Note

Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket

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CONTENTS

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.[1]

INTRODUCTION

This past Term the Supreme Court seemed everywhere present in foreign affairs. Overcoming concerns that it was intruding into an area often considered the exclusive province of the political branches,[2] the Court addressed critical questions regarding presidential power,[3] legislative authorization,[4] and judicial cooperation in the international system.[5] With one exception, the Court reached the merits in every foreign affairs case it heard.[6] If the Court was ever reticent to address matters beyond the water's edge, it is certainly not today.

Despite widespread consensus that today's international environment is more complex than that of the Founders,[7] history carries great weight in the Court's foreign affairs opinions.[8] Precedents from the Courts of Chief

1. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (describing the difficulty that judges face in determining the Framers' intent regarding the constitutional allocation of foreign affairs power among the branches of government).

2. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("The Court today assumes a role in foreign relations which is unprecedented, unfortunate, and unwise."); *id.* at 725 ("[The Court's decision] would require the Executive Branch to surrender its primacy in foreign affairs . . . . [This] is a serious misconception of the proper judicial function, and it is not what Congress enacted.").

3. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

4. Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004); F. Hoffmann-La Roche, Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004); Republic of Austria v. Altmann, 124 S. Ct. 2240 (2004).

5. Intel Corp. v. Advanced Micro Devices, 124 S. Ct. 2466 (2004); *see also* Torres v. Mullin, 124 S. Ct. 562 (2003) (denying certiorari to rehear a question of treaty interpretation under concurrent consideration by the International Court of Justice).

6. The exception being *Padilla*, reversed and remanded for lack of jurisdiction.

7. *See, e.g.*, Thomas M. Franck, *Courts and Foreign Policy*, FOREIGN POL'Y, Summer 1991, at 66, 86 ("Marshall's nineteenth-century notion of 'foreign affairs' no longer describes the complex twentieth-century reality.").

8. *See, e.g.*, Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2100 (1999) ("Generally bereft of text, structure, *or* precedent, thin majorities have recently concocted various constitutional rules based mainly on questionable tales of original intent."); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1982 (1999) ("History is important . . . . [because] the Supreme Court's

Justices Jay and Marshall[9] frame discussions that Blackstone and early English practice clarify.[10] Perhaps because the words "foreign affairs" do not appear in the Constitution and because the powers associated with it are imperfectly divided among the three branches of government, discussion routinely focuses on original intent.[11]

In *Sosa v. Alvarez-Machain*,[12] the much-anticipated case challenging the Alien Tort Statute (ATS),[13] the Court took history one step further.[14] In holding that "courts should require any claim based on the present-day law of nations to rest on a norm of international character . . . defined with a specificity comparable to . . . 18th-century paradigms,"[15] the Court directly incorporated historical practice into the resolution of present-day disputes. As a result, the need to understand the scope and nature of early judicial involvement in foreign affairs has never been greater.

As the Court noted in *Sosa*, however, lawyers and scholars "advance radically different historical interpretations" of the judicial role in foreign affairs.[16] While mainstream scholars argue that the authority of federal courts "to declare [void] all acts contrary to the manifest tenor of the Constitution"[17] does not differentiate between matters foreign and domestic, revisionists contend that federal courts were meant to be "the least dangerous" branch, with "no influence over either the sword or the purse,"[18]

renewed interest in the structural elements of the Constitution has relied in part upon the original understanding.").

9. *See, e.g.*, *F. Hoffman-La Roche*, 124 S. Ct. at 2366 (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)); *Altmann*, 124 S. Ct. at 2247 (citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)); *see also* Rumsfeld v. Padilla, 124 S. Ct. 2711, 2734 (2004) (Stevens, J., dissenting) (citing *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807)); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2666 (2004) (Scalia, J., dissenting) (citing *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830)).

10. *See, e.g.*, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2756 (2004) (citing Blackstone's understanding of the law of nations); Rasul v. Bush, 124 S. Ct. 2686, 2696-97 (2004) (discussing Lord Mansfield's view of habeas jurisdiction in eighteenth-century England).

11. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001) ("The received wisdom would have us believe that the foreign affairs Constitution contains enormous gaps that must be filled by reference to extratextual sources . . . ."); *see also* Flaherty, *supra* note 8.

12. 124 S. Ct. 2739.

13. 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

14. *Sosa* questioned whether the ATS was "enacted on the understanding that the common law would provide a cause of action," *Sosa*, 124 S. Ct. at 2761, or whether "the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action," *id*. at 2754.

15. *Id*. at 2761-62.

16. *Id*. at 2755.

17. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961), *discussed in* Franck, *supra* note 7, at 71.

18. *Id*. at 465, *quoted in* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 926 (2003).

and therefore have little role in international affairs. In recent years, these conflicting views have driven an increasingly bitter and contentious debate, not only on the role of customary international law at issue in *Sosa*, but also on treaties, federalism, and separation of powers.[19] Though the Court may have settled matters between Jose Francisco Sosa and Humberto Alvarez-Machain, it is unlikely to have brought the same finality to scholars.[20]

Though they differ in their understanding of original meaning, mainstream and revisionist scholars alike seem to share a belief that, in scouring the pages of Vattel,[21] *The Federalist*, and the *Records of the Federal Convention of 1787*,[22] they can somehow rediscover a "Founding wisdom" that might definitively explain those decisions of the Jay and Marshall era so favored by today's Supreme Court. Neither side seems comfortable acknowledging that the Framers themselves did not agree on the scope or distribution of the foreign affairs power. The historical canon does not reflect a single viewpoint and is unlikely to ever prove dispositive for either side.[23]

More troubling, basic empirical questions about the Court's early involvement in foreign affairs remain unanswered. How many foreign affairs cases did the Supreme Court hear under Jay and Marshall? Who was party to these disputes and how did they reach the Court? What were the issues in these cases (e.g., treaty disputes, trade regulations, etc.)? Are trends evident that transcend specific areas of foreign affairs or migrate between them? For too long, the modern debate has been framed by two untenable positions: that bold dicta from early cases should be considered authoritative simply because "Article III extended the judicial power of the United States . . . [to] a large class of international cases,"[24] or that "much of the [customary international law] that courts had applied in the nineteenth century . . . ha[s] become irrelevant," in part because it

19. *Cf.* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2278 (1991) ("The status of international law in federal courts is, if anything, more controversial than the status of constitutional law.").

20. In this way, *Sosa* may become like *Missouri v. Holland*, 252 U.S. 416 (1920). Although *Holland* ostensibly resolved the question of whether the federal government has the power to enter into treaties on subjects that are otherwise beyond Congress's legislative authority, this power remains the subject of a heated academic debate more than eighty years later. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1079 (2000).

21. MONSIEUR DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (photo. reprint 2001) (Joseph Chitty trans., London, S. Sweet et al. 1834) (1758).

22. 1-3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966).

23. *See, e.g.*, A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 36-38 (1995).

24. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2352 (1991).

originated in prize cases.[25] Without a common empirical starting point, neither of these claims can be evaluated fairly, allowing mainstream and revisionist scholars to continue advancing divergent views of history without resolution.

This Note presents a new understanding of early judicial involvement in foreign affairs by challenging both the method and the substance of the current debate. Taking signals from the decisions they read, lawyers and scholars alike thus far have looked for cohesion or disjuncture among comments in a limited subset of the most cited cases and primary sources.[26] Such a strategy is analytically dubious and has allowed scholars to address only those materials most congenial to their own positions. In contrast, this Note suggests that a wider examination of cases is necessary to move past the present stalemate. To do so, it draws on the methodological insights of another discipline—political science—that has become adept at analyzing the kind of complex institutional behavior at issue here. This more systematic analysis suggests that, while the mainstream position is correct to assert a longstanding trend of judicial involvement in foreign affairs, it has not fully explored the level or nature of that involvement nor the factors contributing to it.

This Note proceeds in four Parts. Part I evaluates the foreign affairs debate, recounting the central historical claims of the mainstream and revisionist narratives and identifying the shortcomings of each. Rather than take issue with the particular historical sources favored by each school, however, I suggest that scholars in both camps have reason to reexamine whether present modes of inquiry are able to offer clear and definitive guidance about the Court's role in foreign affairs.

Part II presents a new approach to understanding early judicial involvement in foreign affairs. I argue that, by aggregating certain objective elements of the Supreme Court's docket, a method I term "docket analysis," scholars can discern larger patterns that might not be evident when cases are viewed in isolation. By first identifying all instances of judicial involvement in foreign affairs, docket analysis avoids the data-mining problems characteristic of recent legal scholarship. As a result, it can identify aspects of the Court's role that have been overlooked by both parties to the modern debate.

25. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 827 (1997). Prize law traditionally concerned "the capture of the enemy's property and the transfer of its possession and ownership to the apprehending State and its citizens." David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 33 (1995) (book review).

26. *See, e.g.*, Yoo, *supra* note 8, at 2094 ("[S]cholars rely to a great degree on . . . original understanding. Their work, however, has focused too narrowly on a small set of sources . . . .").

Part III analyzes the docket of the Supreme Court under Chief Justices Jay and Marshall. To this end, I constructed a data set containing every foreign affairs case on the Court's docket from 1791 to 1835, identifying 323 such cases from a total caseload of more than 1300.[27] Using this data set, I present a number of summary statistics pertaining to the jurisdiction, parties, and areas of law on the Court's foreign affairs docket. In doing so, I offer a set of objective facts about early judicial involvement in foreign affairs and inject new empiricism into a debate sometimes lost to generalizations.

Part IV revisits the modern debate in light of my empirical findings and comments on three contentious issues: the level of the early Court's involvement in foreign affairs, the degree of deference it afforded the political branches, and its use of international law. I argue that in the Jay and Marshall era the day-to-day business of the Court was foreign affairs. While this interpretation of history conforms with the mainstream consensus, I argue that its primary advocates have not fully understood the degree of this judicial involvement or the reasons for it. With regard to questions about deference and international law, I contend that docket analysis suggests new areas of research long overlooked by traditional research methods. Ultimately, this Note cannot end debate over the role of the Court in foreign affairs. But it can clarify it.

I. THE HISTORICAL UNDERPINNINGS OF THE FOREIGN AFFAIRS DEBATE

Debate over the appropriate role for courts in foreign affairs engages some of today's most sensitive political issues.[28] Though not often the primary focus of inquiry, arguments from original intent are prevalent throughout the debate.[29] But despite a common set of scholars writing on all

27. This data set is on file with the author.

28. Three have generated significant scholarship: the appropriateness of judicial review, particularly where the President is concerned; the relevance of federalism and the role of states; and the use of customary international law. For more on the question of judicial review, see generally John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 182-85 (1996) (describing the relationship between the President and the courts in warmaking). The issue of states' rights in foreign affairs has become particularly popular lately. *See, e.g.*, Edward T. Swaine, Crosby *as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001). The use of customary international law has generated by far the most controversy. *See, e.g.*, Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

29. *See* Flaherty, *supra* note 8, at 2100 ("[S]cholars . . . appeal to the past mainly to underscore points better supported through other interpretive means.").

the relevant issues—judicial review, federalism, and customary international law—no single work has summarized the basic historical assumptions of each school, mainstream and revisionist. To the extent necessary to evaluate their assumptions in Part IV, I provide such an overview here.

A. *The Mainstream Position*

While "there is no canonical statement" of the mainstream position,[30] it can be said to rest on three basic propositions. First is that the "Constitution anticipated that international disputes would regularly come before the United States courts"[31] because the Framers deliberately "distributed [foreign affairs powers] among the executive, legislative, and judicial branches."[32] Second is that "the decisions in those cases could rest on principles of international law, without any necessary reference to the common law or to constitutional doctrines"[33] and, moreover, that "the framers . . . understood the law of nations broadly, even more broadly than we understand it today."[34] Third, and finally, is that "the power over foreign affairs . . . is lodged in the national government" exclusively.[35]

When referring to the Courts of Jay and Marshall, mainstream scholars see numerous cases as paradigmatic. The proposition that international law applies in U.S. courts finds support in nearly a dozen decisions, with the *Charming Betsy* principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"[36] standing first among equals. The idea of federal supremacy in

30. Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 376 (1997).

