

ARTICLES

A CIVILIZED NATION: THE EARLY AMERICAN CONSTITUTION, THE LAW OF NATIONS, AND THE PURSUIT OF INTERNATIONAL RECOGNITION

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This Article argues, contrary to conventional accounts, that the animating purpose of the American Constitution was to facilitate the admission of the new nation into the European-centered community of “civilized states.” Achieving international recognition—which entailed legal and practical acceptance on an equal footing—was a major aspiration of the founding generation from 1776 through at least the Washington administration in the 1790s, and constitution-making was a key means of realizing that goal. Their experience under the Articles of Confederation led many Americans to conclude that adherence to treaties and the law of nations was a prerequisite to full recognition but that popular sovereignty, at least as it had been exercised at the state level, threatened to derail the nation’s prospects. When designing the Federal Constitution, the framers therefore innovated upon republicanism in a way that balanced their dual commitments to popular sovereignty and earning international respect. The result was a novel and systematic set of constitutional devices designed to ensure that the nation would comply with treaties and the law of nations. These devices, which generally sought to insulate officials responsible for ensuring compliance with the law of nations from popular politics, also signaled to foreign governments the seriousness of the nation’s commitment. At the same time, however, the framers recognized that the participation of the most popular branch in some contexts—most importantly, with respect to the question of war or peace—would be the most effective mechanism for both safeguarding the interests of the people and achieving the Enlightenment aims of the law of nations.

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After ratification, the founding generation continued to construct the Constitution with an eye toward earning and retaining international recognition, while avoiding the ever-present prospect of war. This anxious and cosmopolitan context is absent from modern understandings of American constitution-making.

We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride, or degrade the character of an independent nation, which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril, for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. . . . Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our Government even forbids them to treat with us: Our ambassadors abroad are the mere pageants of mimic sovereignty.

—Alexander Hamilton, *Federalist 15* (1787)¹

INTRODUCTION: THE COSMOPOLITAN FOUNDING AND THE QUEST FOR RECOGNITION 934

I. THE ROAD TO PHILADELPHIA: SEEKING LEGITIMACY IN THE ATLANTIC WORLD 946

 A. *State Constitution-Making and Continental Cooperation* 949

 B. *A Diplomatic Education: The International Vices of the Political Systems of the States* 952

 C. *Treaties at Home: Judicial Enforcement of the Peace Treaty Against State Legislation* 961

 D. *The Federalist Vision of American Participation in the Atlantic World* 970

II. THE INTERNATIONAL CONSTITUTION 980

 A. *Constitutional Theory: Reconciling International Legitimacy with Popular Sovereignty* 982

 B. *Theory Applied: The Framers’ Design* 989

III. “LIQUIDATING” THE CONSTITUTION: FOREIGN AFFAIRS IN THE FOUNDING GENERATION 1015

 A. *The Neutrality Crisis of 1793* 1019

 B. *The Jay Treaty Controversy* 1039

IV. CONSTITUTIONS AND THE INTERNATIONAL RECOGNITION OF POSTCOLONIAL NATIONS 1061

¹ THE FEDERALIST NO. 15, at 91–92 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

CONCLUSION 1065

INTRODUCTION: THE COSMOPOLITAN FOUNDING AND THE QUEST FOR RECOGNITION

This Article seeks to reframe the history of the American Founding. Contrary to the premise of constitutional exceptionalism that is an article of faith in the nation’s imagined story,² we argue that the United States’ founding instrument is best understood, in historical perspective, as a fundamentally international document. According to the conventional account, the purpose of the Constitution was to establish a republican frame of government that would safeguard the American people from domestic tyranny, promote respect for individual rights, and avoid encroachments on the autonomy of the states. In short, the framers created the Constitution for internal purposes, and its intended audience was the American people. This understanding is profoundly incomplete. In contrast, this Article highlights the connection between the making of the Constitution—its causes, drafting, and implementation over time—and the integration of the United States into the Atlantic world of “civilized” states.

Historians have long recognized that the weakness of the Articles of Confederation created complications for the new nation’s foreign relations and that the founders organized the Philadelphia Convention at least in part to remedy the difficulties that the new nation had encountered during the “critical period” immediately following the Revolution.³ Diplomatic frustrations resulting from state

² See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 2006) (arguing that national histories help constitute nation and nationalism); see also THOMAS BENDER, *A NATION AMONG NATIONS: AMERICA’S PLACE IN WORLD HISTORY 4* (2006) (“To go beyond the nation is not necessarily to abandon it but to historicize and clarify its meaning.”); Daniel T. Rodgers, *Exceptionalism*, in *IMAGINED HISTORIES: AMERICAN HISTORIANS INTERPRET THE PAST 21* (Anthony Molho & Gordon S. Wood eds., 1998) (analyzing concept of national exceptionalism).

³ See, e.g., FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3* (1973) (discussing how “individual states undercut congressional prerogative in foreign relations and jeopardized the security of the entire nation”); RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781–1789* (1987) (to similar effect); JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 342–52* (1979) (to similar effect); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814*, at 93–122 (1993) (“The move toward federal union followed from the failure of confederal arrangements to guarantee harmony among the states and Congress’s resulting inability to conduct foreign policy.”); GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 51 (2008) (to similar effect).

violations of the Treaty of Peace, in particular, helped create the atmosphere of crisis that motivated profederal forces to organize and write a constitution. On this account, international problems functioned as a catalyst for calling the Convention, but in the actual conception, drafting, ratification, and implementation of the Constitution, these concerns were merely a sideshow.⁴

Historians have similarly diagnosed the problem to which the framers responded in narrow terms: the inability of the Confederation to control the conduct of the almost fully sovereign states. Foreign affairs, many had come to understand, required centralization of authority and, most importantly, the power to enforce decisions directly rather than through the unreliable medium of the states. Historians have thus emphasized the federalism component of the Founding, and they have viewed the founders' goals through a similarly narrow lens.⁵ The founders worried about the government's ability to protect and advance the national interest, understood in a strictly realist fashion. On this account, no larger philosophical or existential interests were at stake.

On all of these counts, the conventional understanding is mistaken, and its errors stem from an even more fundamental lapse: the failure to appreciate that a core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states governed by the law of nations. Viewed in this light, the Founding looks dramatically different from the conventional image. Foreign affairs did not merely contribute to American constitution-making; they were the main event. The fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a "civilized state" worthy of equal respect in the international community. For this reason, the framers sought an international audience for their handiwork. They hoped that the document, as a promise conveyed in a script for action, as well as their

⁴ In a leading version of this account, which is correct as far as it goes, the prescription was to create a "fiscal-military state" with the taxing and military powers that characterized the most powerful European states and that less powerful states tried to imitate. See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); see also John Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (1989) (discussing British fiscal-military model); *THE FISCAL-MILITARY STATE IN EIGHTEENTH-CENTURY EUROPE: ESSAYS IN HONOUR OF P.G.M. DICKSON* (Christopher Storrs ed., 2009) (discussing fiscal-military state as pan-European eighteenth-century phenomenon). This account emphasizes the degree to which the Federalists succeeded in building "a powerful centralized state." Little attention is paid to how the Constitution facilitated their larger aim of admission into the world of civilized states.

⁵ See sources cited *supra* note 3.

performance of that script through actual governance, would earn a favorable reception abroad and facilitate the new nation's integration into the Atlantic world of commerce and civilization.⁶

This new perspective also illuminates the place of the law of nations in the Constitution.⁷ The framers believed that the republic could not expect equal membership unless it demonstrated its respectability as defined by contemporary norms, which in turn depended on whether it could, or would, comply with its international duties. The framers therefore embedded a set of interrelated and innovative mechanisms into the text of the Constitution to ensure that the new republic would comply with its obligations under treaties and the law of nations.⁸

It is not only the centrality of international recognition, and therefore of the law of nations, to the constitutional project that historians have underappreciated. The complex set of reasons why the founders sought recognition is also submerged in the conventional wisdom. Although the doctrine of recognition was being developed only in the late eighteenth century, it was already widely appreciated that recognition served critical, functional purposes.⁹ For example, it

⁶ See *infra* Parts I.D and II.A; see also DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 216 (2005) (“Frequent references to European perceptions of the American experiment demonstrate that while the founders made and defended their constitutions primarily for voters, they also sought a foreign audience. . . . Most of the founders, especially the Federalists, believed that the Constitution should be judged successful only if it persuaded the European empires to accept the United States into the international community.”).

⁷ There is a large literature on the degree to which the Constitution incorporated the law of nations. See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1 & 2), 101 U. PA. L. REV. 26, 792 (1952); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); 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 (1999). For discussion of this issue, see *infra* notes 116–20, 284–93, 299–304, 342, 363–78 and accompanying text.

⁸ See *infra* Part II.B.

⁹ See, e.g., DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 85–86 (2007); C.H. Alexandrowicz, *The Theory of Recognition In Fieri*, 34 BRIT. Y.B. INT’L L. 176 (1958). For the history of recognition under international law, see WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 75–82, 183–86 (recognition after Dutch Revolution), 343–48 (American Revolution), 497–502 (Latin American revolutions), 599–602 (Stimson Doctrine), 659–62 (United Nations recognition process) (Michael Byers trans., 2000); JULIUS GOEBEL, JR., *THE EQUALITY OF STATES: A HISTORY IN THE STUDY OF LAW* (1923); JULIUS GOEBEL, JR., *THE RECOGNITION POLICY OF THE UNITED STATES* (1915).

was a prerequisite for making treaties, like the French treaty of alliance during the American Revolution and various commercial treaties that most founders believed were imperative for the economic development of the United States. Recognition was also essential for security. Without granting genuine acceptance of the nation's sovereign status, the European empires that surrounded the new nation would feel little compunction about interfering in its internal affairs or even seeking to break it apart. The founders, of course, sought recognition with these functional considerations at the forefront of their minds.

Nevertheless, it is a mistake to view the driving motivations of the founders exclusively through a realist lens. While calculations of national interest figured into the demand for more energetic government, they were only part of the story. Indeed, the founders' "interests" should be understood, in the first instance, as inextricably entangled with their ideological premises about the nature of civilization and the special role of the new republic in contributing to the progress of that civilization.¹⁰ "Interest" is itself an historical category that changes over time and across space. The founders' calculation of interests, in other words, depended in the first instance on attributions of value that helped them identify what counted as a valid interest.¹¹

The founders' purposes were multifaceted, involving a complex mix of moral, social, and existential elements. Recognition was crucial to the realization of all these aspirations. The philosophical worldview of many framers closely identified the law of nations with the law of

¹⁰ Michael H. Hunt argues that most accounts of American foreign policy pay "inadequate attention to the place of ideology in [foreign] policy." MICHAEL H. HUNT, *IDEOLOGY AND U.S. FOREIGN POLICY* 2 (1987). For an attempt to schematize realist and nonrealist motivations for following international law, see Ryan Goodman & Derek Jenks, *How To Influence States: Socialization and International Human Rights*, 54 *DUKE L.J.* 621, 638–56 (2004) (analyzing "acculturation" as behavioral mechanism by which states influence one another).

¹¹ See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 12–13 (rev. ed. 2000) (explaining how culture constructs meaning and interests); cf. BRADFORD PERKINS, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS, VOLUME I: THE CREATION OF A REPUBLICAN EMPIRE, 1776–1865*, at 6–16 (1993) (attempting to explain interaction of values, interests, and experience that shaped early American foreign policy). As Stephen Holmes points out in his study of the concept of "self-interest" in eighteenth-century Scottish Common Sense philosophy, "lump[ing] together sharply dissimilar motives under the single category of 'calculating self-interest' involved an undesirable *loss of information* about rudimentary psychological and behavioral processes." STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY* 45 (1995). At a minimum, the concept of "interest" needs to be interpreted more broadly than material interest. For example, ideals and visions of the collective polity as expressed in constitutions and the desire for posthumous reputation functioned as interests that motivated many members of the founding generation.

nature, and they saw compliance with its principles not only as a prerequisite in fact to recognition, but as appropriately so. The European law of nations was not just an externally imposed demand, but also an important part of the Enlightenment project to which the founders were profoundly committed.¹² These moral sentiments, moreover, were inextricably tied to a larger social vision. For many of the leading founders, the full membership that recognition would confer meant entry—as individuals and as a nation—into what American jurists, echoing Sir William Blackstone and generations of European jurists, called “the civilized world.”¹³ Membership in this larger civilization—linked across space by cultural ties of sympathy, benevolence, and commerce—was desirable in its own right, and served the psychological needs of the many founders who viewed themselves not just as members of a family, voluntary association, profession, town or city, state, and nation, but also as “citizens of the world.”¹⁴ Moreover, the quest for recognition fed into many of the founders’ sense of destiny: the fame they wished to earn among posterity for themselves and their collective creation.¹⁵ This pursuit of fame reflected a complicated mix-

¹² There were, of course, other bodies of international law outside of Europe. *See, e.g.*, SHAYBANI’S SIYAR, *THE ISLAMIC LAW OF NATIONS* (Majid Khadduri trans., 1966) (describing Islamic conception of law of nations). However, the American founders sought recognition under the specifically Eurocentric law of nations.

¹³ 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 2 (New York, O. Halsted 2d ed., 1832); 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA* 150 (Philadelphia, William Young Birch & Abraham Small 1803) (referring to revolutionary states before ratification of Constitution as being “bound by no ties but of their own creation, except such as all other civilized nations are equally bound by, and which together constitute the customary law of nations”); James Wilson, *Lectures on Law, reprinted in* 1 *THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D.* 172 (Philadelphia, Lorenzo Press 1804) (including “the commonwealth of Pennsylvania [and] the empire of the United States” within “the civilized and commercial part of the world”); *see also* 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *67 (describing parliamentary acts enforcing offenses against law of nations as “merely . . . declaratory of the old fundamental constitutions of the kingdom; without which it would cease to be a part of the civilized world”). For the prominent role of the law of nations in the revolutionary conception of interstate relations from the Revolution until 1789, *see* DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003).

¹⁴ *See infra* Part I.D. On contemporary understandings of “citizen of the world,” *see* DAVID HANCOCK, *CITIZENS OF THE WORLD* (1995). On “recognition” as a psychological and social necessity, *see* AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (Joel Anderson trans., 1995). For the claim that the framers sought to place the internal relations of the states on a model that diverged from the republic of European states governed by the law of nations as idealized in the work of early modern continental theorists like Emerich de Vattel, *see* ONUF & ONUF, *supra* note 3, at 103–08.

¹⁵ *See* HUNT, *supra* note 10, at 19–45 (describing theme of special destiny in American foreign policy).

ture of idealism and interest, but they could achieve it only if others saw the accomplishments of the republic as having been honorably attained.¹⁶ That too impelled them to embrace the principles of the law of nations.¹⁷

Understanding the centrality of recognition to the Founding permits another—and from the perspective of constitutional theory, a more important—insight: The founders' quest for recognition forced leading framers to confront the tension between two fundamental goals of the Revolution, international legitimacy and popular sovereignty, and to develop a systematic constitutional solution for reconciling the two. Historians have rightly emphasized how the limited powers of Congress under the Articles of Confederation left it unable to prevent the states from violating the nation's treaty obligations and the law of nations, as well as how these violations threatened the economic stability and creditworthiness of the nation and left it vulnerable to predation by European powers. In the conventional account, however, the framers focused solely on the states in drafting the new Constitution and therefore sought to strengthen the powers of the federal government to control them. Doing so would require placing both responsibility and capacity for compliance in the hands of the federal authorities, not the states.

This story is right so far as it goes, but it misses crucial elements of the framers' thinking and therefore obscures the nature of the mechanisms they developed to address the problems that had arisen. These obstacles to international recognition could not be solved solely by giving the federal government the power to control the states; they arose out of the dynamics of republican government itself. The lesson that leading framers derived from the controversies over compliance with the Treaty of Peace in the mid-1780s was that representative institutions could not always be relied upon to uphold international obligations, especially when their members were drawn from small districts and were subject to frequent elections. In the heat of international legal controversies, representatives—as well as their constituents—often would be unable to put aside short-term interests, attachments, and biases and therefore would be incapable of pursuing the nation's long-term interest in international respectability. The problem was compounded by the vulnerability of the people to the well-meaning but misguided, or simply unscrupulous, appeals of poli-

¹⁶ See DOUGLASS ADAIR, *Fame and Founding Fathers*, in *FAME AND THE FOUNDING FATHERS* 3, 7–10 (1974) (describing founders' desire for fame in posterity); see also GERALD STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* 101–04 (1970).

¹⁷ For further development of the framers' ideological framework, see *infra* Part I.D.

ticians, who might seek to exploit the political gains that patriotic appeals yield in times of national passion. This dynamic, moreover, was not just a problem in the state governments. Although localist pressures exacerbated the problem, it could be expected to infect federal representatives as well, especially because republican principles would, as James Madison explained in *Federalist 10*, give local interests, or “factions,” substantial representation in the federal government.¹⁸

If respectability required that nations, when conducting foreign affairs, take a broad perspective over a long time horizon, the framers concluded that in a republican government such a perspective would be possible only if those with responsibility for ensuring compliance with treaties and the law of nations were insulated from direct dependence on the people and public sentiment. Appreciating this insight provides the key to understanding what otherwise appears to be a collection of disparate doctrines of uncertain status, hidden in the interstices of the constitutional text. Among the framers’ greatest contributions to constitutional design were their creative solutions to just this dilemma: their assignment of much of the responsibility for enforcing the law of nations to an independent judiciary; their development of the self-executing treaty doctrine embedded in the Supremacy Clause, a system which privileged the role of the supposedly more dispassionate Senate over the more democratic House; and their dual decision to lodge the conduct of foreign affairs in an independent executive but to subject the executive to the duty faithfully to execute the laws, including not only federal law but also the law of nations.¹⁹ At the same time, the framers believed that in some contexts more direct dependence on the people was essential not only to safeguard the people’s rights, but to promote international peace. That was precisely why they insisted on assigning the power to declare war to Congress, a decision that was among the most revolutionary features of the Constitution.²⁰

Although there was a consensus within the founding generation that the United States ought to bolster its status as an independent republic, Americans were not united in embracing these particular reconciliations of popular sovereignty with international commitments. Nor did everyone equally value membership in the European-based system of states. On the contrary, American constitution-

¹⁸ THE FEDERALIST NO. 10 (James Madison) (propounding his famous cure—extended republic—for problem of factions in republican government). For further development of this theme, see *infra* Part II.A.

¹⁹ See *infra* Part II.B.

²⁰ See *infra* notes 322–32 and accompanying text.

making remained dynamic and contested. The Founding, which Gordon Wood calls a “grand experiment in republicanism,”²¹ was just that: an experiment. Even during the Revolution, when there was considerable pressure for unity, Americans disagreed about what non-monarchical republicanism entailed in practice. The debates within the states over their constitutions, and the diversity of those constitutions across the states, bear witness to the variety of ways that the revolutionaries interpreted and institutionalized republican government.²² It is not surprising, therefore, that there was likewise a wide range of reactions to the refusal of the states to abide by the Treaty of Peace, as well as different prescriptions for dealing with the tension between popular sovereignty and international legitimacy. Some resolved this tension in favor of local autonomy. Their vision of republican government de-emphasized the commitment to the external world, at least as conceived in the conventional law of nations, in favor of more democratic, local expressions of self-rule and interest. To them, independence meant self-determination in their familiar, everyday world. Often based in state legislatures, individuals subscribing to this belief became known as Antifederalists. Others feared that ignoring the law of nations would both harm the interests of the Union, calculated on a larger scale and over a longer period of time, and violate the spirit of the project of nation-building. They took seriously the words of the Declaration of Independence in which the states expressed eagerness to pay “a decent respect to the opinions of mankind” and, invoking the law of nations, to claim all those powers—and only those powers—“which Independent States may of

²¹ GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 4 (2009) [hereinafter WOOD, *EMPIRE*]; see also HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870*, at 96 (1983) (observing that in early Republic, “[a]s an ideology of government, republicanism had to be consciously worked out at every level of government and for every issue”). Classic discussions of republican ideology in early America appear in BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969) [hereinafter WOOD, *CREATION*]; J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 83 (1975) (referring to “civic humanism” rather than republican ideology).

²² For a survey of the state constitutions, see WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (Rita Kimber & Robert Kimber trans., 1980) and DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* (1980) (discussing intellectual eclecticism exhibited in early state constitutions).

right” exercise.²³ They were proponents of constitutional reform and became known as Federalists.²⁴

In recent years, historians have begun to expand the conventional account of the Founding and place it within the imperial histories of the Atlantic World. Particularly relevant is David Armitage’s analysis of the international dimensions of the Declaration of Independence.²⁵ As Armitage points out, contrary to common understanding, the primary audience for the Declaration was in Europe; what the drafters sought was precisely international recognition. Without recognition, there could have been no alliance with France, no loans from the Netherlands, and, most likely, no victory in the Revolution. Armitage’s work, however, like the Declaration itself, only begins the story of the American quest for recognition. There has always been an ambiguity about when the United States achieved *de jure* recognition: Was it in 1776, as Americans asserted? Was it in 1778, when the French treaties were concluded? Or was it not until later, in 1783, when the British finally agreed in the Treaty of Peace to acknowledge independence?²⁶ Whatever the answer as a technical matter, the larger point is that *de jure* recognition was only a first step. The founders knew that the recognition they received was tentative and uncertain in what it entailed and that it remained defeasible for a

²³ THE DECLARATION OF INDEPENDENCE paras. 1, 32 (U.S. 1776).

²⁴ The degree to which these debates reflected social divergences among the founding generation is a contested point among historians. See WOOD, EMPIRE, *supra* note 21, at 27–31 and MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789 (1950); see also *infra* note 187 and accompanying text.

²⁵ ARMITAGE, *supra* note 9 (describing international purposes of Declaration). Other historians have also discussed the international context of the Declaration of Independence. See, e.g., James H. Hutson, *The Partition Treaty and the Declaration of American Independence*, 58 J. AM. HIST. 877 (1972) (discussing international impetus behind Declaration); Peter S. Onuf, *A Declaration of Independence for Diplomatic Historians*, 22 DIPLOMATIC HIST. 71 (1998) (noting that Declaration functioned to facilitate alliances).

²⁶ Cf. Report of Secretary Jay on the Letter of John Adams, Esq. of June 22, 1784 (Mar. 4, 1785) [hereinafter Jay’s Report, Letter], reprinted in 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 829, 829 (Francis Wharton ed., Washington D.C., Government Printing Office 1889) [hereinafter 6 RDCUS] (advising that Congress not connect independence to peace treaty because that might be seen as an “admission that their independence was indebted for legal validity to the acknowledgment of it by Great Britain”). On some accounts, *de jure* recognition might not have been complete until as late as 1791, when Great Britain finally sent a minister plenipotentiary to the United States with full powers under the law of nations, thus establishing formal diplomatic relations between the two nations. See SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 91 (5th ed. 1965).

considerable period of time, perhaps even as late as the conclusion of the War of 1812.²⁷

If the Declaration was a petition for *de jure* recognition, the Constitution was a sustained effort to accomplish a more ambitious goal: lasting *de facto* recognition that would confirm independence. Federalists believed that the Declaration and the Treaty of Peace were insufficient to secure *de facto* as well as *de jure* recognition.²⁸ Statehood had to be performed. To earn and keep the respect of European states—without whose recognition “statehood” was chimerical—that performance would have to be convincing.²⁹ The Constitution drafted in 1787 served the dual purpose of signaling to Europe that the Americans were prepared to act like an international state and capable of building the foundations for a polity capable of sustaining that performance. The republican government that the Constitution created was, of course, quite different from those in the European monarchies. Nevertheless, the fundamental idea—energetic government that was both empowered and charged with the duty of upholding its obligations—was legible enough to those monarchies and enabled the text to carry at least some of the burden of proof.

