americans, the Griswolds, and Henry Waddington, a British subject, where the Griswolds sought to enforce a contract entered during the War of 1812 against Joshua Waddington, an American citizen who was Henry Waddington's brother and alleged business partner.[295] Thus, the court faced two questions: (1) Could the Griswolds enforce a contract made with an enemy alien during the time of war? (2) Could the Griswolds enforce the contract against Joshua Waddington on the basis of Joshua's partnership with this enemy alien brother?[296]

The members of the New York court (then called Senators) published several opinions, but the key opinion came from the court's erudite chancellor, James Kent. He began consideration of the first question by applying the by-now familiar method of "finding" the proper rule of the law of nations. Kent first consulted the major treatises on international law and concluded that a declaration of war between sovereigns automatically created a state of belligerency between all subjects of the two sovereigns.[297] This state of belligerency made commercial intercourse between subjects unlawful under the law of nations.[298]

Next, Kent surveyed the development of the intercourse doctrine in English courts, both the common law and the admiralty courts, and concluded that the English courts have uniformly adopted a rule prohibiting any form of trade between enemies without license from the sovereign.[299]

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293. The Julia, 12 U.S. at 193.
294. The Rapid, 12 U.S. at 155, 161, 162; The Julia, 12 U.S. at 181, 193-95.
295. 16 Johns. 438 (1819).
296. *See id.* at 445.
297. *See id.* at 448-50.
298. *See id.* at 450-52.
299. *See id.* at 456-57.

Finally, Kent turned to American authorities. First, he found that the frequent declarations against trading with the enemy by the Continental Congress during the Revolutionary War were intended to be declarations of the common law rules existing in the several states rather than independent prohibitions.[300] Only then did he turn to the Supreme Court's decision in *The Rapid*.[301] Though he seemed to state that the Supreme Court's decision "must be regarded by us all as the undisputed law of the land," it is not at all clear that this statement meant that Kent considered the Supreme Court's opinion to be binding authority.[302] It is possible, even likely given Kent's exhaustive discussion of other sources of law, that Kent's statement refers to the persuasive, rather than binding, nature of the Supreme Court's ruling. Moreover, as we shall see, state courts would not hesitate to chip away at the broad sweep of the rule announced in *The Rapid*.

2. Civil War

The next major wave of cases involving application of the non-intercourse doctrine arose in the wake of the Civil War. Though the war between the states was, in theory, an internal conflict, both federal and state courts recognized that the law of nations governed many of the legal disputes, including the application of the non-intercourse doctrine. A detailed discussion of key cases from this period applying the non-intercourse doctrine illustrates how state courts played a leading role in narrowing the broad version of the non-intercourse doctrine announced by *The Julia* Court.

Justice Horace Gray, who would later be remembered for his opinion endorsing international law in The *Paquete Habana*,[303] opened the next major discussion of the non-intercourse rule from his perch on the Supreme Court of Massachusetts. In *Kershaw v. Kelsey*,[304] Justice Gray confronted a case that seemed to fall within the broad language of *The Julia* as well as *Griswold*. In *Kershaw* in 1864, the defendant, a citizen of Massachusetts, leased a cotton plantation from the plaintiff, a citizen of Mississippi. After being chased off by some Confederate soldiers, the defendant returned to Massachusetts and refused to continue to pay rent. The plaintiff sued in Massachusetts court, and the defendant claimed that the non-intercourse doctrine invalidated the lease agreement.[305]

300. *See* Griswold, 16 Johns. at 460.
301. 12 U.S. 155 (1814).
302. 16 Johns. at 460.
303. 175 U.S. at 677.
304. Kershaw v. Kelsey, 100 Mass. 561 (1868).
305. *See id.*