31. G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 727 (1989), *quoted in* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1828 (1998).

32. Franck, *supra* note 7, at 70. *See generally* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990) (describing a theory of balanced institutional participation of all three branches in foreign affairs).

33. White, *supra* note 31, at 727.

34. Beth Stephens, *Federalism and Foreign Affairs: Congress's Power To "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 553 (2000).

35. Golove, *supra* note 20, at 1091. Mainstream scholars contend that, because "loopholes and ambiguities in the Articles of Confederation . . . had repeatedly given rise to states' rights controversies which sometimes threatened seriously to embarrass the conduct of foreign affairs," *id*. at 1102, "[t]he existence and content of rules of customary international law that are binding on the United States [was] to be determined as a matter of *federal* law" rather than state law, Neuman, *supra* note 30, at 376 (emphasis added).

36. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land."); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) ("The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial

foreign affairs is supported by more than a few cases as well, with most pertaining to treaties.[37] And in making the general case for judicial review of foreign affairs, mainstream scholars go straight to the source: "[T]he primary legacy of *Marbury v. Madison* to international law cases [is] . . . that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' Nothing in *Marbury* had limited this law-declaring function to cases involving domestic law."[38]

The hegemony of the mainstream position can be attributed to "an impressive array of judicial and political quotes from the 1780s and 1790s. These quotes are taken at face value, however; little or no effort is ever made to account for . . . context by which these statements may be historically assessed."[39] While the greater academic community has taken notice of this problem, its chief suggestion has been a call for more quoting from a wider range of primary and secondary sources.[40] Unfortunately, no amount of quoting the annals of original intent can substantiate some of the mainstream position's most central propositions. While it is interesting to note that "Article III extended the judicial power of the United States . . . [to] a large class of international cases—those affecting Ambassadors, public Ministers and consuls, admiralty and maritime cases, and cases involving foreign parties"[41]—such an observation speaks only to potential; it says little about whether courts were actually involved in foreign affairs or not. Likewise, it is difficult to put much faith in the claim that "[t]he early Supreme Court spent much of its time deciding cases under the law of nations,"[42] if no one actually knows how many times that was in fact the case. Though mainstream scholars can point to more than a dozen cases that seem to support the idea of active federal judicial oversight of foreign affairs based in part on international norms, it is difficult to know if the

states throughout Europe and America."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." (italics omitted)).

37. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812).

38. Koh, *supra* note 24, at 2355-56 (third alteration in original) (footnote omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

39. Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 3 (1999).

40. *See, e.g.*, Flaherty, *supra* note 8, at 2101 ("When invoking history, legal academics have often ignored the standards of historical research. . . . A historical interpretation that relies extensively on primary sources, demonstrates a command of the secondary literature, and receives glowing reviews from professional historians should, and on reflection does, command greater respect than one that cuts and pastes from *The Federalist*, cites to no secondary literature, and would receive a barely passing grade if submitted in an undergraduate survey course.").

41. Koh, *supra* note 24, at 2352.

42. Koh, *supra* note 31, at 1825.

cases they cite are representative or are outliers. It is this weakness that has opened the door to revisionist scholarship.[43]

B. *The Revisionist Position*

Unlike mainstream scholars, who almost universally attribute to the early Court a significant role in shaping U.S. foreign policy, there is no single, unified position that binds revisionists. Nevertheless, three particular critiques have generated significant scholarship. First is that courts were not meant to be heavily involved in foreign affairs because it was the role of "the political branches, rather than the courts, . . . to decide how the nation should meet its international obligations."[44] Second is that early precedent cited by mainstream scholars for the proposition that decisions can rest on principles of international law has become "irrelevant" because it addresses legal issues that no longer exist in the modern world.[45] Third is that federal primacy in foreign affairs is an illusion because, for example, "'[s]tate and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the federal courts.'"[46] In part because of this diffusion of foreign affairs responsibility, many revisionists assert that "[t]hroughout most of this nation's history, [customary international law] did not have the status of federal law" and "did not bind either Congress or the President."[47]

Despite the numerous cases on which mainstream scholars base their narrative, revisionists have found their clear statements from the Jay and Marshall Courts as well. "[I]t is the province of the Court," they remind us, "to conform its decisions to the will of the legislature."[48] Whatever judges may believe U.S. foreign affairs obligations to be, "[t]he propriety of . . . interposition by the court may be well questioned,"[49] particularly because "the judiciary is not that department of the government to which the

43. For example, in one of the earliest revisionist critiques, Phillip Trimble attempted, by simply trying to count the number of times that the law of nations was used to bind the political branches, to show that mainstream scholars had overemphasized the role of international law. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); *see infra* note 64.

44. Yoo, *supra* note 8, at 1962.

45. Bradley & Goldsmith, *supra* note 25, at 827.

46. *Id*. at 824 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 cmt. d, 115 cmt. e (1987)).

47. *Id*. at 849.

48. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829), *overruled by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

49. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

assertion of its interests against foreign powers is confided."[50] They note also that many, if not most, cases on which mainstream scholars rely address outdated prize laws,[51] while the revisionist history is built on treaty questions unarguably more analogous to today's foreign affairs disputes. And not ones to surrender *Marbury* to the mainstream, they quote the decision for their own purposes:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. . . .
>
> . . . The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. . . . The acts of such an officer, as an officer, can never be examinable by the courts.[52]

The revisionist narrative is not without its own problems, however. While the occasional piece has received praise for attempting to add real context to the debate, most are subject to the same criticism about cherry-picking quotes that is leveled at mainstream scholars.[53] Revisionists are equally culpable with regard to the cases they select to discuss. Though it may be true, for example, that the early Court was deferential to the Executive's reading of treaty language, it is far from clear that the Executive prevailed in nearly every treaty dispute, as some claim.[54] Moreover, while efforts to dismiss prize and admiralty cases as irrelevant may be reasonable if such cases made up but a small portion of the early Court's docket, such a conclusion becomes more difficult if these disputes were a primary focus of the early Court: While the substantive legal questions at issue may have become irrelevant, the underlying themes they address, like separation of powers and international comity, remain salient today. Without a complete picture of the Court's docket, however, mainstream scholars are left to fend off revisionist critiques with nothing more than the generalizations that gave rise to revisionism in the first place.

50. United States v. Arredondo, 31 U.S. (6 Pet.) 691, 711 (1832) (internal quotation marks omitted).

51. *See* Bederman, *supra* note 25, at 50-65 (urging scholars to reexamine how and why eighteenth-century prize cases came to be the basis for modern human rights decisions).

52. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803). For use of this language by a revisionist scholar, see, for example, Yoo, *supra* note 28, at 183.

53. *See* Flaherty, *supra* note 8, at 2099-105 (complimenting John Yoo's work on treaty history but critiquing the revisionist movement as a whole).

54. *See infra* note 138.

C. *The Limits of Traditional Scholarship*

The modern debate has thus far been dominated by scholars employing historical analysis to discover and describe an original intent that purportedly explains certain paradigm cases of the Jay and Marshall Courts. Unfortunately, this kind of work is heavily subject to selection bias. Both mainstream and revisionist scholars have focused on the small number of cases that most interest them and have generally ignored the rest. This is a flawed way to make arguments about legal doctrine, and far worse as a descriptive technique. Particularly in politically charged areas like foreign affairs, it is too easy for scholars to anoint as paradigmatic those cases that best reflect their preferred positions in the debate.[55] Making matters worse, attempts to place these so-called paradigm cases in context have been unpersuasive due to the indeterminacy of materials from the period. While the intent of the Framers could theoretically shed light on a number of difficult questions, it is not particularly persuasive when that intent is itself also bitterly disputed, as here.[56]

It is not the case that current inquiries are universally flawed or predestined to fail. Indeed, the issues facing mainstream and revisionist scholars are not unique to the foreign affairs debate.[57] Nevertheless, traditional methods of scholarship have failed to provide lawyers and judges with a complete picture of the early Court's role in foreign affairs. Further engagement with selected primary source material is unlikely to do so; it is simply too difficult to know which materials are rightfully considered representative of original intent. Continued discussion of

55. Mark Tushnet calls this methodological flaw—the use of historical materials or cases to support preconceived legal notions—"law-office history." Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 917, 917-18 (1996). Though both mainstream and revisionist scholars are aware of this problem in their debate, they only rarely discuss it openly. *See, e.g.*, Brilmayer, *supra* note 19, at 2313 ("Koh makes his model of international law more politically ambitious but simultaneously leaves it more vulnerable to political vicissitudes."); *see also* Flaherty, *supra* note 8, at 2095-105 (discussing the use of history in the foreign affairs debate). *See generally* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 9 (2002) ("Too much legal scholarship ignores the rules of inference and applies instead the 'rules' of persuasion and advocacy. These 'rules' have an important place in legal studies, but not when the goal is to learn about the empirical world.").

56. *See* Flaherty, *supra* note 8, at 2102 ("Canvassing the secondary works on a particular era may sometimes reveal little more than disagreement and debate, or what Professor [G. Edward] White has characterized as 'blah.'"); *see also* James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 284 (1991) (arguing that the records we have of the Framers' intentions "are often contradictory, indeterminate, or both").

57. Lee Epstein and Gary King have noted that, across all legal scholarship, work rarely indicates "(1) [h]ow authors canvassed the relevant case law and what precisely was the population from which they sampled; (2) [h]ow authors selected their cases and how many they read; (3) [h]ow authors distinguished 'key' or 'a few . . . exemplary cases' from those that are not central or not typical." Epstein & King, *supra* note 55, at 41-42 (omission in original) (footnote omitted). Epstein and King raise similar questions about analyses of the Framers' intent. *Id.* at 42.

"paradigm cases" is equally unlikely to forge a unified, objective understanding; without some other picture of the Court's activities it is hard to draw representative conclusions from decisions that are exceptional by definition. With these constraints in mind, the remainder of this Note attempts to unify and expand research and discourse by taking a new approach to understanding the role of the Court in foreign affairs.

II. ANALYZING DOCKETS

Mainstream and revisionist scholarly works share two design features that limit their conclusiveness. One is substantive; the other is methodological. First, scholars have focused on original *intent*, rather than original *practice*. To the extent that actual foreign affairs cases are discussed, they are usually used as evidence of intent rather than as phenomena worth examining in their own right. Second, scholars have relied almost exclusively on *qualitative* (textual) analysis rather than *quantitative* analysis. In this Part, I step back from both of these choices and suggest that a quantitative review of the Court's foreign affairs caseload can shed new light on the Court's role.