Ratification of the Constitution was a monumental victory for the Federalists and for their vision of a government that was both republican and capable of restraining passions inconsistent with respect for the law of nations. At the same time, however, ratification was also just another step toward international respect and indefeasible recognition. When the new federal government came into being in 1789, no one could have predicted with any certainty the lasting impact of the Constitution. Even putting aside political threats that might have derailed it, the text itself contained gaps and ambiguities that the new republic’s leaders would have to work out in the actual operations of

²⁷ For evidence that the founding generation believed that recognition was uncertain in the critical period, see *infra* notes 77–97 and accompanying text.

²⁸ Modern international lawyers use the terms *de jure* and *de facto* recognition without consistency. According to one authority, the modern meaning might actually be the reverse of ours. MALCOLM N. SHAW, *INTERNATIONAL LAW* 459–60 (6th ed. 2008). Today, a candidate for nationhood receives *de facto* recognition from an existing nation when the two sign a treaty, for example. *De jure* recognition, by contrast, comes after a more formal process of declaration by existing nations that the candidate has demonstrated, after a trial period, that it has satisfied all the requirements for nationhood. In the eighteenth century, there was as yet no formal declaration of recognition that matched the new, revolutionary Declaration of Independence. The formal element of recognition was captured in treaty-making—which we call *de jure* recognition—while more complete acceptance, as evidenced in a range of official and unofficial behavior by preexisting nations, brought the fuller status of indefeasible recognition, which we term *de facto* recognition.

²⁹ For the importance of “performance” in conveying cultural meaning, see VICTOR TURNER, *DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY* (1974) and RICHARD SCHECHNER, *PERFORMANCE THEORY* (rev. ed. 2003).

governing. Perhaps the founders hoped, and even expected, that these gaps and ambiguities would be resolved in a relatively peaceful environment free of partisan rancor. If so, their hopes were dashed, as the outbreak of the wars of the French Revolution in 1793 plunged the new nation into crisis, provoking intense controversy and the creation of what the founders had uniformly hoped to avoid: political parties.³⁰

It was in this heated political environment—with the question of *de facto* recognition still unresolved and the depth of the Constitution's commitment to majoritarian procedures intensely disputed—that the founders began to work out, or, in Madison's term, "liquidate" the meaning of the Constitution.³¹ During the Washington administration, Federalists retained the upper hand, and their constitutional approach almost uniformly prevailed in the fierce partisan conflicts provoked by the Neutrality Crisis in 1793 and the Jay Treaty between 1795 and 1796.³² During these crises, Federalists successfully managed to uphold, and even extend, the framers' original constitutional vision of republicanism, which insulated compliance with the law of nations from popular control. However, Republicans mounted powerful challenges to that vision, and by the end of the Jay Treaty controversy, it would have been difficult to predict what would be made of the original design, as American society and politics entered yet another period of political transformation. In the end, however, the differences between Republicans and Federalists over the original constitutional vision proved to be far less than met the eye, and the assumption of power by Republicans in the elections of 1800 led, on balance, to more of a consolidation than an overturning of the framers' original approach. When it came to the pursuit of international respect and recognition, there was no thoroughgoing Jeffersonian Revolution in 1800.³³

³⁰ See *infra* Part III

³¹ THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 236 (stating that meaning of Constitution, like that of all laws, would be "liquidated and ascertained by a series of particular discussions and adjudications").

³² The Jay Treaty, Treaty of Amity Commerce and Navigation, between His Britannick Majesty;—and The United States of America, by Their President, with the advice and consent of Their Senate, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116, *reprinted in* 2 *Treaties and Other International Acts of the United States* 245 (Hunter Miller ed., 1931) [hereinafter *The Jay Treaty*], signed in November 1794, ratified by the Senate in August 1795, and put into effect in early 1796, settled several outstanding grievances between the two nations that had threatened to lead to war but was extraordinarily controversial within the United States. For the Jay Treaty controversy, see *infra* Part III.B.

³³ On the question of whether, as Thomas Jefferson claimed, the election of 1800 represented "as real a revolution in the principles of our government as that of 1776 was in its form," see *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 3 (Jan Ellen Lewis, James D. Horn & Peter S. Onuf, eds., 2002). For Jefferson's claim, see

The history here, however, concludes with the controversy over the Jay Treaty. We do not claim that by 1796 all disputes over the so-called Foreign Affairs Constitution and the status of the law of nations within it had been settled. Indeed, a fuller revised history of American Constitutionalism should reveal that a continuing contest over the international dimensions of the Federal Constitution has persisted for over two centuries and has pervaded what have traditionally been seen as essentially domestic disputes.³⁴ We intend this Article, which is the first in a series, as a step towards offering a new framework for viewing this history. Historians of nation-building are increasingly self-conscious of the role that history itself plays in creating the imagined community of the nation.³⁵ Because of the central place of the Constitution in American identity, historians of U.S. constitutionalism ought to be especially aware of how the framing of their inquiries shapes or perpetuates particular conceptions of American nationhood. Rather than settle questions of constitutional interpretation today, we will be satisfied if we move the scholarship of American Founding away from its provincialism.³⁶

We begin in Part I by exploring the international pressures that contributed to the movement for constitutional reform in the 1780s. During the period of the Confederation, American political leaders began to think creatively about the difficulties republican institutions posed for the conduct of foreign affairs. The most dramatic manifestation of this problem arose out of the Confederation's inability to overcome state resistance to the Treaty of Peace with Britain, but the problems were pervasive, repeatedly rendering the new nation unable to uphold its treaty commitments and the law of nations. These failures threatened to undermine the nation's international status, as painfully evidenced by the repeated failures and humiliations experienced by American diplomats. Such experiences compelled men who later became Federalists to begin experimenting with innovative constitutional mechanisms designed to mitigate the difficulties that the

Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 12 WORKS OF THOMAS JEFFERSON 135 (Paul Leicester Ford ed., 1905).

³⁴ For an excellent example, see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (arguing that Cold War diplomacy influenced development of American constitutional law of race).

³⁵ See BENDER, *supra* note 2, at 4 (arguing that "leaders of the new nation-states naturalized the nation as the most basic, obvious form of human solidarity, and they were helped by historians"); *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terence Ranger eds., 1983) (exploring creation of national histories and mythologies in nineteenth century).

³⁶ For important recent work aimed at beginning such a revised, and more cosmopolitan, account of U.S. history, see BENDER, *supra* note 2.

behavior of the states had generated and, when those efforts failed, to seek even more radical solutions. Their concerns about the precarious position of the United States, their insights into the nature and fundamental causes of the problem, and the innovative solutions they had begun to develop, such as the self-executing treaty doctrine, all influenced the drafting and ratification of the Federal Constitution between 1787 and 1788.

In Parts II and III, we turn to the Constitution itself and then two critical episodes in the 1790s—the Neutrality Crisis and the Jay Treaty controversy—that raised crucial questions about constitutional construction. At the Philadelphia Convention, the Federalists designed a Constitution that they believed both reconciled republican principle with international legitimacy and would enable the new republic to conduct a respectable foreign policy that complied with its international obligations. Their success, however, proved controversial in implementation, as the Washington administration quickly learned during the political crises that followed the outbreak of the Wars of the French Revolution and the emergence of the Federalist and Republican parties. Nevertheless, under Federalist leadership, the administration largely succeeded in consolidating and extending the framers' approach, as it struggled to make the many governmental institutions of the United States comply with the law of nations and preserve neutrality in an age of Atlantic warfare. Throughout these years, constitution-making was an experimental process designed to secure efficient government internally in order to perform statehood externally on the international stage.

Part IV suggests that the international dimension of constitution-making in the early United States sheds light on postcolonial constitution-making across the globe since the late eighteenth century. As with the Declaration of Independence, the Constitution established a model that other new nations began to follow, and still do, in their pursuit of international recognition. In addition, compliance with international law remains central to postcolonial constitution-making, as it did for the early United States, both in the written documents and in how those documents are implemented in practical governance.

I

THE ROAD TO PHILADELPHIA: SEEKING LEGITIMACY IN THE ATLANTIC WORLD

This Part argues that constitution-makers in the revolutionary era sought more than simply to organize the internal affairs of the states and then of their collective Union. From the beginning, Americans

also undertook constitution-making to integrate local polities with others in order to pursue a common project.³⁷ Initially, during the Revolution, that common project was the creation of a continental government of states that would have the capacity to wage war against the British Empire and make diplomatic alliances. The solution was the Articles of Confederation, which took the form of a treaty. Thus, interstate relations among the United States were governed by the law of nations. After achieving independence from Britain, the common project became the establishment of a stronger and “more perfect Union,” capable of earning legitimacy as a full member of the Atlantic world of nations. Many American leaders believed that disrespect for treaties and the law of nations in the states imperiled that common project. They began to envision a new government that would have the capacity to fulfill the nation’s international obligations and, by so doing, earn acceptance within the surrounding community of nation-states.

The period between the Declaration of Independence and the ratification of the Federal Constitution is commonly known as the “critical period.”³⁸ These years saw genuine struggle over the meaning of republicanism and how it bore on the states’ relationship with each other and to the wider world. Championing the expansive creed of popular sovereignty, many Americans bristled at the idea that governmental institutions should—let alone *must*—conduct themselves in accordance with legal conventions that originated within European monarchies, as treaties and the law of nations did.³⁹ Alternatively, some states sought to reconcile their behavior with the law of nations by claiming that they were released from respecting the Treaty of Peace⁴⁰ and other aspects of the law of nations because Britain had violated the laws of war during the Revolution. It had, for example, burnt civilian towns and villages, and it continued to breach the treaty

³⁷ This process extended and formalized colonial constitutionalism, in which colonists used English constitutional discourse and institutions to situate the different parts of the empire within a vision of the whole. See HULSEBOSCH, *supra* note 6, at 75–104 (2005) (analyzing use of English constitutionalism to articulate competing visions of British Empire in colonial New York).

³⁸ Just how “critical” this period was—whether the Confederation could function without substantial changes—is much debated by historians. Compare WOOD, CREATION, *supra* note 21, at 393–467 (detailing history of critical period and how political problems in states inspired innovative thinking about republicanism), with JENSEN, *supra* note 24, at xiii (arguing concept of “critical period” misdescribes history of Confederation, which was not as chaotic as some believe).

³⁹ For a sense of this resistance, see *infra* text accompanying notes 134–38.

⁴⁰ Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, U.S.-Gr. Brit., art. VII, Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Peace].

by retaining military forts within the western territory of the Union.⁴¹ Southern states like Virginia further justified their actions by arguing that Britain had not complied with Article VII of the peace treaty because it had “carr[ied] away” slave property during the evacuation of troops in 1783.⁴² This resistance to compliance with the peace treaty as well as other international obligations undermined the diplomatic position of the Confederation and led the states to agree to discuss constitutional reform.

Despite the enormous literature on the critical period, including the foreign affairs imperatives behind the movement for reform, it is not fully understood that the animus behind the reform effort that culminated in the new Constitution was a desire to ensure that the United States would be in a position to meet its international commitments and thereby earn international recognition. Yet complaints about treaty violations were not buried in the correspondence of isolated diplomats; instead, they figured as prominently in domestic political culture as they did in international relations. Two streams of sources illuminate the connection between treaty violations and constitutional reform. The first stream is the diplomatic correspondence of central players in the American Founding like John Jay, John Adams, and Thomas Jefferson. The second contains the few controversial judicial cases in which state courts refused, by one means or another, to enforce state legislation that violated the peace treaty, as well as the pamphlet literature surrounding those cases. These cases were forerunners of the American institution of judicial review and examples of how the founding generation groped toward new forms of republican government that would reconcile popular sovereignty with international commitments. The cases indicate that the problem of treaty violations was linked causally and directly to the striking institutional innovations that American constitution-makers wrought in republicanism. Finally, both this diplomatic experience and the attempts to uphold treaty provisions against the state legislatures com-

⁴¹ See Copies of Certain Resolutions of the honorable the Senate [of New York] (Mar. 31, 1784) [hereinafter Certain Resolutions], reprinted in 2 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 778, 778–79 (Washington D.C., Blair & Rives 1837) [hereinafter 2 DCUS] (communicating state legislature’s refusal to comply with Article V of peace treaty recommending restitution for confiscated property because of British violations of laws of war). On the problem of the western forts, see MARKS, *supra* note 3, at 5–8.

⁴² Treaty of Peace, *supra* note 40, art. VII. For further discussion of state violations of the Peace Treaty, as well as of other treaties and the law of nations, see *infra* notes 70–101, 134–38, 150–56, 211, 215–16, 242, 262, and accompanying text.

bined to shape the Federalists' vision of the place that they and their nation should occupy in the surrounding "civilized" world.

A. *State Constitution-Making and Continental Cooperation*

From the beginning, the imperatives of interstate relations drove revolutionary constitution-making in North America. At this early stage, constitution-making promoted interstate relations along two dimensions. At the state level, the adoption of constitutions enhanced each state's capacity to organize war-making within, and cooperate with the other American states in that common effort beyond, its borders. At the continental level, it enabled them to form a confederation that could seek international recognition, along with international military and financial assistance.

The first examples of conscious constitution-making in North America came in May 1776 when the Second Continental Congress advised the states to write constitutions. After a year of open rebellion across many of the colonies, this was the first collective signal that they had decided to become independent. In fact, the revolutionary process was already underway. Armed resistance commenced in the spring of 1775, and King George III had declared the thirteen colonies to be outside the King's peace in August of that year.⁴³ Local revolutionary committees and provincial congresses already controlled much colonial territory. In addition, three revolutionary legislatures had begun to discuss the need for new governments and had sought guidance from the Second Continental Congress.⁴⁴

But the real catalyst across the colonies was the Congressional resolution. The central purpose of the resolution was to encourage the colonies to formalize individual governments for their *collective* good.⁴⁵ Formalizing the state governments would streamline continental administration. Criticism of government by the local revolutionary committees began almost immediately. In what became a lasting theme, some of the ideals behind the Revolution, like local self-government, also threatened to undermine interstate cooperation. Constitution-making at this early stage was designed to reconcile the twin goals of promoting self-government and ensuring collective

⁴³ King George III, Proclamation of Rebellion (Aug. 23, 1775), *available at* <http://www.britannia.com/history/docs/procreb.html> (last viewed Aug. 2, 2010).

⁴⁴ ADAMS, *supra* note 22, at 56–59 (discussing New Hampshire, South Carolina, and Virginia). Massachusetts even suggested to Congress that it draft a model constitution for all the states. *Id.* at 51–54.

⁴⁵ Indeed, whenever trying to improve governmental efficiency, members of the Continental government used the language of constitutionalism. *See* HULSEBOSCH, *supra* note 6, at 147–55.

security. In the spring of 1776, John Jay wrote home to New York from Philadelphia, suggesting that the colonies “erect good and well ordered Governments . . . [to] exclude that Anarchy which already too much prevails,” foreshadowing James Madison’s analysis of “The Political Vices of the United States” a decade later.⁴⁶ Therefore, it was primarily to further the common cause that, in May 1776, the Continental Congress advised each colony to establish new governments, or, as the New York Convention interpreted the resolution, to “erect[] and constitut[e] a new form of government and internal police.”⁴⁷

Domestic order in the states would contribute to the common good because, the Continental Congress believed, the new state governments would be more accountable to the Congress than the local committees had been.⁴⁸ The functional purpose of constitution-making was clear: The rationalization of state government was the first step towards interstate diplomacy and collective war-making.⁴⁹

Over the next two years, most (though not all) states drafted and adopted new constitutions.⁵⁰ However, the legal status of these constitutions remained unclear for years. Some were drafted by provincial legislatures, others by special conventions. Still, from the beginning, most people saw these first constitutions as different from ordinary

⁴⁶ Letter from John Jay to Alexander McDougall (Apr. 11, 1776), in 1 JOHN JAY: THE MAKING OF A REVOLUTIONARY: UNPUBLISHED PAPERS, 1745–1780, at 254 (Richard B. Morris ed., 1975); James Madison, *Vices of the Political System of the United States* [hereinafter Madison, *Vices*], reprinted in 9 THE PAPERS OF JAMES MADISON 345–58 (Robert A. Rutland ed., 1975) [hereinafter 9 MADISON PAPERS]. For further discussion of the *Vices* memo, see *infra* notes 58, 215–25, and accompanying text. For a related memorandum written by Madison, see *infra* notes 152–54 and accompanying text.

⁴⁷ N.Y. CONST. OF 1777, pmbl.; see also 4 JOURNALS OF THE CONTINENTAL CONGRESS 342, 357–58 (Worthington Chauncey Ford ed., 1906). Congress’s May 10 resolution recommended that the colonies “adopt such governments as shall . . . best conduce to the happiness and safety of their constituents in particular, and America in general.” *Id.* at 342. On May 15, Congress added a preamble recommending that the new governments “suppress” royal authority and instead exercise power “under the authority of the people.” *Id.* at 357–58.

⁴⁸ For a discussion of committee government early in the Revolution, see HULSEBOSCH, *supra* note 6, at 148–55.

⁴⁹ The common effort also contributed to a common American identity, which had not previously existed. See John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 333 (Richard Beeman et al. eds., 1987) (discussing impact of constitution-making on national identity).

⁵⁰ Connecticut and Rhode Island retained their colonial charters. ADAMS, *supra* note 22, at 66–68. The splinter republic of Vermont, which seceded from New York, wrote a constitution in 1777, although it was not admitted as the fourteenth state until 1791. *Id.* at 90–94.

laws.⁵¹ Collectively, they were only a relative success. The states began to act more closely in concert, but the Continental government always lacked sufficient power to enforce its policies. Nonetheless, the congressional initiative and wave of state constitutions that followed demonstrated that constitution-making functioned in part to facilitate cooperation *among* the states.

But another purpose—self-determination by local voters and their delegates—remained powerful.⁵² The new state governments sought to balance two competing impulses: self-government and cooperation. On the one hand, no state wanted to go it alone. On the other, experience under the old empire had left many in the states suspicious of all governmental bodies outside their own province. Consequently, protecting local self-government was a central goal of state constitution-making.⁵³ Many state legislators reveled in their hard-won autonomy and were reluctant to recognize extraterritorial limits on their power. Many of the state constitutions referred only vaguely to the other states and the Declaration, perhaps also to the Continental Congress. However, the political relationships among the states and between each state and the Congress were left unmapped. The Articles of Confederation, approved in Congress in 1777 and ratified by the states four years later, reflected this ambiguity: It was, formally, only a treaty among thirteen sovereign states that agreed to coordinate foreign policy, but it also expressed a deeper connection among the revolutionaries.⁵⁴

These state constitutions were published across the Americas and in Europe.⁵⁵ Along with the Declaration of Independence, itself a product of the states' joint effort in Congress, these constitutions formed part of the case made by American diplomats in Europe for an alliance with the *United States* collectively against Great Britain.

⁵¹ See WOOD, CREATION, *supra* note 21, at 328–43. For a contemporary attempt to characterize the fundamentality of the state constitutions, see Thomas Jefferson, *Query XIII: The Constitution of the State, and Its Several Charters?*, reprinted in NOTES ON THE STATE OF VIRGINIA 116, 127–31 (Frank Shuffleton ed., Penguin Books 1999) (1785).

⁵² For the colonial roots of the revolutionary quest for provincial autonomy, see JACK P. GREENE, QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN COLONIES, 1689–1776 (1963) and HULSEBOSCH, *supra* note 6, at 83–104.

⁵³ See, e.g., SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828 (1999) (describing roots of suspicion of centralized authority in America); HULSEBOSCH, *supra* note 6, at 207–58 (discussing concerns of local elites in face of calls for greater centralization). For further discussion of the localist perspective of many state legislators and their commitment to state autonomy, see *infra* notes 102, 130, 134–38, 186–87, and 217–19.

⁵⁴ See Hendrickson, *supra* note 13 (arguing that Articles of Confederation should be understood as treaty among independent states).

⁵⁵ GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE 67–71, 94–101 (2009).

The defeat of British General John Burgoyne at the Battle of Saratoga in late 1777 sent another strong signal. Suddenly, the British military seemed less than invincible.⁵⁶ Provincial forces demonstrated their capacity and commitment. But the regularity of the state governments, as evidenced in the states' constitutions and, eventually, the Articles of Confederation, was also a precondition for recognition and for the treaties of amity and military alliance.⁵⁷

*B. A Diplomatic Education: The International Vices of the Political Systems of the States*⁵⁸

Without French recognition and alliance in early 1778, the Revolution would probably have failed.⁵⁹ Yet it seemed to some Americans as though the French had reserved the right to revoke recognition. Throughout the war, these Americans feared that France would make a back-door deal with Britain that would return the states to colonization.⁶⁰ Even with allies, then, a treaty did not seal the case for American independence. Nor had most European nations recognized American sovereignty during the Revolution. Spain, for example, fought against Britain during the Revolution, but it did so as an ally of France and did not sign a treaty of alliance with the United States during the war.⁶¹ Recognition, leading American lawyers and diplomats learned, was neither easily earned nor absolute. To endure, recognition required respect, the grounds for which had to be continuously performed. Diplomatic historians have long detailed the extensive treaty negotiations that the Continental Congress began pursuing

⁵⁶ See BEMIS, *supra* note 26, at 27–28 (arguing that Battle of Saratoga, and Britain's evident desire to compromise with colonies afterward, was crucial for obtaining alliance with France). *But see* JONATHAN R. DULL, *A DIPLOMATIC HISTORY OF THE AMERICAN REVOLUTION* 89–91 (1985) (arguing that France had decided to ally with states before Saratoga).

⁵⁷ For the influence of American constitutions on French sympathy for the American cause, see Durand Echeverria, *French Publications of the Declaration of Independence and the American Constitutions, 1776–1783*, 47 PAPERS BIBLIOGRAPHICAL SOC'Y AM. 313 (1953), which discusses how Benjamin Franklin worked with influential Frenchmen to publish these documents as part of the case for an alliance.

⁵⁸ *Cf.* Madison, *Vices*, *supra* note 46, at 348–57 (describing various problems with state legislation, including violations of law of nations and treaties).

⁵⁹ DULL, *supra* note 56, at 89; DON HIGGINBOTHAM, *THE WAR OF AMERICAN INDEPENDENCE: MILITARY ATTITUDES, POLICIES, AND PRACTICE, 1763–1789*, at 431–32 (1971) (describing importance of alliance with France). *See generally* PIERS MACKESY, *THE WAR FOR AMERICA, 1775–1783* (1964).

⁶⁰ GILBERT L. LYCAN, *ALEXANDER HAMILTON AND AMERICAN FOREIGN POLICY* 54–55 (1970). For the diplomacy of “suspicion,” see JAMES H. HUTSON, *JOHN ADAMS AND THE DIPLOMACY OF THE AMERICAN REVOLUTION* 13–30 (1980).

⁶¹ *See* BEMIS, *supra* note 26, at 32–35 (discussing Spain's complicated position during Revolution).

as early as 1775 and that were essential for securing independence and then the viability of the Union.⁶² France and the Netherlands recognized the American states when they signed treaties of amity and alliance in 1778 and 1782, respectively. But the “state” with which the Europeans were dealing remained ambiguous. The Continental Congress did not represent a single state; it was a proxy of convenience for thirteen states. For example, Benjamin Franklin’s task as Minister to France, Edmund S. Morgan observes, was “to get France to recognize the United States as a nation with a future in the world of nations.”⁶³ Treaties were “the most public form of recognition; but a more tangible form, which occupied Franklin before and after he succeeded in making a treaty of alliance, was the recognition that the United States was a going concern, a safe bet for loans.”⁶⁴ On this score, recognition meant respect manifested in credit. The problem was that states, like people, compete in a market for credit, which is a scarce resource. Creditors then, as now, sought assurances of repayment, and a strong mark against the Continental Congress was that it lacked the power to tax. Other states did have that power—including the individual American states, which were able to make stronger cases for loans.⁶⁵ The uncertain locus of sovereignty in the United States was the reason why France asked that “the thirteen United States of North America” individually ratify the Treaty of Amity and Commerce and the Treaty of Alliance in 1778.⁶⁶

The European nations that originally recognized the United States did so for their own strategic reasons, primarily to weaken Great Britain. Those reasons were subject to change. During the course of European and American diplomacy in the 1780s, there was a tentative, revocable quality to the recognition accorded the United States. Only with the benefit of historical hindsight, therefore, does recognition in 1776, 1778, or 1783 look definitive.⁶⁷ It had to be

⁶² See SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* (1935) (examining foreign policy during Revolution); DULL, *supra* note 56 (same); RICHARD B. MORRIS, *THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE* (1965) (detailing negotiations during Revolution).