Gray's opinion in *Kershaw* deserves detailed discussion because it demonstrates how an influential state court opinion can modify and eventually reform a rule of CIL. He began by pointing out that the non-intercourse doctrine required a "consideration of fundamental principles of international law."[306] Consulting English common law sources, Gray established that the outbreak of war prohibited all *commercial* intercourse. Turning to American authorities on the subject, he conceded that Supreme Court opinions in cases like *The Rapid* and *The Julia* appeared to prohibit all contracts and every kind of intercourse. But the language in those cases, Gray argued, constituted "obiter dicta" and was therefore unnecessary to reach the results of those cases.[307]

Rejecting the non-intercourse defense, Gray directly challenged the basis for this dicta by reviewing the English common law authorities as well as the treatises cited by Chancellor Kent. Citing more recent authority from both the Supreme Court of the United States and the Massachusetts courts, he offered his own version of the rule:

> The law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of the war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy.[308]

Not only did Grey identify prior authority inconsistent with this formulation as mere "dicta," he also strongly implied that such holdings should be rejected because they reflected an outdated version of the law of nations that did not share the modern trend toward limiting the effects and constraints on individual contract-making.[309]

Gray's lengthy re-statement of the non-intercourse rule reflects an attempt to limit the rule to "commercial intercourse." To the extent that prior opinions appeared to cover activities not easily fit within this category, such as traveling under license to a third country or forming a

306. *Id.* at 562.
307. *Id.* at 567-68.
308. *Id.* at 572-73.
309. *Id.* at 573.

partnership across borders, Gray included them as specifically prohibited conduct. The broad formulation of the rule, however, was essentially rejected.

3. *Real Property*

That *Kershaw* represented a departure from the rule announced in *The Julia* and *The Rapid* can be seen in a different result in a similar opinion reached by the Supreme Court of Iowa. In *Hill v. Baker*, the court considered the legality of a wartime conveyance of real estate from a citizen of Ohio to a citizen of Virginia.[310] The Iowa court held that war "places an entire restraint upon all commerce *and friendly intercourse*" between citizens of hostile states.[311] Therefore, the court "felt constrained to hold that the execution of the deed . . . was in violation of the principles of international law, and is, of consequence void."[312]

While one might be able to distinguish the facts of the two cases, the key elements for the purposes of the doctrine are the same. Both cases involved a real estate transaction and both required a citizen of one belligerent to make payments to a citizen of the other belligerent. The purchase of real estate in an enemy's territory "furnishes the enemy the sinews of war, and may embarrass the enforcement of any acts of confiscation to which it may be found expedient to resort."[313] It is hard to see how the continuance of lease payments by the Massachusetts citizen in *Kershaw* did not also "furnish the sinews of war" to a citizen of the enemy.

The different results reached by the two state courts on a similar fact pattern demonstrates that the general common law regime could result in a division of opinion. Moreover, it further emphasizes the less than fully binding authority of the Supreme Court of the United States' statements in *The Rapid* and *The Julia.* In *Kershaw,* the Supreme Court's broad formulation of the non-intercourse doctrine in *The Rapid* and *The Julia* are not only distinguished, but are derided as having no basis in common law or international law. The Supreme Court's opinions are considered as important authority, but no more important than those of English judges or, for that matter, Massachusetts judges. Meanwhile, in *Hill*, where Chancellor Kent's statements in *Griswold*

310. Hill v. Baker, 32 Iowa 302 (1871).
311. *Id.* at 309 (emphasis added).
312. *Id.* at 311.
313. *Id.*

and his Commentaries are cited heavily, the Supreme Court's own statements of the rule, cited by Kent himself in *Griswold*, were ignored.