A. *Two Thoughts on Research Design*

I begin with the proposition that scholars should move inquiry away from original *intent* and toward original *practice*. However trite it seems to suggest that scholars should examine cases, it is necessary. To date, scholarship has too often discussed only those few cases purported to be emblematic of original intent. In contrast, inquiry into original practice entails looking at all of the cases before the Court, on the basis that their totality itself yields information not available when viewing cases in isolation. Indeed, by first identifying the Court's foreign affairs cases—*all* of these cases—scholars can begin to discuss the Court's role in foreign affairs with greater objectivity and a sense of completeness.[58]

58. In emphasizing practice over intent, I do not mean to engage the separate constitutional debate over which one better reflects originalism, because that debate is not particularly relevant to my inquiry. *Compare* Charles A. Lofgren, *The Original Understanding of Original Intent?*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 117, 140-41 (Jack N. Rakove ed., 1990) (describing the view of James Madison, who believed that original practice reflected functional solutions to difficult questions either unforeseen or unresolved at the Founding), *with* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 574 (1998) (arguing that "a requirement of fidelity to original meaning is inconsistent with the assumption that original practices are necessarily valid"). Suffice it to say that a basic understanding of Court practice is essential to any type of constitutional argument. While the primary purpose of this Note is to present evidence sufficient to validate or disprove certain

In expanding the scope of research to include the totality of Supreme Court foreign affairs cases, "the goal is . . . to translate or amass information in such a way that researchers can make use of it."[59] One way of doing so is by complementing qualitative analyses, like discussions of cases and primary sources, with larger quantitative frameworks. Indeed, the best scholarship often combines features of both types of analysis.[60] While qualitative methods are strongly suited to the discussion of ideas, quantitative studies are better at systematically identifying patterns and trends.[61] These patterns and trends, in turn, often force scholars to acknowledge whether the cases they choose to discuss qualitatively are representative or extraordinary.[62] This point holds for both camps in the modern debate: In order to assemble the most complete and accurate picture of the Court's role in foreign affairs, both mainstream and revisionist scholars should look to complement the "humanistic" and "discursive" features of traditional legal scholarship with the "systematic" and "generalizing" aspects of quantitative studies.[63]

B. *The Promise of Docket Analysis*

In Part III, I apply quantitative methods to early Court practice in order to catalog the early foreign affairs caseload, characterize and analyze it by category, and examine trends and changes over time. While avoiding the impulse to overquantify, this simple method, which I term "docket analysis," can suggest larger patterns and identify new cases to consider, while empirically validating or disproving certain central assertions made by mainstream and revisionist scholars. This approach also provides a basis for avoiding both problems that plague the modern debate: the selection bias of reading only individual cases and the indeterminacy of inquiries into original intent. Moreover, it generates solid, easily validated facts that provide a more historically objective framework for discussing how the

scholarly assertions about intent, the data presented in Part III would be equally useful for scholars making arguments from history and tradition, and possibly structure as well.

59. King & Epstein, *supra* note 55, at 20.

60. *See* GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 5 (1994).

61. *See id*.

62. *Cf. id*. at 129 (noting that large data sets allow scholars to control selection bias either by selecting case studies at random or by defining some other consistent characteristic by which they narrow their scope of analysis). Moreover, because "all social science requires comparison, which entails judgments of which phenomena are 'more' or 'less' alike in degree (i.e., quantitative differences) or in kind (i.e., qualitative differences)," studies that utilize both methods are more likely to be rigorous. *Id*. at 5.

63. *Id*. at 4.

Court actually functioned when confronted with real parties and controversial foreign affairs disputes.[64]

As I use the term, docket analysis consists of cataloging the wealth of objective and comparable data points that characterize the Court's caseload. These include, but are not limited to, the parties and issues on the docket as well as the jurisdiction under which cases were heard. This information frames the Court's presence in foreign affairs and can be used to identify curious patterns worthy of additional research—if the Court more often made reference to the law of nations in one kind of case than another, for instance, further inquiry into the causes or results of that pattern may prove enlightening.[65] Here, docket analysis functions as a filter for more traditional textual analysis.[66]

64. This Note is not the first attempt to understand the judicial role in foreign policy through an analysis of the Court's docket, though it is the first attempt to provide a comprehensive picture of the early Republic. In 1986, Phillip Trimble conducted a broad survey "[o]f more than 2000 'international law' cases decided between 1789 and 1984" in order to "examine the cases in which American courts are said to have applied customary international law." Trimble, *supra* note 43, at 671, 685. In 1999, political scientists Kimi Lynn King and James Meernik "conducted a search of the WESTLAW database containing all Supreme Court opinions from 1790 to 1996" in order to "demonstrate that the Supreme Court has often issued decisions where there are American foreign policy concerns . . . and that—while generally supportive of the executive branch—the High Court has often ruled against it." Kimi Lynn King & James Meernik, *The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy*, 52 POL. RES. Q. 801, 802, 808 (1999).

Though these efforts demonstrate the potential value of constructing large quantitative data sets and then drawing representative samples from them for further analysis, both face problems that limit their use here. Because they attempted to analyze more than 200 years of Supreme Court history recorded in nearly 10,000 decisions, the authors took shortcuts that raise questions about their findings. Trimble's work is likely the more reliable of the two. Rather than personally identify the 2000 foreign affairs cases that serve as the basis for his inquiry, he relied upon two edited volumes of cases by Francis Deak and Frank Ruddy. *See* Trimble, *supra* note 43, at 685 n.71. Perhaps because he recognized that "Professor Deak did not purport to include all [potentially relevant] cases," *id.* at 686 n.72, Trimble quickly dismissed the vast majority of foreign affairs issues as irrelevant for his purposes, *see id.* at 685 n.71, and decided to focus on only 100 cases involving a very small subclass of customary international law, *see id.* at 686 n.72.

King and Meernik made a similar error. Like Trimble, they did not create their data set from scratch. Rather, they used Westlaw to "search[] for specific references within the Court's opinions to foreign policy issues and powers" using keywords such as "foreign policy" and "foreign affairs." King & Meernik, *supra*, at 808-09. Unfortunately, the keywords they chose are unlikely to be representative of the early Republic; "law of nations," for example, was not queried. This approach led King and Meernik to find only 750 foreign affairs cases over the past 200 years (which, incidentally, they thought to be a lot). *See id.* at 809. Like Trimble, they too then reduced the number of cases they examined (down to 347) in order to have a manageable subset of cases to read and explore. *See id.* If nothing else, both pieces caution against exploring a time period so large that the author is unable at least to skim every case on the Supreme Court's docket.

65. As King and Meernik note, "[B]y examining a set of diverse legal cases that share a common[] issue property—their relevance to foreign policy—we can uncover patterns in Court outcomes that might go unnoticed if we had [only] examined such cases according to the legal issue presented." King & Meernik, *supra* note 64, at 818.

66. I would distinguish docket analysis as I describe it above from a related but more intensive mode of analysis that could be called "textual analysis in bulk." While docket analysis involves cataloging easily retrievable, objective information (like the nationalities of the parties),

It is unfortunate that traditional legal scholarship has paid little attention to the Court's docket, because the docket has changed over time, and these changes track shifts in the Supreme Court's role in the American legal system.[67] In size and content, the docket of the contemporary Court is demonstrably different from that of the Jay and Marshall era. Nevertheless, without an empirical grounding, we can only make vague guesses as to the nature of this change, observing, for example, that the Court decides substantially fewer prize cases today than it did two centuries ago or that the law of nations is invoked less frequently. Docket analysis provides the framework necessary to truly understand the relevance or irrelevance of early cases to today's debates and disputes.

To be sure, docket analysis has its limits. As noted earlier, the best arguments rely upon both qualitative and quantitative analysis. Because the former is well entrenched in legal scholarship, this Note's primary focus is to demonstrate the power of the latter. In taking that road, however, I do not mean to downplay the necessity of traditional close reading. Imposing numerical measures on what are, in reality, complex and unique circumstances can quickly lead to fallacy.[68] Nevertheless, because looking at cases alone can confuse doctrine with other trends that may themselves be interesting to examine, this qualitative approach can only be a companion to the quantitative framework that docket analysis provides, not its replacement.

C. *Reconstructing the Foreign Affairs Docket*

Reconstructing the Court's foreign affairs docket begins with the daunting necessity of defining the subject under examination. This is no easy task: In recent years, the definition of a "foreign affairs" case has itself been heatedly debated.[69] While mainstream scholars take the broad position

it is also possible to compile data obtainable only by reading and interpreting cases (like the level of deference given to coordinate branches). Both modes of inquiry can make invaluable contributions to the foreign affairs debate, particularly when used together. While it is possible, for example, to determine how often foreign parties came before the Court using docket analysis, understanding the treatment they received requires a different level of inquiry. *See* Epstein & King, *supra* note 55, at 20 (describing the value of research that "attempt[s] to systematize various features of interest" from judicial opinions). In Part IV, I suggest how docket analysis can point the way toward areas where more large-scale textual analysis would be useful.

67. For an account of the move from mandatory to discretionary certiorari, a shift that significantly changed the makeup of the Supreme Court's docket, see Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001). Post's work includes a fascinating exploration of the changing page length of Supreme Court opinions in an analysis that embodies the virtues of mixed qualitative/quantitative approaches discussed earlier. *Id*. at 1276-90.

68. Nowhere is this truer than in the law, where cases are necessarily the products of particular controversies whose outcomes are determined by highly nuanced reasoning.

69. *See* G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1113-17 (1999).

that "the concept of foreign affairs encompasses whatever relations among nations those nations view as proper subjects of collective concern,"[70] revisionists take the more narrow position that "[t]he main concerns of foreign relations . . . were military and diplomatic issues, and the primary participants in foreign relations were the executive branches of national governments."[71] The disagreement is not without significance. If the set of cases examined is defined so narrowly as to include only those disputes that directly involve the President or Congress, one ignores the fact that precedent and dicta from private disputes can both guide the Court's action in political disputes and change the "shadow of the law" under which the President and Congress behave. On the other hand, if the set includes every case even remotely involving events abroad, the endeavor becomes so amorphous as to be practically useless.

Despite their differences, the two camps agree, as Jack Goldsmith suggests, that "[a]t the very least, a potential foreign relations interest is raised by any issue that involves [1] a foreign party or transaction, [2] a foreign or international law, or [3] a U.S. law that regulates extraterritorially."[72] This definition, which generally comports with that used by constitutional scholars[73] and the modern Supreme Court,[74] captures a large and diverse set of disputes. It includes cases arising from war and national security emergencies, controversies implicating treaties and international law, questions of citizenship, relations with ambassadors and consuls, and a large portion of admiralty and maritime law. It does not, however, include areas that implicate foreign relations only peripherally,[75] such as questions of domestic navigable waters,[76] conflicts over interstate shipping,[77] or matters pertaining to the administration of customs and

70. Stephens, *supra* note 34, at 556.

71. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1670 (1997).

72. *Id*. at 1677 n.247.

73. *See* White, *supra* note 69, at 1110 ("[C]onstitutional scholars adopted a broad definition of 'foreign affairs' issues as a starting point: any litigation in which a foreign citizen or government was a party potentially had foreign affairs implications.").

74. *See* Zschernig v. Miller, 389 U.S. 429, 432 (1968) (holding an Oregon inheritance statute unconstitutional on the ground that it amounted to "an intrusion by the State into the field of foreign affairs").

75. Specifically, I do not take this definition to include the *lex mercatoria* as applied between U.S. parties only. In this Note, I consider such law part of the pre-*Swift* and pre-*Erie* general common law, and *not* "international law." For more on this distinction, which is a significant part of the debate between mainstream and revisionist scholars but not one I engage here, see Bradley & Goldsmith, *supra* note 25; and Koh, *supra* note 31. I do, however, consider Indian disputes as involving "foreign parties," given the importance of early Indian cases to treaty law.

76. *See, e.g.*, New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820).

77. *See, e.g.*, The Neptune, 16 U.S. (3 Wheat.) 601 (1818); United States v. Willings, 8 U.S. (4 Cranch) 48 (1807); Hooe & Co. v. Groverman, 5 U.S. (1 Cranch) 214 (1803).

duties.[78] It likewise does not include purely domestic disputes in which the Court comments on foreign relations only in dicta, such as *Marbury*[79] and *McCulloch v. Maryland*.[80] While reasonable people might disagree about a handful of cases on the margin, Goldsmith's definition is clear enough to center attention on a common set of materials. That is the first step toward a common understanding of the Court's role.

The data used in this Note was compiled by reading all 1303 decisions by the Supreme Court under Chief Justices Jay and Marshall.[81] For each case, I evaluated whether it could be appropriately considered to implicate foreign affairs using Goldsmith's definition. Many cases merited that label on multiple bases (e.g., cases involving foreign parties and foreign laws). For those cases implicating foreign affairs, I then noted a number of objective elements: the jurisdiction under which the Court took the case (e.g., original versus appellate, writ of error versus writ of appeal), the nature of the dispute (e.g., public or private), the nationality of the parties, and whether the phrase "law of nations" was used. I also identified the areas of law implicated by the cases (e.g., admiralty and prize, treaties, citizenship). While I do not provide an exhaustive set of the statistics that could be generated through docket analysis, even a few can provide valuable context that is sorely lacking in the modern debate.