⁶³ EDMUND S. MORGAN, *BENJAMIN FRANKLIN* 251 (2002).

⁶⁴ *Id.*

⁶⁵ *Id.* at 253–54.

⁶⁶ Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12; Treaty of Alliance Between the United States of America and His Most Christian Majesty, U.S.-Fr., Feb. 6, 1778, 8 Stat. 5. The states had not yet all ratified the Articles of Confederation, which compounded the uncertainty.

⁶⁷ *Cf.* Jay’s Report, Letter, *supra* note 26, at 829 (advising that Congress not connect independence to peace treaty because that might be seen as “admission that their independence was indebted for legal validity to the acknowledgment of it by Great Britain”).

repeatedly assumed and performed. To earn and keep the respect of the other European states—without whose recognition “statehood” was chimerical—that performance had to be convincing.⁶⁸

Lasting recognition was hard to earn while the states were joined in a loose confederation that was itself a treaty organization. Under the Articles, Congress had no taxing power. This reveals two key assumptions behind revolutionary-era notions of sovereignty: Taxation and commercial regulation were essential markers of sovereignty, but foreign policy could be coordinated without violating state independence. This distinction mirrored claims long maintained by British colonists in America between internal and external regulation⁶⁹ and pervaded constitutional debate throughout the 1780s and beyond.

It had never been easy to make sense of the internal-external distinction.⁷⁰ Nowhere was the line between things internal and external more difficult to draw than at the intersection of state legislation and Confederation obligations under the Treaty of Peace. Indeed, the largest controversies during the 1780s involved the effect of treaty commitments within the states. The problem had arisen during the negotiations that led to the treaty, when the American commissioners informed their British counterparts that they could not compel the state governments to revoke certain laws targeting loyalists.⁷¹ The resultant wording in the treaty, which alternated between the imperative and the permissive, reflected the commissioners’ concern that Congress would be unable to enforce its provisions directly. The commissioners promised in the treaty that the states would not violate British property and contract rights in the future,⁷² and they agreed that “creditors on either side[] shall meet with no lawful impediments to the recovery of . . . all bona fide debts heretofore contracted.”⁷³ However, they pledged only that Congress would “earnestly recommend” that the states return real property confiscated during the war or pay restitution.⁷⁴ Enforcement of these provisions safeguarding loy-

⁶⁸ For the notion of performance, see sources cited *supra* note 29.

⁶⁹ For the colonists’ distinction between internal and external regulation, see HULSEBOSCH, *supra* note 6, at 91.

⁷⁰ Charles Townshend, the Chancellor of the Exchequer whose “Townshend Acts” so outraged the colonists, had called the distinction “ridiculous.” BERNHARD KNOLLENBERG, *GROWTH OF THE AMERICAN REVOLUTION, 1766–1775*, at 43 (1975) (quoting Charles Townshend).

⁷¹ MORRIS, *supra* note 62, at 361, 379–80; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1116–20 (2000).

⁷² Treaty of Peace, *supra* note 40, art. VI.

⁷³ *Id.* art. IV.

⁷⁴ *Id.* art. V.

alist and British property and debts depended on state compliance, of which the commissioners expressed skepticism.⁷⁵

Resistance proved even greater than the commissioners had imagined. Many states were reluctant to ratify the treaty, return confiscated property, secure preexisting debts owed to British creditors, or protect British land and debts in the future. The New York legislature, for example, in refusing to return confiscated property, complained that loyalist military forces during the war,

instead of being restrained to fair and mitigated hostilities, which only are permitted by the law of nations, ha[d] cruelly massacred, without regard to age or sex, many of our citizens, and wantonly desolated and laid waste a very great part of this State, by burning not only single houses . . . but even whole towns and villages.⁷⁶

Because the British had not observed the law of nations during the war, the state would not obey the recommendations of the peace treaty.

The belief that treaty violations were endangering the states' reputation in the world—and therefore the viability of independence—rested on solid evidence. European diplomats made this clear in countless communications. Even friendly allies expressed disappointment at the weakness of the Continental government after the Revolution. French diplomats suggested throughout the period that the United States was not quite a nation-state. The most recent diplomatic histories convey a vivid sense of just how secondary the American theater of war was in Paris: The main event was a European conflict with Britain.⁷⁷ As such, France's commitment to the revolutionary states remained tentative. The French envoy to the Confederation in 1782 described the political scene as "ce Tableau continuellement mobile."⁷⁸ The central government could promise no stability, and political relations among the states remained in continuous flux. Another Frenchman referred to the Confederation as a collection of "*republics*,"⁷⁹ emphasizing the plural. He was bewildered by the states' unwillingness to repay wartime loans owed to friends and allies, telling one American contact that the Confederation's reputation would suffer in Europe "till you order your confederation better, till you take measures in common to pay debts, which you contracted

⁷⁵ For a discussion of this skepticism, see MORRIS, *supra* note 62, at 361, 379–80.

⁷⁶ See Certain Resolutions, *supra* note 41, at 778 (explaining that New York legislature refused to ratify peace treaty because of British violations of law of nations).

⁷⁷ This is the theme of DULL, *supra* note 56.

⁷⁸ CHARLES R. RITCHESON, *AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES, 1783–1795*, at 33 (1969). The observation translates as "this constantly moving picture."

⁷⁹ *Id.*

in common, till you have a form of government and a political influence.”⁸⁰ Even allies believed that the United States had no recognizable “form of government” and that the Congress had no “political influence.”⁸¹

But it was the British who pounded the point home: If the states did not respect their treaty engagements, they would receive no respect in return. Many British ministers during the mid-1780s believed that they could discriminate against American shipping, trade, and fishing rights with impunity. The United States was so weak that it could not retaliate. Indeed, there was little immediate official American reaction to the British Order-in-Council of 1783 that excluded American ships from the West Indies—ships that had dominated the West Indies carrying trade during the colonial period.⁸² In turn, several states were violating the spirit and letter of the peace treaty. Nations sometimes violated treaties, of course, and Europeans had developed a series of modulated responses for an aggrieved treaty partner that ranged from diplomatic petition to war. But Britain refrained from pursuing many of these customary remedies. Instead, it refused to withdraw from the western forts, as it had promised, and declined to send a diplomatic representative to the United States, which signaled its lack of respect for the Confederation.⁸³

During the peace negotiations, some prominent British ministers, notably the Earl of Shelburne, had favored amicable relations, though this view was often based on hopes of reconciling the states to the Empire.⁸⁴ But many in Britain felt that there was no need to be gracious during peace. Domestic opinion was soon fueled by the ignominy of defeat and outrage at the treatment of loyalists and British creditors, which was widely publicized in Britain. In addition, parliamentary compensation to the loyalists, though popular, was expensive.⁸⁵

In this context, American breaches of the treaty became a rallying point for British ministers who took a hard line against the United States. The most articulate of these was Lord Sheffield, who

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 37–39. Later the British exclusion of American trade with the Caribbean colonies became a central point of diplomatic contention between the two nations. *See, e.g., id.* at 233–34 (discussing early 1790s commercial negotiations over American trade with British Caribbean colonies); *see also infra* note 250 and accompanying text.

⁸³ *Id.* at 138–39.

⁸⁴ *Id.* at 4.

⁸⁵ Compensation of the loyalists cost 7.5 million pounds by 1789, twice the annual service on the national debt in 1763 which was an amount that had helped spur new colonial taxes that, in turn, contributed to the Revolution. *Id.* at 56.

fought to retain the wartime exclusion of American shippers from the West Indian trade, which had been the bread and butter of the North American carrying trade before the Revolution. American treaty violations only strengthened his case. Sheffield's diagnosis of the ills of the Confederation cut to the Articles themselves. In his view, they were inadequate to empower Congress to negotiate commercial treaties. He wrote in 1784 that:

No treaty can be made with the American States that can be binding on the whole of them. The act of Confederation does not enable Congress to form more than general treaties: at the moment of the highest authority of Congress, the power in question was with-held by the several States. . . . When treaties are necessary, they must be made with the States separately. Each State has reserved every power relative to imports, exports, prohibitions, duties, &c. to itself.⁸⁶

When combined with the lingering bitterness over the war, this view of congressional authority made compromise over treaty violations and trade negotiations difficult.⁸⁷ One English newspaper opined in 1783 that the United States was “without energy and government . . . [and] consequently, no dependence or faith can be put in a government so subject to revolution—no treaties can bind it.”⁸⁸

The perception that congressional diplomats lacked the capacity to make treaties was widespread. In 1785, the British ambassador to France asked the American Peace Commissioners—Benjamin Franklin, Thomas Jefferson, and John Adams—“how far the Commissioners can be duly authorized to enter any engagements with Great Britain which it may not be in the power of any one of the States to reenter totally fruitless and ineffectual.”⁸⁹ The ambassador was amused to find that the trio was offended and concluded that it was not yet time to negotiate a commercial treaty with the United States.

This British perspective on domestic American political culture underscored the fragmentary nature of sovereignty in the United States. It was an enormous problem. “There is no question more frequently asked me by the foreign Ministers,” John Adams, the first

⁸⁶ JOHN LORD SHEFFIELD, *OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES* 199–200 (Sentry Press 1970) (1784).

⁸⁷ See RITCHESON, *supra* note 78, at 49–69 (describing difficulties in establishing treaties and trade negotiations).

⁸⁸ RITCHESON, *supra* note 78, at 37 (quoting *Answers to CORRESPONDENTS on Monday, MORNING CHRONICLE*, Oct. 4, 1783).

⁸⁹ Letter from the Duke of Dorset to the American Commissioners (Mar. 26, 1785), in 8 *THE PAPERS OF THOMAS JEFFERSON* 55–56 (Julian P. Boyd ed., 1953).

minister of the United States to the Court of St. James, reported to Secretary of Foreign Affairs John Jay,

than what can be the reason of such frequent divisions of States in America, and of the disposition to crumble into little separate societies, whereby there seems to be danger of multiplying the members of the Confederation without end, or of setting up petty Republics, unacknowledged by the Confederacy, and refusing obedience to its laws?⁹⁰

Adams reported that the King and Queen received him as they received all ambassadors, without discrimination, and he learned diplomatic etiquette on the fly, taking it all in with his characteristic mixture of earnestness and mockery.⁹¹ Along the way he learned that although it was crucial for the young nation to obey diplomatic conventions, doing so alone was not enough. The performance had to be convincing. No matter how he behaved, formal recognition as the Confederation's representative did not translate into full respect for America. Europe awaited proof that the United States was capable of acting like a nation, enforcing treaties at home, and "conforming to the usages established in the world" abroad.⁹² He feared that the nation would, in the future, "have cause for severe repentance" if it did not begin to follow diplomatic conventions and, for example, recognize the difference between a mere emissary and an ambassador. "Indulgences, founded on the supposition of our inexperience, or, to use a more intelligible word, our ignorance, cannot be expected to continue long."⁹³ Having served for years throughout Europe, Adams was convinced that "we shall never have a satisfactory arrangement with this country [i.e., Great Britain] until Congress shall be made, by the States, supreme in matters of foreign commerce, and treaties of

⁹⁰ Letter from John Adams to John Jay (Nov. 24, 1785), in 2 DCUS, *supra* note 41, at 537, 538.

⁹¹ See, e.g., Letter from John Adams to John Jay (May 13, 1785), in 1 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 495, 497 (Washington D.C., Blair & Rives 1837) (reporting "rule of etiquette there for everybody to have new clothes upon that day who went to Court, and very rich ones," and various rules governing presentation of ambassadors' families). "Adams always thought he and his colleagues were onstage." GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 24 (2006).

⁹² Letter from John Adams to John Jay (Feb. 26, 1786), in 2 DCUS, *supra* note 41, at 573, 574. Adams was referring here to the convention, among European states, of bestowing gifts on the North African kingdoms as part of the treaty process.

⁹³ Letter from John Adams to John Jay (Sept. 10, 1787), in 2 DCUS, *supra* note 41, at 802, 802-03.

commerce, and until Congress shall have exerted that supremacy with a decent firmness.”⁹⁴

Many in the Confederation’s service shared Adams’s views. Secretary Jay worked hard to defend the states from British criticism, but to fellow Americans—including in his reports to Congress—he rebuked his nation. When dealing with the British consul in New York, Jay avoided the consul’s complaints about legislation violating the peace treaty by referring to the limited commission held by the consul. If Britain wanted to discuss such issues with the Foreign Secretary, it would have to send a properly credentialed diplomatic representative, who under the law of nations would have full authority to raise all issues, rather than attempt to carry on negotiations through consuls, who under the law of nations lacked standing to negotiate treaties.⁹⁵ Britain’s refusal to send an envoy epitomized the entire situation. To his colleagues, however, Jay admitted that the grievances were valid. “[T]here has not been a single day, since [the treaty] took effect,” Jay confessed to Adams, “on which it has not been violated in America, in one or other of the States.”⁹⁶

Meanwhile, British loyalists in London compiled a series of antiloyalist statutes from New York as evidence of treaty violations.⁹⁷ Information like this engendered greater sympathy for the loyalists; it also tended to poison Anglo-American relations. The collection left the American diplomats with little leverage in negotiations and dampened even the support of sympathetic Britons. William S. Smith, the young secretary to the American delegation in London who traveled throughout the continent and married Adams’s eldest daughter, wrote Jay,

[T]he existence of some of those laws in the State of New York, and similar ones in other States, in a great degree stop the mouths of our

⁹⁴ Letter from John Adams to John Jay (July 29, 1785), in 2 DCUS, *supra* note 41, at 400, 401. For further discussion of difficulties encountered during the Confederation in making commercial treaties, see *infra* note 250 and accompanying text.

⁹⁵ See Letter from John Jay to John Temple (Apr. 7, 1786), in 3 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 108, 108–10 (Washington D.C., Blair & Rives 1837) [hereinafter 3 DCUS] (explaining required protocol); see also Report of John Jay Relative to Richard Lawrence (May 26, 1788), reprinted in 3 DCUS, *supra*, at 124, 124–27 (admitting merits of grievance but noting that British consul had no authority to raise complaint and adding that “[s]overeigns should be on equal terms in all their transactions with one another; but that would not be the case if one was always bound and the other always loose”).

⁹⁶ Letter from John Jay to John Adams (Nov. 1, 1786), in 2 DCUS, *supra* note 41, at 674, 674.

⁹⁷ LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK, IN FORCE AGAINST THE LOYALISTS, AND AFFECTING THE TRADE OF GREAT BRITAIN, AND BRITISH MERCHANTS, AND OTHERS HAVING PROPERTY IN THAT STATE (London, H. Reynell 1786).

friends here, and give our enemies full scope to censure and abuse; they are held up as a barrier to a treaty and further connexion; and thus justify their own breach of faith in the retaining of the posts on these grounds . . . I am clearly of the opinion that a strict attention to treaties, and a faithful discharge of national obligations, is the sure road to national respectability.⁹⁸

Smith remained optimistic that fruitful relationships remained possible if the United States reformed its government. “[W]e have [the] power to regulate the system of [the English] Court,” he assured Jay, “that is, if we have the power amongst ourselves of bringing our federal abilities to a point of dignified operation.”⁹⁹

In one diplomatic *cause célèbre*, British creditors retaliated against state violations of the treaty by suing an American, who was visiting London on business, in the English Court of King’s Bench. The suit, dealing with an action in trover for conversion of a ship and its cargo, targeted a well-known American merchant who had purchased loyalist lands confiscated by the state of Pennsylvania and who had been a privateer during the war. The defendant had seized the British plaintiff’s ship and cargo during the Revolution, and the goods had been duly condemned as prize. Now, several years later, the plaintiff sued for the value of the ship and its cargo—clearly in violation of the law of nations, which recognized privateering, and the peace treaty, which forbade prosecutions of individuals for actions taken during war. The case seems to have been an exercise in diplomatic drama rather than an attempt to obtain a legal remedy. It was effective: John Adams reported the case to Secretary of Foreign Affairs John Jay, and Jay then informed Congress that he believed that the case was “prompted by the example set in [New York],” under the state’s Trespass Act, which permitted displaced patriots to sue loyalists and Britons who occupied their land during the war.¹⁰⁰ Because thousands of patriots had fled New York City in 1776, which then became the military headquarters of the British Army, the Act generated much retributive litigation in the New York courts. If New Yorkers could sue Britons who occupied their property during the

⁹⁸ Letter from W.S. Smith to John Jay (Aug. 7, 1786), in 3 DCUS, *supra* note 95, at 34, 36. For further discussion of New York anti-Loyalist legislation, see *infra* Part I.C.

⁹⁹ Letter from W.S. Smith to John Jay (Aug. 20, 1786), in 3 DCUS, *supra* note 95, at 38, 41.

¹⁰⁰ Report of Secretary Jay—Case of Blair McClenachan (Feb. 10, 1785), reprinted in 2 DCUS *supra* note 41, at 341, 341–42; see also Letter from Uriah Forrest to Thomas Jefferson, (Oct. 8, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON 435–36 (Julian P. Boyd ed., 1953). The Treaty of Peace explicitly forbade any prosecution “commenced against any person . . . for or by reason of the part which he . . . may have taken in the present war.” Treaty of Peace, *supra* note 40, art. VI.

war, then Britons could in turn sue Americans who captured their property on the seas. Diplomatic reports of court cases like these on both sides of the Atlantic played a substantial role in the constitutional reform movement.¹⁰¹

Over the course of the 1780s, those who conducted foreign policy for Congress gradually realized that the Confederation was inadequate because it did not allow the United States to engage with the larger world as an equal. Yet they also fully understood the proud localism behind state obstructionism. The field of foreign affairs was new ground for most of the men in the state governments. Even those with experience in colonial government or overseas trade had rarely dealt with the formalities of foreign policy, which previously had been handled by British imperial agents, almost all of whom remained loyal to the empire. “Prior to the revolution we had little occasion to inquire or know much about national affairs,” John Jay summed up in 1787,

for although they existed and were managed, yet they were managed *for* us and not *by* us. Intent on our domestic concerns, our internal legislative business, our agriculture, and our buying and selling, we were seldom anxious about what passed or was doing in foreign Courts. . . . War and peace, alliances, and treaties, and commerce, and navigation, were conducted and regulated without our advice or controul.¹⁰²

It was a period of education for all. The lesson began in European courts and reached Congress through diplomatic dispatches. From there, the learning spread to lawyers and judges who, in practice, administered the many antiloyalist and anti-British state statutes.

C. Treaties at Home: Judicial Enforcement of the Peace Treaty Against State Legislation

The republican principles of local autonomy and popular sovereignty, which were important features of revolutionary government as established under the early state constitutions, combined in the state

¹⁰¹ See, e.g., Letter from John Jay to John Adams (Oct. 14, 1785), in 2 DCUS, *supra* note 41, at 419, 420 (“Your letters, I am sure, are useful; they disseminate and enforce those federal ideas which cannot be too forcibly inculcated or too strongly impressed.”). For further discussion of the diplomatic problems caused by state violations of treaties and the law of nations, see *infra* notes 108, 121–23, 142, 155–56, 234–35, and accompanying text.

¹⁰² John Jay, Address to the People of the State of New York (Sept. 17, 1787), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 294, 298–99 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891) [hereinafter 3 JAY PAPERS]. For further discussion of the localist perspectives among Antifederalists, see *supra* notes 52–54 and accompanying text and *infra* notes 134–38, 186–87, 217–19, and accompanying text.

legislatures to generate a battery of anti-British statutes. When beneficiaries of the new state laws used them against loyalists or Britons, most state courts enforced the statutes and refused to hold the peace treaty as a trump against contrary state laws. But in a handful of cases, state judges generated forerunners of the American doctrine of judicial review and struck down state statutes, or strongly interpreted them in a way that essentially nullified them, to vindicate the peace treaty or an ancillary rule of the law of nations. These cases involved horizontal judicial review: the review of a state statute by a coequal state court (and sometimes an inferior state court), rather than by a court at a higher level of government.¹⁰³

Leading Federalist lawyers wrote pamphlets decrying those laws, supported legislation to repeal them, and litigated against them in the courts. These were coordinated strategies. For example, Alexander Hamilton wrote his “Letters from Phocion” in 1784 to oppose proposed state legislation that would declare loyalists to be aliens, making it impossible to enjoy a host of civil rights like inheriting land. “Phocion” also publicized some of the issues that he was pleading simultaneously in *Rutgers v. Waddington*, a New York City Mayor’s Court decision that, in effect, nullified a key provision in New York’s antiloyalist Trespass Act to vindicate the Treaty of Peace.¹⁰⁴ Proto-Federalists like Hamilton coordinated their activities as legislators, pamphleteers, and advocates.

In his newspaper essays, Hamilton criticized the state legislature for violating the procedural and property rights of loyalists. The laws were, in his words, not “humane.”¹⁰⁵ He accused New York legislators of violating the “spirit of Whigism” in pursuit of “revenge” and indulging “dark passions.”¹⁰⁶ These passionate—meaning unreasonable—and inhumane laws were unfortunate in themselves, but they also interfered with international relations, resulting in two problems. First, the statutes harmed the state’s interests. The legislature was

sacrific[ing] important interests to the little vindictive selfish mean passions of a few. To say nothing of the loss of territory, of the disadvantage to the whole commerce of the union, by obstructions in

¹⁰³ This argument is elaborated in Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825 (2006).

¹⁰⁴ A Letter from Phocion to the Considerate Citizens of New York (Jan. 1–27, 1784) [hereinafter Letter from Phocion], in 3 THE PAPERS OF ALEXANDER HAMILTON 483–97 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter 3 HAMILTON PAPERS]; Second Letter from Phocion (Apr. 1784), in 3 HAMILTON PAPERS, *supra*, at 530–58.

¹⁰⁵ Letter from Phocion, *supra* note 104, at 484.

¹⁰⁶ *Id.*

the fisheries; this state would loose an annual profit of more than [fifty thousand pounds] . . . from the furr trade.¹⁰⁷

In sum, the short-sighted pursuit of local interests was damaging to the greater, long-term good.

Second, these state laws were costly to the national character. “But not to insist on possible inconveniences,” Hamilton proceeded, there is a certain evil which attends our intemperance, a loss of character in Europe. Our Ministers write that our conduct . . . has done us infinite injury, and has exhibited us in the light of a people, destitute of government, on whose engagements of course no dependence can be placed.¹⁰⁸

Hamilton identified both realist and idealist problems: Antilyalist legislation was bad for American commerce, and it was damaging the United States’ international reputation. Collectively, the nation lost “character” and its people seemed “destitute of government.”

Simultaneously, in *Rutgers v. Waddington*, Hamilton relied on the law of nations to defend his client in a Trespass Act case, possibly the most prominent early case in which a court groped toward judicial review. His client was a British merchant who, under the authority of a military order, occupied the New York City brewery of the plaintiff after she fled the British-controlled area at the outbreak of the Revolution. The plaintiff sought compensation as provided in the Trespass Act, which permitted displaced patriots to sue Britons who occupied their property during the war and explicitly denied a defense based on British military orders. On Hamilton’s view, however, under the law of nations a military order was a valid defense to trespass during wartime. The laws of war, therefore, demanded that the court dismiss the case.¹⁰⁹ The question was whether the law of nations rule or the explicit exception to it in the Trespass Act bound the New York court.

