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**Federalism, Foreign Affairs, and State Courts: The Habeas Corpus Act of 1842 and the Permanent Debate Over the Status of International Law**

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# FEDERALISM, FOREIGN AFFAIRS, AND STATE COURTS: THE HABEAS CORPUS ACT OF 1842 AND THE PERMANENT DEBATE OVER THE STATUS OF INTERNATIONAL LAW

Jake Karr\*

*There is today an ongoing debate over the status of customary international law within U.S. law. Proponents of both “modern” and “revisionist” positions advance absolutist arguments based on vague constitutional provisions, conflicting theories of constitutional structure, cherry-picked statements of favorite Founding Fathers, historical practice of the relevant branches of government, and Supreme Court precedent. Unsurprisingly, consensus around constitutional meaning remains elusive.*

*This Article demonstrates that the current scholarly stalemate is neither novel nor unique to post-Erie debates over federal common law and the power of the federal judiciary. Indeed, Congress addressed many of the same constitutional arguments nearly two centuries ago, when a series of international incidents involving the United Kingdom prompted passage of the Habeas Corpus Act of 1842, an unprecedented expansion of federal judicial power in the antebellum United States. This largely forgotten but formative episode in our nation’s early history suggests that when it comes to the status of international law, and the authority of Congress or the federal courts to incorporate it into U.S. law, there may not be one true constitutional meaning that we have lost along the path of American constitutional history.*

## INTRODUCTION

The status of customary international law within U.S. law has been a hot academic topic in recent years. Is it part of the common law? If so, after *Erie Railroad Co. v. Tompkins*,<sup>1</sup> is it federal or state common law? If not, can it be incorporated into U.S. law through legislation? Contemporary scholars on either side of these debates have dug their heels into firm positions based on the usual trappings of constitutional argumentation: vague constitutional provisions; conflicting theories of constitutional structure; cherry-picked statements of favorite Founding Fathers; historical practice of the relevant branches of government; and Supreme Court precedent. Yet consensus around constitutional meaning remains elusive.

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\* J.D., 2018, New York University School of Law. Thanks to Professor David Golove for an initial introduction to this debate.

1. 304 U.S. 64 (1938).

This Article demonstrates that the current scholarly stalemate is neither novel nor unique to post-*Erie* debates over federal common law and the power of the federal judiciary. Little more than fifty years after the ratification of the Constitution, and shortly after the death of James Madison, a largely forgotten but formative episode in our nation's early history raised crucial questions about the constitutional authority of Congress and the federal courts to incorporate the law of nations into U.S. law. The senatorial sparring match that resulted revealed fundamental disagreements—over federalism, separation of powers, and foreign affairs<sup>2</sup>—that elicited the same constitutional arguments, and relied upon the same constitutional sources, as does the current debate over international law in our law.<sup>3</sup> Ultimately, the fact that these issues went unresolved even then undermines absolutist arguments about the intent or understanding of the Framers. Indeed, when it comes to the status of international law, and the constitutional authority of Congress or the federal courts to incorporate it into U.S. law, there may not be one true original understanding that we have lost along the path of American constitutional history.

Part I of this Article describes the events that prompted congressional action: the destruction by British forces of the U.S. steamboat *Caroline* in 1837 and the subsequent arrest by New York state officials of Alexander McLeod, a British subject, on charges of arson and murder for his alleged participation in the international incident. These specific events are situated in their historical, legal, and political context in the antebellum United States and the aftermath of the presidency of Andrew Jackson.

Part II examines the constitutional debate that consumed the Senate in 1842 after the newly empowered Whig Party introduced a proposal to expand the habeas corpus jurisdiction of the federal courts in response to the diplomatic row caused by the detention and trial of McLeod. Specifically, this Part focuses on the arguments offered for and against the proposition that Congress has the constitutional authority to grant the federal courts the power to decide issues presented in state criminal prosecutions that implicate the law of nations. At its core, the debate turned on

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2. The congressional debate touched upon other related and perennially contested constitutional issues not addressed here, such as the scope of the Treaty Power. Compare CONG. GLOBE, 27th Cong., 2d Sess. 540 (1842) (speech of Sen. Choate) (arguing that “[i]f, with a view to the preservation of peace, we can incorporate the laws of nations into the laws of the United States, for the government of our own territory by treaty, then, with a view to the same end, we can do it by law”), with *id.* at 617 (speech of Sen. Walker) (arguing that the Tenth Amendment imposes an external limitation on the Treaty Power).

3. This Article focuses principally on the legal arguments advanced during this congressional debate. The primary sources and Supreme Court precedents that these arguments relied upon are briefly mentioned here, but they have been covered extensively in the contemporary literature. See generally, e.g., ANTHONY J. BELLIA, JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017); David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593 (2018); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*]; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]; Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617 (1997); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989); John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248.

interrelated questions regarding the status of the law of nations within U.S. law, the supremacy of federal law, and state sovereignty.

Part III outlines the contemporary scholarly debate over these questions, in the context of the content and scope of federal common law. This Part demonstrates that the terms of the debate, and the uncertainty surrounding it, have remained relatively unchanged nearly two hundred years later.

## I

### HISTORICAL BACKGROUND: THE *CAROLINE* INCIDENT, THE MCLEOD AFFAIR, AND THE ANTEBELLUM PERIOD

#### A. The Destruction of the *Caroline*

In 1837, the outbreak of rebellion in the British Canadian colonies placed the United States in an untenable position. Since the War of 1812, the U.S. government had strained to keep the peace with the British.<sup>4</sup> But Americans eager for another revolution on the continent began to assist and even fight alongside their northern neighbors. Raids on British forces were launched from the United States, often with the aid of American ships.<sup>5</sup> Although the Van Buren Administration, wary of antagonizing the British, closely monitored the situation and “took steps to maintain order,” the extensive Canada-U.S. border proved impossible to secure.<sup>6</sup>

In late December of 1837, Canadian loyalists boarded and set fire to the American-owned steamship *Caroline* while it docked in New York.<sup>7</sup> The ship and its crew had been suspected of supplying Canadian rebels camped out on the Niagara River outpost of Navy Island. During the incident, two members of the crew were killed—including an American citizen, Amos Durfee.<sup>8</sup>

President Van Buren sought to preserve U.S. neutrality. He was careful not to classify the provocation as an act of war.<sup>9</sup> He ordered the Secretary of War, Joel Poinsett, to dispatch a commander to commandeer the New York and Vermont militias.<sup>10</sup> He then petitioned Congress for legislation that would “restrain all persons within our jurisdiction” who “tend to disturb the peace of the country, and inevitably involve the Government in perplexing controversies with foreign powers.”<sup>11</sup>

In March of 1838, Congress delivered, enacting a new law, which would sunset two years later, that authorized federal officials “to seize vessels, arms, and munitions destined for use against” the territory of a foreign power with which the

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4. DONALD R. HICKEY & CONNIE D. CLARK, *THE ROUTLEDGE HANDBOOK OF THE WAR OF 1812*, at 239 (2015); see also Patrick Lacroix, *Choosing Peace and Order: National Security and Sovereignty in a North American Borderland, 1837–42*, 38 INT’L HIST. REV. 943, 946–47 (2016).

5. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 82–83 (1938) (briefly detailing American assistance to Canadian rebels).

6. *Id.*

7. *Id.* at 84; see also David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515, 517 (1992).

8. Jennings, *supra* note 5, at 84; Bederman, *supra* note 7, at 517.

9. See Lacroix, *supra* note 4, at 948.

10. *Id.*

11. CONG. GLOBE, 25th Cong., 2d Sess. 79 (1838) (message of President Van Buren).

United States was at peace.<sup>12</sup> Ultimately, “the Van Buren administration and British colonial authorities . . . successfully extended their control over the borderlands, increased security for residents of both sides and moved further in the direction of peaceful coexistence.”<sup>13</sup>

These policies of neutrality and proactive federal enforcement of the border, however, took a political toll on President Van Buren and his anti-British, limited-government Democratic Party. In late 1838, the Whig candidate, William Seward, defeated the incumbent Democratic Governor of New York, William Marcy.<sup>14</sup> In the 1840 presidential election, President Van Buren himself lost to the Whig General William Henry Harrison.<sup>15</sup> President Harrison quickly tapped prominent Whig party leader Senator Daniel Webster to be his Secretary of State and to negotiate with the British. After President Harrison’s death at the beginning of his term, Secretary Webster continued to serve under his successor, President John Tyler.<sup>16</sup>

### **B. The Arrest and Trial of Alexander McLeod**

Amidst ongoing diplomacy and intermittent conflicts along the border, a British subject named Alexander McLeod boasted publicly in New York about his participation in the *Caroline* raid.<sup>17</sup> Shortly thereafter, in November of 1840, he was arrested by New York state officials, who charged him with violations of state criminal law—arson and murder—in connection with the international incident.<sup>18</sup>

Eventually, McLeod pleaded that he had lied and that, in fact, he had not been involved in the incident at all. McLeod’s lawyers argued that, no matter his guilt or innocence, his case should not even come before a jury. They petitioned the New York Supreme Court of Judicature for habeas corpus relief on the ground that “the law of nations provided [McLeod] a complete defense to the indictment, even if all of its facts were admitted as true”<sup>19</sup>:

The attack on and destruction of the *Caroline* was an act of public force, done by the command of the British government, and all the defendant did in it, if any thing, he did by command of his superior officer, and in obedience to his own government. For acts done under such authority he is not responsible, personally and individually, in any court of law whatever.<sup>20</sup>

On this point, the U.S. government agreed. Yet with no authority to order McLeod released from state custody, and having unsuccessfully petitioned New

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12. Lacroix, *supra* note 4, at 948.

13. *Id.* at 951.

14. *Id.* at 953.

15. *Id.*

16. *Id.* at 954.

17. Bederman, *supra* note 7, at 516.

18. *Id.* at 518.

19. *Id.* at 521.

20. *People v. McLeod*, 25 Wend. 483, 488 (1841). McLeod also argued that because the Constitution grants “the power to declare war, conclude peace, and generally to superintend the foreign relations of the country” to “congress or the general government,” “[a]ny interference of the state authorities will be and is incompatible with the exercise of these high powers.” *Id.* at 491–93.