III. THE FOREIGN AFFAIRS DOCKET OF THE JAY AND MARSHALL COURTS

A. *Caseload*[82]

Under Chief Justices Jay and Marshall, the Court heard more than 1300 cases between 1791 and 1835.[83] Beginning with *Georgia v. Brailsford*,[84] 323 of these cases, or one in four, involved the foreign affairs of the United States. Nearly two in five cases heard by the Jay Court involved international issues. During John Marshall's thirty-five-year term as Chief

78. *See, e.g.*, Harris v. D'Wolf, 29 U.S. (4 Pet.) 147 (1830); Van Ness v. Buel, 17 U.S. (4 Wheat.) 74 (1819); Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808).

79. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803).

80. 17 U.S. (4 Wheat.) 316, 407-08 (1819).

81. This Note examines the Jay and Marshall Courts because the majority of cases cited by both mainstream and revisionist scholars as evidence of original intent were decided in this period.

82. The data discussed in this Section can be found in Tables 9, 10, and 11 of the Appendix.

83. ANNE ASHMORE, LIBRARY OF THE SUPREME COURT OF THE UNITED STATES, DATES OF SUPREME COURT DECISIONS: UNITED STATES REPORTS VOLUMES 2-107: AUGUST TERM 1791-OCTOBER TERM 1882 (1997), *available at* http://www.supremecourtus.gov/opinions/datesofdecisions.pdf. In this Note, I use the terms "decisions" and "cases" interchangeably, though the Court issued multiple decisions in a handful of cases. For consistency, I treat each decision as a separate "case," but make note when this discrepancy appears relevant.

84. 2 U.S. (2 Dall.) 402 (1792).

Justice, only one year, 1803, failed to see a single foreign relations case reach the Supreme Court.[85] Not surprisingly, the Court heard more of these cases in the years following armed conflict. From 1813 to 1820, for example, more than forty percent of the Court's docket raised questions implicating foreign affairs.

More than half of all foreign affairs cases involved a foreign party or transaction (Type 1). Framed differently, this is one in seven of all Supreme Court cases decided under Jay and Marshall. A larger number involved foreign or international laws (Type 2), though international laws outnumbered foreign ones almost five to one.[86] Cases involving the extraterritorial application of U.S. law (Type 3) reached the Supreme Court 110 times.[87] The vast majority of these cases involved nonintercourse or embargo acts[88] or the prohibition against slave trading.[89] Nearly two-thirds of these Type 3 cases arose in the decade following the War of 1812 alone.

TABLE 1. SUPREME COURT FOREIGN AFFAIRS CASES BY TYPE, 1791-1835[90]

Type	Number of cases	Percentage of foreign affairs cases	Percentage of total Supreme Court cases
1: Foreign party or transaction	194	60%	15%
2: Foreign or international law	271	84%	21%
3: U.S. law applied extraterritorially	110	34%	8%

85. The Supreme Court did not release decisions in 1802 and 1811.

86. I include foreign judgments, *see, e.g.*, The Santa Maria, 20 U.S. (7 Wheat.) 490 (1822), and decrees, *see, e.g.*, Keene v. M'Donough, 33 U.S. (8 Pet.) 308 (1834), in the term "foreign laws." "International laws" are more difficult to exhaustively identify. For my purposes, I include in the term treaties, prize law, piracy law, and cases decided under the principle of sovereign immunity. I also include cases decided under admiralty law in Type 2, though only when those cases *also* included a foreign party or judgment (Type 1) or extraterritorial law (Type 3). Such a condition is necessary to avoid the overinclusion of cases that are probably better characterized as domestic disputes, even though they recognize the existence of international norms. Along similar lines, I do not include cases implicating the law of merchants, which I consider part of the general common law here. *See supra* note 75.

87. This type includes a number of trade restrictions that were often, though not universally, enforced when ships were docked in U.S. ports. I recognize that some will take issue with labeling these laws extraterritorial, even though they clearly regulated American activity abroad. However, because the focus of this Note is foreign affairs and because there can be no debate that these trade restrictions figured prominently in American foreign policy of the era, *see infra* note 131 and accompanying text, I believe I would be in error to exclude these cases.

88. *See, e.g.*, Non-Intercourse Act of 1809, ch. 24, 2 Stat. 528 (repealed 1815); Embargo Act of 1807, ch. 5, 2 Stat. 451 (repealed 1809).

89. *See, e.g.*, Act of Mar. 2, 1807, ch. 22, 2 Stat. 426; Act of Mar. 22, 1794, ch. 11, 1 Stat. 347.

90. As noted earlier, many cases arise in more than one type.

A distinction should be made between foreign affairs cases, particularly those of Type 2, and references to the "law of nations." While there is a relationship between the two, they are not identical. The phrase "law of nations" arose in 131 cases, of which 105 addressed foreign affairs (99 of them being Type 2).[91] More than two-thirds of foreign affairs cases, however, do not mention the phrase. This is not to say that common law principles generally similar across nations were not addressed in these disputes, only that they were not explicitly discussed. More interesting, perhaps, is that the small group that mentioned the law of nations but did *not* implicate foreign affairs includes such seminal cases as *McCulloch v. Maryland*,[92] *Cohens v. Virginia*,[93] and *Gibbons v. Ogden*.[94]

Given the limited number of cases typically discussed by scholars of foreign affairs, these are remarkable findings. They suggest that, even if the Founders intended to create courts with limited power over foreign relations, as some assert, the overall federal system they designed actually facilitated substantial involvement. Some of this was no doubt welcome; there was little disagreement that the Court should hear admiralty disputes, and most recognized that the Court would help Congress and the President hold states to their federal commitments. Nevertheless, when twenty-five percent of the caseload involves issues pertaining to foreign affairs, the Court has moved past the stage of occasional player. It has taken a robust role. An examination of the jurisdiction, parties, and subject matter addressed in these disputes begins to shed light on how this came to be.

B. *Jurisdiction*

1. *Original Versus Appellate*

Article III of the Constitution grants the judicial branch numerous jurisdictional heads through which to hear foreign affairs disputes.[95]

91. I include in this figure not only cases where the law of nations is mentioned in the Court's opinion but also those where it figured in arguments made by counsel before the Court. Because many of the Court's opinions are quite short, they do not paint a complete picture of the ideas brought to bear on the decision. I do not mean to suggest that the Court relied upon the law of nations in all of these cases, only that it was asked to consider it. *See, e.g.*, Maley v. Shattuck, 7 U.S. (3 Cranch) 458 (1806) (recording six references to the law of nations made by counsel).

92. 17 U.S. (4 Wheat.) 316, 417 (1819).

93. 19 U.S. (6 Wheat.) 264, 325 (1821) (argument of counsel).

94. 22 U.S. (9 Wheat.) 1, 227 (1824).

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

Though the Supreme Court has original jurisdiction over a small class of these cases, those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,"[96] most foreign affairs disputes are expected to begin in a trial court and work their way to the Supreme Court on appeal. In the Jay and Marshall era, this primarily happened by way of "writs of error and writs of appeal, the distinction resting on whether the appeal stemmed from a suit at law or a suit in equity, respectively."[97] Additionally, a handful of cases reached the Court through certificates of division that listed questions of law on which circuit judges disagreed and therefore requested resolution by the Supreme Court.[98] Together, these three writs constituted "mandatory" appellate jurisdiction, because the Court was obligated to decide all such cases by either full or memorandum opinion.[99]

The Supreme Court rarely heard even the most contentious foreign affairs disputes through original jurisdiction. Only three cases were heard on the basis that a state was party (all three involved the State of Georgia).[100] Another, *Jones v. Le Tombe*, involved a public minister, and that suit was quickly dismissed as involving the obligations of a foreign government and not the consul himself.[101] All but *Cherokee Nation* were heard by the Jay Court. These were not the only foreign affairs cases involving states or consuls, but all others began in lower courts. Whatever the original intent of the Framers might have been with regard to the Supreme Court's original jurisdiction, that grant of power was rarely exercised by states or foreign governments in the early Republic.

96. *Id.* art. III, § 2, cl. 2.

97. Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 MARQ. L. REV. 535, 539 n.17 (1999). For more on the distinction, see Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997).

98. *See* White, *supra* note 31, at 730 n.14.

99. *See* Post, *supra* note 67, at 1276.

100. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

101. 3 U.S. (3 Dall.) 384 (1798).

TABLE 2. POSTURE OF FOREIGN AFFAIRS CASES REACHING THE SUPREME COURT, 1791-1835

Type of jurisdiction	Posture at Supreme Court	Number of cases	Pecentage of foreign affairs cases
Original jurisdiction	Trial	6	2%
	Other	2	<1%
Appellate jurisdiction	Writ of error	95	29%
	Writ of appeal	196	61%
	Certificate of division	22	7%
	Other	2	<1%
Total		**323**	**100%**

Appellate jurisdiction, in contrast, offers a much more interesting picture of how, and in what posture, cases reached the Supreme Court. It is difficult to parse, on a systematic basis, the frequency with which each head in Article III provided jurisdiction over foreign affairs cases, because most disputes could have been heard on numerous grounds, and the Court generally only discussed the basis for its jurisdiction when that basis was at issue in the case.[102] Nevertheless, by referring to the parties before the Court and the issues that they raised, it is possible to construct a model of how frequently each head *could* have been invoked. Such a heuristic, even if only directionally accurate, provides some basis for evaluating how the Court's docket came to be dominated by foreign affairs disputes. Even a glance at the results suggests that any discussion of early judicial involvement in foreign affairs must explicitly address the unique aspects of admiralty and maritime jurisdiction that seem so irrelevant to modern scholars.[103] I note here two of the most salient issues.[104]

102. But note that cases involving maritime issues arose exclusively in admiralty jurisdiction even if they also included a foreign party or were based upon an underlying federal law. On the origins of this rule, see *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 106 n.a (1820). For my purposes, however, I have noted cases arising in admiralty, but also including a foreign party or U.S. law, in all relevant categories.

103. A small number of these early cases have received considerable attention in the modern debate because of their role supporting modern human rights litigation. *See, e.g.*, Bederman, *supra* note 25, at 50-65. Unfortunately, scholars rarely comment on the unique nature of admiralty itself. Most admiralty cases are simply dismissed as relics of a bygone era. *See, e.g.*, Weisburd, *supra* note 23, at 29 (dismissing the interpretive value of cases arising under admiralty jurisdiction because they reflect an outdated, "pre-positivistic" view of law); *see also* Bederman, *supra* note 25, at 32 (discussing this view).

TABLE 3. POTENTIALLY APPLICABLE HEADS OF FEDERAL APPELLATE JURISDICTION IN SUPREME COURT FOREIGN AFFAIRS CASES, 1791-1835

Jurisdictional head	Number of potentially applicable cases
Arising under laws of the United States	110
Arising under treaties	66
Admiralty and maritime jurisdiction	202
Controversies with a state party	5
Alien diversity jurisdiction	173
Total foreign affairs cases heard on appeal	**315**

2. *Admiralty Jurisdiction*

Admiralty was at the heart of international affairs during the Jay and Marshall period. As Grant Gilmore and Charles Black once argued, admiralty was "the inevitable concern of statecraft—and the plaything of politics."[105] Accordingly, its jurisdiction provided the most consistent forum for judicial comment on foreign affairs. Admiralty cases reached the Court in three-fourths of the years of the Jay and Marshall era (thirty-four of forty-five years) and in every year from 1812 to 1828, when they constituted more than eighty percent of the Court's foreign affairs docket. Moreover, no area of law involved a more diverse set of parties,[106] suggesting that, despite their jurisdictional posture, early admiralty cases might rightly inform present-day discussions of comity and cooperation (as mainstream scholars usually assume without comment).

Three features unique to admiralty suggest that the one in seven cases arising in its jurisdiction might actually provide the most interesting picture of the early Court's worldview. First, the guaranteed grant of jurisdiction

104. The following discussion does not account for cases arising in admiralty jurisdiction that do *not* constitute foreign affairs cases. *E.g.*, Sheppard v. Taylor, 30 U.S. (5 Pet.) 675 (1831); The Star, 16 U.S. (3 Wheat.) 78 (1818).

105. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 958 (2d ed. 1975). Gilmore and Black offer two reasons for the nexus between shipping and statecraft:

> First, the patterns of shipping—trade routes, volume, rates, nationality—affect in turn the whole scheme of geographic distribution of population and of economic activity. . . . Second, and closely connected, is the strategic aspect of the industry. . . . [W]ars have become global in potentiality, and the quantities of troops and material required for conducting them grow steadily greater.

Id.

106. Except for American Indians, every nationality appearing before the Court did so at least once in admiralty.

provided by Article III likely freed the Court from concerns that decisions made contrary to political wishes would result in jurisdiction stripping. Second, the unique authority that courts hold in maritime disputes was not likely to be questioned by the coordinate branches.[107] Third, the tradition of comity and uniformity between the admiralty courts of different nations created a strong institutional interest that was expected to dull national passions.[108] In light of these factors, it is interesting to consider that some of the Court's most innovative pronouncements came while addressing maritime disputes—from the decision to allow exercise of jurisdiction over disputes arising entirely between foreigners,[109] to a suggestion that courts may intervene in wars (to uphold the prize proceedings of one nation against another) without per se violating American neutrality laws,[110] to a framework for the limited abrogation of sovereign immunity.[111] If there are cases that provide a window into the Court's own sense of its involvement in foreign affairs, it is those in admiralty.[112] These cases provide the unstated basis for much of the modern debate.

3. *State Versus Federal*

It is also worth noting that more than ninety percent of all foreign affairs cases reaching the Supreme Court originated in federal, as opposed to state, courts. At first glance, this data seems to suggest that the federal system captured a large number of the nation's foreign affairs disputes, as mainstream scholars suggest. This would not be surprising, given that federal courts maintain exclusive jurisdiction over admiralty cases, which, as we have already seen, constituted a large part of the Court's foreign affairs docket.[113] Nevertheless, because state courts maintained concurrent

107. The tradition of resolving interstate conflicts at sea through legal mechanisms dates as far back as Justinian, and such disputes have been the exclusive concern of courts almost continuously since 1400. GILMORE & BLACK, *supra* note 105, at 4-5.

108. Consider Marshall's comments about the leading British admiralty judge: "I respect sir William Scott, as I do every truely great man; and I respect his decision; nor should I depart from them on light grounds: but it is impossible to consider them attentively, without perceiving that his mind leans strongly in the favor of the captors," who were British. The Venus, 12 U.S. (8 Cranch) 253, 299 (1814) (Marshall, C.J., dissenting) (italics omitted). That Marshall thought this bias noteworthy enough to mention suggests that Scott's decision deviated from an understood international norm. *See* Bederman, *supra* note 25, at 67.

109. *See* Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240, 264 (1804).

110. *See* The Divina Pastora, 17 U.S. (4 Wheat.) 52, 64 n.a (1819); The Brig Alerta v. Moran, 13 U.S. (9 Cranch) 359, 365 (1815).

111. *See* The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 352-53 (1822).

112. *Cf.* Bederman, *supra* note 25, at 64 (suggesting that prize law can fill gaps in scholarly discussions that lack "depth in precedent").

113. Exclusive federal jurisdiction over admiralty was granted in the First Judiciary Act of 1789. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 450-51 (4th ed. 1996).

jurisdiction over most foreign affairs cases, definitively confirming this assertion will require additional docket analysis.[114] One might begin such an analysis by concentrating efforts on those states whose federal district courts provided a majority of the foreign affairs cases that ultimately reached the Supreme Court.

TABLE 4. MOST COMMON ORIGINATING FEDERAL DISTRICT COURTS FOR SUPREME COURT FOREIGN AFFAIRS CASES, 1791-1835[115]

Location of district court	Number of cases	Percentage of all foreign affairs cases originating in district courts
Maryland	51	17%
Massachusetts	35	12%
Georgia	25	8%
Louisiana[116]	24	8%
New York	24	8%
Rhode Island	22	7%
South Carolina	21	7%

C. *Parties*

Across its foreign affairs docket, the Supreme Court heard not only a wide variety of legal issues, but a wide variety of accents. Parties to cases in the Jay and Marshall eras hailed from no fewer than fourteen different foreign nations and numerous Indian tribes. British and Spanish subjects, in particular, frequently found themselves before the Court, appearing in more than sixty percent of cases involving a private foreign party. While the French were somewhat less frequent parties to cases, their consul was the most frequent foreign official in the Supreme Court, appearing eight separate times.[117] Perhaps not surprisingly, save for five appearances by parties from then-newly independent Caribbean and South American states,

114. It is also worth noting that, until the passage of the Act of December 23, 1914, the Supreme Court's appellate jurisdiction did not extend to state court decisions favorable to claims of federal rights. *Id*. at 37-38.

115. Figures in the percentage column represent the portion of foreign affairs cases originating in a given state's federal district courts. Accordingly, the denominator here is 294 and not 323. The other 29 cases began in state courts or the Supreme Court itself. *See infra* App. tbl.12.

116. Figures for Louisiana include cases from the pre-statehood District of Orleans.

117. *See infra* App. tbl.14.

all foreign parties before the Supreme Court were European (and with the exception of the Russians, Western European).

TABLE 5. FOREIGN PARTIES BEFORE THE SUPREME COURT, 1791-1835[118]

Nationality of party	Number of cases	Percentage of all cases involving foreign party
British	68	36%
Spanish	48	25%
French	32	17%
Portuguese	10	5%
American Indian	9	5%
Dutch	8	4%
Other nations (9)	30	16%
Total number of cases involving a foreign party	**189**[119]	—

The United States itself was frequently a party before the Supreme Court as well, appearing officially in 21% of all foreign affairs cases. An additional 7% of cases featured states or foreign sovereigns as parties. It would be misleading, however, to conclude that the remaining three-fourths of cases were purely private disputes. As was common in the era, the U.S. government frequently employed commissioned privateers to fight and enforce trade restrictions. These "semipublic" cases, combined with the handful of cases where a U.S. agent (rather than the United States itself) was named as a party, constitute an additional 28% of cases. Only the remaining 44% can be considered truly private disputes where neither the federal government, nor a state, nor a foreign sovereign, had a direct interest in the outcome. Even these cases, however, often involved significant discussions of political considerations and would lead to precedent dispositive of later cases where the United States was a party.[120]

118. For the complete table, see *infra* App. tbl.13.

119. The total number of discrete cases including a foreign party is 189, but because 16 involved two foreign parties, the total number of appearances is 205. The difference between the 189 cases involving a foreign party and the 173 implicating alien diversity jurisdiction, *see supra* tbl.3, can be attributed to 9 Indian cases and 7 cases involving foreign parties that originated in the Supreme Court.

120. *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), *overruled by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

TABLE 6. NATURE OF FOREIGN AFFAIRS DISPUTES BEFORE THE SUPREME COURT, 1791-1835

Type of party	Number of cases	Percentage of total
Public (United States, state, or foreign sovereign is a party)	90	28%
Semipublic (privateer or U.S. agent is a party)	90	28%
Private	143	44%
Total	**323**	**100%**

This summary data suggests two points worth pondering. First is the extent to which the international environment was a relatively closed system of interests during the early Republic. If parties before the Court are any indication, the "law of nations" almost exclusively bound European states and the United States. While debate on the relationship between Jay and Marshall's "law of nations" and today's international legal norms has focused on questions of scope and the place of *Erie Railroad Co. v. Tompkins*,[121] little has been written on the changing character of states supposedly bound by these laws.[122] Second, this data suggests that scholars like Phillip Trimble who claim to have found few examples of the early Court applying customary international law to bind the political branches need to reconsider the assumption that the results of "conflicts of law, admiralty, and private law of war cases . . . cannot be the limitation of government political authority or conduct."[123] The prevalence of semipublic cases on the Court's docket suggests that U.S. interests were often represented by proxy, a trend that warrants further scrutiny.[124] Both points

121. 304 U.S. 64 (1938).

122. *But see* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992) (considering the relevance of a state's liberal democratic regime to international law).

123. Trimble, *supra* note 43, at 685 n.71.

124. Take, for example, the cases of *The Frances and Eliza*, 21 U.S. (8 Wheat.) 398 (1823), and *The Pitt*, 21 U.S. (8 Wheat.) 371 (1823). Both are semipublic cases where the Court was asked to consider how far it should go in enforcing the Non-Intercourse Act of 1818. In both cases, the Court was asked by the executive branch to enforce judgments against British ships entering American ports under the pretense of being driven there by bad weather. According to the government's lawyer,

> Entering the port, *infra fauces portus*, is not necessary; and there is more danger to the revenue laws in vessels coming into these by-places, than of their entering *ports* which are made such by statute. The present voyage is within the mischiefs intended to be guarded against by the prohibition of an indirect voyage . . . .

are considered further in Part IV, when I return to discussion of the foreign affairs debate.

D. *Areas of Law*

As jurisdictional data suggests, the mass of foreign affairs cases heard by the Court generally fell within two areas: maritime disputes and questions of treaty interpretation. Together these areas cover more than eighty percent of all foreign affairs disputes. Though scholars generally speak of both as unified areas of law, the data compiled here provides insight into the specific types of disputes that were most common within each.

1. *Maritime Disputes*

The Admiralty Clause gave the federal government power over three types of maritime issues: prize, crime, and trade.[125] While "[m]odern scholars are reluctant to recognize the significance of these subsets of admiralty jurisdiction,"[126] the division offers a useful lens for understanding the kinds of maritime disputes that reached the Supreme Court around the turn of the nineteenth century.

TABLE 7. SUPREME COURT ADMIRALTY CASES BY DISPUTE TYPE, 1791-1835

Type of admiralty case	Number of cases	Percentage of admiralty cases	Percentage of foreign affairs cases
Prize and salvage	91	45%	28%
Crime and piracy	8	4%	2%
Trade and revenue	103	51%	32%
Total	**202**	**100%**	**62%**

The Pitt, 21 U.S. (8 Wheat.) at 377. Despite that formulation of foreign policy, the Court instead advanced a more lenient regime, finding that Congress intended to create a "system of equality" that would better reflect long-term American interests, *The Frances and Eliza*, 21 U.S. (8 Wheat.) at 406, because "[t]he evidence of fairness [underlying such a policy] is full and unequivocal," *The Pitt*, 21 U.S. (8 Wheat.) at 379. Both ships were released.

125. *See* William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 131 (1993). For my purposes, I have expanded Casto's categorization of revenue cases to include all trade-related disputes.

126. *Id.*

While little has been written on admiralty and the development of the Court in general, there has been at least one well-respected article written on both prize[127] and piracy[128] under Marshall. In contrast, there has been virtually no legal writing on the Court's handling of trade disputes in this era.[129] While it is beyond the scope of this Note to provide comprehensive coverage, a few points are worth briefly considering with regard to the Court's role in foreign affairs.[130]

First, trade restrictions, particularly the Embargo Act of 1807 and the Non-Intercourse Act of 1809, were arguably the most expansive foreign policies of their era, providing the Court a meaningful entry into international affairs.[131] Second, the acts were extraordinarily unpopular in some regions,[132] causing the Jefferson and Madison Administrations to rely heavily on the judiciary for political cover, further enhancing the role of the Court.[133] Third, the policy issues raised by these trade disputes were consequential; indeed, some of the most famous foreign affairs cases to arise from the era, those most often cited by mainstream scholars, arose in cases framed by trade restrictions.[134] Fourth, and finally, such enforcement usually involved two private American citizens: the American merchant at

127. Bederman, *supra* note 25.

128. White, *supra* note 31.

129. What little that has been written primarily addresses the separation-of-powers issues raised by the congressional delegation of power to the President by acts restricting trade. *See, e.g.*, H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171 (1998).