Hamilton put forward at least two arguments for why the court should adhere to the law of nations rather than the state statute. First, he argued that the law of nations was federal law that bound the states and could be enforced in state courts. There were in turn two reasons for this federalization. First, the Articles of Confederation created a

¹⁰⁷ *Id.* at 492.

¹⁰⁸ *Id.*

¹⁰⁹ Alexander Hamilton, The Rutgers Briefs, Brief No. 6 [hereinafter Hamilton, Brief No. 6], in 1 THE LAW PRACTICE OF HAMILTON: DOCUMENTS AND COMMENTARY 331, 368–73 (Julius Goebel, Jr. ed., 1964) [hereinafter 1 THE LAW PRACTICE OF HAMILTON] (reviewing literature of law of nations and concluding belligerents have right to use of enemy property during war and “cannot be made answerable to another without injustice and a violation of the law of Universal society”). For further discussion of *Rutgers*, see HULSEBOSCH, *supra* note 6 at 189–202.

federal power to control foreign relations, which implied that the law of nations, including the laws of war, bound the states.¹¹⁰ “Congress have the exclusive direction of our foreign affairs,” Hamilton argued in a brief, “& of all matters relating to the Laws of Nations.”¹¹¹ Second, the peace treaty implicitly adopted the law of nations’ rule that granted amnesty for all trespasses carried out under military orders, and the treaty was likewise a federal law that bound the states.¹¹² “The power of Congress in making Treaties is of a Legislative kind,” Hamilton argued, and such law was “Paramount to that of any particular state.”¹¹³ He added, significantly, that state judges “must of necessity be judges of the United States” and, therefore, “must take notice of the law of Congress as part of the law of the land.”¹¹⁴

The second argument was that the state constitution incorporated the law of nations when it adopted the common law. Hamilton argued both that the state legislature could not violate the law of nations and also, more cautiously, that it had not intended to do so.¹¹⁵ Actually, the New York constitution nowhere referred to the law of nations. To carry his case for incorporation, Hamilton argued, first, that the law of nations was part of the common law, an increasingly common claim in the age of Lord Mansfield.¹¹⁶ Second, he argued that the common law reception clause in the state constitution also included the law of nations.¹¹⁷ This logic ran into the problem that the reception clause

¹¹⁰ *Id.* at 368 (arguing in draft brief that “[t]he United States are the Directors of our Intercourse with foreign nations And They have expressly become parties to the law of nations”); *see also id.* at 374 (stating that Confederation’s “constitutional powers [are] not controulable by any state”); *id.* at 379 (referring to “Feederal authority”).

¹¹¹ *Id.* at 378–79.

¹¹² *Id.* at 377–79.

¹¹³ *Id.* at 377.

¹¹⁴ *Id.* at 380. For later development of the self-executing treaty doctrine, which Hamilton anticipated in *Rutgers*, *see infra* notes 139–40, 261–63, 265–77, 417–43, and accompanying text.

¹¹⁵ *Id.* at 381–82.

¹¹⁶ Hamilton cited Coke, Blackstone, and Mansfield for the proposition that “[t]he *jus gentium* and *jus belli* are part of the common law.” *Id.* at 353; *see also* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 11(b) (Philadelphia, Johnson, Warner & Fisher 1853) (“There be divers lawes within the realme of England . . . *Jus belli* the law of armes, war, and chivalrie . . .”); BLACKSTONE, *supra* note 13, at *67 (stating that law of nations “is here adopted in it’s full extent by the common law”); *Triquet v. Bath*, (1764) 97 Eng. Rep. 936, 937–38 (K.B.) (finding diplomatic immunity of embassy secretary under law of nations and applying that rule as part of law of England). For further discussion of the incorporation doctrine, and its application in the Constitution, *see infra* notes 284–93, 299–304, 363–74, and accompanying text.

¹¹⁷ Hamilton, Brief No. 6, *supra* note 109, at 368 (arguing that “our [i.e., New York’s] constitution adopts the common law of which the *law of nations* is a part”). Hamilton was

also provided that the legislature could alter the common law so received. If the law of nations was part of the received common law, the legislature had altered that law when it passed the Trespass Act. Accordingly, the counsel for the landowner replied to this plea with a demurrer: The statute did not permit such a plea in justification, thus the plea was “not sufficient in Law to bar” the plaintiff’s trespass action.¹¹⁸ Hamilton responded by again pleading that the justification was valid and did bar the claim. With this joinder of demurrer, the parties agreed that the case turned on a question of law for the judges rather than the jury: whether a military command was a valid justification for trespass under the statute.¹¹⁹ Finally, Hamilton referred to the larger ramifications of the case. First, within New York, it would set a precedent for many cases “depending on the same principle.”¹²⁰ As such, it “will remain a record of the spirit of our courts and will be handed down to posterity.”¹²¹ Second, Hamilton believed that the case would have some “influence on the national character.”¹²² The decision “[m]ay be discussed in Europe; and may make good or ill impressions according to the event [i.e., the decision].”¹²³

The Mayor’s Court of New York City agreed with much of Hamilton’s reasoning. It held that the law of nations’ amnesty rule for trespass operated in New York by force of the “foederal compact,” which “vested Congress with full and exclusive powers to make peace and war,” and the peace treaty.¹²⁴ The court declared “that no state in this union can alter or abridge, in a single point, the foederal articles or the treaty.”¹²⁵ In addition, the state constitution recognized and “legalized” this union. The court could not imagine that the state legislators had knowingly violated the law of nations without stating, explicitly, that they intended to depart from the conventional rule.¹²⁶ Finally, prior approval by the state Council of Revision did not pre-

referring to Article XXXV of New York’s Constitution of 1777. N.Y. CONST. of 1777 art. XXXV (declaring “such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, [1777]”).

¹¹⁸ Hamilton, Brief No. 6, *supra* note 109, at 329.

¹¹⁹ The pleadings are printed in *id.* at 318–31.

¹²⁰ Hamilton, Brief No. 6, *supra* note 109, at 339.

¹²¹ *Id.* at 339–40.

¹²² *Id.* at 339.

¹²³ *Id.* at 339.

¹²⁴ Opinion of the Mayor’s Court (Aug. 27, 1784), *reprinted in* 1 THE LAW PRACTICE OF HAMILTON, *supra* note 109, at 393, 413. The court applied the amnesty rule to the three years of occupancy during which the defendants acted pursuant to a military order, but not to the year-and-a-half when they acted under a civilian order.

¹²⁵ *Id.* at 413.

¹²⁶ *Id.* at 417.

clude judicial examination in individual cases. Judicial review was a separate process with independent authority. Thus, the British defendant could plead military justification.¹²⁷

Mayor James Duane, who headed the court, most clearly embraced Hamilton's argument that the law of nations operated directly on the legislature by way of Confederation law, referring repeatedly to the "foederal compact."¹²⁸ The advocate and judge went out of their way to constitutionalize the law of nations and then ignored a legislative provision that directly contradicted it. The court did so, it explained, not just to obtain justice in this case, but also because New Yorkers needed to learn respect for the law of nations. Here too, Duane followed Hamilton's cue. Echoing the "Phocion" letters, Duane maintained that "in the infancy of our republic, every proper opportunity should be embraced to inculcate a sense of national obligation, and a reverence for institutions, on which the tranquility of mankind, considered as members of different states and communities . . . depends."¹²⁹ Judicial examination of statutes was an opportunity to encourage New Yorkers to take a broader perspective and consider not only their own interests but also "national obligation" and even "the tranquility of mankind." Applying the law of nations served those ends. Although the Mayor's Court did not explicitly claim the power to nullify the statute, it in effect did so.

Duane, following Hamilton, emphasized the "sacredness" of the law of nations. Part of the problem, he supposed, was that "[w]e hitherto have not been so loudly called upon to form and inculcate an extensive knowledge of this interesting science; but now since we are placed in a new situation, as one of the nations of the earth, it is become an indispensable obligation."¹³⁰ What was this law of nations? It contained a series of principles such as that

man was made for *society*—that *society* is absolutely necessary for *man* . . . that the spirit of *sociability* ought to be *universal* . . . that we should preserve a benevolence even towards our *enemies* . . . that revenge introducing, instead of benevolence, a sentiment of hatred and animosity is condemned; because such a sentiment is vicious in itself, and contrary to the public good.¹³¹

¹²⁷ *Id.* at 416 (rejecting plaintiff's argument that Council of Revision's approval was equivalent to adjudication binding state courts).

¹²⁸ *See, e.g., id.* at 413.

¹²⁹ *Id.* at 418.

¹³⁰ *Id.* at 400.

¹³¹ *Id.* at 400 n.*.

After leafing through a shelf of leading commentators—“Grotius, Puffendorf, Wolfius, Burlamaqui and Vattel”¹³²—Duane asserted that, no matter what depredations New Yorkers suffered during the Revolution, they could not “alter the common laws of war: they are founded on reason and humanity, and will prevail as long as reason and humanity are cultivated.”¹³³

Other New Yorkers were not as enamored of those principles and books, doubting at least whether a court had the power to use them to nullify a clear state statute. State legislators protested against *Rutgers* and sought to remove Mayor Duane.¹³⁴ A group of the legislators expressed outrage that a court had assumed power that was “inconsistent with the nature and genius of our government, and threatening to the liberties of the people.”¹³⁵ They thought it axiomatic that a court had no power “consistently with our constitution and laws, [to] adjudge contrary to the plain and obvious meaning of a statute.”¹³⁶ The legislators were especially upset with the source of authority claimed by the court: “the *vague and doubtful* custom of nations,” as against the “*clear and positive* statute.”¹³⁷ Given this premise, authority such as “Grotius, Puffendorf, Wolfius, Burlamaqui, Vattel, or any other Civilians, are no more to the purpose than so many opinions drawn from sages of the Six Nations,” meaning the Iroquois Indians.¹³⁸ By 1784, the state legislators had laid out the case for their supreme authority in terms that resonated with the revolutionary cry for local autonomy and legislative supremacy, while casting doubt on the literature that, for Hamilton, Duane, and like-minded men, embodied the learned tradition at the heart of European-based law of nations.

The angry state legislators were not alone in viewing the case as an attempt to nullify legislation. John Jay included some discussion of the case in his report to Congress in 1786 detailing state violations of

¹³² *Id.* at 400–01.

¹³³ *Id.* at 403.

¹³⁴ 1 THE LAW PRACTICE OF HAMILTON, *supra* note 109, at 312–13 (quoting resolution of New York Assembly against decision and referring to motion to remove Duane). The parties settled out of court. Letter from Alexander Hamilton to Thomas Jefferson (Apr. 19, 1792), in 11 THE PAPERS OF ALEXANDER HAMILTON 316, 317 (Harold C. Syrett ed., 1966).

¹³⁵ MELANCTON SMITH ET AL., AN ADDRESS FROM THE COMMITTEE APPOINTED AT MRS. VANDEWATER’S ON THE 13TH DAY OF SEPTEMBER, 1784, at 6 (New York, Shepard Kollock 1784).

¹³⁶ *Id.* at 6.

¹³⁷ *Id.*

¹³⁸ *Id.* at 6–7. For further discussion of similar localist perspectives, see *supra* notes 52–54, 102, 134–38 and accompanying text and *infra* notes 186–87, 217–19, and accompanying text.

the Treaty of Peace. He then made explicit the principle that the treaty had direct effect, or was self-executing, on the states. "When therefore a treaty is constitutionally made, ratified and published by Congress," he advised, "it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention, consent or fiat of state legislatures."¹³⁹ Congress accepted his report, resolved that treaties had effect within the states, and asked the states to enact statutes declaring that all state laws conflicting with the treaty were void.¹⁴⁰

Several years later, leaders of the first federal administration interpreted *Rutgers*—and the few other examples of strong judicial interpretation vindicating the treaty or British creditor rights—in the same way. When British diplomats complained in the early 1790s that the states were still not adhering to the peace treaty, but instead had continued to confiscate land, hinder debt collection, and pass other statutes in derogation of the rights of British subjects, Secretary of State Thomas Jefferson cited *Rutgers* as "proof that the courts consider the Treaty as paramount the laws of the States."¹⁴¹ The British actually cited *Rutgers* first (exiled loyalists had evidently publicized it

¹³⁹ 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS: FROM THE FIRST MEETING THEREOF TO THE DISSOLUTION OF THE CONFEDERATION, BY THE ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 204 (William S. Hein & Co. 2005) (1821) [hereinafter 4 SECRET JOURNALS OF CONGRESS].

¹⁴⁰ *Id.* at 296–97. Congress also sent a circular letter to the states explaining the basis for its resolution. *See id.* at 329–38. In introducing its legal argument, Congress invoked the same considerations that had informed Duane's decision in *Rutgers*:

We have deliberately and dispassionately examined and considered the several facts and matters urged by Britain as infractions of the treaty of peace, on the part of America; and we regret that, in some of the states, too little attention appears to have been paid to the public faith pledged by that treaty. Not only the obvious dictates of religion, morality and national honour, but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made.

Id. at 330. The Report then elaborated:

Contracts between nations, like contracts between individuals, should be faithfully executed, even though the sword in the one case, and the law in the other, did not compel it. Honest nations like honest men require no constraint to do justice; and though impunity and the necessity of affairs may sometimes afford temptations to pare down contracts to the measure of convenience, yet it is never done but at the expense of that esteem, and confidence, and credit which are of infinitely more worth than all the momentary advantages which such expedients can extort.

Id. at 333–34. For further discussion of Jay's report, see *infra* notes 270, 316–17, and accompanying text. For further discussion of Congress's circular letter, see *infra* note 270 and accompanying text.

¹⁴¹ Letter from Thomas Jefferson to George Hammond (May 29, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON 551, 580 (Charles T. Cullen ed., 1990) [hereinafter 23 JEFFERSON PAPERS].

in London), arguing that the compromise decision, under which the British merchant had to pay rent for the first year-and-a-half of occupancy but not for the last three years, demonstrated that the states were violating the peace treaty. During negotiations to secure British adherence to the treaty, Jefferson wrote Hamilton and other New Yorkers to find out about New York's Trespass Act and what had happened in *Rutgers*. Their reports emphasized the part of the decision that restrained or nullified the statute in favor of the law of nations. Jefferson then appended Hamilton's statement of the case to his official reply.¹⁴² In international diplomacy, cases like *Rutgers* became the subject of controversy and, for U.S. officials, evidence that the United States adhered to the law of nations and the peace treaty.

Rutgers is the best example of the few early state cases in which some state judges and lawyers struggled to reconcile state legislation with the protections of loyalists and British creditors specified in the Treaty of Peace.¹⁴³ In most of these cases, advocates and judges did not assert the treaty or the law of nations directly. Rather, they invoked long-standing English liberties, such as the jury trial, as ways of short-circuiting the legislation.¹⁴⁴ In the small world of post-revolutionary America, these cases forced lawyers and judges to think about the nature of the new state constitutions, the relationship between the state constitutions and the Articles of Confederation, and the connection between the United States and Atlantic world of empires around it. Several of these lawyers became leading Federalists and served in the first federal government. Their experience with antiloyalist legislation was part of their constitutional education. It was not that these lawyers developed unusual sensitivity towards the individual rights of political minorities, such as loyalist Americans and British subjects. Instead, they had developed a cosmopolitan outlook that, if they did not have it before, they learned during the critical period. From their perspective, antiloyalist and related populist legislation impeded the reintegration of the states into the larger "civi-

¹⁴² See Letter from George Hammond to Thomas Jefferson (Mar. 5, 1792), in 23 JEFFERSON PAPERS, *supra* note 141, at 196–220 (discussing New York antiloyalist statutes and citing *Rutgers*); Letter from Thomas Jefferson to George Hammond (May 29, 1792), in 23 JEFFERSON PAPERS, *supra* note 141, at 551, 580–81 (replying to Hammond and appending Hamilton's statement); see also Letter from Alexander Hamilton to Thomas Jefferson (Apr. 19, 1792), in 23 JEFFERSON PAPERS, *supra* note 141, at 434 (describing *Rutgers*); Letter from Richard Harison to Thomas Jefferson (Dec. 4, 1790), in 18 THE PAPERS OF THOMAS JEFFERSON 125, 125–30 (Julian P. Boyd ed., 1971) (surveying New York's antiloyalist laws and discussing *Rutgers*).

¹⁴³ For the other cases, see Hulsebosch, *supra* note 103, at 843–58.

¹⁴⁴ For the other long-standing English liberties, see Hulsebosch, *supra* note 103, at 833; cf. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005) (interpreting these cases as vindicating judicial control over judicial institutions).

lized” world. In short, the reintegration of the loyalists into the states and the protection of British merchants like the defendants in *Rutgers* would facilitate the integration of the United States into the Atlantic world.¹⁴⁵

The innovative assertion of judicial power in *Rutgers* had an international context. The judicial struggle to reconcile state legislation with the law of nations, through strong statutory construction that effectively rewrote a state statute, was not reflexively anti-democratic or driven by the material interests of the Federalists.¹⁴⁶ Instead, it was intended to help the United States meet its international commitments. As such, the exercise of judicial power was an early post-revolutionary innovation in republican government that, along with others established in the Constitution of 1787, was designed to facilitate the integration of the United States into the Atlantic world on an equal footing.

D. *The Federalist Vision of American Participation in the Atlantic World*

“The revolutionary generation,” remarks Gordon Wood, “was the most cosmopolitan of any in American history. . . . They were patriots, to be sure, but they were not obsessed, as were later generations, with the unique character of America or with separating America from the course of Western Civilization.”¹⁴⁷ Much of the founders’ cosmopolitanism focused on commerce. Three-quarters of the former colonies’ trade had been with other dominions in the British Empire, especially the West Indian colonies. Reestablishing that trade, along with commercial relations with other European empires, was a key part of the constitutional reform program. Britain had made it clear that it would not negotiate a commercial treaty until the United States adhered to the terms of the Treaty of Peace.¹⁴⁸

In addition, the United States had taken out extensive European loans during the Revolution and needed new credit, at reasonable interest rates, in order to continue to make payments. There was a close connection between financial credit and the reputation of a

¹⁴⁵ The only monograph addressing the reintegration of loyalists focuses on Massachusetts. DAVID EDWARD MAAS, *THE RETURN OF THE MASSACHUSETTS LOYALISTS* (1989).

¹⁴⁶ For the example of Alexander Hamilton, who, when running the Federal Treasury, studiously avoided all appearance of self-dealing and corruption, see RON CHERNOW, *ALEXANDER HAMILTON* 287, 529–44 (2005) and WOOD, *supra* note 91, at 238–39.

¹⁴⁷ GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 222 (1992).

¹⁴⁸ See RITCHESON, *supra* note 78, at 141–42 (discussing British ministry instructions to envoy George Hammond in 1791 to make settlement of Peace Treaty violations priority above negotiating new commercial treaty).

nation. From the seventeenth century on, national character, at home and abroad, was judged along the new metric of whether or not a state's financial commitments—its contracts to borrow and then repay money for state-building purposes—were credible.¹⁴⁹ “The man or the nation who eludes the payment of debts,” Jay instructed a federal jury “ceases to be worthy of further credit, and generally meets with deserts in the entire loss of it, and in the evils resulting from that loss. . . . All our citizens, therefore, are deeply interested in public credit.”¹⁵⁰ Diplomats, jurists, and investors increasingly blurred the distinction between public and private debt; they began to view a state's system of private credit and repayment as reflecting its public creditworthiness. A state's laws, after all, shaped the repayment process.¹⁵¹ Consequently, debts owed by U.S. citizens to British creditors, debts contracted before the Revolution and guaranteed under the peace treaty, but shielded behind debtor-friendly state laws, posed a threat to national creditworthiness. The states' various debtor friendly statutes, such as those sequestering debts owed to Britons, tolling interest during the war, and issuing paper money that effectively devalued the debt owed, violated either the letter or spirit of the treaty. James Madison called paper money schemes, for example, “unconstitutional” because they affected property rights “as much as taking away equal value in land.”¹⁵² He conceded that the colonies had long issued paper money but “[s]uch [would] not then, nor now succeed in Great Britain.”¹⁵³ These policies might have been permissible for a colony, but not for a full-fledged state. He argued that

¹⁴⁹ The seminal article on “credible commitments,” focusing on national debt owed to domestic creditors-citizens, is Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989). For an application of the reputational theory to the history of international sovereign debt, see MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES (2007).

¹⁵⁰ John Jay, Charge to the Grand Jury, Richmond, Virginia (May 22, 1793) in 3 JAY PAPERS, *supra* note 102, at 479–80 [hereinafter Jay's Charge, Richmond].

¹⁵¹ Supreme Court Justice William Cushing captured this connection between a state's debtor-creditor legal regime and its public faith in his opinion in *Ware v. Hylton*, the 1796 decision that required a Virginia debtor to repay a British creditor despite having paid the debt to the state under a sequestration statute during the Revolution. Cushing referred to “the sense of all *Europe*, that such debts [i.e., private debts] could not be touched by States, without a breach of public faith: And for that, and other reasons, no doubt, this provision [i.e., in the Peace Treaty requiring repayment of private debts] was insisted upon, in full latitude, by the *British* negotiators.” *Ware v. Hylton*, 3 U.S. 199, 282 (1796) (opinion of Cushing, J.). For further discussion of *Ware v. Hylton*, see *infra* notes 266, 269, 393, 438–47, and accompanying text.

¹⁵² James Madison, Notes for Speech Opposing Paper Money (1786), in 9 MADISON PAPERS, *supra* note 46, at 158.

¹⁵³ *Id.*

Congress, rather than states, should regulate currency “to prevent fraud in States towards each other or foreigners.”¹⁵⁴

Even British diplomats who were sympathetic to American independence were exasperated by state legislative attempts to extinguish these debts. The colonists had won American independence fairly cheaply and quickly—at least when compared to the eighty years that it took the Netherlands to receive recognition of their independence from Spain.¹⁵⁵ Because of this relatively easy course, the United States had an opportunity to embed principles of reciprocity into its foundational legal order. “Let the foundations of the New World be laid in these principles,” declared David Hartley, one of the British peace commissioners, “to discharge debts of honor and conciliation to the last farthing; they may be considered as part of the purchase of independence.”¹⁵⁶

American diplomats-cum-founders like Jay took this lesson to heart. The founding generation was well aware that the United States, as a non-European republic, represented something new and experimental;¹⁵⁷ yet they had also expressed their desire, in the Declaration of Independence, to join the existing system of nation-states with the power “to do all other Acts and Things which Independent States may of right do.”¹⁵⁸ Now American diplomats were learning, from both sympathetic and unsympathetic observers in Europe, what it would take to gain acceptance in that world. They translated that lesson into the language of individual morality. Jay often linked the personal to the political and diplomatic: Nations should behave like well-mannered individuals. “Every man owes it to himself to behave to others with civility and good manners,” he charged a federal grand jury a few years later,

and every nation in like manner is obliged by a due regard to its own dignity and character to behave towards other nations with decorum. Insolence and rudeness will not only *degrade* and *disgrace*

¹⁵⁴ *Id.* at 158–59.

¹⁵⁵ Letter from David Hartley to William S. Smith (Dec. 1, 1786), in 3 DCUS, *supra* note 95, at 56, 57.

¹⁵⁶ *Id.* Hartley suggested that Congress repay British creditors directly, using the proceeds of western land sales to fund the scheme. *Id.* In fact, the federal government eventually assumed the repayment of outstanding debts in special arbitral commissions under the Jay Treaty a decade later. BEMIS, *supra* note 62, at 438–41. For further discussion of the Jay Treaty, see *infra* Part III.B.