Approximately one year after the Iowa Supreme Court's decision, the New York Court of Appeals faced another difficult application of the non-intercourse doctrine. The plaintiff, the survivor-beneficiary of a pre-war life-insurance policy holder, sued New York Life for benefits.[314] New York Life Insurance Company, citing *Griswold v. Waddington*, refused to pay on the grounds that the decedent was a citizen of Alabama and that the war and the non-intercourse doctrine voided the insurance contract.[315]

Turning away from *Griswold*, the Court of Appeals embraced the more limited formulation found in *Kershaw*. "The general rule undoubtedly is, that it is only commercial contracts, such as give aid and comfort to the enemy" that fall within the doctrine.[316] Citing *Kershaw*'s statement of the rule and its holding that a pre-war lease may survive after the war, the court found that "it is idle to say that [a life insurance contract] fosters or implies commercial intercourse."[317]

The Court of Appeals' rejection of *Griswold* (and implicitly the broad formulation of the rule in *The Rapid* and *The Julia*) demonstrates another aspect of the general common law regime. State courts not only do not feel bound by previous decisions of the Supreme Court of the United States, but they may freely depart from a rule announced in their own jurisdiction as well. Unlike a modern positivist court concerned with lines of judicial authority, the emphasis of a court applying general common law is on the correctness of the rule and not which court stated the rule.

This is not to say that the Supreme Court of the United States did not wrestle with the application of the non-intercourse doctrine to life insurance contracts. The Court's treatment of these cases reveals some of the tensions in the general common law regime, but it also confirms the co-equal roles of federal and state courts in the application of this international law doctrine.

4. Life Insurance

The first reported life insurance case to reach the Supreme Court of the United States was appealed from a Virginia Supreme Court decision that reached essentially the same result as the *Sands* Court. In *New York*

314. Sands v. New York Life Ins. Co., 50 N.Y. 626 (1872).
315. *See id.*
316. *Id.* at 633.
317. *Id.* at 634.

Life Insurance v. Hendren,[318] the Supreme Court was squarely faced with the question of whether the non-intercourse doctrine applies to life insurance contracts.

Because this question required the application of "the general laws of war, as recognized by the laws of nations," however, the court refused to assert its appellate jurisdiction.[319] A decision made upon principles of the general common law, the Court decided, did not involve the Constitution, laws, treaties, or executive proclamations of the United States, and it did not create appellate jurisdiction under Section 25 of the Judiciary Act.[320] The *Hendren* result foreshadows similar decisions about appellate jurisdiction over the law of nations in *Ker* and *Wulfsohn*.

The life insurance issue returned to the Court on appeals from decisions in the lower federal courts.[321] In *New York Life Ins. Co. v. Statham*,[322] the Court reached a result that differed from that reached by state courts like the *Sands* court. Where premiums on the policy had been interrupted due to the war, the Court held that such policies could be cancelled, but that the holder could retain the "equitable value" of his policy.[323] It is noteworthy that counsel for Statham cited *Sands* as well as several other state court decisions that had reached a similar result as the Court of Appeals.[324]

In *New York Life Ins. Co. v. Davis*, the next major life insurance case to reach the Court, the Court openly acknowledged its split with the state courts on the application of the non-intercourse doctrine to life insurance contracts.[325] *Davis* raised the question of whether payments to an agent of the insurance company would allow the policy to survive the war. In other words, the plaintiffs now argued that though the outbreak of war made payments across enemy borders impossible, the war did not interrupt the principal-agent relationship between New York Life and its brokers. Therefore, as long as the premiums were paid to the agents, who were on the Confederate side of the border, no violation

318. 92 U.S. 286 (1875).

319. *Id.* at 286.

320. *Id.* at 287.

321. Federal jurisdiction was probably acquired on diversity grounds in the Circuit Court for Mississippi or via the general federal jurisdiction over the District of Columbia.

322. 93 U.S. 24 (1876).

323. *Id.*

324. *See* discussion of the arguments offered by the plaintiffs. Statham, 93 U.S. at 29 (*citing* Statham v. New York Life Ins. Co., 45 Miss. 592 [sic]; Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610; Sands v. New York Life Ins. Co., *supra* note 324, at 626 (cited for the proposition, "It had no other effect than to suspend the remedy upon, or the performance of, it.").

325. New York Life Ins. Co. v. Davis, 95 U.S. at 425 (1877).

of the non-intercourse rule had occurred and the policy remained enforceable.