130. The trade disputes to which I refer arose primarily out of the Embargo Act of 1807 and the Non-Intercourse Act of 1809. Other trade restrictions leading to judicial involvement included the nonintercourse acts passed during the U.S. quasi-war with France, *e.g.*, Act of June 13, 1798, ch. 53, 1 Stat. 565; and numerous prohibitions on slave trading, *see supra* note 89. Also occasionally before the Court were actions arising out of acts concerning the registration of ships, *e.g.*, Act of Dec. 31, 1792, ch. 1, 1 Stat. 287 (repealed).

131. *See* Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 512 (2002) ("For decades afterwards, the Embargo Act was cited as the broadest exercise of federal authority in our history . . . .").

132. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 87 (1995) ("When Jefferson burdened New England with his Embargo Act, secessionist sentiments flared up. When Madison continued Jefferson's policy provoking the War of 1812, New England came close to secession.").

133. *See* Douglas Lamar Jones, *"The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 319 (1980) ("With the passage of the Embargo, the Jeffersonians attempted to use admiralty law to enforce a politically unpopular law.").

134. *See, e.g.*, Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (finding illegal a seizure of enemy property by the President on the grounds that a declaration of war did not by itself grant the Executive such power); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (arising out of the seizure of a ship that allegedly violated the Non-Intercourse Act of 1799); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (holding, inter alia, that the good faith of an officer who had seized a vessel without probable cause did not defeat a claim for compensatory damages).

issue and the collections officer or privateer who asserted the violation.[135] Such context provided the Court an opportunity for shaping policy under the façade of adjudicating merely private or semipublic disputes; indeed, the Court shaped much of its early doctrine on official immunity (or the lack of it) through these cases.[136]

2. *Treaties*

Treaty cases had a consistent place on the docket of the Jay and Marshall Courts as well, arising in thirty-one of Jay and Marshall's forty-five years leading the Court. Despite their prevalence, these cases primarily related to only three treaties: the 1783 Treaty of Paris and the 1794 Jay Treaty with Great Britain, and the 1819 Adams-Onis Treaty with Spain.[137]

TABLE 8. SUPREME COURT DECISIONS INVOLVING TREATIES, 1791-1835

Treaty	Number of decisions	Percentage of all cases involving treaties
1778 Treaty of Alliance (France)	3	4%
1783 Treaty of Paris and 1794 Jay Treaty (Britain)	30	42%
1795 Treaty of Madrid (Spain)	7	10%
1803 Louisiana Purchase Treaty (France)	5	7%
1819 Adams-Onis Treaty (Spain)	21	29%
Various American Indian treaties	6	8%
Total	**72**	**100%**

These cases present an interesting paradox. Numerous scholars have commented that, if any body of law reflects deference to the political branches, it is treaty law.[138] Such an observation finds significant support in

135. Two-thirds of these cases were semipublic, involving commissioned collectors or privateers. More than eighty percent involved U.S. (as opposed to foreign) merchants.

136. *See* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-22 (1987).

137. Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty (Adams-Onis Treaty), Feb. 22, 1819, U.S.-Spain, 8 Stat. 252; Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, by Their President, with the Advice and Consent of Their Senate (Jay Treaty), Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116; Definitive Treaty of Peace, Between the United States of America and His Britannic Majesty (Treaty of Paris), Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80.

138. *See, e.g.*, King & Meernik, *supra* note 64, at 807, 814; *cf.* KOH, *supra* note 32, at 78.

dicta from some of the most often cited treaty cases of the time.[139] Nevertheless, it does not appear that the United States found itself victorious in every treaty dispute before the Court. In fact, private parties prevailed in nearly every land title claim arising out of the Adams-Onis Treaty.[140] To be sure, the stakes in these disputes were rather low, and Trimble finds matters relating to this treaty simply "obsolete."[141] Nevertheless, these cases raise another issue not often considered by commentators: the extent to which deference to political branches is context specific. I will return to this issue of deference in Part IV.

E. *Summary*

Quantifying the Court's docket offers objective context to guide inquiry into the judicial role in foreign affairs. While case analysis can shed light on the development of particular legal doctrines, docket analysis provides a clearer picture of institutional development and competence. Judges become good at what they do on a regular basis. To be sure, quantitative analyses like the kind presented here have obvious limitations. Knowing that the Court regularly sat in admiralty says little about the Court's actual decisions in those cases. But such information does suggest where scholars should look and what they should look for. In the next Part, I do just that, leveraging data on the Court's docket to guide an evaluation of the modern debate. Before doing so, however, I briefly summarize the most significant empirical findings of this Part:

(1) The Supreme Court was heavily involved in foreign affairs: One-fourth of its docket addressed disputes with international implications.

(2) Eighty percent of cases discussing the law of nations involved foreign affairs; one-third of all foreign affairs cases considered the law of nations.

(3) While numerous foreign parties appeared before the Court, they primarily hailed from Western Europe.

(4) Admiralty, and particularly trade disputes, played a formative role in bringing the Court into the foreign policy debate.

139. *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307 (1829) ("[H]owever individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed."), *overruled by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); *see also* Garcia v. Lee, 37 U.S. (12 Pet.) 511, 520 (1838) ("[T]he boundary line determined on as the true one by the political departments of the government, must be recognised as the true one by the judicial department . . . .").

140. *See, e.g.*, Delassus v. United States, 34 U.S. (9 Pet.) 117 (1835); United States v. Clarke, 33 U.S. (8 Pet.) 436 (1834); *Percheman*, 32 U.S. (7 Pet.) 51.

141. Trimble, *supra* note 43, at 686 n.71.

(5) The Court had numerous opportunities to comment on political issues, particularly through the semipublic cases that constituted nearly one-third of its foreign affairs docket.

IV. EVALUATING THE DEBATE ON JUDICIAL INVOLVEMENT IN FOREIGN AFFAIRS

As I described in Part I, the debate on judicial involvement in foreign affairs is based, in part, on certain conceptions about history and original intent. Mainstream scholars believe that, since the Founding, courts have had a natural and obvious role to play in monitoring the political branches in matters foreign and domestic. This role was to be shouldered almost exclusively by federal courts, which were to take into consideration the law of nations, that "great source from which we derive . . . rules . . . which are recognized by all civilized and commercial states throughout Europe and America."[142] To the extent that courts deferred to political branches, they did so of their own will, on a case-by-case basis. Revisionist scholars take issue with all three of these basic propositions, seeing instead an early history characterized by strong judicial deference, broad executive power, and a general diffusion of responsibility to the states.

While debates over original intent may provide support for both positions, the Supreme Court docket under Jay and Marshall provides a more unified and objective framework for evaluating each camp's claims. Here, I address three contentious issues: the level of the Court's involvement in foreign affairs, the degree of deference it afforded the political branches, and its use of international law.

A. *The Judicial Presence in Foreign Affairs*

Courts were actively involved in the foreign affairs of the early Republic. The most important international events and national policies of the era were present on their dockets. Courts were expected to implement and enforce trade restrictions. They were asked to quell uncertainty following war and territorial expansion.[143] At times, they were even used as a mechanism for ensuring that America took its rightful place in the world as a full and independent sovereign nation.[144] Though many, if not most, of

142. Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815).

143. *See* Soc'y for the Propagation of the Gospel in Foreign Parts v. Town of New-Haven, 21 U.S. (8 Wheat.) 464, 494 (1823) (holding that treaties are not extinguished, ipso facto, by war between two nations).

144. Such a role dates back to the Citizen Genet affair. In *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794), the Court's third foreign affairs case, Jay declared that "the admiralty

the Court's early decisions offer little legal doctrine applicable to today's world, the extent of judicial involvement cannot be overlooked. In that sense, mainstream scholars are correct to note that foreign policy was not above judicial review, even if actual "review" was rare. Indeed, regardless of original intent, in practice the Jay and Marshall Courts came to be crucial institutions for ensuring that national policies were implemented fairly and consistently and that minor political questions, like the effect of the 1819 Adams-Onis Treaty on land rights, did not unduly exacerbate conflict with other international powers.

Despite being generally correct about the presence of the Court in foreign affairs, however, mainstream scholars have not yet fully explored the nature of that involvement. Consider the types of cases that mainstream (and revisionist) scholars typically discuss. While those involving treaties and customary international law (Type 2 cases) have received considerable attention, little is said about other groupings that might shed light on the Court's worldview. For example, cases involving foreign parties (Type 1) played groundbreaking roles in establishing judicial review.[145] Given that federal jurisdiction over cases involving aliens is understood as a driving force for Article III,[146] it seems odd that little work has been done to systematically trace the reception given to foreign parties and interests in the early Court. Similarly, while *The Schooner Exchange v. M'Faddon*[147] often prefaces discussion of modern-day extraterritoriality,[148] it is rarely acknowledged that the Court's early experiences with extraterritorial laws might shed light on how the Founders would understand present-day problems like the unreliability of evidence taken abroad, difficulty gaining access to witnesses, and conflicting judgments between foreign and domestic tribunals. Moreover, given that extraterritorial laws were often expressions of executive and legislative wartime strategy, understanding

jurisdiction, which has been exercised in the United States by the Consuls of France, not being so warranted, is not of right," *id*. at 16 (italics omitted), and in so doing asserted America's own judicial prerogative in issues of maritime concern. The decision brought great respect from European powers, who viewed the decision as an expression of American independence.

145. I refer specifically to two cases: *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), and *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). In dismissing the foreclosure action of a British subject for lack of jurisdiction in *Mossman*, David Currie has argued, the Court "approached in practical effect the not-yet-established power of judicial review." David P. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 851 (1981). Similarly, it is an often overlooked fact that the second time the Supreme Court found a federal act unconstitutional was not *Dred Scott* but *Bowerbank*, which addressed a provision of the First Judiciary Act that purported to give the federal courts jurisdiction in "'all suits' in which an alien is a party." FALLON ET AL., *supra* note 113, at 444.

146. *See* Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 548 (1989) (concluding that alienage jurisdiction was "historically the single most important grant of national court jurisdiction embodied in the [First Judiciary] Act").

147. 11 U.S. (7 Cranch) 116 (1812).

148. *See, e.g.*, Republic of Austria v. Altmann, 124 S. Ct. 2240, 2247 (2004).

how and when the Court upheld their exercise offers valuable insight into early judicial involvement in international conflict.

Docket analysis also suggests that mainstream scholars should devote attention to understanding *how* the Court came to be involved in foreign affairs. While it is true that "Article III extended the judicial power of the United States . . . [to] a large class of international cases,"[149] some heads of jurisdiction were ultimately more important than others in bringing the Court to the world stage. However important individual cases may have been, disputes involving ambassadors were rare, as were those invoking the Supreme Court's original jurisdiction. In contrast, admiralty disputes provided the most consistent basis for judicial involvement in foreign affairs. While this is not a particularly novel point, mainstream scholars have yet to offer a forceful, straightforward argument for how and why the Court's experiences in maritime disputes are comparable to present-day controversies. In particular, they have failed to differentiate prize disputes, which are an admittedly archaic type of international interaction, from conflicts over trade restrictions, which remain archetypical of the balance between national security and individual rights.[150] Moreover, because conflicts arising out of policies like the Embargo Act and the Non-Intercourse Act reflected the confluence of statutory and international law, these early disputes appear to be close historical analogies to present-day foreign affairs controversies.[151] To date, revisionist scholars have disposed of these lessons by suggesting that they reflect a pre-positivistic notion of law that has no place in our present legal order.[152] Mainstream scholars must respond. These disputes took too great a place on the early Court's docket to be disposed of so easily.

Finally, as discussed earlier, additional docket analysis offers the potential to advance the debate over the role of states and state courts in foreign affairs. While it is no doubt true that state courts could hear most types of foreign affairs disputes, it is entirely unclear how often they actually did so. Indeed, the fact that we know so little about the types of

149. Koh, *supra* note 24, at 2352.

150. Trade cases often forced the courts to strike a delicate balance between an individual's interest in commerce and the state's interest in effective security policy. *See, e.g.*, The New-York, 16 U.S. (3 Wheat.) 59 (1818) (identifying circumstances that would excuse a violation of nonimportation laws). *The New-York* asked the Court to weigh the government's interest in smoking out fraud against an individual's interest in taking safe harbor during a storm. *Id.* at 74-75 (Johnson, J., dissenting). The Court split 3-3.