¹⁵⁷ See, e.g., THE FEDERALIST No. 1 (Alexander Hamilton), *supra* note 1, at 3 (“It has been frequently remarked, that it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice . . .”).

¹⁵⁸ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

nations and individuals but also *expose* them to hostility and insult.¹⁵⁹

Jay's desk had been the resting place for dozens of letters recounting hostility and insult during the period in which he was foreign secretary. The criticism, he lamented, was deserved. Americans had not followed the etiquette and manners that marked gentility, civility, and the contemporary Anglo-American ideal of a gentleman.¹⁶⁰ It followed that Europe would not accept a nation governed in such a fashion as a part of the civilized world.

"Being a gentleman," observes Gordon Wood, "signified being cosmopolitan, standing on elevated ground in order to have a large view of human affairs, and being free of the prejudices, parochialism, and religious enthusiasm of the vulgar and barbaric."¹⁶¹ The vision of a civilization linked by gentlemen of liberal character rested partly on the ideal of disinterestedness: the "classical conception of virtue or self-sacrifice."¹⁶² This self-denying conception of virtue, however, had been difficult for many to maintain as an ideal, let alone in practice, in the increasingly commercial Atlantic world. Supplementing it was the more forgiving and hopeful notion of benevolence as an instinctive basis of human interaction. Commerce among diverse people was a manifestation of the new ethical world.¹⁶³ This "new, modern virtue was associated with affability and sociability, with love and benevolence, indeed with the new emphasis on politeness."¹⁶⁴ Enlightenment thinkers sought to identify the universal moral laws that made social life work, and they thought they had found them in benevolent sociability. A motor force behind it was the distinct "moral sense" possessed by each human being. In the Scottish Common Sense

¹⁵⁹ Jay's Charge, Richmond, *supra* note 150, at 478, 482–83.

¹⁶⁰ "At the center of this new civilized world [envisioned in the Anglo-American enlightenment] was the idea of a gentleman." WOOD, *supra* note 91, at 14 (2006). See generally RICHARD L. BUSHMAN, *THE REFINEMENT OF AMERICA: PERSONS, HOUSES, CITIES* (1993) (exploring diffusion of genteel tastes and manners in postrevolutionary American society); JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2001) (describing culture of honor in new republic); WOOD, *supra* note 147, at 189–225.

¹⁶¹ WOOD, *supra* note 91, at 15; see also WOOD, *supra* note 147, at 189–225 (describing founders' understanding of Enlightenment and benevolence).

¹⁶² WOOD, *supra* note 91, at 16; see also BAILYN, *supra* note 21, at 23–26 (noting revolutionary Americans' fascination with classical republican virtue); POCOCK, *supra* note 21, at 335–552 (analyzing development of concept of "virtue" in early modern Britain and America).

¹⁶³ See generally J.G.A. POCOCK, *VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY* (1985) (summarizing philosophical writings on relationship between economic and social systems and political and ethical theory in eighteenth century).

¹⁶⁴ WOOD, *supra* note 147, at 216.

Philosophy, people were thought to act as if on display, even when not; the moral sense, as one of the human faculties, was like an imaginary internal and objective spectator that judged behavioral choices before they were selected. The moral faculty could anticipate the external reaction and figure it into the calculus of future behavior.¹⁶⁵

Indeed, personal and national morality overlapped in substance and method. The “culture of gentility and virtuous leadership”¹⁶⁶ not only provided a script for individual behavior. It also directed collective behavior, for it “implied audiences, spectators, and characters, a theatrical world of appearances and representations, applause, and censure.”¹⁶⁷

The institutional mechanisms that expressed the idea of sociability reflected the concept itself: publications and correspondence that generated a transnational public sphere, which contemporaries called “the republic of letters.”¹⁶⁸ These enabled thinkers to communicate across space, including national boundaries and, Americans believed, oceans.¹⁶⁹

The cross-fertilization between the ideas of sociability in both individual moral sense philosophy and the law of nations leaps off the page of the leading treatises.¹⁷⁰ It pervaded the writings of American constitutional reformers, too. Recall that Mayor Duane had opined, in *Rutgers*, that “the spirit of *sociability* ought to be *universal*.” He

¹⁶⁵ The notion of an internal “impartial spectator” was the premise of much Scottish faculty psychology and the moral philosophy built on it. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 133, 208 (London, A. Millar 1759). For the pervasiveness of Scottish enlightenment thought among the founding generation, see MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 97–141 (1978); GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 16–17 (1981).

¹⁶⁶ WOOD, *supra* note 91, at 24.

¹⁶⁷ *Id.*

¹⁶⁸ See 3 KENT, *supra* note 13, at 19 (observing that English Admiralty Judge Sir William Scott’s opinions “have been read and admired, in every region of the republic of letters, as models of the most cultivated and enlightened human reason”). For the early modern concept of the republic of letters, see ANTHONY GRAFTON, *A Sketch Map of a Lost Continent: The Republic of Letters*, in *WORLD MADE BY WORDS: SCHOLARSHIP AND COMMUNITY IN THE MODERN WEST* 9–34 (2009).

¹⁶⁹ On the participation of eighteenth-century Americans in the republic of letters, see Norman S. Fiering, *The Transatlantic Republic of Letters: A Note on the Circulation of Learned Periodicals to Early Eighteenth-Century America*, 33 WM. & MARY Q. 642 (1976) and Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377 (2009).

¹⁷⁰ See RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* (1999) (analyzing anti-Hobbesian sociability tradition in early modern law of nations literature); see also Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 481–88 (1989) (discussing framers’ belief that upholding law of nations was matter of “national honor” similar to moral duties of individuals).

added that “we should preserve a benevolence even towards our *enemies*” and “revenge introducing, instead of benevolence, a sentiment of hatred and animosity,” should be “condemned” because “such sentiment is vicious in itself, and contrary to the public good.”¹⁷¹ James Madison wrote in *Federalist 62* that “[o]ne nation is to another what one individual is to another” and therefore every nation “whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of its wiser neighbours.”¹⁷² The “principle of benevolence and sociability,” Justice James Wilson lectured his students in 1790, “is not confided to one sect or to one state, but ranges excursive through the whole expanded theatre of men and nations.”¹⁷³ James Kent, who began lecturing at Columbia College a few years later, similarly wrote that “States . . . are moral persons, because they have a public will capable as well as free to do right and wrong.”¹⁷⁴ The institutions and doctrines of the law of nations derived in part, Kent instructed his students, from the “natural law of morality; a law which in its general axioms has been pretty universally felt, and well understood, from the joint result of the impressions of the moral sense, and the deductions of reason.”¹⁷⁵ And John Jay, when Chief Justice of the United States, instructed a jury that “[i]nsolence and rudeness will not only *degrade* and *disgrace* nations and individuals, but also expose them to hostility and insult. It is the duty of both to cultivate peace and good-will, and to this nothing is more conducive than justice, benevolence, and good manners.”¹⁷⁶

Interest mattered, of course, and this notion of a common, transatlantic rule of law embodied in the Treaty of Peace and the related law of nations did facilitate the participation of the United States in the international economy. But in the eighteenth century, commerce yielded benefits beyond wealth. It was thought to encourage every-

¹⁷¹ Opinion of the Mayor’s Court (Aug. 27, 1784), in 1 THE LAW PRACTICE OF HAMILTON, *supra* note 109, at 393, 400 n.*. For further discussion of Mayor Duane’s opinion in *Rutgers*, see *supra* notes 124–34 and accompanying text.

¹⁷² THE FEDERALIST NO. 62 (James Madison), *supra* note 1, at 420.

¹⁷³ James Wilson, Lectures on Law, *reprinted in* 1 JAMES WILSON, THE WORKS OF JAMES WILSON 151 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) [hereinafter Wilson, Law Lectures].

¹⁷⁴ JAMES KENT, DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LECTURES 58 (New York, George Forman 1795) [hereinafter KENT, DISSERTATIONS]. Each nation was “bound to conduct itself with justice, good faith, and benevolence,” lectured James Kent, when observing the necessary or natural law–based part of the law of nations. It was “obligatory upon them in point of conscience.” 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2 (New York, O. Halsted 2d ed. 1832).

¹⁷⁵ KENT, DISSERTATIONS, *supra* note 174, at 53.

¹⁷⁶ Jay’s Charge, Richmond, *supra* note 150, at 478, 482–83.

thing from good manners to peaceful and humanitarian sentiments, and it supposedly sustained the highest stage of human civilization.¹⁷⁷ People were sociable; so were nations. Commerce was the means of sociability. Sociability promoted (though could not guarantee) peace.¹⁷⁸ Consequently, early Americans sharply distinguished commercial relations from “political alliances,” by which they meant alliances promising mutual defense.¹⁷⁹ “[T]he business of America with Europe was commerce,” John Adams wrote in 1783 while negotiating the Treaty of Peace in Paris, “not politics or war.”¹⁸⁰ This distinction was central to the Model Treaty that he had drafted for the Continental Congress in 1776 and that featured guarantees for American free ports, capacious neutral rights, and a specified list of contraband goods.¹⁸¹ Like the Declaration of Independence, the Model Treaty was part of the strategy for achieving independence in the larger world, and it also contained principles that the drafters designed to help remake that world to foster freer international commercial exchange. “American foreign policy,” Felix Gilbert observed in his classic account of foreign policy ideas in the founding era, “was

¹⁷⁷ Further treatments that trace this ideology of commerce that trace it to the Scottish Enlightenment are POCOCK, *supra* note 163, and ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977). For a description of the importance of commerce in the Enlightenment thinkers’ understanding of civilization, see ONUF & ONUF, *supra* note 3, at 103–08, and for a comparison of Enlightenment and American understandings of commerce, see Sylvester, *supra* note 7, at 61–64.

¹⁷⁸ Alexander Hamilton, for example, did not believe that commerce, alone, guaranteed peace. “Have there not been as many wars founded upon commercial motives,” Hamilton wrote in *Federalist* 6, “since that has become the prevailing system of nations, as were before occasioned b[y] the cupidity of territory or dominion?” *THE FEDERALIST* NO. 6 (Alexander Hamilton), *supra* note 1, at 32. Instead, commercial rights had to be obtained through active negotiation; other nations would not simply grant or recognize them, as others, such as Thomas Jefferson, believed. Merrill D. Peterson, *Thomas Jefferson and Commercial Policy, 1783–1793*, 22 *WM. & MARY Q.* 584, 586 (1965); see also LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 214 (1978) (discussing formation of Jefferson’s beliefs about trade and commerce negotiations); DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 76–104 (1980) (describing American experience of free trade in this period more generally). In addition, once obtained, commercial integration would not be self-sustaining. Instead, other aspects of state power were necessary to facilitate commercial relations: a financial system, an effective military, and treaties. LYCAN, *supra* note 60.

¹⁷⁹ The distinction is memorialized in President George Washington’s Farewell Address and analyzed in FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* 43 (1961).

¹⁸⁰ Letter from John Adams to Secretary Robert R. Livingston (Feb. 5, 1783), *quoted in* GILBERT, *supra* note 179, at 45; see also HUTSON, *supra* note 60 (describing how American foreign policy was designed and implemented during Revolution).

¹⁸¹ GILBERT, *supra* note 179, at 49–54. Although the Model Treaty was never adopted in model form, its central provisions—free ports, neutral rights, and a specified list of contraband—became central pillars of American foreign policy for decades.

idealistic and internationalist no less than isolationist.”¹⁸² Wariness about “political entanglements” was matched with enthusiasm for commercial relations.¹⁸³ This distinction was most famously expressed in Washington’s Farewell Address, in which both Madison and Hamilton had a hand.¹⁸⁴ Complementing the rejection of political connections, which meant bilateral treaties of defense, was the celebration of the law of nations: a supposedly neutral set of transjurisdictional principles that governed commercial exchange between nations and their merchants in an Atlantic world traditionally prone to war.¹⁸⁵

Playing by the rules of this Atlantic world would slow down the emigration of loyalists, reopen traditional trade networks, and attract international investment. It would therefore facilitate the circulation of people, ideas, and credit. Reintegration of the American states into this Atlantic world would also bring, for the first time, full membership in that world. The failure of British imperial administrators to respect the colonists’ “liberties of Englishmen,” which defined for them transatlantic equality, contributed substantially to the Revolution.¹⁸⁶ Again, after the Revolution, the new Americans were divided about how to approach their former ruler. For some, the Revolution had been waged to vindicate full local autonomy.¹⁸⁷ To them, popular sovereignty meant legislative freedom, without regard

¹⁸² *Id.* at 72; *see also id.* at 66–75 (analyzing revolutionaries’ free trade ideology).

¹⁸³ Hamilton emphasized the point repeatedly, writing for example in a 1790 letter to President Washington that the United States should “steer as clear as possible of all foreign connection, other than commercial and in this respect to cultivate intercourse with all the world on the broadest basis of reciprocal privilege.” Letter from Alexander Hamilton to George Washington (Sept. 15, 1790), in 7 *THE PAPERS OF ALEXANDER HAMILTON* 52 (Harold C. Syrett & Jacob E. Cooke eds., 1963).

¹⁸⁴ GILBERT, *supra* note 179, at 124–36.

¹⁸⁵ *See* 1 KENT, *supra* note 174, at 3 (“[W]e have the authority of the lawyers of antiquity, and of some of the first masters in the modern school of public law, for placing the moral obligation of nations and of individuals on similar grounds . . .”).

¹⁸⁶ JOHN PHILLIP REID, 2 *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 99 (1987); *see also* HULSEBOSCH, *supra* note 6, at 105–44 (describing colonial appropriation of liberties of Englishmen to defend provincial autonomy); *cf.* Liam Séamus O’Melinn, *Our Discrete and Insular Founders: American “Degeneracy” and the Birth of Constitutional Equality* (Oct. 27, 2009) (unpublished manuscript, on file with the *New York University Law Review*) (arguing that English discourse of colonial degeneracy contributed to American rights consciousness).

¹⁸⁷ This is a theme in the neo-Progressive history of the American Revolution in which constitutional reform appears as a reaction against revolutionary democracy. *See, e.g.*, TERRY BOUTON, *TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 7 (2007) (arguing that during critical period “the gentry changed their minds about democracy and began an effort to scale back its meaning and practice”); WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 5 (2007) (arguing that Federalists sought to “find a way to put the democratic genie back in the bottle”); LARRY D. KRAMER, *THE PEOPLE THEMSELVES:*

to treaties. That is what they understood by republican government. In a variation on this line of thought, popular sovereignty meant that state governments had the power to determine whether to adhere to the peace treaty, regardless of the fact that the states had bestowed on Congress the power to regulate foreign policy in the Articles of Confederation. Others, however, believed that internal autonomy could be reconciled with external commitments. For them—gradually known in the 1780s as the Federal party, or Federalists—treating loyalists and British subjects fairly would give all Americans entry into a community of states from which they had long been excluded. Consequently, questions involving the law of nations and its relationship to local state law were central to constitutional debates of the 1780s.

This intellectual context—in which commerce expressed sociability—helps reframe the traditional analysis of the role of ideals and interests in the American Founding. Historians of the Founding commonly ask whether interests or ideas motivated the Constitution's drafters. A century ago, Charles Beard famously argued that the Federalists were creditors and merchants who supported the new Constitution to protect their investment in government paper issued by the states and Confederation Congress during the Revolution. Farmers and debtors, by contrast, were against the Constitution.¹⁸⁸ Many mid-century historians challenged this account of conflicting economic interests, though it retains defenders to this day.¹⁸⁹ The succeeding neo-Whig¹⁹⁰ interpretation stressed, instead, the ideological roots of the founders' concerns for structural restraints on government: their longstanding fears of corruption, for example, and their reservations about popular forms of democracy, as opposed to representative government.¹⁹¹ At present, the dominant historical interpretation combines these positions, admitting that there was great

POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (emphasizing importance of popular constitutionalism in founding generation).

¹⁸⁸ CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* 17 (1936).

¹⁸⁹ Compare FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958) (criticizing economic interpretation of Constitution), with ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* (1956) (criticizing Beard's use of historical method), and Edmund S. Morgan, *The American Revolution: Revisions in Need of Revising*, 14 *WM. & MARY Q.* 3 (1957) (criticizing Beard), with ROBERT A. MCGUIRE, *TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION* (2003) (providing contemporary economic interpretation of Constitution).

¹⁹⁰ On Whig history, or history as the tale of progress, see generally H. BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1951).

¹⁹¹ See, e.g., BAILYN, *supra* note 21, at 130–40 (discussing corruption and political process).

conflict among the founders and then linking different positions on the Constitution with different visions of the new nation's political culture.¹⁹²

The interpretation here contributes to the dominant interpretation by adding depth to the Federalists' concern for national integrity. It is misleading to characterize their concerns in terms of aristocracy or elitism. Yet they did hold themselves to international standards of conduct—rules of commercial law, for example, and diplomatic etiquette—that sat uneasily with the more democratic elements of the revolutionary ideology. The problem was how, structurally, to reconcile the revolutionary principle of popular sovereignty with commitments under the law of nations that these men believed were necessary to vindicate the revolutionary desire for respect. Adherence to international standards of behavior would require reining in some of the populist and redistributive actions by state legislatures. But the short-term gains would go to loyalists, in the United States and Britain, and British creditors, not to the Federalists. No doubt some of these framers would gain in the short or medium term through commercial relationships with people abroad; ideology and interest are often intertwined. But the driving force was a coherent vision of governmental rectitude of the sort that would solidify international recognition. They viewed themselves, collectively, as they believed foreign observers were looking at them. “Were it certain that the United States could be brought to act as a nation,” the American Peace Commissioners wrote Congress in late 1783, then commercial relations with the rest of the world would surely follow.¹⁹³ Five years later, the United States had a new Constitution. Still, the question remained: Would it act like a nation? The answer required not simply that the founders conform to preexisting standards of nation-statehood. Instead, their revolutionary situation forced them to contribute to the very definition of “civilized” statehood. They did so by designing a republican Constitution that tried to balance the twin revolutionary goals of popular sovereignty and international recognition.

¹⁹² See WOOD, *EMPIRE*, *supra* note 21, at 36–38 (arguing that Constitution helped suppress social conflicts about proper form of government); HULSEBOSCH, *supra* note 6, at 207–58 (describing conflicting visions of Constitution within founding generation). The law school version of this compromise tends toward an anodyne pragmatic interpretation. See, e.g., PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING* 2–4 (1992) (simplifying complex differences and compromises among competing groups of founders).

¹⁹³ Letter from John Adams, Benjamin Franklin, & John Jay to the President of Congress (Sept. 10, 1783), in 6 RDCUS, *supra* note 26, at 687, 690.

II THE INTERNATIONAL CONSTITUTION

The text that the framers produced in Philadelphia was the product of their efforts to institutionalize solutions to the shortcomings of the Articles of Confederation. But it was more than that. If the national government could not enforce national treaties against recalcitrant states, compel their compliance with the law of nations, punish offenses against that law, regulate foreign commerce, and so on, the new republic would be unable to obtain commercial advantages and, given its military weakness and perilous geographic situation, would face external threats. These dangers were a large part of what made Philadelphia so urgent. But the aims of the framers were also more complex and multifaceted. They sought to create a republic that, by pursuing a “respectable” foreign policy, could both claim and earn recognition as a sovereign on an equal footing in the existing world of European sovereigns and, they believed in their more visionary moments, achieve national greatness.

Historians have rightly focused on the federalism dimension of the Founding in the area of foreign affairs. Almost all delegates agreed that the relevant powers should be vested in the federal government. But this focus on federalism is also misleading because it tends to suppress some of their larger purposes and the full nature of the lessons that they drew from their experience under the Confederation.¹⁹⁴ Widespread state resistance to the Confederation’s treaties and violations of the law of nations revealed more than the danger that the states, as competing power centers with their own conflicting interests, posed to the national interest.

Many Federalists had come to believe that republican government itself posed distinctive obstacles to the conduct of foreign policy. Federalists had concluded that similar problems plagued republican governments in many other areas, and they sought the establishment of the federal government—Madison’s extended republic¹⁹⁵—as at least a partial solution to the weaknesses that characterized republican governments at the state level. But the difficulties of ensuring respect for international obligations ran deeper, and Federalists anticipated that national passions and prejudices, not only local interests, could

¹⁹⁴ Although he does not focus on foreign affairs, Gordon Wood notes that the critical period led to a profound rethinking of republicanism and that some Antifederalists viewed the revised conception, which was reflected in the new constitutions adopted at the state and federal levels as violating the spirit of the Revolution itself. WOOD, CREATION, *supra* note 21, at 430–564.

¹⁹⁵ See THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 61–65 (propounding his famous cure—extended republic—for problem of faction in republican governments).

infect national institutions. One could not expect officials drawn from small districts, let alone ordinary citizens, to understand all of the complexities of international legal controversies. Moreover, the natural attachment of citizens and their representatives to their own country, combined with the great difficulty of taking an unbiased perspective in international disputes, made citizens especially vulnerable to exploitation by unscrupulous politicians. These dynamics, if unchecked, were as incompatible with protecting the national interest as they were with upholding the national honor.

It was not sufficient, therefore, to address the federalism problem in a vacuum, as if controlling the states would fully solve this deep structural dilemma. Also needed were institutional mechanisms that would insulate government officials responsible for upholding the legal claims of foreign nations from the influence of popular passions. For the framers, the critical concerns were with the law of nations and national treaty commitments. Observance of these obligations could not be left subject to the shifting winds of popular sentiment. Even after eliminating the possibility of state interference, the framers believed that it was essential to structure the national government in a way that best ensured the nation's international duties would be respected.¹⁹⁶

When viewed in light of the problem of recognition, the Constitution's text reveals how carefully the framers sought to balance popular sovereignty and international respectability in the design of the new constitutional system. Admittedly, the text poses real interpretive difficulties. The significance of many of the legal terms and mechanisms that the framers employed to achieve these purposes cannot be fully appreciated without background knowledge about what were, even then, specialized legal doctrines and concepts. As a result, their handiwork is far from transparent to modern readers, including modern constitutional scholars and lawyers. Moreover, even when interpreted in light of the relevant historical background, the text contains many gaps and ambiguities, reflecting the inevitability that many details would have to be worked out in practice. Nevertheless, what is clear is that the framers sought, while remaining consistent with republican principles, to ensure that the public officials responsible for complying with the law of nations and treaties would be removed as far as possible from direct public influence. This meant limiting the role of the most popular branch, assigning the federal

¹⁹⁶ See *infra* Part II.A.

judiciary a large enforcement role, and charging the executive with the duty faithfully to execute the international obligations of the nation.¹⁹⁷

Although many founders were aware of the limits on what the text could reasonably accomplish,¹⁹⁸ they may not have anticipated how quickly the debatable points would emerge or the intensely partisan atmosphere in which they would have to be resolved. The great political controversies provoked first by the outbreak of the French Revolution,¹⁹⁹ and then by the widely reviled Jay Treaty,²⁰⁰ revealed the extent to which the framers had insulated questions concerning compliance with international obligations from direct democratic control and provoked controversy over the allocation of responsibility for foreign affairs. That these disputes emerged in the midst of ongoing battles between Federalists and Republicans over their conflicting conceptions of republicanism—reflected rhetorically in their acrimonious charges of “Monarchism” and “Jacobinism”—made it inevitable that the issue of popular control would move to the center stage. Nevertheless, it is striking that many institutional features of the balance between popular sovereignty and international commitments were accepted as settled on both sides.

A. *Constitutional Theory: Reconciling International Legitimacy with Popular Sovereignty*

The deteriorating international status of the Confederation was at the forefront of the minds of the framers as they made their way to Philadelphia.²⁰¹ It is not surprising, therefore, that they gave serious thought to the foreign affairs powers and developed systematic ideas about how those powers be reorganized in the new government.