The Court again turned away this attempt to limit the application of the non-intercourse rule. In doing so, it admitted that it was aware that its result was inconsistent with the results reached by several state courts. "In some recent cases in certain of the State courts of last resort, for whose decisions we always entertain the highest respect, a different view has been taken; but we are unable to concur therein."[326]

The results of this trio of cases may seem odd to a modern reader. In resolving a question of the proper interpretation of international law, the Supreme Court first refused to assert its appellate jurisdiction because no federal question had been presented. When cases came to the Court with other bases for federal jurisdiction, the Court took the cases and reached results at odds with their state court counterparts.

The Court's acknowledgement that the lower state courts had reached different results highlights the two-way nature of the general common law regime's treatment of international law: while state courts were free to depart from rulings of the Supreme Court, the Supreme Court was likewise free to adopt its own view of the proper interpretation. The proper application of the non-intercourse doctrine demonstrated that the general common law regime was not always able to develop consistent rules of international law.

Commentators espousing the nationalist position have attacked the result in *Hendren* suggesting that the decision does not mean that a question of international law is not a federal question. But their attempts do not take into account the Supreme Court's subsequent cases as well as the previous state court cases.

For instance, one nationalist commentator suggested that the decision could really be explained as a way for the Supreme Court to avoid jurisdiction over a flood of post-war cases involving the application of the laws of war.[327] However this legal realist explanation is offered without any further historical evidence. Indeed, as the *Davis* and *Statham* cases demonstrate, the Supreme Court was probably flooded with more of those life insurance cases anyway.

Another commentator simply concluded that *Hendren* was wrongly decided and argued that the dissent in *Hendren* was the correct view.[328] This is a much more serious objection to the result reached in *Hendren*. But even if one ignored the views of the six justices in *Hendren* (and

326. *Id.* at 425-32.

327. *See* Stephens, *supra* note 2, at 427-28.

328. *See* Neuman, *supra* note 2, at 374 n. 14.

ignored consistently reasoned Supreme Court decisions in *Ker* and *Wulfsohn* as well as Justice Bradley's own acknowledgement of the inconsistent state court views in *Davis*), Justice Bradley's dissent does not represent a clear endorsement for the modern nationalist view.

It is certainly true that Justice Bradley advocated treating what he calls "unwritten international law" as the law of the United States.[329] Nevertheless, he does not ground federal question jurisdiction on that basis alone. Rather, he argued that the non-intercourse with the enemy defense was actually governed by federal law because it was implicitly authorized by Congress's declaration of war and the federal government's subsequent execution of the war. "It is under the authority of the government of the United States that the party is not only shielded, but prevented from, the execution of his contracts. If he performed them, it would be a violation of his obligations to his government."[330]

In other words, Congress essentially federalized the non-intercourse doctrine by its declaration of war. On this basis, Bradley argued, international law can become a federal question for the purpose of the Supreme Court's appellate jurisdiction over state courts.[331] However, this is not quite an adoption of the wholesale nationalist position that would view any form of CIL as a question for federal courts, whether or not implicitly authorized by Congress or the President.

Almost immediately after the United States entered the First World War, Congress acted to specify the extent of its prohibitions on trading with the enemy. Though the Trading with the Enemy Act of 1917[332] offered statutory definitions of who and what would be prohibited during the war, some state courts continued to independently apply the non-intercourse doctrine where parties did not rely on the TWEA.[333] However, for the most part, Congress's intervention in 1917 and the rise of an elaborate federal statutory regime restricted even peacetime trade federalized the remaining vestiges of the non-intercourse doctrine.

The pre-TWEA development of the non-intercourse doctrine remains instructive on how an international law doctrine was developed and

329. *Hendren*, 92 U.S. at 287-88.

330. *Id.* at 288.

331. *See id.*

332. 50 U.S.C.A. app. § 3(a).