York officials to do so of their own accord, Secretary Webster and other federal officials were relegated to the role of spectators.<sup>21</sup> Nevertheless, Secretary Webster assured his British counterparts: “[McLeod] demands immunity from personal responsibility by virtue of the law of nations, and that law in civilized States is to be respected in all courts.”<sup>22</sup> He enlisted Attorney General John Crittenden to ensure McLeod’s defense and, if necessary, U.S. Supreme Court review of any adverse judgment.<sup>23</sup>

The New York Supreme Court denied McLeod’s habeas petition, primarily on factual grounds. The court declared, after a review of the seminal treatises of international law,<sup>24</sup> that what is known as “superior orders” (or, more commonly today, the “Nuremberg defense”) could be a valid defense under the law of nations, but only if a state of war in fact existed between the relevant nations at the time that the alleged crimes are committed.<sup>25</sup> The court held that since, in its view, no war existed, McLeod should be tried as an ordinary criminal under New York state law.<sup>26</sup>

McLeod opted against appealing this decision to the U.S. Supreme Court “for fear of further prolonging his incarceration.”<sup>27</sup> “Instead, McLeod’s counsel sought, and received, a change of venue for the trial. McLeod produced witnesses who corroborated his alibi. He was acquitted after being detained for nearly a year.”<sup>28</sup>

The McLeod affair did not break out into all-out war, but “the legal [and political] difficulties raised by his case persisted.”<sup>29</sup> Thus, in December 1841, President Tyler proposed that Congress “mak[e] such provisions by law, so far as they may constitutionally do so, for the removal . . . of all such cases . . . which may involve the faithful observance and execution of our international obligations, from

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21. See Bederman, *supra* note 7, at 519; see also *Cunningham v. Neagle*, 135 U.S. 1, 71 (1890) (“McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that state. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed.”).

22. Letter from Daniel Webster to Henry Fox (Apr. 24, 1841), reprinted in 29 BRITISH AND FOREIGN STATE PAPERS (1840–41) 1129, 1132 (1857) (“[H]is rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this Government.”).

23. See Letter from Daniel Webster to John Crittenden (Mar. 15, 1841), reprinted in 29 BRITISH AND FOREIGN STATE PAPERS (1840–41) 1139, 1141–42 (1857).

24. See *McLeod*, 25 Wend. at 578–96 (discussing Grotius, Puffendorf, and Vattel).

25. See *id.* at 591.

26. See *id.* at 591–92, 603.

27. Bederman, *supra* note 7, at 526 (citing Jennings, *supra* note 5, at 95).

28. *Id.*

29. *Id.* Most directly, another alleged participant in the *Caroline* raid was arrested in New York. See CONG. GLOBE, 27th Cong., 2d Sess. 292 (1842) (recording a March 8, 1842 message from President Tyler in which he informed the Senate that “a subject of Great Britain, residing in Upper Canada, has been arrested upon a charge of connection with the expedition fitted out by the Canadian authorities, by which the ‘Caroline’ was destroyed”). Moreover, as Professor Bederman explains, these were not the first instances of state-level attempts to prosecute foreigners in situations that implicated the foreign relations concerns of the federal government. See Bederman, *supra* note 7, at 526–27; see also *Ex parte Cabrera*, 4 F. Cas. 964, 966 (C.C.D. Pa. 1805) (No. 8,759) (holding that the federal court had no jurisdiction to hear a habeas petition for an individual, even a public minister, held in state court, in violation of the law of nations).

the State to the Federal Judiciary.”<sup>30</sup> By the end of the summer of 1842, Congress followed suit with “An Act to provide further remedial justice in the courts of the United States” (“1842 Habeas Act” or “Act”), which granted federal courts the power to issue writs of habeas corpus in cases in which foreigners are detained in either state or federal custody for acts allegedly committed under color of a foreign sovereign.<sup>31</sup> A modified version of the original bill did pass, but not before an epic constitutional colloquy on the Senate floor.<sup>32</sup>

### C. Antebellum Law and Politics

International tensions on the northern U.S. border arose as domestic disputes with the southern states dominated the pre-Civil War era. Although these general dynamics, revolving around slavery and states’ rights, are well known, a few specific developments warrant mention here as particularly relevant to the immediate legal and political context in which the 1842 Habeas Act was enacted.

The years following the presidency of Andrew Jackson were politically tumultuous. Due in part to President Jackson’s hardline stance against the Second Bank of the United States, an economic recession that began with the Panic of 1837 lasted well into the 1840s<sup>33</sup> and contributed to the desperation of subsequent administrations to maintain peaceful relations with the United Kingdom, the predominant global financial power and primary trading partner of the United States.<sup>34</sup> The gravity of the situation breathed life into the policies of nationalization favored by the nascent Whig Party, which took control of the presidency and both chambers of Congress for the first time in the elections of 1840.<sup>35</sup> In a short window of united government—before they were trounced in the House in the 1842 midterms<sup>36</sup>—the Whigs attempted to carry out an ambitious agenda, including a range of economic proposals with far-reaching implications.

The Whigs pushed to create a Third Bank of the United States, after the Second Bank, thoroughly lambasted by President Jackson,<sup>37</sup> was privatized in 1836

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30. CONG. GLOBE, 27th Cong., 2d Sess. 292 (1842) (“In my message of the 7th December, I suggested to Congress the propriety, and in some degree the necessity of making proper provision by law, within the pale of the Constitution, for the removal at their commencement, and at the option or the party, of all such cases as might arise in State courts, involving national questions, touching the faithful observance and discharge of the international obligations of the United States from such State tribunal to the Federal judiciary.”).

31. See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539–40 (codified as amended at 28 U.S.C. § 2241(c)(4) (2012)). A few weeks before final passage of the law, the U.S. and British governments concluded the Webster-Ashburton Treaty, which resolved outstanding issues regarding the U.S.–Canada border, the transatlantic slave trade, and extradition for certain enumerated crimes—including, naturally, arson and murder. See generally *British-American Diplomacy: The Webster-Ashburton Treaty*, THE AVALON PROJECT, [http://avalon.law.yale.edu/19th\\_century/br-1842.asp](http://avalon.law.yale.edu/19th_century/br-1842.asp) [<https://perma.cc/FR4X-ZJHZ>].

32. See *infra* Part III.

33. See generally ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945); PETER TEMIN, *THE JACKSONIAN ECONOMY* (1970).

34. SCHLESINGER, JR., *supra* note 33; TEMIN, *supra* note 33.

35. See Lacroix, *supra* note 4, at 953–54.

36. U.S. HOUSE OF REPRESENTATIVES, *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions> [<https://perma.cc/8QAP-W6Y9>].

37. SCHLESINGER, JR., *supra* note 33.

and liquidated in 1841.<sup>38</sup> President Tyler vetoed the legislation,<sup>39</sup> leading to the resignation of his entire cabinet (save Secretary Webster),<sup>40</sup> his expulsion from the Whig Party,<sup>41</sup> and, in turn, a poor showing in the next election.<sup>42</sup> The Whigs also passed the Bankruptcy Act of 1841—the first such law in decades—which allowed for both involuntary and voluntary bankruptcy across the country before it was promptly repealed in 1843.<sup>43</sup>

As the Whigs sought to enact new policies of centralization and economic modernization, slavery continued to dominate the public debate. Plantation owners viewed industrialization as a threat to their slavery-dependent agricultural system as well as their economic and political dominance.<sup>44</sup> Moreover, the increasing intensity and support of the abolitionist movement in the 1830s alarmed the South.<sup>45</sup> Slave revolts, such as Nat Turner's Rebellion,<sup>46</sup> provoked anxiety in southern whites. Ardent northern and foreign abolitionists, encouraging emancipation in violation of slave states' laws, posed major threats to the Slave Power. Indeed, the successful slave rebellion on board the *Creole* in 1841, later sanctioned by the British authorities in Nassau,<sup>47</sup> was manifestly on the minds of southern Democrats in Congress as they debated the 1842 Habeas Act.<sup>48</sup>

Many southerners believed that the federal courts presented an additional, related threat to states' rights. The Democrats were doubtful that federal judges could be trusted to protect slave ownership and (as they saw it) the proper balance of federalism.<sup>49</sup> Their fears were not necessarily unfounded. Although President Jackson was able to appoint six justices to the Supreme Court,<sup>50</sup> the Court remained, to an extent, ideologically committed to the robust conception of federal judicial

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38. *Id.*

39. John Tyler, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/presidents/john-tyler> [https://perma.cc/FAD6-5CHC].

40. *Id.*

41. *Id.*

42. See U.S. HOUSE OF REPRESENTATIVES, *supra* note 36.

43. See Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (1841) (repealed 1843).

44. SCHLESINGER, JR., *supra* note 33.

45. See generally *Abolitionist Movement*, HISTORY, <https://www.history.com/topics/black-history/abolitionist-movement> [https://perma.cc/2TAN-3YBY]. The United Kingdom had formally abolished slavery in its colonies by 1833. JOHN OLDFIELD, *British Anti-slavery*, BBC, [http://www.bbc.co.uk/history/british/empire\\_seapower/antislavery\\_01.shtml](http://www.bbc.co.uk/history/british/empire_seapower/antislavery_01.shtml) [https://perma.cc/QFW9-SVWR].

46. Thomas Wentworth Higginson, *Nat Turner's Insurrection*, ATLANTIC MONTHLY, Aug. 1861, <https://www.theatlantic.com/magazine/archive/1861/08/nat-turners-insurrection/308736> [https://perma.cc/8TLG-6F3L].

47. Kat Eschner, *When Enslaved People Commandeered a Ship and Hightailed It to Freedom in the Bahamas*, SMITHSONIAN MAG. (Nov. 7, 2017), <https://www.smithsonianmag.com/smart-news/slave-revolt-ended-128-enslaved-people-free-bahamas-180967070> [https://perma.cc/4Y3Q-Y8QX].

48. See, e.g., CONG. GLOBE, 27th Cong., 2d Sess. app. 647 (1842) (speech of Sen. Smith). The *Creole* issue also became a sticking point in Secretary Webster's diplomatic negotiations with the British. *Webster-Ashburton Treaty, 1842*, OFF. HISTORIAN, BUREAU PUB. AFF., U.S. DEP'T ST., <https://history.state.gov/milestones/1830-1860/webster-treaty> [https://perma.cc/EQ93-SNC3].