Nevertheless, modern American lawyers and scholars have paid insufficient attention to the salience of foreign affairs in the founders' thinking. Instead, they have been enthralled with James Madison's *Federalist 10*. It seems to speak with realism and prescience about domestic pluralist politics and the importance of structural design in the quest to balance interests and prevent the tyranny of the majority.²⁰² The focus on *Federalist 10*, and Madison's essays on the separation of powers more generally, has eclipsed the more explicitly

¹⁹⁷ See *infra* Part II.B.

¹⁹⁸ See, e.g., THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 236 (“All new laws, though penned with the greatest technical skill . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

¹⁹⁹ See *infra* Part III.A.

²⁰⁰ See *infra* Part III.B.

²⁰¹ See *supra* Part I.B.

²⁰² See THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 56–65.

internationalist concerns in *The Federalist Papers*, which were urgent, and which formed the most consistent theme in its eighty-five letters. Indeed, simply turning from *Federalist 10* to *Federalist 11* makes this point.²⁰³ Rehearsing the familiar argument that the Union was necessary to prevent foreign depredations against the states, Hamilton stresses the need for a federal treaty-making authority to harmonize the states' international commercial policy and for a federal navy to protect American shipping. He then lists the still unresolved issues of contention with Britain and Spain, including access to the Atlantic fisheries, access to the Great Lakes, and navigation on the Mississippi River. All of these issues were paramount in the minds of the delegates.

Less familiar to contemporary scholars is the geopolitical vision in which Hamilton framed problems of foreign relations. He saw the United States as constituting itself on the edge of the Americas, two continents still filled with European colonies. Someday, he predicted, all those colonies would become free republics. One of these republics would have to lead the rest in their dealings with the old empires of Europe.²⁰⁴ It was, Hamilton forecast in 1787, in "our interests . . . to aim at an ascendant in the system of American affairs."²⁰⁵ He divided the world into four parts: Europe, Africa, Asia, and America, each of which had "a distinct set of interests."²⁰⁶ Nonetheless, Europe dominated the other three. "The superiority, she has long maintained, has tempted her to plume herself as the Mistress of the World, and to consider the rest of mankind as created for her benefit."²⁰⁷ This arrogance had even led "profound philosophers" to conclude that Europeans were physically superior and "[to] gravely assert[] that all animals, and with them the human species, degenerate in America—that even dogs cease to bark after having breathed a while in our

²⁰³ THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 1, at 65–73.

²⁰⁴ He was imagining especially the disintegration of the Spanish empire, which he abhorred for ideological and religious reasons. By 1787, Hamilton was in contact with the ambitious Venezuelan revolutionary Francisco de Miranda, who strove for decades to gain American and British support for a Spanish American colonial revolution. See LYCAN, *supra* note 60, at 84–91 (describing Hamilton's relationship with Miranda); MARIE-JEANNE ROSSIGNOL, *THE NATIONALIST FERMENT: THE ORIGINS OF U.S. FOREIGN POLICY, 1792–1812*, at 87–90 (2004) (explaining Miranda's motivations and actions). For two decades these plans attracted the interest and support of Americans of all ideological stripes, from Hamilton to Jefferson—and, most notoriously, Aaron Burr. See, e.g., Marshall Smelser, *George Washington Declines the Part of El Libertador*, 11 WM. & MARY Q. 42 (1954).

²⁰⁵ THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 1, at 72.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

atmosphere.”²⁰⁸ Political experience in the United States would begin to debunk these complacent European theories. “It belongs to us,” Hamilton concluded, “to vindicate the honor of the human race, and to teach that assuming brother moderation. Union will enable us to do it. Disunion will add another victim to his triumphs. Let Americans disdain to be the instruments of European greatness!”²⁰⁹

But the advantages did not end there. Union would allow the United States to create “one great American system, superior to the controul of all trans-atlantic force or influence,” which in turn would permit the United States to “dictate the terms of the connection between the old and the new world!”²¹⁰ An equal footing in the emerging Atlantic state system meant, in practice, a dominant posture in the Americas themselves. This prediction about how effective constitutional engineering could lead to dominance within the Americas and equality with the old European empires was at least as important as—and, indeed, complemented—Madison’s argument that structural checks and balances could temper domestic factionalism.

Hamilton’s vision, which revealed feelings of anxious inferiority mixed with a desire for grandeur, was only an extreme expression of the way many American founders perceived their existential situation. Behind these hopes and fears, however, lay more practical concerns about controlling the excesses of popular government, to which the framers turned once the Philadelphia Convention was underway. In an early address to the Convention, Madison emphasized state violations of the law of nations. Unless prevented, these violations would “involve us in the calamities of foreign wars.” Reports of violations were numerous: “The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations.”²¹¹ Indeed, treaty violations headed the list of concerns he presented when arguing for his famous, and famously rejected, federal veto on state legislation.²¹² Madison’s next four items

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 72–73.

²¹⁰ *Id.* at 73. On the European naturalists’ argument about American degeneracy, see generally LEE ALAN DUGATKIN, *MR. JEFFERSON AND THE GIANT MOOSE: NATURAL HISTORY IN EARLY AMERICA* (2009); ANTONELLO GERBI, *THE DISPUTE OF THE NEW WORLD: THE HISTORY OF A POLEMIC, 1750–1900* (1973).

²¹¹ 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 316 (Max Farrand ed., 1937) (statement of James Madison). For further discussion of state violations of treaties and the law of nations, see *supra* notes 39–41, 70–101, 134–38, 150–56, and accompanying text and *infra* notes 262, 338, and accompanying text.

²¹² Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *WM. & MARY Q.* 215 (1979).

cut to the integrity of the federal government in relation to the states and the necessity of disciplining the internal order of the states. That these problems of federalism were related to foreign relations came out again in his sixth item: “Will it secure the Union agst. the influence of foreign powers over its members[?]” Madison’s answer was clear: “The plan of Mr. Patterson [i.e., the New Jersey plan], not giving to the general Councils any negative on the will of the particular States, left the door open for the like pernicious machinations among ourselves.”²¹³

The dilemmas that the state violations posed were at the center of the Convention’s work. Even before Philadelphia, however, leading political figures had begun reflecting on the deeper lessons to be learned from the experience of the Confederation. Famously, Madison, who was perhaps the most systematic thinker among the founders, recorded many of his critical conclusions in his memorandum, “*Vices of the Political System of the United States*,” which he drafted two months before the Federal Convention.²¹⁴ The problem of compliance with treaties and the law of nations was uppermost in his mind. Although “[a]s yet foreign powers have not been rigorous in animadverting on us,” he pointedly observed, “[t]his moderation . . . cannot be mistaken for a permanent partiality to our faults.” It would lead inevitably to disputes with other nations, which were “among the greatest of public calamities.”²¹⁵ In fact, Madison had been focused on this problem for some time. As he had lamented in a letter to James Monroe in 1784: “Nothing seems to be more difficult under our new Governments, than to impress on the attention of our Legislatures a due sense of those duties which spring from our relation to foreign nations.”²¹⁶

²¹³ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 211, at 319.

²¹⁴ Madison, *Vices*, *supra* note 46, at 345–58. For further discussion of the *Vices* Memorandum, see *supra* notes 46, 58, and accompanying text.

²¹⁵ *Id.* at 349. The structure of the Confederation, moreover, made these violations inevitable:

Accordingly, not a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

Id.

²¹⁶ Letter from James Madison to James Monroe (Nov. 27, 1784), in 8 THE PAPERS OF JAMES MADISON 156, 157 (Robert A. Rutland et al. eds., 1973) (responding specifically to Marbois affair, which involved attack on French Consul in Philadelphia and French demands for proper satisfaction under law of nations). In *Federalist* 53, Madison later urged federal legislators to study the law of nations because, “as far as it is a proper object of municipal legislation [it] is submitted to the federal government.” THE FEDERALIST NO. 53 (James Madison), *supra* note 1, at 364.

In *Vices*, Madison attributed these lapses, in part, to the sociology of the state legislators: The representatives were drawn from a “sphere of life” in which international affairs were ignored.²¹⁷ Similarly, paper money schemes were the products of parochial minds. “Is it to be imagined,” he asked, “that an ordinary citizen or even an assembly-man of R[hode] Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in M[assachusetts] or C[onnecticut]?”²¹⁸ The average state legislator, Madison realized, lacked the imagination to perceive the longer-term and extra-territorial effects of localist legislation, like laws that depreciated currency. The result was the “[i]njustice of laws of States,” their “[m]ultiplicity,” “mutability,” and “[i]mpotence.”²¹⁹

Political sociology, however, was only part of the story. With the Treaty of Peace no doubt vividly in mind, Madison stressed the weakness of the Confederation, especially the “want of [any] sanction” to its laws, for which its illustrious, but inexperienced, authors had neglected to provide on “a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals.”²²⁰ Madison did not stop there. The explanation lay at an even deeper level and, when identified, would lay bare a fundamental defect in republican institutions as so far developed in America. In part, the fault lay with the imperfections of representation:

But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance, again prevail on the unwary to misplace their confidence? How frequently too will the honest but unenligh[t]ened representative be the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence?²²¹

Even solving this principal-agent conflict of interest, however, would not suffice because the ultimate explanation lay deeper still, in the people themselves. “A still more fatal if not more frequent cause lies among the people,” whose commitment to impartiality “the

²¹⁷ Madison, *Vices*, *supra* note 46, at 349.

²¹⁸ *Id.* at 355–56.

²¹⁹ *Id.* at 353–58. For further discussion of localist perspectives among state officials, see *supra* notes 52–54, 102, 134–38, 186–87, and accompanying text.

²²⁰ *Id.* at 351.

²²¹ *Id.* at 354.

Courtiers of popularity” could all too easily subvert.²²² Although “a prudent regard to their own good” should, in principle, be “of decisive weight in itself,” as unjust measures were, in fact, inconsistent with “the general and permanent good of the Community,” experience amply demonstrated that “[i]t is too often forgotten, by nations as well as by individuals that honesty is the best policy.”²²³ Nor would a regard for their own reputation—“character,” in Madison’s terms—in the unbiased world at large be sufficient, since “public opinion without the Society, will be little respected by the people at large of any Country.”²²⁴ Although “[i]ndividuals of extended views, and of national pride, may bring the public proceedings to this standard,” he noted, “the example will never be followed by the multitude.”²²⁵

Madison continued this theme in *The Federalist Papers*. Reflecting the Common Sense epistemology characteristic of much contemporary constitutional thought,²²⁶ he insisted that no nation was so enlightened that it could ignore the impartial judgments of other nations and still expect to govern itself wisely and effectively. In *Federalist* 63, for example, he emphasized the importance of respecting the consensus views of other nations and observed that a “sensibility to the opinion of the world [was] perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence”:²²⁷

An attention to the judgment of other nations is important to every government for two reasons: The one is, that independently of the merits of any particular plan or measure, it is desirable on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy: The second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed.²²⁸

He then pointedly added:

What has not America lost by her want of character with foreign nations? And how many errors and follies would she not have avoided, if the justice and propriety of her measures had in every

²²² *Id.* at 352, 355.

²²³ *Id.* at 355.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ For further discussion of the pervasiveness of Common Sense epistemology among the Federalists, see *supra* notes 165–75 and accompanying text.

²²⁷ THE FEDERALIST NO. 63 (James Madison), *supra* note 1, at 422.

²²⁸ *Id.* at 423.

instance been previously tried by the light in which they would probably appear to the unbiassed part of mankind?"²²⁹

Madison's point is clear. Even apart from the danger of provoking war or acting unjustly, paying respect to the consensus judgments embodied in the law of nations was an essential strategy for avoiding "errors and follies" and for managing a foreign policy that would enable the nation to flourish.

Madison's views were shared by many of the framers, and consequently, they carefully designed the new Constitution to ensure that the new nation would uphold its duties under the law of nations. The most immediate concern, based on bitter experience, was to ensure that localist pressures at the state level would not undermine the nation's capacity to comply. To accomplish this result, the Constitution centralized the foreign affairs powers in the hands of the federal government. As Madison put it, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."²³⁰ Again, however, the framers' concerns were not limited to federal-state relations. They also worried that popular sentiment, whipped up by "the artful misrepresentations of interested men," would threaten to undermine compliance with the nation's international duties.²³¹ The people, John Jay lamented, were "liable to be deceived by those brilliant appearances of genius and patriotism, which like transient meteors sometimes mislead as well as dazzle."²³² Consequently, their representative assemblies would be prone "to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions."²³³ Indeed, it was precisely this sort of defect in democratic systems that had led to disastrous results during the Confederation. "[T]he best instruction on this subject is unhappily conveyed to America by the example of her own situation," Madison observed. "She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs."²³⁴

Hamilton's assessment was, if anything, even more dire:

We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely any thing that can wound the pride, or degrade the character of an independent

²²⁹ *Id.*

²³⁰ THE FEDERALIST NO. 42 (James Madison), *supra* note 1, at 279.

²³¹ THE FEDERALIST NO. 63 (James Madison), *supra* note 1, at 425.

²³² THE FEDERALIST NO. 64 (John Jay), *supra* note 1, at 433.

²³³ THE FEDERALIST NO. 62 (James Madison), *supra* note 1, at 418.

²³⁴ *Id.* at 420–21.

nation, which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril, for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. Have we valuable territories and important posts in the possession of a foreign power which by express stipulations ought long since to have been surrendered? These are still retained, to the prejudice of our interests not less than of our rights. Are we in a condition to resent, or to repel the aggression? We have neither troops nor treasury nor government. Are we even in a condition to remonstrate with dignity? The just imputations on our own faith in respect to the same treaty, ought first to be removed. . . . Is public credit an indispensable resource in time of public danger? We seem to have abandoned its cause as desperate and irretrievable. Is commerce of importance to national wealth? Ours is at the lowest point of declension. Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our Government even forbids them to treat with us: Our ambassadors abroad are the mere pageants of mimic sovereignty.²³⁵

B. *Theory Applied: The Framers' Design*

Constitutional understandings are constantly developing in light of political developments and changing circumstances, but understanding the framers' design begins with the text. Their concerns about foreign affairs appear pervasively throughout the document—in some cases obviously, in others, more subtly. Considered as a whole, and understood in historical perspective, the text establishes a comprehensive regime for dealing with foreign affairs with an eye equally on centralizing all of the relevant powers in the federal government and on ensuring, as far as possible, that the federal government would uphold the nation's international duties. It thereby signaled the nation's capacity and resolution to be a responsible member in the community of civilized states.

In view of the conduct of the states during the Confederation, the framers' most urgent task was to centralize foreign policy-making in the national government. Because the foreign affairs powers were, for the most part, already nominally in the Confederation under the Articles, the main goal was to make those powers effective by eliminating the national government's dependence on the states for car-

²³⁵ THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 1, at 91–92. For further discussion of the diplomatic failures of the Confederation, and the consequences for the new nation, see *supra* Part I.B.

rying its powers into effect and by enabling it to discipline state obstructionism. After adoption of the Constitution, localist interests in individual states, it was hoped, would no longer be able to disrupt national foreign policy or undermine the position of the federal authorities with foreign governments by acting in violation of treaties and the law of nations. At the same time, and more subtly, the Constitution, to a degree unprecedented in prior European experience, sought to incorporate treaties and the law of nations into the legal order in a way that discouraged violations even by the federal government itself and thereby gave foreign governments assurances of national good faith and reliability. This meant carefully structuring federal foreign affairs authority to insulate delicate decisions about the legal claims of foreign states from direct popular control.

With a few exceptions, the main problems of the Confederation stemmed not from Congress's lack of substantive foreign affairs powers, but from its inability to exercise its acknowledged powers effectively. For example, the Articles explicitly granted Congress the sole and exclusive power "of determining on peace and war"²³⁶ and an only minimally restricted treaty power.²³⁷ Yet Congress faced large, and sometimes insurmountable, obstacles to exercising both of these powers. Thus, although Congress had authority to determine how many soldiers to raise for the defense of the United States and to issue legally binding requisitions to the states demanding that each supply a quota, it was dependent on the good faith of the state legislatures to carry out its determinations.²³⁸ The same dependency existed in the context of raising money to fund the war effort and Congress's other activities.²³⁹ Congress had power to appropriate money and to require the states to raise the necessary funds, but the states retained complete control over the imposition and collection of taxes.²⁴⁰ During the war, the problems generated by this system were less aggravated because the overwhelming threat posed by the common enemy encouraged state cooperation. Once the war was concluded, however, Congress found state cooperation almost at a complete end.²⁴¹ In no area was this more the case, and more consequential, than with

²³⁶ ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IX.

²³⁷ *Id.* arts. IX, VI. On the treaty power under the Confederation, see Golove, *supra* note 71, at 1104–32.

²³⁸ See ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IX.

²³⁹ *Id.* arts. VIII, IX.

²⁴⁰ *Id.*

²⁴¹ On the difficulties experienced during the Confederation, see RAKOVE, *supra* note 3, at 275–96, 333–59. The deficiencies of the Articles of Confederation in these respects are heavily emphasized in *The Federalist Papers*. See, e.g., THE FEDERALIST NOS. 15–16 (Alexander Hamilton), *supra* note 1, at 89–105.

respect to the unwillingness of the states to carry out national treaty commitments. When at critical junctures the states simply refused to comply—as they did with the Treaty of Peace—Congress could do little more than remonstrate.²⁴²

The Constitution employed a number of devices to solve these crucial defects. It assigned all of the Confederation's foreign affairs powers to the new national government and added other powers that the Confederation had withheld—powers that were associated with fully competent nations under the law of nations. For example, it granted Congress power to tax and spend for the “common Defence and general Welfare,”²⁴³ thereby denying the states the capacity to frustrate Congress's fiscal decisions simply by refusing to raise the necessary funds. It also granted Congress a whole array of powers over war and the military establishment, including the power to declare war and authorize captures and privateering,²⁴⁴ to raise and support armies,²⁴⁵ to maintain a navy,²⁴⁶ and to govern the military forces (including, under a more complex arrangement, the state militias).²⁴⁷ These powers were meant to prevent a repeat of the dilemmas that had plagued the war effort when, among other things, the states had been dilatory in responding to Congress's troop requisitions.²⁴⁸ Finally, the Constitution expressly granted Congress the power to regulate foreign commerce and commerce with the Indian tribes.²⁴⁹ The absence of the foreign commerce power during the Confederation had deprived Congress's diplomatic representatives of the capacity to threaten commercial retaliation against foreign governments discriminating against American commerce. As a result, Congress's efforts to conclude commercial treaties, widely seen as essential to American economic interests, had come to naught.²⁵⁰ Similarly, the equivocal

²⁴² See *supra* notes 39–41, 70–101, 134–38, 150–56, 211, 215–16, 262, and accompanying text.

²⁴³ U.S. CONST. art. I, § 8, cl. 1.

²⁴⁴ *Id.* art. I, § 8, cl. 11.

²⁴⁵ *Id.* art. I, § 8, cl. 12.

²⁴⁶ *Id.* art. I, § 8, cl. 13.

²⁴⁷ See *id.* art. I, § 8, cls. 14, 16.

²⁴⁸ See, e.g., THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 1, at 91.

²⁴⁹ U.S. CONST. art. I, § 8, cl. 3.

²⁵⁰ See *supra* notes 86–94 and accompanying text; see also THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 1, at 136 (“The want of it has already operated as a bar to the formation of beneficial treaties with foreign powers”); *cf. id.* (“No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance to them, while they were apprised that the engagements on the part of the Union, might at any moment be violated by its members”). In particular, Congress's inability to negotiate a commercial treaty with Great Britain was a major driving force behind the Foreign Commerce Clause. See Albert S. Abel, *The Commerce Clause in the Constitutional*

power over the Native Americans had generated a host of serious diplomatic complications and security threats.²⁵¹ In turn, the Constitution placed the President in charge of the diplomatic corps, with the power to appoint diplomatic agents for the United States and to receive those sent from abroad.²⁵² The Constitution also made him Commander in Chief of the armed forces and gave him, with the consent of two-thirds of the Senate, the power to make treaties.²⁵³

Convention and in Contemporary Comment, 25 MINN. L. REV. 432, 448 (1940). Concluding a commercial treaty allowing American access to the West Indian markets was a major goal of U.S. diplomacy for over a decade after the Revolution. The Peace Commissioners had tried to negotiate such a commercial treaty while negotiating the Treaty of Peace. See RITCHESON, *supra* note 78, at 38–42. Then John Adams remained in England as minister to the Court of St. James and tried to complete treaty negotiations for three more years, until 1788. See LYCAN, *supra* note 60, at 102. Efforts continued after adoption of the Constitution. See *id.* In 1790, before Thomas Jefferson was installed as Secretary of State, President Washington sent Gouverneur Morris to London. See *id.* at 101–04. In the early 1790s, Alexander Hamilton conducted semi-secretive negotiations with British representatives in the United States, also with Washington’s blessing. See *id.* at 102–06. Finally, the President sent then-Chief Justice Jay to London in 1794 to resolve outstanding grievances between the two nations, including, if possible, to make headway on the issue of commercial relations with the West Indian colonies. See *id.* at 224. For a discussion of the Jay Treaty, see *infra* Part III.B. The problem was not limited, however, to Great Britain. Congress also failed almost entirely in its vigorous efforts, after the war, to conclude commercial treaties with other European powers. For discussion, see Golove, *supra* note 71, at 1127–32.

²⁵¹ The power over Indian commerce in the Confederation had been restricted because of reservations of power to the states over tribes within their respective territories. See ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IX; see also THE FEDERALIST No. 42 (James Madison), *supra* note 1, at 284 (describing how limitations on Indian Commerce power in Articles “render[ed] the provision obscure and contradictory”). As British imperial authorities had experienced during the colonial era, state and private land interactions with the Native American tribes during the Confederation were disorderly and frequently exploitive. See ERIC HINDERAKER, *ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY, 1673–1800* (1997); RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815* (1991). The grant of the Indian commerce power reflected the framers’ decision to return to the earlier approach of the imperial authorities and to treat the tribes as separate polities within the boundaries of the Union that the federal government would deal with through the law of nations and treaties. ROSSIGNOL, *supra* note 204, at 112; FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 70–73* (1994). Although the forms of interaction followed the law of nations, the substance was intended to bring domination. Yet this too fit into the European pattern for the relationship between strong and weak states or, with more relevance, between European empires and indigenous Americans during the three centuries of contact in the Americas.

Another power granted Congress in the Constitution that had not been among the powers of Congress under the Articles of Confederation was the power to define offenses against the law of nations. See U.S. CONST. art. I, § 8, cl. 10. This grant too represented an effort to avoid serious diplomatic problems that had arisen during the Confederation. For discussion, see *infra* notes 278–79, 282–83, and accompanying text.

²⁵² See U.S. CONST. art. II, § 2, cls. 2, 3.

²⁵³ See *id.* art. II, § 2, cls. 1, 2. *The Federalist Papers* described both the power to receive ambassadors and the commander-in-chief power in modest terms. As to the former, see

In complementary provisions, the Constitution reinforced the exclusion of the states from the realm of foreign affairs. Most explicitly, the text prohibited states from making any “Treaty, Alliance, or Confederation” or even, without the consent of Congress, from making any more minor “Agreement or Compact” with one another or with foreign governments.²⁵⁴ This restriction cut off the states from direct diplomatic contacts with foreign governments, preserving diplomacy as an exclusive federal power.²⁵⁵ The Constitution also enjoined the states from regulating foreign commerce, including, for example, by laying “any Imposts or Duties on Imports or Exports”²⁵⁶ or, without the consent of Congress, laying “any Duty of Tonnage.”²⁵⁷ Likewise, it prohibited the states from engaging in war. More specifically, it enjoined the states from “grant[ing] Letters of Marque and Reprisal,”²⁵⁸ or, without the consent of Congress, from “keep[ing] Troops, or Ships of War in time of Peace”²⁵⁹ or from “engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”²⁶⁰ Most importantly, the Supremacy Clause declared that all lawful federal acts, whether laws passed by Congress or treaties made by the United States, were to be supreme over state law and that even state judges were bound to apply them over inconsistent state law, including state constitutional requirements.²⁶¹ This provision was the text’s explicit effort to deal with the great controversies

THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 1, at 468, which described the power as “more a matter of dignity than of authority.” Similarly, Hamilton argued that the commander-in-chief power “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy.” *Id.* at 465. In this respect, it “would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it,” *id.*, because the power of the latter extended to declaring war and raising and regulating the military forces, which did not appertain to the President, but to Congress.