333. For instance, a New York court, citing *Sanders* and *Kershaw* alongside authority from the Supreme Court, refused to void a foreign exchange contract between two German citizens. Because both parties were in New York during the time of the transaction, and because there was no proof that the transaction contemplated transfer of funds to Germany, the court refused to void the transaction. It is the transmission of property or money across enemy lines "which is prohibited by international law." Kannengeisser v. Israelowitz, 176 N.Y.S. 535, 536 (App. Div. 1919).

modified by the general common law regime. First, the *Hendren* and *Davis* cases confirm that state and federal courts analyzed the application of the non-intercourse doctrine as a question of general common law. This meant that each system of courts was free to reach decisions independently subject only to the *persuasive* authority of the other systems of courts. Unlike the *Ker-Frisbee* and diplomatic immunity in transit doctrine, applications of the non-intercourse doctrine split different state courts as well as state and federal courts.

Second, state courts played a key role in the development of the non-intercourse doctrine. Indeed, Justice Gray's opinion in *Kershaw* appears to have played a key role in reformulating and narrowing the doctrine's scope. While it is true that the development of the rule was not completely consistent and uniform, the ability of a single state court opinion to influence other federal and state courts should not be underemphasized. It is worth noting that the eventual TWEA formulation hewed much more closely to the Massachusetts decision in *Kershaw* than *The Rapid.*

Finally, the *Hendren* case confirms that the Supreme Court considered the applicability of a doctrine of international law to be a question of general law rather than a federal question. Therefore, it both tolerated and acknowledged the development of different applications and interpretations of this doctrine in the federal and state court systems.

E. Summary

This section provides the basis for a few general observations. First, even though federal courts could not review the application of these CIL doctrines, state courts rarely diverged in their interpretation of CIL. Consistent with the idea of a general common law, state courts looked to the same treatises and precedents as highly persuasive but not binding sources of law. Part of this could be explained by the persuasive power certain states, New York in particular, held in the interpretation of many of these CIL doctrines.

Second, it is worth emphasizing again that all the relevant actors—state courts, federal courts, Congress, and the President—treated CIL as a part of the general common law. State courts cited other state courts, federal courts, and English courts as authority, but they did not seem to afford federal courts any special deference. This makes sense within the general common law intellectual framework, however odd this might seem to us today.

Third, the application of many of these doctrines did have real ramifications for foreign affairs. However, it was the Executive and Legisla-

tive branches, and not federal courts, that would intervene to represent the national interest in maintaining a unified foreign policy. Even these interventions, however, often saw the Executive branch treating state courts in the same way that they treated federal courts. The Executive and Legislative branches asserted their constitutional authority as the national representatives of foreign affairs, but they did not seek additional authority from federal courts to buttress their arguments, either in the form of jurisdictional preemption or binding federal precedent.

Indeed, at some points the Executive branch seemed to only have the power to request action on the part of the governors of the individual states. On the other hand, state courts and state governments would obey the Executive's requests despite never explicitly admitting that it was their legal duty to obey Executive branch interpretations of CIL.

As this part explained, however, the federal government did eventually unify the interpretation and application of all of these CIL doctrines. However the federalization of these CIL doctrines was accomplished by Congress and the President, and not by the federal courts. The next part will discuss the significance of this historical analysis for the ongoing debate over the proper status of CIL in the American legal system.

IV. IMPLICATIONS FOR THE MODERN UNDERSTANDINGS OF THE STATUS OF CIL

Though this article does not attempt to conclusively resolve the complicated question of how American courts should treat CIL, its findings strongly suggest that the historical evidence does not support the nationalist view. Therefore, the historical evidence vindicates revisionists at least to this extent. Whatever its merits from a policy perspective, the nationalist view really is a "modern position."[334]

As I have explained earlier, adherents to the nationalist view of CIL have relied heavily on two broad historical claims to support their position. First, they have argued that the Framers intended to guarantee federal control over the application of the law of nations in American courts. Second, they have insisted that state courts have not played a significant role in the development of CIL in American law because courts have always understood that federal courts ultimately controlled CIL interpretations. I discuss each claim in light of the historical evidence reviewed in this article. Then, I consider some of the policy consequences of my analysis for the courts today.