151. *See, e.g.*, Rasul v. Bush, 124 S. Ct. 2686, 2698-99 (2004) (suggesting that international law might provide a remedy to continued presidential violation of a statutory right to habeas corpus).

152. *Cf.* Bradley & Goldsmith, *supra* note 25, at 852 ("Prior to *Erie*, federal courts applied a common law . . . that did not emanate from a particular sovereign authority . . . . [But now] *Erie* requires federal courts to identify the sovereign source for every rule of decision."); *id.* at 853 (concluding that "advocates of the modern position err in relying on pre-*Erie* decisions").

foreign affairs cases heard by state courts is surprising given how contentious the issue has become of late. Moreover, we know little about how state courts handled the foreign affairs cases they did hear. What little we do know is drawn from cases like *Martin v. Hunter's Lessee*,[153] which corroborate the concerns of some Founders that local passions would complicate the national interest in a unified foreign policy. To the extent that these concerns continue to animate mainstream calls for federal supremacy in much of foreign affairs law, there is need for more extensive empirical research into the behavior of state courts in the early Republic.

B. *Degrees of Judicial Deference*

The docket of the Supreme Court supports mainstream assertions that the early Court was heavily involved in foreign affairs. Revisionist scholars respond, however, by asserting that this involvement was nevertheless characterized by strong deference to the political branches, particularly in cases involving U.S. relations with foreign sovereigns. Such deference, they maintain, "ensures that the political branches, which are democratically elected, retain the power to choose how or whether to implement the nation's international obligations. . . . [and] keeps the counter-majoritarian judiciary within its proper sphere."[154] Having demonstrated that the Court was involved in foreign affairs, it remains to be seen whether that involvement was consequential, or merely a judicial rubber-stamping of policies dictated by the political branches.

This has proven to be a difficult issue for mainstream scholars, who would like to portray judicial deference as having been limited to a small set of circumstances. For example, Harold Koh has argued that "in the first era of our constitutional history, the courts played an important and active role in preserving the constitutional principle of balanced institutional participation."[155] According to Koh, this is history's primary lesson, even during an "era . . . marked by sporadic . . . aggrandizement of presidential powers in foreign affairs," particularly with respect to the exercise of textually enumerated powers like state recognition, the reception of ambassadors, and treaty making.[156] Because the number of textually

153. 14 U.S. (1 Wheat.) 304 (1816).

154. Yoo, *supra* note 8, at 2089.

155. KOH, *supra* note 32, at 135.

156. *Id*. at 78. Though Koh does not explicitly argue that judicial deference followed this accretion of power, the mainstream canon would appear to substantiate such a connection. With regard to state recognition and the reception of ambassadors, see *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 272 (1808) ("It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered . . . .");

enumerated presidential powers over foreign affairs is small, this understanding conforms with the belief that courts had a relatively active role in international issues.[157]

A look outside the mainstream canon, however, suggests that deference may not fit such clean constitutional distinctions. Courts were not universally deferential to the Executive in treaty disputes, where presidential power would be considered strongest.[158] Moreover, courts did, at times, show great deference to the political branches in admiralty, where one might expect the greatest level of judicial freedom.[159] Indeed, while theories linking deference to constitutional powers are both elegant and satisfying for those looking to make sense of original intent, reality rarely fits into so neat a package. It may be that there is no clear logic that explains early judicial deference in foreign affairs. This is the position taken by Thomas Franck, a pioneer of the mainstream movement, who has become resigned to the view that "there is no consistent jurisprudence but

and *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 324 (1818) ("No doctrine is better established, than that it belongs exclusively to governments to recognise new states . . . ."). With respect to treaty making, see, for example, *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829) (suggesting that the Court's proper role in foreign affairs is "to conform its decisions to the will of the legislature"), *overruled by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

157. To the extent that revisionist scholars point to cases like *Foster* to argue that courts should be deferential, mainstream scholars, like Koh, can dismiss those cases as "outliers" and suggest, instead, that the general trend in the period is found elsewhere, as in cases granting greater roles to Congress and the Court. *See* KOH, *supra* note 32, at 81-82 (discussing cases like *Talbot v. Seeman* and *Little v. Barreme*).

158. For example, nearly all discussion of the judicial deference in *Foster* ends with its ostensible reversal four years later in *United States v. Percheman*, 32 U.S. (7 Pet.) 51. Neither mainstream nor revisionist scholars have noted that the Adams-Onis Treaty remained the subject of considerable litigation between the United States and private parties after *Foster* and *Percheman* or that in nearly every instance, the United States lost. *See supra* note 140 and accompanying text.

159. In *United States v. 1960 Bags of Coffee*, the Court made clear that "even absurdity may be supposed to grow out of [a judicial] decision, ... [in which case] provision is made by law for affording relief under authority much more competent to decide on such cases, than this Court ever can be." 12 U.S. (8 Cranch) 398, 405 (1814). That noted, mainstream scholarship has identified numerous instances where the Court acted contrary to its pronouncements. Though modern scholars speak frequently about those few admiralty cases in which the Court squarely reviewed the conduct of an executive agent, *see* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), or determined the sufficiency of a congressional declaration of war, *see* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800), less often discussed are the myriad of disputes that asked the Court to adapt the policy decisions of the political branches to unforeseen situations that arose in the international system, *see, e.g.*, The Schooner Jane v. United States, 11 U.S. (7 Cranch) 363 (1813) (discussing the evidence sufficient to find probable cause for seizing ships); The Schooner Good Catharine v. United States, 11 U.S. (7 Cranch) 349 (1813) (describing the procedures for changing the nationality of a ship so as to not violate an embargo). Most of these cases resulted in judicially crafted exceptions to policies strongly supported by the Executive and often resulted in the U.S. government losing its case. As it made clear in *The Eleanor*, the Court cannot simply "altogether close its feelings against the claims to protection of that navy which has so nobly protected the reputation of the country." 15 U.S. (2 Wheat.) 345, 356 (1817).

only a welter of contradictory cases and that the state of the law governing the judicial role in foreign-affairs cases is essentially incoherent."[160]

I would not go so far as Franck, at least not yet. While it is difficult to reconcile apparently conflicting judicial pronouncements in the handful of paradigm cases discussed by scholars, extensive empirical work, supported by docket analysis, offers an alternative approach that does not face the constraints of a small sample size. With a larger data set of Court decisions, reflecting not only the canon but also underexplored cases in a variety of other foreign affairs areas, scholars can explore the possibility that general trends in deference may be tied to other identifiable factors.[161] While these trends may not suggest a uniform jurisprudential logic in the Court's deference, they may illuminate hitherto-unnoticed features of the Court's behavior in foreign affairs.

Two features identified in this Note would be interesting explanatory variables to ponder in a broader empirical analysis of deference: the public/private nature of cases and the areas of law they addressed. Because questions of deference were as likely to arise in semipublic cases involving commissioned privateers, where the government essentially appeared by proxy, as they were in more commonly discussed cases like *Little v. Barreme*[162] or *United States v. Smith*,[163] scholars must look beyond those few cases that directly involved the President or Congress. Indeed, in cases like these, when the Court set lenient standards or took an expansive view of individual rights, it virtually crippled the power of the coordinate branches in foreign policy.[164] Moreover, evidence that courts played a role in shaping policy, rather than merely implementing it, may be *more* evident in cases involving privateers because such cases were less likely to lead

160. THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 7-8 (1992).

161. Consider the work of Peter Schuck and Donald Elliott, who, in a different context, analyzed the level of deference that federal courts give to administrative agencies. Recognizing that "judicial review 'matters' in all cases . . . but that it has different effects which depend upon a variety of factors," the authors suggest that scholars should "identify those factors and effects, discern significant patterns in the relationship between them, and derive systematic conclusions that can illuminate the ways in which reviewing courts actually shape agency behavior." Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 988. Because the large volume of data necessary to undertake this analysis was not readily available, Schuck and Elliott generated it themselves, cataloging the outcomes of nearly 2500 representative cases. *Id.* at 989 n.13.

162. 6 U.S. (2 Cranch) 170.

163. 27 F. Cas. 1192, 1230 (Paterson, Circuit Justice, C.C.D.N.Y. 1806) (No. 16,342) (holding that "[t]he president of the United States cannot . . . authorize a person to do what the law forbids").

164. *See, e.g.*, White, *supra* note 31, at 731 ("[T]he *Palmer* decision, especially with its language indicating that Congress could not authorize punishment for robberies 'on persons within a vessel belonging exclusively to subjects of a foreign state,' appeared to cripple the federal Government's power to punish pirates . . . .").

directly to a potentially embarrassing showdown with the President or Congress. Textual analysis across a wider selection of cases would enable this hypothesis to be tested with empirical rigor.

Another potential explanatory variable could be the subject matter of cases on the Court's docket. It is certainly plausible, as revisionist scholars suggest, that judicial deference was consistent across issue areas. But there are good reasons to believe otherwise. Consider, for example, trade cases: Five factors suggest that coordinate-branch opinion may have constrained courts less here than in other types of disputes. First, trade cases almost universally involved the rights of American citizens as against their own government, a factor unique among foreign affairs issues. It is, therefore, not unreasonable to suppose that courts might be more attentive to individual interests in trade disputes than in other types of cases. Second, trade cases were disproportionately more likely to involve semipublic parties (sixty-one percent), creating the possibility that public policy became conflated with private interests.[165] Third, the Court did not yet have the power of discretion over its docket, and trade cases often raised mixed questions of fact *and* law; such cases do not lend themselves to the kind of "political question" abdication that has characterized more recent judicial encounters with foreign affairs.[166] Cases in this posture beg for circumstance-specific determinations rather than simple, universal rules of deference. Fourth, the fact that trade cases almost universally arose in admiralty increased the likelihood that international norms would come to bear on the Court's interpretation of national policies.[167] Fifth, the frequency with which the Court heard very similar questions regarding issues like fraud and seizure makes it reasonable to assume that the Court developed an institutional expertise that might have made it more comfortable advancing an independent interpretation of events that did not necessarily mirror the political branches'.[168] Trade is, of course, only one area of law that could be examined. As with the relationship between semipublic cases and deference, more extensive textual analysis offers a

165. Because privateers had financial incentives to capture ships and seek condemnation, courts had to consider not only the national security implications of enforcing trade policy but also the private interests at play in any given case.

166. This Note has not presented evidence sufficient to demonstrate that questions of fact arose more commonly in trade disputes than in other areas of law, though a cursory reading of trade cases will leave any reader with the sense that *nearly every* case of this kind involved significant factual inquiries, even at the Supreme Court.

167. This would be the case not only because of the rich body of international law addressing maritime issues but also because of the unique history of judicial involvement in admiralty. *See supra* Subsection III.B.2.

168. *See, e.g.*, The Fortuna, 16 U.S. (3 Wheat.) 236, 238 (1818) (discussing one admiralty dispute by analogy to a previous case to which "[i]n all its prominent features . . . [it bore] a striking resemblance"); The George, 15 U.S. (2 Wheat.) 278, 280 (1817) (describing the Court's repetitive interactions with very similar questions arising out of the embargo regime).

mechanism for exploring the ways in which deference depended on the substance of the legal dispute at issue in a given case.

C. *The Role of International Law*

Perhaps because they differ so greatly in their beliefs about present-day policy, mainstream and revisionist scholars advance widely divergent views of the scope of international law in the Jay and Marshall era.[169] The mainstream contends that "the framers . . . understood the law of nations broadly, even more broadly than we understand it today."[170] Revisionists assert that "[h]istorically, [customary international law] primarily governed relations among nations, such as the treatment of diplomats and the rules of war."[171] Docket analysis suggests that, in practice, the law of nations fell somewhere between these poles.