²⁵⁴ U.S. CONST. art. I, § 10, cls. 1, 3. On the distinction between “treaties” and “agreement or compacts,” see Golove, *supra* note 71, at 1095–97 & n.52 and David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1909–11, 1914–15 & n.375 (1998).

²⁵⁵ On the exclusion of the states from diplomatic contacts, see Golove, *supra* note 71, at 1095–96 & n.52 (discussing rationale for exclusion of states from foreign affairs). *Cf.* *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 573–74, 578–89 (1840) (Taney, C.J.) (observing that “[t]he framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union” and that “it would open a door of which foreign powers would avail themselves to obtain influence in separate states” and concluding that “[p]rovisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations”).

²⁵⁶ U.S. CONST. art. I, § 10, cl. 2.

²⁵⁷ *Id.* art. I, § 10, cl. 3.

²⁵⁸ *Id.* art. I, § 10, cl. 1.

²⁵⁹ *Id.* art. I, § 10, cl. 3.

²⁶⁰ *Id.*

²⁶¹ U.S. CONST. art. VI, § 2.

during the Confederation over the refusal of states (and their judges) to comply with treaties, especially the Treaty of Peace.²⁶² Finally, the Constitution gave the new federal courts jurisdiction over all cases arising under federal law and federal treaties, ensuring that the federal judiciary would be available to uphold federal authority against recalcitrant states.²⁶³

Notwithstanding the gaps and ambiguities in these provisions, their general aim was clear: to enable the federal government to assert control over all aspects of foreign affairs, to carry out its policies without relying on the states, and, when necessary, to bring the states into line with federal policy. These aspects of the framers' plan were well understood and, during the Founding, were relatively uncontroversial.²⁶⁴

Simultaneously, however, the Constitution was concerned with more than federal-state relations. It also incorporated a series of mechanisms designed both to ensure, and to manifest to foreign governments, that the new federal government would observe treaties and the law of nations and that excessive popular passions would not unduly influence national policy when the rights of foreign sovereigns were at stake. It is these provisions, less obvious today in their import but no less significant in their aim, which most often have been underappreciated or altogether overlooked.

²⁶² On state violations of treaties during the Confederation, see *supra* notes 39–41, 70–101, 134–38, 150–56, 211, 215–16, and accompanying text. For more background on the Supremacy Clause, see, for example, CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2004).

²⁶³ See U.S. CONST. art. III, § 2, cl. 1. In *Federalist* 22, Hamilton focused on the treaty power, but it is no accident that this is also the first *Federalist Paper* to raise the judicial power as an essential feature of federalism. Hamilton argued a federal judiciary was necessary to ensure the uniform interpretation of treaties and allow the Union to fulfill its international obligations. The absence of such a forum “crowns the defects of the confederation.” Without central review, and despite the Supremacy Clause, state courts might render contradictory treaty interpretations. He warned that “[i]f there is in each State, a court of final jurisdiction, there may be as many different final determinations on the same point, as there are courts.” The remedy was “one SUPREME TRIBUNAL.” THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 1, at 143; see also THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 1, at 102 (noting importance of judicial enforcement of federal law in upholding power of federal government against state encroachments); THE FEDERALIST NO. 39 (James Madison), *supra* note 1, at 256 (same).

²⁶⁴ With some notable exceptions, they have been reasonably effective throughout U.S. history in limiting the ability of the states to interfere with the federal government's conduct of foreign affairs. For some of the exceptions, see, for example, *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (dealing with resistance of states to War of 1812); JOHN BACH McMASTER, DANIEL WEBSTER 263–70 (1902) (describing infamous McLeod Affair, involving New York State prosecution of British national in connection with so-called Caroline incident); Golove, *supra* note 71, at 1211–33 (discussing Antebellum Negro Seamen Acts controversy and others).

The Supremacy Clause provides a useful starting point. Although in part a federal-state relations provision declaring the supremacy of federal over state law, it served a dual function with respect to treaties in particular. It enjoined state compliance, requiring state judges to enforce treaties over inconsistent state law. At the same time, it also incorporated into the Constitution a controversial doctrine, developed by John Jay, Alexander Hamilton, and others during the Confederation, which made treaties, upon ratification, the supreme law of the land enforceable by courts without the need for legislative implementation.²⁶⁵ This doctrine—which came to be called the self-executing treaty doctrine—was contrary to the British practice, which required parliamentary implementation through statute before treaties could be applied by courts as law of the land, and was unprecedented in the practice of other nations.²⁶⁶

During the Confederation, Jay and Hamilton had developed the doctrine in an effort to thwart the resistance of the state legislatures to implementation of the Treaty of Peace. They argued that Congress's treaties were necessarily the supreme law of the land and not only repealed any existing state laws standing in their way, but also invali-

²⁶⁵ On the immediate precedent for the Supremacy Clause in Foreign Secretary John Jay's report in 1786 on state violations of the Treaty of Peace, see *supra* notes 139–40 and accompanying text, *infra* notes 275, 316–17, and accompanying text, and also Golove, *supra* note 71, at 1120 & n.120. The legal concept was not originally Jay's, however, having been articulated even earlier by both Hamilton and Jefferson. See *supra* notes 109–14 and accompanying text; see also Golove *supra* note 71, at 1115 & n.98. On the activities of Hamilton and Jay during the Confederation, see *supra* notes 104–40 and accompanying text and also Golove, *supra* note 71, at 1124–26.

²⁶⁶ The seminal early decision affirming the self-executing treaty doctrine is *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). For further discussion of *Ware*, see *supra* note 151 and *infra* notes 269, 393, 438–47, and accompanying text. On the founding history with respect to the doctrine, and later developments, see, for example, Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as 'Supreme Law of the Land.'* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999). On the early British practice, see Flaherty, *supra*, at 2108–12. The leading early Supreme Court decision introducing the distinction between self-executing and non-self-executing treaties is *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). In *Foster*, Chief Justice Marshall, writing for the Court, noted that treaties, in most countries, are not automatically effective as domestic law, “especially so far as [their] operation is infra-territorial, but [are] carried into execution by the sovereign power.” *Id.* However, the Constitution established a different approach by “declar[ing] a treaty to be the law of the land.” *Id.* At the same time, Marshall further explained some treaty provisions are not self-executing because “the terms of the stipulation import a contract,” in which case “the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.” *Id.* Ironically, after holding the treaty with Spain at issue in *Foster* to be non-self-executing, the Court, a few years later, overturned itself on the basis of a new translation of the Spanish text, finding that the treaty was, after all, self-executing. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833). For further discussion of the self-executing treaty doctrine, see *infra* notes 417–43 and accompanying text.

dated any subsequently enacted state laws that sought to impede state judicial application of a treaty's legal obligations.²⁶⁷ The argument received a mixed reception.²⁶⁸ Many doubted whether it was a valid interpretation of the Articles of Confederation, which did not contain a Supremacy Clause.²⁶⁹ However, towards the end of the Confederation, Jay convinced Congress to formally adopt his interpretation of the Articles and to insist, albeit in Congress's feeble way, that the state legislatures acknowledge its validity.²⁷⁰

It is therefore striking that the Supremacy Clause embraced Jay's doctrine and took it a step further. Whereas during the Confederation the principal concern of Federalists like Jay and Hamilton had been to ensure that the states complied with the nation's treaty obligations, the Supremacy Clause applied that idea not only to the states, but to the House of Representatives as well. The Treaty Clause already had excluded the most popular branch from participating in the making of treaties, leaving that responsibility to the President and the Senate.²⁷¹ The Supremacy Clause then removed the need for House participa-

²⁶⁷ See *supra* notes 109–14 and accompanying text (discussing Alexander Hamilton); *supra* notes 139–40 and accompanying text (discussing John Jay).

²⁶⁸ See *supra* notes 134–38 and accompanying text; Golove, *supra* note 71, at 1125–27.

²⁶⁹ See *id.* at 1125–26. On the Supreme Court's later treatment of the issue, with an extended discussion of the relevant history, see *Ware*, 3 U.S. (3 Dall.) at 220, 236 (Chase, J.) (expressing view that treaties were self-executing during Confederation); *id.* at 256, 272–77 (Iredell, J., concurring in part and dissenting in part) (discussing relevant history and concluding that treaties were not self-executing under Confederation). For further discussion of the debate in *Ware* over self-executing treaties, see *supra* notes 151, 266, and accompanying text as well as *infra* notes 393, 438–47, and accompanying text.

²⁷⁰ On Jay's report, see *supra* notes 139–40, 262, and accompanying text, *infra* notes 316–17 and accompanying text, and also Golove, *supra* note 71, at 1126–27. Congress's resolution provided that:

[T]he legislatures of the several states cannot of right pass any act or acts for interpreting, explaining or construing a national treaty . . . nor for restraining, limiting or in any manner impeding, retarding or counteracting the operation and execution of the same; for that on being constitutionally made, ratified and published, they become in virtue of the confederation, part of the law of the land

4 SECRET JOURNALS OF CONGRESS, *supra* note 139, at 295 (Mar. 21, 1787). Congress also sent a circular letter to the states elaborating on the basis for its resolution. See *id.* at 329–38. In the letter, Congress repeated Jay's position on self-execution and emphasized the judicial character of treaty interpretation and enforcement. See *id.* at 331–34, 337 (recommending that “the business . . . be turned over to its proper department, viz. the judicial; and the courts of law will find no difficulty in deciding whether any particular act or clause is or is not contrary to the treaty”); see also *supra* note 140.

²⁷¹ See U.S. CONST. art. II, § 2, cl. 2. The Treaty Clause provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” *Id.* On the reasons for excluding the House, see *Federalist 3* (John Jay), *supra* note 1, at 15–16, *Federalist 64* (John Jay), *supra* note 1, at 432–36, and *Federalist 75* (Alexander Hamilton), *supra* note 1, at 506–07. For further discussion, see also Golove, *supra* note 71, at 1135–43.

tion not only in the making of treaties, but in the adoption, repeal, and modification of laws necessary to execute the American side of a treaty bargain. That the framers adopted this approach reflects the broader lesson that they had drawn from their experience during the Confederation. In the face of an impassioned public, popular assemblies would be too vulnerable to immediate political pressures to uphold national obligations reliably. That responsibility, they concluded, ought to be vested, whenever possible, in the courts, with their structurally guaranteed independence from the political branches, and otherwise in the President and Senate.

The framers' approach caused consternation among some, and it was a key point to which Antifederalists objected and which they sought to exploit in their political campaign to defeat the Constitution.²⁷² But Jay explained the basic rationale clearly, if delicately, in his essay in *The Federalist Papers* on the treaty power. Responding to those who objected to the exclusion of the House from treaty-making, he observed:

Although the absolute necessity of system in the conduct of any business, is universally known and acknowledged, yet the high importance of it in national affairs has not yet become sufficiently impressed on the public mind. They who wish to commit the power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances²⁷³

²⁷² Antifederalist opposition to the treaty power focused on the combined exclusion of the House from the treaty-making process and the endowing of treaties with status as supreme law of the land. For an excellent discussion of the relevant founding debates over self-execution, see Flaherty, *supra* note 266, at 2120–51. Antifederalists were concerned about self-execution because it excluded the House from any participation in the treaty-making process, not because of skepticism about the need to ensure compliance with international commitments. They wanted assurance that the more representative House would have a check over the President and Senate in foreign policy-making, which would not be the case if the House neither participated in the advice and consent process, nor had a necessary role in implementing treaties once they were adopted by the President and Senate. In any case, the text of the Supremacy Clause leaves little room for dispute on the Constitution's embrace of self-execution. There would have been little or no reason to include treaties, along with the Constitution and statutes, as "supreme law of the land" if treaties became supreme law only upon legislative implementation.

²⁷³ THE FEDERALIST NO. 64 (John Jay), *supra* note 1, at 433–34. Jay also dismissed objections to the decision to make treaties supreme law of the land and, thus, to have the status of laws. *See id.* at 436 ("Some are displeased with it, not on account of any errors or defects in it, but because as the treaties when made are to have the force of laws . . ."). For further discussion, see *infra* note 318 and accompanying text. Hamilton provided a similar explanation for the exclusion of the House:

He was less gentle when he explained that senators—in implicit contrast to members of the House—“will not be liable to be deceived by those brilliant appearances of genius and patriotism, which like transient meteors sometimes mislead as well as dazzle.”²⁷⁴ William Davie, who had been a delegate to the Philadelphia Convention, was more direct in his remarks on the treaty power during the North Carolina Ratifying Convention. Defending the exclusion of the House and the treatment of treaties as supreme law of the land, he explained that this approach was necessary “to prevent their [i.e., treaties] being impeded, or carried into effect, by the violence, animosity, and heat of parties, which too often infect numerous bodies.”²⁷⁵

The Supremacy Clause’s inclusion of self-execution into the new constitutional system, and particularly its application to the House of Representatives, thus reflected the framers’ appreciation of the special structural problem that compliance with international obligations posed in a republican government. It also constituted a creative solution to this structural dilemma, much as the development of judicial review was an innovative solution to the structural danger of legislative oppression of a minority.²⁷⁶ Recognition of the need to balance

The fluctuating, and taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, *secrecy* and dispatch; are incompatible with the genius of a body so variable and so numerous.

THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 1, at 507. He likewise affirmed that treaties would “have the force of law.” *Id.* at 504.

²⁷⁴ THE FEDERALIST NO. 64 (John Jay), *supra* note 1, at 433.

²⁷⁵ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 119–20 (statement of W. Davie) (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d. ed. 1836). Davie then went on to affirm the Jay-Hamilton interpretation of the Articles. Referring to the resistance of the states to complying with the Treaty of Peace and the decision by the North Carolina legislature to pass a law to carry the treaty into effect, he argued that treaties had, in fact, been the supreme law of the land under the Confederation as well:

But no doubt that treaty was the supreme law of the land without the sanction of the Assembly; because, by the Confederation, Congress had power to make treaties. It was one of those original rights of sovereignty which were vested in them; and it was not the deficiency of constitutional authority in Congress to make treaties that produced the necessity of a law to declare their validity; but it was owing to the entire imbecility of the Confederation.

Id. at 120. For discussion of the dispute over self-execution during the Confederation, see *supra* notes 110–14, 139–40, 262, 265–70 and accompanying text and *infra* notes 441–42 and accompanying text.

²⁷⁶ On the origins of constitutional judicial review in early judicial applications of treaties and the law of nations against state statutes, see *supra* notes 103, 109–33, 144–46, and accompanying text. Both of these innovations would inspire imitation by democratic

majoritarianism with the imperative to uphold other values central to the Revolution underlay both practices. In the case of treaties, what was at stake was the “sanctity of plighted faith,” the “honor” and “respectability” of the nation, and enlightened self-interest, all of which would be threatened if popular excesses were not properly managed.²⁷⁷

If the Constitution’s provisions on treaties are relatively clear and explicit, its treatment of the law of nations is more difficult to parse, especially for contemporary lawyers. The Supremacy Clause does not mention the law of nations. Indeed, the only provision that does is the Offenses Clause, which grants Congress the power to define and punish offenses against the law of nations.²⁷⁸ That Clause was added to fill a gap in the national government’s powers which had emerged during the Confederation, when states proved dilatory in punishing individuals who had breached protected rights of foreign nations in the United States and thereby provoked diplomatic controversy.²⁷⁹

nations in the future. Thus, for example, judicial review became a widespread practice in Europe and elsewhere after World War II, *see* VICTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* 29 (2009), and the doctrine of direct effect in the European Union, and in some of its member states, is an analogue of the self-executing treaty doctrine first devised by the American framers. *See* Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 *NW. J. INT’L L. & BUS.* 556, 572–75 (1996) (describing European Union doctrine of direct effects).

²⁷⁷ Jay and Hamilton made these points repeatedly throughout their essays in *The Federalist Papers* dedicated to the treaty power and the role of the federal judiciary. *See, e.g.*, THE FEDERALIST NO. 3 (John Jay), *supra* note 1, at 15–16; THE FEDERALIST NO. 64 (John Jay), *supra* note 1, at 432–33; THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 1, at 506–07 (arguing against giving House of Representatives role in treaty-making).

²⁷⁸ U.S. CONST. art. I, § 8, cl. 10.

²⁷⁹ The most salient case involved an attack on a French diplomat. On the importance of the so-called Marbois affair, *see* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 *COLUM. L. REV.* 830, 860–61 (2006). Madison’s explanation of the Offenses Clause focused on this rationale. *See* THE FEDERALIST NO. 42 (James Madison), *supra* note 1, at 280–81 (noting that Articles of Confederation “contain no provision for the case of offences against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations”). The proper interpretation of the Offenses Clause has been subject to a wide range of conflicting claims. *See, e.g.*, J. Andrew Kent, *Congress’s Under-Appreciated Power To Define and Punish Offenses Against the Law of Nations*, 85 *TEX. L. REV.* 843, 848, 852 (2007) (reviewing divergent interpretations of Offenses Clause and arguing that it provided authority to punish not only individuals but also foreign states for offenses against law of nations); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power To “Define and Punish . . . Offenses Against the Law of Nations,”* 42 *WM. & MARY L. REV.* 447, 454, 458–62 (2000) (describing dispute over interpretation of Offenses Clause and arguing that it allowed imposition of “civil or criminal regulations and sanctions” for violations of international law). For further discussion of the Offenses Clause, *see supra* note 251 and accompanying text.

The Offenses Clause was a minor provision. Beyond its evident concern for ensuring that the law of nations would be respected, it was not framed for the purpose of defining more generally the role of the law of nations in the new constitutional order.

Despite this single mention of “the law of nations,” the framers were as concerned with national compliance with the law of nations as they were with compliance with treaties.²⁸⁰ Indeed, many of the Constitution’s provisions refer to key institutions and doctrines that were part of the early modern law of nations. As with treaties, the framers incorporated various mechanisms for ensuring that the new government would be in a position to uphold the nation’s duties. Arguably, they went so far as to incorporate portions of the law of nations into the powers that the Constitution delegated to the national government and thereby to endow those portions with a kind of constitutional status.²⁸¹ In any case, contemporaries realized—as modern readers often cannot—that many clauses referred directly to recognized principles, concepts, and institutions of the law of nations. Among such references are the grants to Congress of the power to define and punish piracies and felonies on the high seas, to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water.²⁸² The commander-in-chief and treaty powers, like the powers to receive and appoint ambassadors, all lodged in the President, provide further examples.²⁸³

The framers adopted a multipronged strategy for ensuring respect for the law of nations that was in many respects similar to their strategy for treaties. Here, too, they sought to avoid placing too much responsibility for upholding the law of nations on the House, instead shifting a portion of that duty to the courts. Compared to the self-executing treaty doctrine, the mechanism that they employed for achieving this result is less obvious today; yet it was actually more conventional. It could be less explicit because the framers borrowed it

²⁸⁰ On the framers’ intense concern about violations of the law of nations, see *supra* notes 39–41, 104–33, 139–45, 171–76 and accompanying text.

²⁸¹ See David Golove, *A Just War Constitution: Historical Practice, Present Prospects* 20–48 (unpublished manuscript, on file with the *New York University Law Review*); *infra* notes 290–91, 312–19, 422–23, 429–31, and accompanying text.

²⁸² U.S. CONST. art. I, § 8, cls. 10, 11. Less obviously, but equally important, were provisions that sought to assure foreign governments, and their citizens, that the new nation would not seek to escape from obligations incurred during the Confederation. The Debts Clause, for example, provided that “[A]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.” U.S. CONST. art. VI, § 1.

²⁸³ See *id.* art. II, § 2, cls. 1, 2; *id.* § 3.

from British practice, rather than, as in the case of self-execution, rejecting the long-established British approach.

Without any specific parliamentary authorization, the British Admiralty Courts, when exercising prize jurisdiction, had for at least two centuries applied the law of nations as the governing rules of decision and repeatedly declared themselves to be courts of the law of nations.²⁸⁴ In the mid-eighteenth century, the common law courts, under the direction of Lord Mansfield, likewise declared that the law of nations was part of the law of the land and that the judiciary would enforce it without the need for any act of Parliament so directing.²⁸⁵ Significantly, courts in the United States during the Confederation, including Congress's Court of Appeals for Prize Cases as well as state common law courts, had followed the British practice, finding even in the absence of statutory authorization that the law of nations was incorporated into the common law.²⁸⁶ The framers could therefore assume as a background principle that the federal courts would continue this practice without the need for any explicit direction in the constitutional text or, for that matter, in statutes adopted by Congress.

In view of this jurisprudential background, Article III of the Constitution, dealing with the powers of the federal judiciary, appears in a different light. All that was needed for the federal courts, like their British complements, to incorporate the law of nations into the law of the land was a grant of jurisdiction over cases in which questions determined by the law of nations would arise. Acting on this assumption, the framers focused not on declaring the law of nations to be the supreme law of the land, but instead on extending the judicial power to every kind of justiciable controversy that could be expected to raise questions under the law of nations—or at least those that might implicate foreign affairs. That is precisely how they framed Article III, thereby removing many disputes over the law of nations

²⁸⁴ See Dickinson, *supra* note 7, at 31; David Golove, The Commander-in-Chief, The Law of War and the Constitution (2009) (unpublished manuscript, on file with the *New York University Law Review*).

²⁸⁵ Jay, *supra* note 7, at 824. Blackstone unequivocally declared that “the law of nations . . . is here adopted in it's full extent by the common law, and is held to be a part of the law of the land.” BLACKSTONE, *supra* note 13, at *67. The most famous of Mansfield's decisions finding that the law of nations was incorporated into the laws of England was *Triquet v. Bath*, (1764) 97 Eng. Rep. 936 (K.B.). For further discussion of *Triquet*, the English incorporation doctrine and its American embrace, see *supra* notes 115–18 and accompanying text and *infra* notes 299–304, 342, 363–74, and accompanying text.

²⁸⁶ On the Court of Appeals for Prize Cases, see HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775–1787 (1977) and also Dickinson, *supra* note 7, at 33–34 and Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1084–88 (1985).

from the political process, ensuring that its principles would receive uniform interpretation, and making the federal courts available to remedy violations in appropriate cases.²⁸⁷

Most importantly, Article III granted the federal courts jurisdiction over maritime and admiralty disputes.²⁸⁸ It was well understood that the greatest number of cases raising questions under the law of nations would fall under admiralty jurisdiction, and for this reason, as Hamilton put it, even

the most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they

²⁸⁷ Stewart Jay provides one of the best discussions of the law of nations and Article III of the Constitution. See Jay, *supra* note 7, at 829–33; see also Bellia & Clark, *supra* note 7, at 33–46. The drafting history makes clear that providing federal court jurisdiction over cases in which questions under the law of nations would arise was among the framers' highest priorities. Early in the Convention, George Mason reported that "[t]he most prevalent idea I think at present is . . . to establish . . . a judiciary system with cognizance of all such matters as depend upon the law of nations." Letter from George Mason to Arthur Lee (May 21, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24 (Max Farrand ed., rev. ed. 1937). Nevertheless, for reasons that are not recorded anywhere, the framers ultimately removed any specific reference to cases arising under the law of nations from Article III. One possible explanation was their recognition that the contemporary law of nations was understood to include a number of subjects, such as the law merchant, which had little to do with diplomatic affairs and which the framers thought were best left to the decisions of the state courts, at least when such cases did not involve foreign citizens. See Jay, *supra* note 7, at 832 (pointing to law merchant, which was then considered part of law of nations but which applied to commercial transactions even when they involved no foreign parties).