49. See *infra* Section II.B.1.

50. SCHLESINGER, JR., *supra* note 33.



supremacy championed by Chief Justice John Marshall and Justice Joseph Story, the latter of whom remained on the Court until his death in 1845.<sup>51</sup>

For his part, Justice Story famously penned the Court's opinion in *United States v. The Amistad* in 1841, which acknowledged the freedom of illegally transported slaves who had revolted in the Caribbean.<sup>52</sup> The following year, in *Swift v. Tyson*, he also upheld the authority of federal courts to develop their own common law.<sup>53</sup> Another contemporaneous Supreme Court case found even the Democratic Chief Justice Roger Taney asserting that foreign relations is the exclusive domain of the national government.<sup>54</sup> The Senate was well aware of these recent precedents as it debated the Act in the spring and summer of 1842.

## II

### THE CONGRESSIONAL DEBATE: FUNCTIONALISM, FORMALISM, AND FEDERALISM

As introduced by Senator John Berrien of Georgia, the initial iteration of what became the 1842 Habeas Act would have provided federal courts with the power to issue habeas writs in all cases of state or federal prisoners detained “on account of any act done, or omitted to be done, under or by virtue of the Constitution, or any law or treaty of the United States, or claimed under the law of nations, or commission, or authority of any foreign State or sovereignty.”<sup>55</sup> Such a law—providing for the possibility of federal habeas relief in any case in which the U.S. Constitution, laws, or treaties may be raised as a defense—would have greatly expanded the authority of the federal courts, far beyond the single extension of federal habeas power that Congress authorized in 1833, which applied to state detention of federal officials who had been acting under federal authority.<sup>56</sup>

With fierce opposition to this unprecedented expansion of the power of the federal courts,<sup>57</sup> Senator William Preston of South Carolina successfully introduced an amendment to strip out the all-encompassing language and cabin the ambitious scope of the proposal to address only those situations that were factually analogous

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51. See GERALD T. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* (1970).

52. 40 U.S. 518, 591–592 (1841).

53. 41 U.S. 1 (1842). Justice Story is further remembered for his opinion in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), which held that federal courts have the power to review state court interpretations of the U.S. Constitution and laws. He was also a “key drafter” of the Bankruptcy Act of 1841. David A. Skeel, Jr., *The Empty Idea of “Equality of Creditors,”* 166 U. PA. L. REV. 699, 706 n.29 (2018).

54. *Holmes v. Jennison*, 39 U.S. 540, 574 (1840).

55. CONG. GLOBE, 27th Cong., 2d Sess. 382 (1842) (remarks of Sen. Berrien); Bederman, *supra* note 7, at 527–28.

56. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634, 634–35. Prior to the 1833 bill, the First Judiciary Act had enabled habeas relief only for individuals detained by federal authorities. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82; see also CONG. GLOBE, 27th Cong., 2d Sess. 444 (1842) (remarks of Sen. Berrien). It was not until the Civil War and the consequent realignment of power between the national and state governments that the Radical Republicans enacted this general habeas power in 1867. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 385–86.

57. See *infra* Section II.B.

to McLeod's case.<sup>58</sup> The final version of the bill<sup>59</sup> was narrowed to a grant of habeas jurisdiction to the U.S. Supreme Court, or the district court "in which a prisoner is confined," over cases in which a citizen or subject of a foreign state, "and domiciled therein," is confined under state or federal authority for "any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."<sup>60</sup> That is, the 1842 Habeas Act provided federal courts with jurisdiction to hear habeas petitions brought by a certain class of state or federal prisoners—non-citizens domiciled abroad—in certain circumstances—when under orders from a foreign sovereign—in which the law of nations provides the rule of decision.<sup>61</sup>

The Senate debate over the bill addressed two main issues, one of legality and the other of policy: First, whether Congress had the power, under the Constitution, to vest the federal courts with jurisdiction to oust the state courts of their authority to hear habeas petitions that turned on the law of nations. Second, assuming Congress had such power, whether Congress should decline to exercise it for reasons of comity or political expediency.<sup>62</sup>

On the one hand, the Whigs asserted the national government's supreme and exclusive role in the broad domain of foreign affairs. The Democrats, on the other hand, decried the ever-increasing intrusion of the national government into the reserved powers of the states. Each side laid claim to arguments—for example, dual sovereignty versus federal supremacy or functionalism versus formalism—based on the history of the Founding, the constitutional conventions, and the structure and text of the Constitution. Debaters on both sides skillfully engaged in constitutional argumentation and displayed familiarity with relevant precedent—exposition reminiscent and worthy of Alexander Hamilton's *Pacificus* and James Madison's *Helvidius*.<sup>63</sup> Then-Senator James Buchanan of Pennsylvania described the opposing

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58. CONG. GLOBE, 27th Cong., 2d Sess. 708, 729 (1842) (remarks of Sen. Preston). Other opponents of the legislation unsuccessfully attempted to cabin the bill even further. *See, e.g., id.* at 729–30 (recording other proposed amendments to the bill, including to omit mention of the "law of nations" and limit its operation "during a period of war . . . and in prosecution of such war").

59. The bill passed the Senate on July 8, 1842, CONG. GLOBE, 27th Cong., 2d Sess. 734 (1842), exactly four months after it was reported by Senator Berrien from the Committee on the Judiciary. *Id.* at 292. It passed the House on August 26, 1842, *id.* at 949, with little discussion as to its constitutionality. *See* CONG. GLOBE, 27th Cong., 2d Sess. app. 953 (1842) (speech of Rep. Ingersoll). The bill was signed into law three days later. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539–40.

60. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539–40 (codified as amended at 28 U.S.C. § 2241(c)(4) (2012)).

61. *See Jimenez v. Aristeguieta*, 311 F.2d 547, 564 n.6 (5th Cir. 1962) (characterizing current 28 U.S.C. § 2241(c)(4) as "only a jurisdictional provision conferring no substantive right on appellant to discharge from custody merely upon allegation of jurisdictional facts"); *cf.* 28 U.S.C. § 1350 (2012) (providing district courts with jurisdiction to hear common law causes of action for which "the law of nations or a treaty of the United States" provides the rule of decision).

62. *See* CONG. GLOBE, 27th Cong., 2d Sess. 488 (1842) (remarks of Sen. Huntington) ("[T]his bill asserted two distinct propositions—one, the constitutionality of Congress to pass such a law; and the other, the expediency of doing it.").

63. *See* ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793 (J. & G.S. Gideon ed., 1845).

parties in these grand but familiar terms, referring not to the Whigs and Democrats, but more generally to “the two great parties which have existed since the origin of the Government, and must endure until its end”<sup>64</sup>:

[O]n the one side, all those Federalists (if you choose the name) who honestly believe that the powers of the Federal Government ought to be extended by a liberal construction of the Constitution; and, on the other side, those friends of State rights who believe, with equal honesty, that the powers of this Government are already too great, and ought to be confined within the limits of a strict construction.”<sup>65</sup>

Southern Democrats were also forthright about the primary motivation behind their legal position: slavery.<sup>66</sup> They were concerned not only that the expanded habeas jurisdiction of the federal courts would encroach upon the authority of state courts, but also that legislation specifically incorporating the law of nations would allow liberal federal judges to assert jurisdiction over and then release “foreign abolitionists” who would “incite revolts and then claim a privilege under the law of nations.”<sup>67</sup> Slavery would thereby be ultimately dismantled by a thousand judicial cuts—an objective that, at the time, could not have been accomplished through the political branches.

#### A. The Functionalist Federalist (Whig) Position

The arguments advanced by the Whigs to justify the 1842 Habeas Act proceeded on two parallel tracks. First, Senator Berrien plainly asserted that the federal government has inherent duties under the law of nations that are implied in and by “the character of the United States as a nation.” Thus, notwithstanding the enumerated powers in Article I, in establishing the United States as sovereign with respect to the international community, the Constitution necessarily vested the national government with a general grant of power to ensure that the United States could fulfill its international obligations.

Second, the Whigs endeavored to provide a textual basis for their bill. Senator Rufus Choate of Massachusetts took a kitchen-sink approach, turning to provisions of both Article I and Article III to make this case. He contended that Congress has sufficient lawmaking authority under specific enumerated powers to pass a jurisdictional statute that also establishes the law of nations as federal law to be applied. In the alternative, he asserted either that criminal prosecutions by states of foreign citizens or subjects should be regarded as “controversies”<sup>68</sup>—over which the federal courts may take cognizance under diversity jurisdiction—or that the law

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64. CONG. GLOBE, 27th Cong., 2d Sess. app. 385 (1842) (speech of Sen. Buchanan).

65. *Id.*

66. It should be noted, however, that the debate did not divide completely on geographic or purely party lines, as evidenced most clearly by the fact that Senator Berrien of Georgia, the legislative sponsor, was a staunch supporter of slavery and, before switching parties, had formerly served as a Democrat in the Senate and as President Jackson’s Attorney General. Thomas P. Govan, *John M. Berrien and the Administration of Andrew Jackson*, 5 J. S. HIST. 447 (1939).

67. Bederman, *supra* note 7, at 528.

68. U.S. Const. art. III, § 2, cl. 2.

of nations is already U.S. law—and, therefore, the federal judicial power automatically extends to it.

### 1. *Duty of Nations*

Senator Berrien argued that congressional authority to provide for the airing in federal court of all disputes implicating U.S. foreign relations was a necessary and proper measure to realize the federal government's power over foreign affairs—a power implied in and derived from the very existence of the United States as a nation. He maintained generally that as responsible sovereign in the eyes of the international community, this power must be exclusive. He asserted specifically that under the law of nations, as an incident of national sovereignty, Congress is duty bound to protect and show reciprocal respect for foreigners found within the United States.<sup>69</sup> Accordingly, Congress must possess the power to protect foreigners (including through the federal courts, whose power is coextensive with the duties and powers of the political branches<sup>70</sup>) because where there exists a duty, there exists a corresponding power to perform it.