As we have seen, more than eighty percent of cases involving the law of nations pertained to foreign affairs. To the extent that foreign affairs cases implicated a wide range of substantive issues—from insurance[172] to borders,[173] citizenship policy[174] to criminal law[175]—mainstream scholars are on solid ground in taking a maximal position on scope. Such a position is strengthened by the fact that nearly a third of all foreign affairs cases, regardless of the issue in controversy, invoked the law of nations. Docket analysis, at the very least, substantiates the belief that international law was frequently considered by the Court. Whether or not that consideration, in counsel argument or court decision, necessarily made the law of nations binding remains to be proven, however. The docket analysis presented here cannot reach that question. It does, however, suggest the need for mainstream scholars to engage in a large-scale effort like Trimble's to systematically trace the outcome of cases where the law of nations was invoked.[176] As noted, earlier, Trimble's analysis likely considered too small

169. It bears noting that discussions of international law are typically of two varieties. The first, on scope, addresses questions of content: To what issues did the law of nations pertain, and whom was it intended to bind? The second, on its proper place, addresses questions of interpretation: Is the law of nations part of a unified federal law, or is it a remnant of general common law, amenable to various interpretations by state courts? Because docket analysis is ill suited for answering the second question, I focus here on the first.

170. Stephens, *supra* note 34, at 553.

171. Bradley & Goldsmith, *supra* note 25, at 818. Revisionists typically argue that the law of nations was meant to address only three discrete issue areas: piracy, safe conduct, and offenses against ambassadors. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2756 (2004).

172. Olivera v. Union Ins. Co., 16 U.S. (3 Wheat.) 183, 196 (1818).

173. The Apollon, 22 U.S. (9 Wheat.) 362, 368 (1824).

174. Inglis v. Trs. of the Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99, 156 (1830).

175. United States v. Palmer, 16 U.S. (3 Wheat.) 610, 641-42 (1818).

176. In conducting this research, it would be useful to know precisely *how* the law of nations came to influence the Court's reasoning. Koh has observed that "over the years, the Court has

a set of cases to be taken as definitive, particularly because the law of nations was invoked in forty-one semipublic cases implicating political policies but not the President or Congress directly.

In conducting such research, however, mainstream scholars must acknowledge that the law of nations brought order to an international system in few ways similar to today's. They often proclaim that "[f]rom the beginning, . . . American courts regularly took judicial notice of both international law and foreign law,"[177] but review of the Court's docket suggests that a more accurate depiction of history is that American courts primarily took notice of judicial practice in European nations. In all four cases featuring parties from South America, those parties lost.[178] To be sure, America's interaction with areas outside of Western Europe was extraordinarily limited, and it comes as no surprise that most foreign affairs cases involved British, French, or Spanish parties. Nevertheless, it falls on scholars looking to invoke early history to explain how comments made about the limited international system of Jay and Marshall speak to the vastly more diverse world in which the United States participates today.[179]

CONCLUSION

More than two hundred years later, the legacy of early judicial involvement in foreign affairs continues to impress itself upon the Supreme Court. Blackstone and Mansfield lurk in the background of *Hamdi*, *Padilla*, and *Rasul*. Precedents from Jay and Marshall frame the central issues in

regularly looked to foreign and international precedents as an aid to constitutional interpretation in at least three situations, which for simplicity's sake [he calls] 'parallel rules,' 'empirical light,' and 'community standard.'" Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004). Despite the revisionist mantra that all uses of the law of nations in the Jay and Marshall era reflect a purely pre-positivistic understanding of law, *see* Weisburd, *supra* note 23, at 29, it would greatly assist mainstream scholarship to understand how frequently each use was invoked. While discussions of the law of nations typically characterize it as a manifestation of a community standard, my review of the Court's docket gives me the sense that it was more often used as a representation of parallel rules. The distinction is relevant if only because revisionist scholars often seem more comfortable with the latter use than the former.

177. Koh, *supra* note 176, at 45.

178. La Nereyda, 21 U.S. (8 Wheat.) 108 (1823); The Neustra Senora de la Caridad, 17 U.S. (4 Wheat.) 497 (1819); The Estrella, 17 U.S. (4 Wheat.) 298 (1819); The St. Joze Indiano, 14 U.S. (1 Wheat.) 208 (1816). But note that the Haitian parties in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), were awarded additional damages when their libel for trespass reached the Court.

179. Consider, for example, that Supreme Court Justices in the Jay and Marshall era were familiar with the most famous jurists of the European nations whose laws and rulings they so often cited. *See, e.g.*, HENRY BOURGUIGNON, SIR WILLIAM SCOTT, LORD STOWELL: JUDGE OF THE HIGH COURT OF ADMIRALTY, 1798-1828, at 282-83 (1987) (describing the relationship between Justice Story and Sir William Scott, the greatest admiralty judge of that era). Similar relationships are evident in today's international system as well, providing at least one example of why pronouncements from the early Court might be more analogous to today's than one might first assume.

Hoffman-LaRoche and *Altmann*. Eighteenth-century paradigms are at the heart of the holding in *Sosa*. The echoes of history are animating some of the most important cases of our generation.

Unfortunately, foreign affairs scholars have been unable to agree on even the most basic features of this history. The role of courts, the degree of deference given to political actors, and the nature of international law all remain the subject of heated debate. Resolution appears unlikely. Focused as they have been on a small subset of decisions and sources, mainstream and revisionist scholars have been content with confining themselves to discussions about original intent that are based on materials that are neither definitive nor uniform. The result is an increasingly stale discussion about federalism and deference that at times appears more driven by politics than empirics.

This Note has suggested that answers, if they are to be found, will come from exploring Supreme Court practice rather than the Framers' intent. To facilitate such a transition, I presented summary data on the Supreme Court's foreign affairs docket. Drawing on the quantitative bent of political science, I then used this data to paint the picture of a Supreme Court heavily involved in international issues. By analyzing data on the jurisdiction, parties, and legal issues before the Court, I addressed the most contentious issues in the modern debate, arguing, for example, that in practice the law of nations implicated a wider range of issues than those involving states alone.

Though I ultimately concluded that mainstream scholars have correctly seen a historic role for courts in foreign affairs, I also suggested that the conventional narrative has not fully explored how that role developed. While the heads of jurisdiction established in Article III created the possibility that the Court would become involved in foreign policy, history emphasizes some heads more than others. Specifically, I suggested that the prevalence of international trade restrictions provided the Court with an opportunity to build a sophisticated competence in an important area of policy that did not necessitate overt disagreement with the political branches.

The data and trends presented in this Note raise an important question about the Court's institutional development. While scholars have attributed the rise of executive power over foreign affairs to the late-nineteenth-century rise in controversies involving Indians, aliens, and territories,[180] this unchecked accumulation of power might also be attributed to other changes

180. *See* Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. COLO. L. REV. 1127 (1999); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

in the Court's docket. For example, the decline in admiralty disputes after the Civil War would seem to have naturally reduced the frequency and authority with which the Court spoke about international affairs. Such a hypothesis could be tested through additional docket analysis.

The proper role for courts in foreign affairs cannot be determined by historical practice alone. Nevertheless, because today's Court has looked to scholars for guidance in understanding the scope and nature of early judicial involvement in foreign affairs, the assertions of mainstream and revisionist scholars must be evaluated. This Note has suggested that neither position can be fully validated and that the modern debate is far more constrained than it need be. Fortunately, there exists a larger universe of foreign affairs decisions to explore than scholars might have imagined, providing ample opportunity to fill existing holes with richer, more nuanced work.

APPENDIX

TABLE 9. SUPREME COURT FOREIGN AFFAIRS CASES BY YEAR, 1791-1835

Year	Foreign affairs cases	Total cases	Percentage that are foreign affairs
1791	0	2	0%
1792	1	4	25%
1793	2	3	67%
1794	2	2	100%
1795	5	6	83%
1796	9	16	56%
1797	2	7	29%
1798	1	6	17%
1799	0	11	0%
1800	4	10	40%
1801	2	5	40%
1802	0	0	—
1803	0	19	0%
1804	5	14	36%
1805	3	24	13%
1806	8	28	29%
1807	3	19	16%
1808	7	32	22%
1809	7	46	15%
1810	11	39	28%
1811	0	0	—
1812	8	40	20%
1813	14	46	30%
1814	28	48	58%
1815	18	40	45%
1816	21	43	49%

1817	15	42	36%
1818	14	38	37%
1819	8	33	24%
1820	9	27	33%
1821	6	42	14%
1822	6	30	20%
1823	12	30	40%
1824	8	41	20%
1825	7	28	25%
1826	5	33	15%
1827	8	47	17%
1828	10	55	18%
1829	4	44	9%
1830	9	59	15%
1831	1	42	2%
1832	9	56	16%
1833	6	41	15%
1834	15	63	24%
1835	10	42	24%
Total	**323**	**1303**	**25%**

TABLE 10. SUPREME COURT FOREIGN AFFAIRS CASES BY TYPE, 1791-1835

Year	Type 1: Foreign party or law	Type 2: Foreign or international law	Type 3: U.S. law applied extraterritorially
1791	0	0	0
1792	1	1	0
1793	2	2	0
1794	2	2	0
1795	4	4	0
1796	9	8	0
1797	2	2	0
1798	1	0	0
1799	0	0	0
1800	4	3	0
1801	2	2	0
1802	0	0	0
1803	0	0	0
1804	3	5	2
1805	2	2	1
1806	8	3	1
1807	3	0	0
1808	5	6	0
1809	5	4	1
1810	7	8	5
1812	2	8	6
1813	5	12	9
1814	3	28	26
1815	10	16	12
1816	15	21	5
1817	11	15	4
1818	10	13	6

1819	6	7	2
1820	4	9	7
1821	4	5	2
1822	6	6	0
1823	7	10	5
1824	5	8	4
1825	7	7	3
1826	4	5	2
1827	2	6	2
1828	7	5	1
1829	3	2	0
1830	6	5	1
1831	1	1	0
1832	5	5	2
1833	5	3	0
1834	2	14	0
1835	4	8	1
Total	**194**	**271**	**110**

TABLE 11. SUPREME COURT REFERENCES TO THE LAW OF NATIONS, 1791-1835

Type of case	Mentions "law of nations"	Does not mention "law of nations"	Total
Foreign affairs case	105	218	**323**
Non-foreign-affairs case	26	954	**980**
Total	**131**	**1172**	**1303**

TABLE 12. ORIGINATING COURTS OF FOREIGN AFFAIRS CASES REACHING THE SUPREME COURT, 1791-1835

Type of court	State	Number of decisions
Federal District	Alabama	1
	Connecticut	4
	Delaware	2
	District of Columbia	11
	Florida	18
	Georgia	25
	Illinois	1
	Kentucky	4
	Louisiana	24
	Maine	2
	Maryland	51
	Massachusetts	35
	Michigan	3
	Mississippi	3
	Missouri	1
	New Hampshire	3
	New Jersey	3
	New York	24
	North Carolina	6
	Pennsylvania	11
	Rhode Island	22
	South Carolina	21
	Tennessee	3
	Vermont	3
	Virginia	13
	Total federal district courts	*294*

State	Arkansas	1
	Georgia	1
	Louisiana	1
	Maryland	3
	Massachusetts	5
	Mississippi	1
	New York	8
	Virginia	1
	Total state courts	*21*
Supreme Court		8
Grand total		**323**

TABLE 13. PARTIES IN FOREIGN AFFAIRS CASES BEFORE THE SUPREME COURT, 1791-1835

Nationality of private parties	**Number of cases**	**Percentage of all cases involving a foreign party**
British	68	36%
Spanish	48	25%
French	32	17%
Portuguese	10	5%
American Indian	9	5%
Dutch	8	4%
German (Prussian)	7	4%
Swedish	7	4%
Russian	6	3%
Danish	4	2%
Venezuelan	2	1%
Argentinean	1	1%
Brazilian	1	1%
Haitian	1	1%
Swiss	1	1%

TABLE 14. FOREIGN SOVEREIGNS IN FOREIGN AFFAIRS CASES BEFORE THE SUPREME COURT, 1791-1835

Foreign sovereigns	Number of cases
France	8
Saxony	3
Spain	3
Argentina	1
Venezuela	1