334. *See* Bradley & Goldsmith, *Critique, supra* note 4, at 816 n.2.

A. Original Intent

The Second Circuit's analysis in *Filartiga*[335] reflects the widespread consensus about the Founders' intent with respect to CIL and federal jurisdiction. "The Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world therefore reinforces the result we reach today."[336]

As I argued in Part I, this widely accepted understanding is, at best, an overstatement. The Founders appeared to focus not on federalizing CIL as a whole, but on federalizing those types of CIL cases that would directly affect foreign relations. Moreover, the actions and statements of the Congress and the Attorneys General plainly contemplated a role for state courts in the application of CIL. That they did so is not exactly surprising given the difficulty of separating the law of nations from general common law and the limited role of federal courts at that time.

In my account, the Founders used specific grants of jurisdiction to federalize certain cases likely to implicate foreign relations. They then left the job of deciding the proper allocation of jurisdiction between the federal and state court systems to the first Congress. It is unlikely that there was ever an intellectual consensus on the proper scope of federal court jurisdiction over the law of nations because this question was deeply intertwined with deep-seated controversies over the general common law. A lack of consensus on how it would all work makes sense given the dearth of federal judicial models available in the eighteenth century.

For the purposes of the modern debate, however, both the absence of consensus among the Founders and the advocacy by some Founders of a vigorous role for state courts cut strongly in favor of the revisionist view. Certainly, my account lends almost no support to the originalist claims of some scholars on behalf of the nationalist view.

Recognizing the force of the revisionist critique, some nationalist scholars have offered a more nuanced historical claim. Instead of claiming that *federal courts* were essentially granted exclusive jurisdiction over questions of CIL, these scholars have argued that the Founders, in broad terms, intended to allocate all matters involving foreign affairs to the *federal government*. These scholars have emphasized the allocation of the power to make treaties and the power to "[d]efine and [p]unish" offenses against the law of nations as evidence that the Foun-

335. 630 F.2d at 885.
336. *Id.* at 887.

ders intended to create federal government supremacy over all questions involving foreign affairs, including CIL.[337]

I do not attempt to evaluate the merits of these claims for unfettered federal supremacy in the area of foreign relations here. However my description of the attitude of key members of the Founding generation toward CIL and state courts shows that, at least with respect to the allocation of jurisdiction over cases involving the law of nations, the Founders did not intend to constitutionalize federal supremacy. Indeed, Congress's decision not to federalize jurisdiction over all questions of CIL led to the development of a rich jurisprudence of CIL in state courts.

B. Historical Role of State Courts

The nationalist scholars' assumption that the Founders granted federal courts a monopoly on the development of CIL in American law has led them to ignore the important role state courts have played in the development of CIL doctrines. As I have noted, this omission is surprising given the importance of this assumption to the overall validity of the nationalist view. Unfortunately for adherents to the nationalist view, Part II's sketch of the role state courts played in the development of four CIL doctrines further weakens the historical foundations of the nationalist view.

Specifically, Part II describes a regime where state courts played a co-equal role in the origination, development, and reformation of CIL doctrines. Consistent with the assumptions of a general common law regime, state courts would look to Supreme Court and federal court opinions as only one of several equally persuasive sources of authority on questions of CIL.

Federal courts have at various times acknowledged the supremacy of state courts over the interpretation of CIL within their own jurisdictions. For example, the Supreme Court has, on several occasions, refused to assert its appellate jurisdiction over state court decisions interpreting CIL on the grounds that CIL alone does not raise a federal question.[338]

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337. *See* 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 (2000) (arguing that Constitution's textual grant of power to "define and punish" confers unconstrained federal power over foreign affairs); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (finding federal monopoly on foreign relations and CIL in a "dormant treaty power"); David M. Golove, *Treaty-making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (arguing that treaty power delegates to federal government separate plenary power unconstrained by Tenth Amendment).