Senator Berrien did also gesture toward conventional constitutional reasoning. He reminded the Senate that “the framers of the Constitution, in convention, manifested an extraordinary solicitude to vest in the federal jurisdiction the right of deciding upon all cases, between foreigners and this country, affected by the laws of nations.”<sup>71</sup> He identified Supreme Court precedent recognizing federal judicial supremacy,<sup>72</sup> such as *Holmes v. Jennison*,<sup>73</sup> *Worcester v. Georgia*,<sup>74</sup> and

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69. See CONG. GLOBE, 27th Cong., 2d Sess. 729 (1842) (remarks of Sen. Berrien) (“[T]he duties of a nation being imposed upon the United States by the Constitution, the power to do all acts necessary to enable the National Government to fulfil those duties must be coexistent with the obligation to perform the duties of a nation.”); see also *id.* at 488 (remarks of Sen. Huntington) (“[The United States] is bound to perform the duties required of an independent nation by the law of nations. The necessity of being vested with the right to claim the protection of the law of nations, implies the power to reciprocate the right.”); *id.* at 539 (speech of Sen. Choate) (“The Constitution declares this in and by the mere act of bringing you into the circle of independent, christian, and civilized nations. It is the condition of such national existence to be under that code.”).

70. Senator Berrien persuasively summarized the concept of coextensivity:

The conduct of foreign relations belongs to the General Government. Congress may legislate with regard to these foreign relations, and the limit of the Congressional legislation in that respect, is the only limitation that can be made to the judicial power of the United States. But the whole legislative power of Congress is subjected to the action and interpretation of the judicial department. Thus are the legislative and judicial powers commensurate with each other.

CONG. GLOBE, 27th Cong., 2d Sess. 444 (1842) (remarks of Sen. Berrien); see also *id.* (asserting that the federal judiciary is “the only competent judicial power to decide upon matters involved in foreign relations or the law of nations”).

71. CONG. GLOBE, 27th Cong., 2d Sess. 444 (1842) (citing THE FEDERALIST NO. 80 (Alexander Hamilton)).

72. See CONG. GLOBE, 27th Cong., 2d Sess. 444 (1842) (remarks of Sen. Berrien); see also CONG. GLOBE, 27th Cong., 2d Sess. app. 538, 541 (1842) (speech of Sen. Choate) (discussing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)).

73. 39 U.S. 540 (1840). On Senator Berrien's reading, the divided opinions in *Jennison* “establish[ed] the proposition that the law of nations is incorporated in the laws of the United States; and, therefore, the federal courts have special jurisdiction over all such cases.” CONG. GLOBE, 27th Cong., 2d Sess. 444 (1842) (remarks of Sen. Berrien) (citing *Jennison*, 39 U.S. at 569).

74. 31 U.S. 515 (1832).

*Cohens v. Virginia*.<sup>75</sup> Lastly, he pointed to “other incidental powers” in the Constitution—including the “foreign power and commercial power,” which “depend on the law of nations,” as well as the “treaty-making power, “war power,” and “exclusive jurisdiction in admiralty cases,” which were “subjected to control of the Federal Government”—to “show[] that the jurisdiction over foreign relations, in every possible incident, devolves on this Government.”<sup>76</sup>

Nevertheless, Senator Berrien did not pretend that his functionalist argument rested chiefly either on constitutional text per se or on any logic internal to constitutional structure.<sup>77</sup> He doubled down on the extra-constitutional proposition that “[t]he power to [enact the 1842 Habeas Act] was deducible from the law of nations; and the character of the United States as a nation, claiming the rights of the law of nations, is involved in its discharge of the obligations imposed upon it by the law of nations.”<sup>78</sup> This general grant of power was to be implied in the mere existence of a Constitution and the United States as a nation, and it attempted to rely on the Necessary and Proper Clause<sup>79</sup> to bridge the textual gap. Senator Choate put that point succinctly:

You may pass all laws necessary and proper to execute any constitutional power, or perform any constitutional duty of the General Government. Among those powers and duties is that of preserving peace, by observing international law. Then you have the power to secure that observance, and of course the power to pass this part of this bill, adopting and executing it so far as it regulates foreign intercourse.<sup>80</sup>

That the states, and state courts, are also expected to uphold the law of nations—and, exercising their reserved powers, may do so—is of no moment. Protection of foreigners may not be an enumerated power explicitly vested in the federal government, but it is a legal duty of nations as such. Thus, Congress must possess the power to pass any law necessary to avoid U.S. responsibility on the international plane<sup>81</sup>—to prevent war and preserve peace. States are simply not bound by the law of nations in the same way as the national government. As Senator Choate asked, “[m]ay you not just as well say that the States are bound to preserve

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75. 19 U.S. 264 (1821).

76. CONG. GLOBE, 27th Cong., 2d Sess. 444 (1842) (remarks of Sen. Berrien); *see also* CONG. GLOBE, 27th Cong., 2d Sess. app. 540 (1842) (speech of Sen. Choate) (“[E]verywhere, in numerous provisions, the Constitution assumes that you observe the laws of nations. In making war, concluding peace, in trade, in negotiation, in all your intercourse with the world, it supposes it.”).

77. *See* CONG. GLOBE, 27th Cong., 2d Sess. 729–30 (1842) (remarks of Sen. Berrien).

78. *Id.* at 729.

79. U.S. CONST. art. I, § 8, cl. 18.

80. CONG. GLOBE, 27th Cong., 2d Sess. app. 539 (1842) (speech of Sen. Choate); *see id.* (“[S]ince the Constitution makes you a nation[] . . . since it subjects you to the general law of nations, and imposes on you, as a nation, the duty of obedience to it—does it not clothe you with the power to provide for the administration of that law? Is not this a necessary and proper means to execute a clear power, and to perform a clear duty?”).

81. *See id.* at 555 (debate between Sen. Bagby and Sen. Berrien); *see also id.* at 539 (speech of Sen. Choate) (“In thus erecting you into the nation . . . the Constitution subjects you, subjects the Union, the General Government, to the general law of nations, in so far as that law applies to your intercourse with, and relation to, the rest of the world.”).

national peace? So, in one sense, they are: so are we all. But is there not a peculiar and constitutional sense in which that is the duty of this Government alone?"<sup>82</sup>

## 2. *Presumptions and Penumbras*

However, the Whigs strained to ground Senator Berrien's intuitions in the Constitution itself. Senator Choate, who had been elected the year before to the seat left open by now-Secretary Webster, provided the most comprehensive textual defense of the bill.<sup>83</sup> He expounded at length upon both the affirmative grants of power to Congress in Article I<sup>84</sup> and the delineation of disputes that fall within the judicial power in Article III.<sup>85</sup>

Senator Choate's reasoning relied on a liberal presumption in favor of finding broad grants of federal jurisdiction over cases that implicate foreign affairs: "[T]he Constitution has gone so far in its grant of federal jurisdiction, and upon such policy, that there is a sound, not to say an irresistible, presumption, *a priori*, that we shall find, in some clause, a grant of the jurisdiction asserted by this bill."<sup>86</sup>

Senator Choate analogized to the well-established power of the federal courts, sitting in diversity, to hear civil matters between states and foreign citizens or subjects. He argued that the accepted rationales for such jurisdiction in civil suits applies with at least equal, if not greater force in criminal cases: State court judges and juries "may be somewhat less certain to be impartial in a case where their own States, or their own neighbors, are parties on one side . . . presuming that they may be more exposed, somewhat, to be disturbed and darkened by sympathy with local passion and excitation."<sup>87</sup> And "they may be . . . less profoundly impressed with the responsibilities attendant upon bringing on, by a judicial decision, a war which their State would not have to sustain, and which the nation would."<sup>88</sup> "[T]o preserve, undisturbed, harmonious intercourse with the rest of the world," the Constitution provided federal court jurisdiction over "the most frivolous civil lawsuit with a subject of England resident in Canada."<sup>89</sup> Surely, he posited, "the Constitution has [not] done so capricious, inconsistent, (not to say incomprehensible and absurd), a thing as to have given, with so much solicitude, to your courts, jurisdiction over such disputes as these, and yet to have overlooked altogether the weightier matters of this bill?"<sup>90</sup>

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82. *Id.* at 539.

83. Choate, Rufus (1799 – 1859), BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000375> [<https://perma.cc/BV4J-REFX>].

84. U.S. CONST. art. I, § 8.

85. *Id.* art. III, § 2.

86. CONG. GLOBE, 27th Cong., 2d Sess. app. 537 (1842) (speech of Sen. Choate); *see also id.* at 539 ("I regard the Constitution as declaring, by inevitable implication, as intelligibly and as peremptorily as if it were written in it, that the laws of nations, in so far as they apply to and regulate intercourse with foreigners and foreign Governments, are, or may be, made by the Legislature obligatory on and in the United States, exactly as they are on and in the other christian and civilized nations of the world.").

87. *Id.* at 537.

88. *Id.*

89. *Id.*

90. *Id.*; *see also id.* at 538 ("Civil suits by a State against aliens are triable in the national courts, for the preservation of the national peace. Why should not criminal charges, also, between the same parties, be so tried on the same policy?").

In addition, Senator Choate harkened back to the ratification debates, quoting illustrious figures of the Founding to explain the intentions behind the constitutional text. Senator Choate cited Hamilton’s Federalist No. 80 as well as Edmund Randolph for the widely shared sentiment that “[d]isputes between [foreign states and the United States] ought . . . to be decided by the Federal Judiciary.”<sup>91</sup> He reminded his colleagues that Randolph both introduced the Virginia Plan, which envisioned federal jurisdiction over “all cases in which foreigners may be interested,”<sup>92</sup> and was a member of the Committee of Detail charged with converting that plan into a first draft of the Constitution. Perhaps more persuasively, Senator Choate highlighted Madison’s view that the purpose of the federal judiciary was “to prevent all occasions of having disputes with foreign powers, to prevent disputes between different states, and remedy partial decisions” of the state courts in order to demonstrate that even the original advocates of states’ rights expected the federal judicial power to extend to the kinds of cases encompassed by the 1842 Habeas Act. Taking stock of this history, Senator Choate proclaimed: “[T]his bill seems to me well calculated to accomplish one of the chief original ends of the Constitution . . . .”<sup>93</sup>

Having set forth this interpretive presumption, Senator Choate next listed the textual provisions to which he argued it should be applied. In Article II, the Treaty Clause<sup>94</sup> grants the federal government wide latitude in its relations with foreign sovereigns—a power greater, perhaps, than Congress’s domestic lawmaking powers.<sup>95</sup> Accordingly, Senator Choate appeared to suggest something akin to a dormant Treaty Power: “If, with a view to the preservation of peace, we can incorporate the laws of nations into the laws of the United States, for the government of our own territory by treaty, then, with a view to the same end, we can do it by law.”<sup>96</sup> Furthermore, the Define and Punish Clause<sup>97</sup> “commits to Congress the exclusive and the entire administration of the whole law of nations as a criminal code, in just so many words”<sup>98</sup>:

If a doubt is moved, whether you have not declared an act to be an offence against the laws of nations which was no such offence, thus usurping upon the municipal jurisprudence and legislation of a State, this, like every other judicial question on the validity of a law of the United States, must be determined by the national judiciary.<sup>99</sup>

Since Congress retained “the undisputed right to *punish* offences against the law of nations, . . . the right must be implied to *prevent* offences.”<sup>100</sup> Finally, Senator

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91. *Id.* at 537.

92. *Id.*

93. *Id.* at 542.

94. U.S. CONST. art. II, § 2, cl. 2.

95. See CONG. GLOBE, 27th Cong., 2d Sess. app. 540 (1842) (speech of Sen. Choate).

96. *Id.*

97. U.S. CONST. art. I, § 8, cl. 10.

98. CONG. GLOBE, 27th Cong., 2d Sess. app. 540 (1842) (speech of Sen. Choate).

99. *Id.*

100. CONG. GLOBE, 27th Cong., 2d Sess. 489 (1842) (remarks of Sen. Huntington).

Choate “traced the power over these matters to the constitutional power given to the General Government to declare war or make peace,”<sup>101</sup> arguing that the Declare War Clause<sup>102</sup> implies all necessary power to prevent it. Consistent with this line of reasoning, the 1842 Habeas Act could be considered “necessary to enable the General Government to carry out the enumerated powers with which the Constitution invests it.”<sup>103</sup>

In case his liberal exposition of enumerated powers in Article I was found wanting, Senator Choate sought alternative textual authorization in the language of Article III.<sup>104</sup> He claimed that there is no relevant distinction between the words “cases” and controversies,” as used in Section Two. In popular usage, he noted, “controversies” connoted both the civil and criminal,<sup>105</sup> and he cited the First Judiciary Act, which specified “controversies of a civil nature.”<sup>106</sup> He believed that common sense favored this interpretation: “I know of nothing in reason, or in the Constitution, to warrant the imagination that you invade the sovereignty of the States any more, when you take from them the trial of crimes, than when you take from them the trial of contracts.”<sup>107</sup>

Notably, Senator Choate saw no obstacle to providing the federal courts with common law-making power. He stated that the bill “first adopt[ed] the law of nations as the law to be administered, and then commit[ted] the administration of that law to the national judiciary.”<sup>108</sup> “Instead of enumerating the cases in which the imprisonment of a foreigner by the authority of a State is an offence against the laws of nations you refer it at once to the judicial power to ascertain whether a given case, judicially presented, is such an one or not.”<sup>109</sup> He compared the Act to the congressional codification of the crime of piracy, as defined by international law, as well as the Alien Tort Statute<sup>110</sup>: “Is this void, because, instead of enumerating and

101. *Id.* at 488.

102. U.S. CONST. art. I, § 8, cl. 11.

103. CONG. GLOBE, 27th Cong., 2d Sess. 488–89 (1842) (remarks of Sen. Huntington).

104. Senator Choate also conclusively asserted that the power to enact the 1842 Habeas Act could derive from *either* the Constitution *or* federal law: “If the Constitution, by direct operation, makes the laws of nations your law, then these cases arise under the constitution. If, by this statute, they are made such, then the cases arise under a law of the United States; and either way is unquestionably within your judicial power.” CONG. GLOBE, 27th Cong., 2d Sess. app. 540 (1842). Of course, this argument, grounded in the concept of coextensivity, begs the question as to whether such powers exist, either within or without the Constitution. *Id.* at 619 (speech of Sen. Walker) (“The Senator says this bill is a ‘law of the United States;’ and therefore you have this jurisdiction under it. Then you may pass any law authorizing the Federal courts to take charge of all cases whatsoever; but surely the act must be passed ‘in pursuance’ of the granted powers of the Constitution, or it is null and void . . . . It is said that this act adopts the law of nations; then it is not adopted by the Constitution in these cases; and, if so, Congress cannot adopt it.” (citing *Marbury v. Madison*, 5 U.S. 137 (1803))).

105. CONG. GLOBE, 27th Cong., 2d Sess. app. 538 (1842) (speech of Sen. Choate).

106. *Id.*

107. *Id.*

108. *Id.* at 539 (speech of Sen. Choate); *see also id.* (describing it “first, as a bill making law, and then as a bill conferring jurisdiction”).

109. *Id.* at 540.

110. 28 U.S.C. 1350 (2018).



defining those torts, the courts are authorized to pronounce, by recurrence to that law, whether, in a given case, such an one has been committed?”<sup>111</sup>

### **B. The Formalist State Sovereignty (Democratic) Position**

The Democrats aggressively assumed the mantle of the strict constructionist approach to constitutional interpretation generally and enumerated powers specifically.<sup>112</sup> Senator Robert Walker of Mississippi represented the Democratic position most forcefully, methodically rebutting the constitutional contentions of the Whigs “for upwards of two hours”<sup>113</sup> on the Senate floor.<sup>114</sup>

But these senators, many of whom spoke and wrote impassionedly in opposition to the proposed legislation, invoked not only bare legal arguments based on constitutional history, structure, and text, but also what they asserted would be the potential practical consequences of its impending passage. Their real-world predictions—which at their most extreme did not come to pass but which certainly reflected and presaged the simmering North-South tensions that exploded in the years to come—distilled down to a simple admonition: Attempts to prevent conflicts with foreign powers through self-aggrandizing federal legislation would incite even more acute conflicts within the United States.<sup>115</sup>

In addition to a violation of the Constitution, the Democrats perceived the bill as an insult to state judiciaries,<sup>116</sup> as cowardly capitulation to the British,<sup>117</sup> and as an invitation for unnecessary and inconvenient litigation.<sup>118</sup> Most crucially, they characterized the 1842 Habeas Act as a tangible threat to the states’ ability to defend themselves, not only from alleged criminals like McLeod, but also from foreign elements perceived to be far more dangerous to the southern way of life: abolitionists

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111. CONG. GLOBE, 27th Cong., 2d Sess. app. 540 (1842) (speech of Sen. Choate).

112. Cf. HAMILTON & MADISON, *supra* note 63, at 53.

113. See CONG. GLOBE, 27th Cong., 2d Sess. 660 (1842).

114. See *infra* Section II.B.2.

115. Although the abbreviated debate in the House did not air the constitutional questions raised by the bill, Democratic representatives were not to be outdone by their Senate colleagues in terms of hyperbolic pronouncements. For example, Representative Samuel Gordon of New York “ventured to assert that, if another case similar to that of Alexander McLeod should occur within her limits, and a Federal judge should attempt to bring the accused before him by *habeas corpus*, his authority would be nullified by the spontaneous action of the people.” CONG. GLOBE, 27th Cong., 2d Sess. 891 (1842) (remarks of Rep. Gordon). He continued: “[S]hould these unhappy controversies between the Federal Government and the States continue, he feared [the Union’s] days were numbered, and its glory at an end.” *Id.*

116. See, e.g., CONG. GLOBE, 27th Cong., 2d Sess. app. 387–88 (1842) (speech of Sen. Buchanan) (“Are not the supreme courts of the several States composed of men as enlightened, as humane, and as patriotic, as the judges who compose the Federal judiciary? And yet protection against these courts is spoken of, as though they were composed of cannibals.”); see also *id.* at 387 (“Ours is a complex system of Government; but, under it, we have hitherto faithfully performed all our duties to foreign nations.”).

117. See, e.g., *id.* at 385 (“On our part, we have conceded every thing, and done every thing in our power to satisfy England; while England has done nothing to satisfy us.”); *id.* at 645 (speech of Sen. Smith) (“The insolent and haughty demeanor of the British Government towards ours, in relation to this subject, ought to have awakened in the bosom of American statesmen and patriots a far different sentiment than that which seems to have produced this humiliating action in our National Legislature.”).

118. See, e.g., *id.* at 384 (speech of Sen. Buchanan).

and the similarly subversive law of nations.<sup>119</sup> These fears both infected and informed their legal arguments.

### 1. *Law of Nations as Existential Threat*

The Democrats did not hesitate to characterize the habeas corpus bill winding its way through Congress as posing a threat to the issue about which they cared most deeply. The proposal was not just a symbolic affront to state sovereignty.<sup>120</sup> The bill provoked vociferous protest that incorporating the “undefined and undefinable”<sup>121</sup> law of nations would provide too much discretion to federal judges—namely, the discretion to apply more enlightened views of slavery to state prosecutions of abolitionists than the Constitution or Congress would allow: “We know there is a spirit—call it fanaticism, if you please—abroad in the land,” declared Senator Arthur Bagby of Alabama, “inculcating . . . a patriotism above the Constitution.”<sup>122</sup> The spirit of abolitionism was a “new-fangled philanthropy . . . of foreign birth and foreign growth,” establishing “a new school of the rights of man, which teaches the slave to war upon his master.”<sup>123</sup> His concern, shared by his fellow Democrats, was clear: Foreign powers like the United Kingdom, afflicted with “fanaticism,” would send “emissaries” into the slave states, “prowling about, imparting to their slaves the new light which has been thrown in, by this modern theory, upon the doctrine of the rights and equality of man.”<sup>124</sup> And “these infernal scoundrels, fiends,” despite violating state criminal laws against insurrection, could argue that they were “acting under the orders of [their] sovereign, who has been so far illuminated by the doctrines of this new school in morals, philanthropy, and the equality and rights of man, as to have become convinced that property cannot exist in slaves.”<sup>125</sup>

Senator John Calhoun of South Carolina even more directly questioned the loyalties of federal judges. He posited that the federal courts would entertain and grant habeas petitions when “the ground of such interference with the authority of

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119. It is striking that the current debate over the status of customary international law in our law similarly revolves around the evolving body of international human rights law and the social and political movement that has propelled it. See generally Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997); *infra* Section III.B.