338. *See, e.g.*, Wulfsohn, 266 U.S. at 580; Ker, 119 U.S. at 436; Hendren, 92 U.S. at 286.

The prominent role of state courts in the development of CIL doctrines—and the federal courts' willingness to assent to their role – also further weakens the nationalist version of the Founding. If the Founders intended to guarantee federal court supremacy over the law of nations, why have state courts historically exercised the authority to develop CIL free from the review of federal courts?

For these reasons, my survey of the role of state courts in the development of CIL lends historical plausibility to the revisionist position. Rather than assuming that the Constitution itself federalizes all questions of CIL, the revisionist account emphasizes the key role of the political branches in deciding whether and how to allocate control over CIL decision-making. In my historical account, Congress created exclusive federal jurisdiction over some CIL matters but left others open to the general jurisdiction of the state court systems. These CIL doctrines were hardly backwaters. They touched on sensitive foreign policy questions of diplomatic immunity, extradition, sovereign immunity, and trading with alien enemies. At some point, Congress or the President acted to federalize these questions, but until that action by the political actors, state courts remained important fora for application of these doctrines.

C. Practical Necessity of a Federal Court Monopoly

While my sketch of the role of state courts strongly increases the historical plausibility of the revisionist view, I do not claim that it can, or that it should, conclusively resolve the modern debate over the status of CIL. The problems with the historical foundations of the nationalist view identified in this study, however, do suggest that it is the nationalist scholars, rather than the revisionist scholars, who bear the burden for proving why courts should treat CIL as federal common law. In addition to arguments made on the basis of claims about history, nationalist scholars have made persuasive policy arguments about the practical necessity of the modern view.[339] I believe that my study has some relevance for answering this policy argument as well.

One prominent nationalist scholar has argued that, if the revisionist view were accepted, we would face the specter of 50 different parochial interpretations of CIL.[340] My study demonstrates that even though key doctrines of CIL were immune from the appellate jurisdiction of the Supreme Court of the United States, serious splits between state court in-

339. *See* Koh, *supra* note 2, at 1828-29 (pointing out potential policy confusion of having fifty different laws for "head of state" immunity).

340. *See id.* at 1828.

terpretations of CIL did not occur nearly as frequently as might be expected. Moreover, state courts were just as likely to protect U.S. foreign relations interests as federal courts. Finally, there is evidence that state courts would defer to executive suggestions on the proper application of CIL, thereby giving the President effective control over some types of CIL such as sovereign immunity. Therefore, this account shows that the chaos of independent state court interpretation of CIL has been the rule, rather than the exception, for much of American history.

V. CONCLUSION

G. Edward White has sagely warned against the dangers of "purposive" historical analysis, or the use of historical research to support a particular policy preference.[341] Professor White has noted that such purposive scholarship has been highly influential in the field of constitutional foreign relations law.[342] This article has been an attempt to remedy some of these failings. It sharply challenges the history-based claims of scholars arguing on behalf of the nationalist view of CIL. It has offered historical evidence that contradicts and undermines nationalist assumptions about the dominance of federal courts in the interpretation and application of CIL.

As Professor White also notes, it would be equally dangerous to conduct a historical inquiry for the purpose of insisting upon the revisionist view of CIL. While I am convinced that the historical plausibility of the revisionist proposal for CIL is strengthened by this article, I have attempted to avoid indulging in the kinds of purposive analysis that Professor White has criticized. My aim has not been to "prove" the revisionist case. Rather, I have tried to show that the historical foundations for the revisionist position are at least as strong, if not stronger, than those for the nationalist view. At the very least, I believe I have established that the revisionist position can no longer be dismissed as mere "nonsense."[343]

341. *See* G. Edward White, *The Historical Turn in the Constitutional Law of Foreign Relations*, 1 CHI. J. INT'L L. 133-34 (2000).

342. *See id.* at 138-39.

343. *See* Neuman, *supra* note 2, at 371 (essentially describing revisionist view as "nonsense").

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