120. After the general “arising under” provision was stripped from the bill, limiting it to narrowly defined circumstances, see *supra* notes 58–60 and accompanying text, the states’ rights argument was much weaker.

121. *CONG. GLOBE*, 27th Cong., 2d Sess. app. 340 (1842) (speech of Sen. Walker).

122. *Id.* at 555 (remarks of Sen. Bagby).

123. *Id.*

124. *Id.*; see also *id.* at 387 (speech of Sen. Buchanan) (imagining “pious apostle of abolition, who is a subject of Her Majesty of England, coming directly from the world’s convention, enters the State of South Carolina, and excites insurrection among the slaves”); *id.* at 557 (remarks of Sen. Calhoun) (imagining “an emissary sent by any foreign power, with written authority to tamper with our slave population . . . should be imprisoned under the authority of the State”); *id.* at 613 (speech of Sen. Walker) (“A Northern or foreign Abolitionist comes into a State, and excites insurrection among the slaves; yet the State can neither arrest, try, nor punish him . . .”).

125. *Id.* at 556 (remarks of Sen. Bagby); see also *id.* at 615 (speech of Sen. Walker) (“The law of nations is said to embrace the laws of nature; and these laws, many of these writers tell us, are against slavery.”).

the State should be, that slavery was contrary to the laws of nations—which, as extravagant and false as it may be, we know that it is not too much so for fanaticists to assume.”<sup>126</sup>

The Democrats claimed that any international comity that might arise from the bill would not be worth the domestic discord resulting from the ability of foreigners to wield the law of nations as a shield against state prosecution—and of federal courts to wield it as a sword against slavery. Senator Buchanan argued that “[i]t would greatly promote the peace and security of the people of that State to try, convict, and hang such a criminal, who had excited the mad passions of the slaves to indiscriminate slaughter.”<sup>127</sup> It would be a mistake to “arrest[]” “the power of the State to punish this criminal” “[i]n order to preserve the peace and harmony existing between . . . two nations.”<sup>128</sup> He predicted that “[s]uch fanciful constructions of the Constitution will never be sustained by the good sense and jealous patriotism of the mass of the people.”<sup>129</sup> Similarly, Senator Calhoun warned that “[w]e have to dread danger to the peace of the Union from within as well as without.”<sup>130</sup>

## 2. *Strict Constructionist Counterarguments*

Point by point, Senator Walker pushed back against the arguments put forth by the Whigs. He expressed fear of the boundless power that Senator Berrien’s “general grant” proposition could unleash: “If we can assert the mighty powers assumed by this bill, not from specific grants in the Constitution, but from the mere fact that we are a nation—who can impose limits upon such an authority?”<sup>131</sup> Moreover, that proposition ignored the unique composition of the United States as “a confederate republic, *made by*, and *composed of*, sovereign States”<sup>132</sup> and formed by a Constitution of limited powers.<sup>133</sup> It was “directly in conflict with that clause which declares that ‘the powers not delegated to the United States *by the Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’ If, then, the power is not delegated *by the Constitution*, it does not exist.”<sup>134</sup> Senator Walker quoted Hamilton at the New York convention: “[T]he States have certain *independent* powers, in which their laws are *supreme*;—for example, in making and *executing* laws concerning the punishment of certain crimes—such as murder, theft, &c—the *State, cannot be controlled*.”<sup>135</sup>

Relatedly, Senator Walker argued that Senator Choate’s liberal presumption cut against settled enumerated powers principles. By focusing on the

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126. *Id.* at 557 (remarks of Sen. Calhoun).

127. *Id.* at 387 (speech of Sen. Buchanan).

128. *Id.*

129. *Id.*

130. *Id.* at 557 (remarks of Sen. Calhoun).

131. *Id.* at 615 (speech of Sen. Walker).

132. *Id.*

133. See CONG. GLOBE, 27th Cong., 2d Sess. 730 (1842) (remarks of Sen. Walker) (“[This position] would be going beyond anything ever assumed by Alexander Hamilton, because it would be assuming that powers not enumerated by the Constitution might be derived from the law of nations.”).

134. CONG. GLOBE, 27th Cong., 2d Sess. app. 615 (1842) (speech of Sen. Walker) (quoting U.S. CONST. amend. X).

135. *Id.* at 611.

intentions of specific drafters or ratifiers, the Whigs were confusing possible implicit objects of the Constitution with certain explicit grants of power, an indeterminate strategy that could expand the power of the national government over anything and everything. Yet the Necessary and Proper Clause can only validly be exercised to carry out the enumerated powers of Congress.<sup>136</sup> And “[t]he judicial power of the Union is carved by the States out of their own judicial authority, by a surrender of a portion of it only, by special grants, leaving with the States exclusive power in all the cases not enumerated.”<sup>137</sup>

Regarding the significance of the distinction in Article III between “cases” and “controversies,” Senator Walker pointed out that in the Articles of Confederation, controversies referred only to civil cases.<sup>138</sup> He mentioned that, at the Virginia convention, both Madison and then-Virginia House Delegate John Marshall referred to controversies in the civil sense.<sup>139</sup> He also maintained that “the judicial power was not extended to *all cases* under the law of nations; for it was extended to special specified cases arising under the law of nations, which would have been superfluous and nugatory had it been previously extended to all cases.”<sup>140</sup>

Regarding “arising under” jurisdiction, Senator Walker first noted an inconsistency between Senator Choate’s position and the initial draft of the bill, which in one clause specified habeas corpus relief for state prisoners with claims based on the U.S. Constitution and laws, and in another, claims based on the law of nations.<sup>141</sup> If the law of nations were already U.S. law, this separate specification

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136. See CONG. GLOBE, 27th Cong., 2d Sess. 729–30 (1842) (remarks of Sen. Walker) (“[Senator Berrien] frankly admitted that he found no specific power in the Constitution to authorize the second part of the bill; but he pointed to a constructive power—that of making laws to carry out enumerated powers. Where, in the Constitution, did he find the enumerated power to be carried out by this law?”).

137. CONG. GLOBE, 27th Cong., 2d Sess. app. 615 (1842) (speech of Sen. Walker); see also *id.* at 387 (speech of Sen. Buchanan) (“[T]his Government has precisely the powers over our foreign relations enumerated in the Constitution, and no more . . . [W]hatever has not been specifically granted . . . ‘is reserved to the States respectively, or the people.’ And where, I ask, has the power been granted to the Federal courts to try and punish murder and other crimes committed by foreigners against the laws of the States? Such a power . . . never would have been granted by the States.”).

138. *Id.* at 613 (speech of Sen. Walker).

139. See *id.* Senator Walker also noted a procedural problem with the bill: “This is admitted to be a case in which a State is a party; and being so, the language of the Constitution is imperative, that the Supreme Court *shall have* original jurisdiction.” *Id.* at 614. “Then, if this term ‘controversy’ embraces criminal cases ‘in which a State is a party,’ the bill now before us is clearly unconstitutional,” because it “gives appellate, when the Supreme Court could only take original jurisdiction—a jurisdiction which they have *never taken*; and gives to the inferior courts jurisdiction when that of the Supreme Court ‘is original and exclusive’—a jurisdiction which they have *never sustained*.” *Id.* (“[T]o drag all these criminals from every county and State, and all the witnesses with them, for or against the prisoner, to the seat of Government of the Union, is a power so despotic, absurd, and impracticable, that the framers of the Constitution never could have designed to confer it upon Congress.”).

140. *Id.* at 616.

141. See *infra* note 55 and accompanying text.

would be unnecessary.<sup>142</sup> Further, he contended that the Supremacy Clause<sup>143</sup> demands that U.S. law is only that which is passed by Congress, pursuant to the Constitution.<sup>144</sup> “There is no such thing known to the Constitution as the law of the United States, other than the laws made by Congress . . . .”<sup>145</sup>

Additionally, Senator Walker discussed each of the Article I provisions mentioned by Senator Choate. Not only had Congress and the President “made no treaty embracing this case,” but the Treaty Power was “not omnipotent . . . . It can add no one power to the Constitution, or it may add any number. It can withdraw or control no one *reserved power of a State*, or it may all.”<sup>146</sup> He appealed to the practical reality of a contrary interpretation: “Now, can nineteen men [(the President plus two-thirds of what was then a majority of the Senate)], by a treaty with any foreign Government, subvert the Constitution, amend or change, limit or enlarge it?”<sup>147</sup> The Define and Punish Clause was just as textually unavailing. The 1842 Habeas Act did not purport “to try or punish any one, for any offence against the United States, or for any offence whatever.”<sup>148</sup> In fact, it was “a bill authorizing your courts to release all offenders against a State law.”<sup>149</sup> That is, “[i]t is a power, not to punish in your own courts, but a power to arrest or prevent the trial in the courts of the States; and a power in your courts only to acquit and discharge.”<sup>150</sup> Finally, Senator Walker contended that the War Powers Clause did not confer power to enact a law that would operate in times of peace.<sup>151</sup> He even introduced a failed amendment that would have so confined the operation of the statute to wartime cases.<sup>152</sup>

For Senator Walker, the law of nations was emphatically the province of state common law. Citing early federal court cases<sup>153</sup> as well as the legal luminary

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142. See CONG. GLOBE, 27th Cong., 2d Sess. app. 611 (1842) (speech of Sen. Walker) (“By its very classification, the bill extends to cases other than those arising under the Constitution, laws, and treaties of the Union.”); see also *id.* at 615 (“Now, if these cases arose under the Constitution, laws, or treaties, they would be embraced in the first part of the bill; but this subsequent separate enumeration admits that such is not the fact.”).

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

144. See CONG. GLOBE, 27th Cong., 2d Sess. app. 616 (1842) (speech of Sen. Walker).

145. *Id.* at 618.

146. *Id.* at 617.

147. *Id.* (“Can these powers, ‘reserved to the States,’ and never granted to any or all of the departments of the Federal Government, be sold by treaty to a foreign power, or limited or restrained, impaired or abrogated?”).

148. *Id.* at 618.

149. *Id.*

150. *Id.*; see also *id.* (“You claim, then, cognizance of the case, not because it is an offence against the law of nations—for you concede it is not; but because the trial in the State court for an offence *only against its laws* involves a question depending upon the law of nations.”).

151. See *id.* at 616–17 (speech of Sen. Walker); cf. *id.* at 557 (remarks of Sen. Calhoun) (“[The bill’s] provisions go far beyond the limits of [the McLeod] case, and comprehend a variety of cases, which may occur in time of profound peace. If his impression as to the laws of nations in regard to this point be correct, there was no case, in time of peace, in which the authority of one State could afford immunity to its citizens or subjects within the limits of another, except to persons connected with the diplomatic or commercial relations of the country.”).

152. See CONG. GLOBE, 27th Cong., 2d Sess. 729–30 (1842).

153. E.g., *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (C.C.D. Pa. 1798) (“[T]he United States, as a Federal Government, have no common law; and, consequently, no indictment can be maintained in their Courts for offences merely at common law.”).

William Blackstone, he undertook to “correct a radical error, in speaking of the common law, or the law of nations, or any other law, as the law of the United States.”<sup>154</sup> “The common law . . . (and the law of nations, as a part of that law, both in civil and criminal cases,) is a part of the law of each State . . . .”<sup>155</sup> “[A]fter the Declaration of Independence, and before the Confederacy, [the law of nations] was part of the law of the several States, and to be administered only in the State courts.”<sup>156</sup> It followed that “after the Confederacy, the law of nations, except as to the enumerated cases of captures, &c., was to be administered only in the State courts.”<sup>157</sup> Thus, “how can there be a doubt that this law is to be administered in the courts of the States, in all but the special cases in which it has been surrendered by the Constitution to the courts of the Union?”<sup>158</sup>

Yet Senator Walker’s account of the dangers of federal judicial discretion betrays an inconsistency in his position. He took issue with Congress granting the federal courts “cognizance of all matters arising under the law of nations[,] . . . the law of the world,”<sup>159</sup> because he feared a democratic deficit: “[M]ust our citizens find their form of Government and its powers, affecting their life, liberty, and property, not in the Constitution made by the States, but in the books of Grotius, Vattel, Puffendorf, and the thousand ponderous tomes—many not yet translated into English—that fill the libraries of Europe?”<sup>160</sup> This deficit still exists, of course, when a state judge exercises discretion to invoke international law, but Senator Walker did not voice a similar amount of concern about that possibility.

### III

#### THE MODERN DEBATE: CUSTOMARY INTERNATIONAL LAW AFTER *ERIE*

In the decades after the passage of the 1842 Habeas Act, the Supreme Court did not question its constitutionality or logic, or the power of federal courts to hear habeas petitions under it. In *Ex parte Royall*, the Court matter-of-factly included the law of nations provision in its list of “cases of urgency, involving the authority and

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154. CONG. GLOBE, 27th Cong., 2d Sess. app. 618 (1842) (speech of Sen. Walker).

155. *Id.*

156. *Id.* at 616.

157. *Id.*; *see also id.* at 615 (“The State courts, it is conceded, alone possessed this power, before as well as after the Confederation, which made us a nation, if we are so now; and the State courts must still continue alone to possess this power, unless it is transferred to the Federal courts by some of the enumerated grants of the Constitution.”).

158. *Id.* at 618; *see also id.* (“The law of nations was the law of New York at least as early as the 4th July, 1776, in all cases whatsoever, when she proclaimed herself a free, sovereign, and independent State. It remained the law of New York, under the articles of Confederation, as well as under the Constitution; and to be executed by her alone, as a reserved right, except in the special cases delegated to the Union, or prohibited to the States, by the Constitution.”).

159. *Id.* at 615.

160. *Id.*; *see also id.* at 614 (“[T]o travel out of the Constitution, as is proposed by this bill, to abolish the criminal jurisdiction of the States, and usurp their rights; to enter upon the boundless range of power arising under the law of nations, undefined and undefinable; to become the arbiter of the peace of nations, and receive and execute the mandates of foreign kings,—is an unexplored continent—a *terra incognita*—of power never assigned to the Federal courts by the Constitution . . .”).

operations of the General Government, or *the obligations of this country to, or its relations with, foreign nations*, [in which] the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority.”<sup>161</sup> And in *In re Neagle*, a colorful case involving the attempted murder of Justice Stephen Field, the Court approvingly quoted from Senator Berrien’s performance on the Senate floor:

The object [of the 1842 Habeas Act] was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before *the only competent judicial power to decide upon matters involved in foreign relations or the law of nations*.<sup>162</sup>

The status of the law of nations and the federal government’s related power to oust the state courts of jurisdiction over habeas petitions implicating that law was never fully resolved—in part because, as Professor Bederman notes, after the McLeod affair “no similar incident occurred again.”<sup>163</sup> However, once the Supreme Court in *Erie R.R. Co. v. Tompkins* overturned *Swift* and rejected the general common law,<sup>164</sup> the status of international law in our law necessarily plunged into a new phase of uncertainty.<sup>165</sup>

For many, the Supreme Court’s decision in *Sabbatino* appeared to put to rest the debate over customary international law and its validity as “a federal [common] law of foreign relations.”<sup>166</sup> As Professor Neuman has explained it:

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161. 117 U.S. 241, 251–52 (1886) (emphasis added).

162. 135 U.S. 1, 71 (1890) (emphasis added) (quoting CONG. GLOBE, 27th Cong., 2d Sess. 444 (1842) (remarks of Sen. Berrien)); see also *id.* (“[The McCleod Case] led to an extension of the powers of the federal judges under the writ of *habeas corpus*, by the act of August 29, 1842 . . . . It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations.”).

163. Bederman, *supra* note 7, at 537 (“As time has revealed, neither sides’ fears were justified.”).

164. 304 U.S. 64, 79–80 (1938).

165. See Anthony J. Bellia Jr. & Bradford R. Clark, *Why Federal Courts Apply the Law of Nations Even Though It Is Not the Supreme Law of the Land*, 106 GEO. L.J. 1915, 1936 (2018) (“Without general law as an available source of law, federal courts were forced, in certain cases, to examine the status of the law of nations when it conflicted with otherwise applicable state law.”). Although the Court has declared that “[i]nternational law is part of our law,” *The Paquete Habana*, 175 U.S. 677, 700 (1900), the Court has refused to clarify what exactly this means after *Erie*. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

166. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. d (AM. LAW INST. 1987) (“[C]ustomary international law, while not mentioned explicitly in the Supremacy Clause, [is] also federal law . . . .”); Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.119 (1964) (“[T]he Supreme Court has found in the Constitution a mandate to fashion a federal law of foreign relations.”); Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); see also Koh, *supra* note 3, at 1826 (“By 1981, the Supreme Court had come unanimously to ‘recogniz[e] the need and authority in some limited areas to formulate what has come to be known as ‘federal common law’” in cases in which ‘a federal rule of decision is ‘necessary to protect uniquely federal interests,’” including ‘international disputes implicating . . . our

“Former doctrines of ‘general common law’ have been reconceptualized as doctrines of federal common law that continue to govern in areas of dominant federal concern.”<sup>167</sup>

But this prevailing position came under attack with the rise of human rights litigation under the Alien Tort Statute (ATS) in the late twentieth century<sup>168</sup> and the resulting backlash to the asserted power of federal judges to create common law causes of action under customary international law.<sup>169</sup> Conservative scholars, and members of the Supreme Court, have dusted off the pro-slavery arguments of nineteenth-century Democrats to criticize a human rights community that has taken up the legal mantle of nineteenth-century Whigs. Despite the evident historical pedigree of the associated array of constitutional arguments, scholars describe them as the “modern” and “revisionist” positions.<sup>170</sup>

While it is not wholly novel, the debate over international law in our law has certainly shifted. In the modern era—post-Civil War, post-New Deal, post-World War II, and mid-War on Terror—in which the national government has commanding control over foreign affairs and foreigners found within U.S. borders, the former focus on states’ rights federalism has given way to separation-of-powers concerns about the lawmaking power of federal judges.<sup>171</sup> What was initially a debate over Congress’s constitutional authority to legislate under the law of nations has become a debate, more or less assuming that authority, over the power of the federal judiciary to adopt customary international law in the absence of congressional authorization.

#### A. Modern-Day Whigs

The “so-called ‘modern position’”<sup>172</sup> that “judicial determinations of international law . . . are matters of federal law”<sup>173</sup> relies upon the same lines of constitutional reasoning that the Whigs employed to justify the 1842 Habeas Act.

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relations with foreign nations.” (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

167. Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 380 (1997).

168. 28 U.S.C. § 1350 (2018); see, e.g., *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

169. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798–823 (D.C. Cir. 1984) (Bork, J., concurring).

170. See, e.g., RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 714–17 (7th ed. 2015); BELLIA & CLARK, *supra* note 3, at xiii. Others have attempted to provide “intermediate” theories, relying on the same methods of constitutional exposition. See, e.g., Gary Born, *Customary International Law in United States Courts*, 92 *WASH. L. REV.* 1641, 1653–55 (2017). Most notably, Professor Bellia and Professor Clark reject both the “modern” and “revisionist” positions for what they characterize as “a more exacting account” that argues that the Founders “designed various provisions of the Constitution to interact in distinct and precise ways with the three main branches of the law of nations known to the Founders—the law merchant, the law of state-state relations, and the law maritime.” BELLIA & CLARK, *supra* note 3, at 1919.

171. As discussed above, fears of judicial activism with respect to human rights were also very much a part of the related antebellum debates. See *supra* Section II.B.1.

172. Koh, *supra* note 3, at 1826, 1841.

173. *Id.* at 1824.



First, proponents invoke the motivating factors of the Founding: “Every schoolchild knows that the failures of the Articles of Confederation led to the framing of the Constitution, which established national governmental institutions to articulate uniform positions on such uniquely federal matters as foreign affairs and international law.”<sup>174</sup> Second, they point to constitutional structure and “embedded understandings about the national character of foreign relations.”<sup>175</sup> Third, they dismiss “federalism concerns” by assuming that because the Constitution vests power over foreign relations “exclusively in the federal government,”<sup>176</sup> determinations of customary international law cannot fall within the reserved powers of the states. Finally, they make the argument—one that Whig senators understandably did not emphasize<sup>177</sup>—that “concerns about the judiciary’s exercising legislative discretion are addressed by the fact that judges find [customary international law] based on an existing body of law derived from the common consent and practice of sovereigns.”<sup>178</sup>

Moreover, in discussing the “legitimate authority” of federal courts “to incorporate bona fide rules of customary international law into federal common law,” Professor Koh echoes both the presumption—the “judicial authority inheres . . . in the distinct federal interest in foreign relations”<sup>179</sup>—and penumbras—“the explicit grant of authority in Article I, Section 8, Clause 10 of the Constitution to define and fashion federal rules with regard to the law of nations, various other constitutional

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174. *Id.* at 1825; *see also* GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 7–8 (5th ed. 2011) (“In drafting the Constitution, one of the Framers’ central concerns was to ensure that the federal government would enjoy broad control over the foreign affairs and trade of the new Republic. The Founding Fathers were convinced that, in these matters, the United States must speak with a single voice. . . .”); FALLON, JR. ET AL., *supra* note 170, at 714 (“[T]he historical record reveals that the founders, chastened by the inadequacies of the Articles of Confederation, sought to ensure uniform and effective federal implementation of the law of nations, in part, by giving the federal courts jurisdiction over those cases most likely to implicate foreign relations (those concerning foreign envoys, admiralty cases, and alienage-based diversity jurisdiction.)”); Koh, *supra* note 3, at 1832 (“[T]o treat determinations of customary international law as questions of state law would have rendered both state court and federal diversity rulings effectively unreviewable by the U.S. Supreme Court.”).

175. FALLON, JR. ET AL., *supra* note 170, at 714.

176. *Id.* at 714–15. There is ample case law from the twentieth-century Supreme Court to support not just federal exclusivity over, but a broad definition of, foreign relations. *See, e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (asserting that states may not intrude “into the field of foreign affairs which the Constitution entrusts to the President and the Congress”); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (“[T]he supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution . . . and has since been given continuous recognition by this Court.”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[I]n respect of our foreign relations generally, state lines disappear. As to such purposes the State . . . does not exist.”).

Congress and the President frequently have been found to preempt the states in the area of foreign relations, *e.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000); *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and “Congress’s powers over U.S. foreign relations are particularly extensive.” BORN & RUTLEDGE, *supra* note 175, at 6. *See generally id.* at 7–8 (“[T]he Supreme Court has said that the Federalist Papers demonstrate the ‘importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field.’” (quoting *Hines*, 312 U.S. at 62 n.9)).

177. For the Democrats, this was a central defect of the law of nations.

178. FALLON, JR. ET AL., *supra* note 170, at 715.

179. Koh, *supra* note 3, at 1835.

provisions, and particular federal statutes”<sup>180</sup>—that Senator Choate thoroughly discussed in 1842.<sup>181</sup>

The Supreme Court went a step further in *United States v. Curtiss-Wright Export Corp.*, staking out the familiar “general grant” ground that Senator Berrien once covered<sup>182</sup>:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.<sup>183</sup>

### **B. Modern-Day Democrats: From States’ Rights to Judicial Restraint**

As the gravitational center of the debate has shifted from Congress to the federal courts, the strict constructionist argument has shifted along with it. Detractors from the prevailing position now emphasize that a liberal construction “departs from constitutional norms of democratic self-governance,” at least “in the absence of any textual source of constitutional or statutory authorization.”<sup>184</sup> They invoke “*Erie*’s positivist insistence that law be associated with a particular sovereign” and, echoing the Democrats, they complain that customary international law “is often unwritten and its contours are often uncertain.”<sup>185</sup>

Federalism questions regarding the antecedent authority of Congress to oust state courts of jurisdiction on the basis of the law of nations have taken a back seat, in large part because the academic and judicial focus of late has been on federal common-lawmaking under the ATS.<sup>186</sup> But there are faint echoes. For example, Professor Bradley and Professor Goldsmith have suggested that “there may be

180. *Id.* (citing U.S. CONST. art I, § 8, cl. 3; *id.* art. II, §§ 2–3; *id.* art. III, § 2; *id.* art. VI, cl. 2).

181. *See infra* Section II.A.2.

182. *See infra* Section II.A.1.

183. 299 U.S. 304, 315–16, 318 (1936); *see also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1296–97 (1996); Koh, *supra* note 3, at 1846 (“[T]he Court [in *Curtiss-Wright*] suggested that the federal power over foreign affairs never derived from the states.”).

184. FALLON, JR. ET AL., *supra* note 170, at 715.

185. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 858.

186. Certainly, the courts’ power to define violations of the law of nations under the ATS is more straightforwardly derived from Congress’s coextensive power under the Define and Punish Clause. *Id.* at 856–57 (“Article I does authorize Congress to define and punish offenses against the law of nations, and Congress has exercised this and related powers to incorporate select CIL principles into federal statutes. But Congress has never purported to incorporate all of CIL into federal law. And Congress’s selective incorporation would be largely superfluous if CIL were already incorporated wholesale into federal common law, as advocates of the modern position suggest.”).

constitutional limitations on the power of the political branches to incorporate CIL into domestic law.”<sup>187</sup> And they reiterate the Democratic disapproval of the extraconstitutional “general grant” argument:

In contrast to the Commerce Clause, no clause in the Constitution provides the federal government with a general “foreign relations” power. Article I, Section 8 of the Constitution authorizes Congress to “define and punish . . . Offences against the Law of Nations,” but it was settled long ago that this clause does not of its own force preempt state authority to do so as well. In addition, Article I, Section 10 expressly prohibits state activity in certain specified foreign affairs contexts, and Article I, Section 8 and Article II authorize the federal political branches to act with supremacy in certain specified foreign affairs contexts.<sup>188</sup>

Professor Bradley and Professor Goldsmith characterize *Curtiss-Wright*’s general grant “theory about the source of the federal foreign relations power” as “unusual,”<sup>189</sup> but it is, of course, one of the primary legal justifications originally offered for the 1842 Habeas Act. Yet taking the argument “even by its own terms,” they rebut that it “only applies to powers that the states did not possess prior to the Constitution,” and the law of nations was “clearly viewed as under the control of state law during the pre-Constitutional period”<sup>190</sup>—just as Senator Walker contended.<sup>191</sup> In other words, “general common law was not part of the ‘Laws of the United States’ within the meaning of Articles III and VI of the Constitution: federal court interpretations of general common law were not binding on the states, and a case arising under general common law did not by that fact alone establish federal question jurisdiction.”<sup>192</sup>

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187. *Id.* at 862 n.302.

188. *Id.* at 863. *But see id.* (conceding that “Article I, Section 10’s self-executing limitations on state power in foreign relations are exhaustive and that other foreign relations activities fall within the concurrent authority of the state and federal governments” only “until the federal political branches exercise their foreign relations powers in a manner that preempts state law”).

189. *Id.* at 863 n.307.

190. *Id.*

191. *See infra* Section III.B.2.

192. Bradley & Goldsmith, *Customary International Law*, *supra* note 3, at 823; *see also* Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2262 (“General common law did not have the status of federal law, and, therefore, CIL did not trump state law and did not provide a basis for federal question jurisdiction.” (citing *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1876))).

This modern-day Democratic position has been picked up and parroted by the conservative wing of the Supreme Court, most notably by the late Justice Scalia, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 739–51 (2004) (Scalia, J., concurring in part and concurring in the judgment), and now Justice Gorsuch:

You might wonder . . . if the First Congress considered a “violation of the law of nations” to be a violation of, and thus “arise under,” federal law. But that does not seem likely. At the founding, the law of nations was considered a distinct “system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world[.]” . . . While this Court has called international law “part of our law,” . . . it was “part of the so-called general common law,” but *not* part of federal law.

*Jesner v. Arab Bank, PLC*, 136 S. Ct. 1386, 1412–14 (2018) (Gorsuch, J., concurring) (citations omitted); *see also id.* (arguing that the “text of the Constitution appears to recognize just this distinction” because “Article I speaks of ‘Offences against the Law of Nations,’ while both Article III and Article VI’s

Furthermore, Bradley and Goldsmith differentiate between the traditional law of nations, which “govern[s] relations among members of the international community,”<sup>193</sup> and the new customary international law “of human rights that purports to govern the relationship between a nation and its citizens.”<sup>194</sup> Although incorporation into U.S. federal law of the traditional law of nations might “not implicate federalism concerns” because nation-to-nation relations are an exclusive federal prerogative “[t]he same cannot be said of the judicial incorporation of the new [customary international law], which regulates issues like criminal punishment that are *not* exclusive federal prerogatives.”<sup>195</sup> But the line between external and internal affairs is a blurry one. As antebellum Democrats perceived it, the 1842 Habeas Act did regulate “criminal punishment” in state courts. The Whigs, however asserted an exclusive federal prerogative when such punishment implicated U.S. foreign relations.<sup>196</sup>

### CONCLUSION

As this Article makes clear, the contemporary debate over the status of customary international law within U.S. law is neither new nor novel. The original understanding of the relationship between international and U.S. law was anything but settled—and fiercely contested—through the early years of the nation. Although the focus of the debate has shifted from Congress to the courts, the underlying constitutional uncertainties persist in the post-*Erie* era.

The very fact that the Habeas Corpus Act of 1842 became and remains law surely lends some legitimacy, if not constitutional validity, to the arguments advanced by the Whigs in support of the legislation, many of which are now made on behalf of the “modern” position that customary international law is part of federal common law. But the lack of any conclusive resolution to the constitutional debate surrounding its passage or subsequent judicial attention paid to the statute leaves ample room for scholars to prolong the permanent debate over international law in our law.

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Supremacy Clause, which defines the scope of pre-emptive federal law, omit that phrase while referring to the ‘Laws of the United States’”). Yet the depth of independent historical or legal research conducted by these jurists, relying on the work of revisionist scholars, is not clear. *See, e.g., id.* (citing no legal authority for the proposition that international law is not federal law apart from Justice Scalia’s concurrence in *Sosa* and what appears to be an erroneous citation to an argument made by the defendant, but not actually addressed by the Court, described in *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 228 (1872)).

193. Bradley & Goldsmith, *Federal Courts*, *supra* note 3, at 2268.

194. *Id.*

195. *Id.*

196. *But see* BELLIA & CLARK, *supra* note 3, at 181 (“[T]he McLeod incident actually supports—rather than refutes—the proposition that Article III permits U.S. courts to review a state’s denial of a foreign nation’s rights under the law of state-state relations.”).