Alternatively, the framers may have understood the law of nations, in whole or in part, to be federal law for purposes of Article III and the Supremacy Clause. As we shall see, it is clear that in the period immediately following adoption of the Constitution, most leading constitutional authorities, including Hamilton, Jefferson, Madison, and several Supreme Court Justices, were of this view. See *infra* notes 363–74 and accompanying text. However, the issue later became entangled with the great controversies over the federal common law, and the status of the law of nations as federal law grew increasingly uncertain in the period after the Jeffersonian Revolution. See *infra* notes 342, 373–74, and accompanying text. Even leaving aside the application of federal question jurisdiction, in constructing Article III, the framers were careful to provide for federal jurisdiction over every kind of case involving the law of nations that might affect the new nation's foreign affairs. As Professor Jay concludes, "[A]rticle III gave the federal courts potential jurisdiction over every type of judicially cognizable case involving the law of nations that the Framers thought needed treatment by the federal judiciary." Jay, *supra* note 7 at 831. Hamilton's extended discussion of Article III in *The Federalist Papers* makes this point clear. See THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 443–49; THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 1, at 449–59; THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 1, at 463–78.

²⁸⁸ See U.S. CONST. art. III, § 2, cl. 1. Prize and admiralty suits proved to be the bread and butter of the early federal docket. See generally, Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855 (2005).

fall within the considerations which are relative to the public peace.²⁸⁹

There are several striking features of the admiralty jurisdiction worth underscoring. First is the puzzle that, although Article III grants the federal courts admiralty jurisdiction, Article I nowhere grants Congress a complementary legislative power over admiralty and maritime law. This lapse is probably best explained by the widespread understanding that admiralty law was part of the law of nations and would be governed by it, not by statute. Because the new government intended to observe the law of nations, it was sufficient simply to grant the courts jurisdiction to apply the law of nations. Any further grant of legislative power over the subject was unnecessary.²⁹⁰ Indeed, it took more than a century for the Supreme Court finally to rule that the grant of admiralty jurisdiction to the federal courts implied a corresponding legislative power in Congress over the subject, and by that time, the admiralty and maritime law governed a wide range of purely domestic transactions in which foreign states had little or no interest.²⁹¹

Second, admiralty jurisdiction included jurisdiction over prize cases, which were among the most numerous and important types of cases raising questions under the law of nations at the time. Arising in wartime, prize cases frequently involved delicate international law questions.²⁹² Moreover, it was general international practice—

²⁸⁹ THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 446.

²⁹⁰ See Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1230–31 (1954) (explaining absence of grant of admiralty power to Congress in part on ground that “the maritime law was viewed less as a municipal code than as an international law of the sea, a set of rules accepted by all seafaring nations”). For further discussion, see *supra* note 281 and *infra* notes 312–19, 422–23, 426–31, and accompanying text.

²⁹¹ See *id.* at 1230–37. Until the Supreme Court’s decision in *In re Garnett*, 141 U.S. 1 (1891), courts scrutinized congressional legislation affecting maritime matters under the commerce power, which imposed important limitations on the scope of Congress’s power over intrastate transactions. See Note, *supra* note 290, at 1232–34 (describing relevant cases). In *Garnett*, the Court reconceptualized a century of precedents and found that the Constitution implicitly granted Congress legislative power over maritime law independently of the commerce power. *Garnett*, 141 U.S. at 12–18; see also Note, *supra* note 290, at 1234–36 (describing changes in subject matter to which maritime jurisdiction applied by time of *Garnett* decision).

²⁹² On the history of prize and the many great controversies to which it gave rise, see generally 1 PHILIP C. JESSUP & FRANCIS DEÁK, NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW: THE ORIGINS (1935) (recounting development of neutrality and prize up to French Revolution); 2 W. ALISON PHILLIPS & ARTHUR H. REEDE, NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW: THE NAPOLEONIC PERIOD (1936) (describing neutrality and prize law during and after French Revolution and Napoleonic wars). The United States twice went to war—in 1798 with France and in 1812 with Great Britain—over perceived violations of U.S. neutral rights. PHILLIPS & REEDE, *supra*, at 18, 26.

mandated by the law of nations—that states establish and maintain prize courts that would apply the law of nations to all of their belligerent captures of property on the seas.²⁹³ Thus, the grant of admiralty jurisdiction to the federal courts—with their constitutionally guaranteed independence from the legislative and executive branches—was an important signal to European powers of the willingness and capacity of the new nation to uphold its legal obligations.

Finally, although the framers sought to depoliticize enforcement of the law of nations by assigning jurisdiction over those disputes amenable to judicial resolution to the federal judiciary, they also recognized the danger that juries could pose to the proper administration of cases of this kind. They were aware, for example, of the recommendation of the Continental Congress during the early years of the Revolutionary War that the states establish admiralty courts to try prize matters and that they employ juries in such trials, contrary to accepted international practice.²⁹⁴ Congress later realized its error and, citing international practice, revised its earlier resolution, recommending instead that the states proceed without juries “in all cases, where the civil law, the law of nations, and the resolutions of Congress, are the rules of their proceeding and adjudication.”²⁹⁵ The revision came too late, however, to avoid an extended dispute with Pennsylvania over a decision rendered by a Pennsylvania jury, whose verdict had been overturned by Congress’s Court of Appeals for Prize Cases.²⁹⁶ In any event, in view of their structural concerns about popular influence over enforcement of the law of nations, the framers consciously declined to extend the jury trial right to admiralty cases. In defending this decision, Hamilton explained:

²⁹³ See 3 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW §§ CCCLVII–CCCLXX, at 339–48 (Philadelphia, T. & J.W. Johnson & Co. 1857) (describing applicable law); 1 JESSUP & DEÁK, *supra* note 292, at 203–11 (same).

²⁹⁴ See 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 371–75 (Worthington Chauncey Ford ed., 1905) (Nov. 25, 1775) (resolving to recommend establishment of prize courts). In providing for jury trials, Congress was no doubt responding to the widespread criticisms that had been leveled at the British Vice-Admiralty courts for their lack of juries. BOURGUIGNON, *supra* note 286, at 46.

²⁹⁵ 16 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 62 (Gaillard Hunt ed., 1910) (Jan. 15, 1780); see also BOURGUIGNON, *supra* note 286, at 115 (describing congressional proceedings).

²⁹⁶ See BOURGUIGNON, *supra* note 286, at 101–11 (recounting dispute over *Olmstead* case). Pennsylvania courts refused to comply with the judgment of Congress, and the dispute persisted for thirty years, from 1779 until 1809, when the Supreme Court finally issued a definitive ruling against the state. See *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809). Even then, Pennsylvania resisted, and the controversy did not finally end until two Pennsylvania militia officers, who had forcibly resisted federal marshals seeking to enforce the Supreme Court’s judgment, were convicted in federal court. For a discussion, see Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 409 (2005).

I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations that is, in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries. There would of course be always danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war.²⁹⁷

Hamilton further noted, as adding “great weight to this remark,” that the method of determining [prize cases] has been thought worthy of particular regulation in various treaties between different powers of Europe, and that pursuant to such treaties they are determinable in Great Britain in the last resort before the king himself in his privy council, where the fact as well as the law undergoes a re-examination.²⁹⁸

Thus, the same underlying concerns about the dangers of inflamed popular sentiment that led the framers to embrace the self-executing treaty doctrine and the British incorporation doctrine—both of which shifted responsibility for compliance from the House to the courts—also led them to limit the right to jury trial in cases that would turn on the law of nations.

Although admiralty jurisdiction was by far the most important category of cases raising law of nations questions, Article III of the Constitution also granted the federal courts jurisdiction over all suits affecting ambassadors and other public ministers and consuls.²⁹⁹ These too were matters frequently governed by the law of nations, and the grant of federal jurisdiction meant that the federal courts would be available in this particularly delicate class of cases—involving foreign diplomatic agents in the United States—to ensure fair and unbiased treatment to the agents and uniform application of

²⁹⁷ THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 1, at 568.

²⁹⁸ *Id.* On the concerns about the localist bias of juries, and its relationship to the decision to create the federal judiciary in Article III of the Constitution, see Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1458–78 (1989). For a revealing discussion of the framers’ deep concerns about the role of juries in cases brought to enforce obligations under the law of nations, including in suits by British creditors seeking to enforce their rights under Article IV of the Treaty of Peace, see Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 168–79 (2001). For further discussion of the role of juries in cases involving the law of nations, see *infra* notes 371–72.

²⁹⁹ U.S. CONST. art. III, § 2, cl. 1.

the law of nations.³⁰⁰ These kinds of suits were obviously matters of great importance from the perspective of foreign states. During the Confederation, the absence of any federal judicial tribunal with the requisite jurisdiction had been the source of diplomatic complaint in connection with several incidents occurring in the states.³⁰¹ It had also contributed to pressure on the government to agree to humiliating consular treaties, giving foreign states extraterritorial jurisdiction in U.S. territory.³⁰² Again, the governing assumption was that the law of nations would apply of its own force without the need for any legislative act of incorporation. Here, too, the framers found yet another mechanism for reducing the likelihood that popular feeling might improperly impede the impartial administration of justice in these cases: In a dramatic recognition of the delicacy and importance of these cases, Article III granted the Supreme Court original jurisdiction over this entire category of cases.³⁰³ Finally, for similar reasons, Article III also granted the federal courts jurisdiction over all suits between states or their citizens and foreign states or their citizens.³⁰⁴

³⁰⁰ See THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 536 (explaining reasons for extending federal court jurisdiction to cases affecting ambassadors); THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 1, at 548 (same). Cases affecting ambassadors, Hamilton explained, “have an evident connection with the preservation of the national peace.” THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 540.

³⁰¹ See Lee, *supra* note 279, at 860–62 (recounting two major incidents during Confederation—Marbois and van Berckel affairs—in which federal authorities were embarrassed by their inability to provide federal judicial forum to ambassadors whose law of nations rights had been violated by private persons); *supra* note 216 and accompanying text (describing Madison’s frustration over Marbois incident). The Marbois incident gave rise to a famous Pennsylvania state court decision in which the court found that the law of nations was part of the law of the state. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (PA 1784).

³⁰² See Emory R. Johnson, *The Early History of the United States Consular Service: 1776–1792*, 13 POL. SCI. Q. 19, 33–39 (1898) (describing background of much-regretted Consular Convention of 1788 with France, including difficulties experienced by French consular officials in state courts, which provoked French foreign minister to insist on ratification of Convention). For discussion of the defects of the Convention from the American point of view but the necessity of approving it nonetheless, see Golove, *supra* note 71, at 1149–50.

³⁰³ U.S. CONST. art. III, § 2, cl. 2; see also THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 1, at 548 (noting that all cases affecting ambassadors are “so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation”).

³⁰⁴ U.S. CONST. art. III, § 2, cl. 9; see also THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 536. As Hamilton explained, because “the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war,” it followed that the federal courts should have jurisdiction over all cases in which citizens of other countries are parties. *Id.* “This is not less essential to the preservation of the public faith, than to the security of the public tranquility.” *Id.* One might suppose, he noted, that there was a distinction between cases arising under

Depending on the context, the law of nations would frequently govern these suits too.

Despite these provisions of Article III, it would be a mistake to think that the framers expected the courts to have primary responsibility for ensuring that the new government would comply with the law of nations or even treaties. Contemporaneous concepts of justiciability limited the jurisdiction of courts, and, consequently, the political branches would necessarily share responsibility with the courts for conforming the conduct of the United States to its international duties. The burden of this responsibility did not always strike even the most highly regarded government officials as a desirable state of affairs. Early on, during the Genêt Affair,³⁰⁵ when the Washington administration faced difficult questions about the scope of U.S. neutral duties in the wars of the French Revolution, the cabinet drew up a long list of legal questions about the law of nations and existing treaty commitments and sent them to the Justices of the Supreme Court in the hope of obtaining an advisory opinion. Besides the intrinsic difficulty of answering the questions, the cabinet members felt caught, as the framers had anticipated, between the demands of an inflamed public and their legal duties under the law of nations. Their request was an effort to put some distance between themselves and the highly unpopular decisions that they felt compelled to take. In response, Chief Justice Jay penned his famous letter declining, on behalf of the Court, to offer the requested advisory opinion. The Court thus left the administration to its own devices, offering only its confidence in Washington's ability to "discern what is right" and in the capacity of his "usual prudence, decision, and firmness [to] surmount every obstacle" to that end.³⁰⁶

In view of the inevitability that the political branches would often have to administer the international duties of the nation without the supervision of the courts, the framers were careful not to leave these matters simply to the free play of political discretion. This decision was most obvious in the case of the President, who, in conducting diplomatic relations and war, would hold the lion's share of responsibility

treaties or the law of nations, and those arising only under the municipal law. However, it was "at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general law of nations." *Id.* Therefore, the jurisdiction of the federal courts extended to all cases in which a foreign citizen was a party.

³⁰⁵ See *infra* Part III.A.

³⁰⁶ Letter from Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 JAY PAPERS, *supra* note 102, at 488–89. For further discussion of this incident, see *infra* notes 349–60 and accompanying text.

for ensuring that the United States upheld its duties. Thus, for example, the Constitution made the President the “Commander in Chief” of the armed forces.³⁰⁷ The office of Commander in Chief, however, derived from the law of nations and implicitly carried with it a duty, when exercising the vast discretion accorded military officials, to act in accordance with the “rules of civilized warfare” embodied in the laws of war.³⁰⁸ So too with his other foreign affairs powers. Indeed, the point was overdetermined in the text. The President’s most important general power, or rather responsibility, was his duty to “take Care that the Laws be faithfully executed,” a reference not only to the laws of Congress and to the Constitution itself, but to treaties and the law of nations.³⁰⁹ As Jay put it, reflecting the English practice, the latter “make Part of the Laws of this, and of every other civilized Nation.”³¹⁰ The President thus had no more authority to violate the nation’s international legal obligations than to disregard an act of Congress.³¹¹

Congress’s powers were also entangled with the law of nations in a manner that arguably suggested it could not simply disregard that body of law at will. A hint of the framers’ thinking along these lines is suggested, as already noted, by the failure of Article I to include a corresponding legislative power over maritime and admiralty law to complement the Article III jurisdiction of the federal courts.³¹² This absence suggests that the founders’ understanding was that congressional power was neither needed—since the courts would apply the appropriate body of law on their own—nor desirable, as it might imply a power in Congress to act in disregard of the law of nations, which, evidently, was not intended. More generally, the terms that the Constitution employed in its grants of foreign affairs powers to Congress came from the lexicon of the law of nations—terms like “[t]o declare War,” “Letters of Marque and Reprisal,” “Captures on

³⁰⁷ U.S. CONST. art. II, § 2, cl. 1.

³⁰⁸ See Golove, *supra* note 284, at 11–28 (unpublished manuscript, on file with the *New York University Law Review*).

³⁰⁹ U.S. CONST. art. II, § 3. For a helpful historical discussion of international law as a constraint on presidential power, see Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1245–49 (2005).

³¹⁰ John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (April 12, 1790) [hereinafter Jay’s Charge, New York], in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: CASES: 1796–1797, at 29 (Maeva Marcus ed., 1988) [hereinafter 2 DOCUMENTARY HISTORY].

³¹¹ For affirmations of this understanding of the President’s powers by both Madison and Hamilton shortly after adoption of the Constitution see the discussion of the celebrated *Pacificus-Helvidius* debate, *infra* note 343 and accompanying text and also notes 375–85 and accompanying text.

³¹² See *supra* notes 290–91 and accompanying text.

Land and Water,” and “Offences” against the law of nations.³¹³ This deliberate borrowing suggested that the established principles of the law of nations might define the scope of the powers themselves.³¹⁴ Congress could, for example, wage war by adopting a declaration of war and authorizing captures on land and sea, but, arguably, it could authorize only those captures and other acts that were consistent with the standards of civilized warfare embodied in the laws of war.³¹⁵

Similarly, the text also arguably suggested that Congress would be without authority simply to disregard national treaty obligations. As Foreign Secretary, Jay had made this claim about the state legislatures during the Confederation, but, in explaining the basis for this view, he had reached beyond federalism arguments and rested on a more general principle. A treaty, he explained,

derives its obligation from its being a compact between the Sovereign of this, and the Sovereign of another Nation; but Laws or statutes derive their force from being Acts of a Legislature competent to the passing of them. Hence it is clear, that treaties must be implicitly received and observed by every member of the Nation³¹⁶

This fundamental difference between the nature of treaties and legislation, he argued, meant that legislatures were without power to disregard treaty obligations:

When doubts arise respecting the construction of State Laws, it is common and proper for the State Legislatures by explanatory or declaratory Acts to remove those doubts; but when doubts arise respecting the construction of a treaty, they are so far from being cognizable by a State Legislature, *that Congress itself have no authority to settle and determine them. For as the Legislature only, which constitutionally passes a law, has power to revise and amend it, so the Sovereigns only, who are parties to the treaty, have power by posterior Articles and mutual consent to correct or explain it.*

All doubts . . . respecting the meaning of a treaty . . . are to be heard and decided in the Courts of Justice having Cognizance of the causes in which they arise, and whose duty it is to determine them

³¹³ U.S. CONST. art. I, § 8, cls. 10, 11.

³¹⁴ For use of these terms in Vattel’s treatise, see EMMERICH DE VATTEL, *THE LAW OF NATIONS* 315 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson, 7th American ed., 1849) (describing form of “the declaration of war”); *id.* at 284–85 (defining “*letters of marque*” and grants of reprisals); *id.* at 299 (describing commission of “commander in chief”); *id.* at 384–92 (outlining right of captures or “acquisitions by war”); *id.* at 370 (“[T]he natural and voluntary law of nations does not allow us to inflict such punishments, except for enormous offences against the law of nations . . .”).

³¹⁵ For discussion of this issue, see Golove, *supra* note 281, at 20–48.

³¹⁶ 4 *SECRET JOURNALS OF CONGRESS*, *supra* note 139, at 204.

according to the rules and maxims established by the laws of nations for the interpretation of treaties.³¹⁷

Jay returned to this point in his discussion of the treaty power in *Federalist 64*. Explaining what the Supremacy Clause's language making treaties the "supreme" law of the land implied, he again claimed that even Congress would be obliged to observe treaty obligations:

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. . . . These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.³¹⁸

Under this view, treaties were "supreme" in the strong sense that they were binding on the legislative authority and, in accordance with accepted principles of the law of nations, could be modified or repealed only through diplomatic negotiations.³¹⁹

Whatever the precise meanings of the more ambiguous and potentially far-reaching aspects of the text, the general direction of the framers' approach was clear. Those Federalists who had most closely experienced the difficulties of conducting foreign affairs in the heady populist atmosphere of the Confederation period took the lead in constructing constitutional mechanisms that would facilitate the new government's respect for national obligations and enhance its ability to conduct what they viewed as an honorable, respectable, and effective

³¹⁷ *Id.* at 205.

³¹⁸ THE FEDERALIST NO. 64 (John Jay), *supra* note 1, at 436–37. For reaffirmations of this view by Federalists during the Jay Treaty debate, see *infra* notes 422–23, 429–31, 449–50, and accompanying text.

³¹⁹ Although he did not make the point here, Jay recognized that under the law of nations a state could lawfully terminate a treaty even without the consent of the other contracting party in some instances, as, for example, in response to breaches by the other party. See John Jay's Circuit Court Opinion (June 7, 1793), reprinted in 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: CASES: 1796–1797, at 292, 294–96 (Maeva Marcus ed., 2003) [hereinafter 7 DOCUMENTARY HISTORY].

foreign policy. These mechanisms were essential, in their view, if the new nation was to earn the equal position in the European-centered community of states that it claimed and that many of them desired. They were trying to create a government that had the capacity to act like a “civilized” nation. Whether the external audience for their effort would be convinced, however, still depended on how the new Constitution, and the government it created, performed in the practical operation of government.

Before turning to the two major foreign affairs crises of the 1790s—the Neutrality Crisis and the Jay Treaty controversy—we should emphasize that we do not wish to be understood as making a sweeping claim that the framers sought to root out democratic influences over foreign policy-making. Rather, we make the narrower claim that drawing on their experience under the Confederation, the framers viewed the problem of compliance with treaties and the law of nations as posing a special dilemma. In their view, constitutional engineering was necessary to correct the tendency of republican institutions to be unduly swayed by national passions and short-term interests in controversies over national obligations to foreign states. It was for this reason that responsibility for compliance with international duties had to be removed from too direct a dependence on popular sentiment and representative institutions.

This wariness toward the representative branch did not, however, extend to all aspects of the conduct of foreign affairs. The framers’ thinking about the role of popular opinion was more supple and complex. Indeed, in a radical break with the English constitution and the views of leading theoretical writers, including Locke and Montesquieu, they assigned the power to declare war to the legislature, and they subjected the President’s treaty-making power to a super-majoritarian legislative (in this case, senatorial) check.³²⁰ In these contexts, more direct popular control was, they believed, necessary to prevent the executive from disregarding the rights and interests of the people. “The history of human conduct does not warrant

³²⁰ On the views of Locke and Montesquieu, who were both admirers of the English constitution and of executive control over the “federative” power, see Flaherty, *supra* note 266, at 2105–08. The framers’ decisions to remove the treaty and war-declaring powers from sole executive control were among their most significant departures from conventional practices. Madison emphasized this point in his *Helvidius* essays in 1793. See James Madison, *Helvidius Number 1* (Aug. 24, 1793) [hereinafter *Helvidius Number 1*], reprinted in 15 THE PAPERS OF JAMES MADISON 66, 68 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985) [hereinafter 15 MADISON PAPERS] (dismissing importance of Locke and Montesquieu in light of framers’ decision to depart from their embrace of English constitution’s approach to foreign affairs). For further discussion of Madison’s *Helvidius* essays, see *infra* notes 374–85 and accompanying text.

that exalted opinion of human virtue,” Hamilton explained in relation to the treaty power, “which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.”³²¹

The framers’ thinking about the war powers brought together their dual concern for the rights of the people and for upholding international obligations. In accordance with Enlightenment thinking and the aspirations of the law of nations, they wished to discourage war-making—“clogging rather than facilitating war,” as George Mason put it during the Philadelphia Convention³²²—and they believed that assigning to Congress the momentous power to decide on war or peace would best achieve this goal. The House of Representatives, in particular, under the direct influence of the people, would be wary of expending the blood and treasure of the citizenry except where national honor required it. In this context, it was the President who could not be trusted; executives would naturally be tempted by the prospect of laurels and the manifold powers that accrue to the Commander in Chief in time of war.³²³

In an important essay written only two and a half years after ratification of the Constitution, Madison returned to these themes and

³²¹ THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 1, at 417, 419. The framers’ approach to treaties and war, however, was different. With respect to war, they insisted, for the reasons discussed in the text below, on participation by the whole Congress. In contrast, they excluded the House from any participation in treaty-making. This difference reflected the multiple functions that treaties serve—including in some cases providing a mechanism for resolving disputes over international legal rights—and different assessments of the likely consequences of more direct popular control in each context. Treaties were an intermediate category between law of nations compliance and war, and, hence, received a more nuanced treatment. Federalist thinking about the problem of popular influence over treaty-making was nicely captured by John Marshall in his biography of Washington. Speaking of the treaty power, Marshall explained:

In national contests . . . few men, even among the intelligent, are sensible of the weakness which may exist in their own pretensions, or can allow their full force to the claims of the other party. If the people at large enter keenly into the points of controversy with a foreign power, they can never be satisfied with any equal adjustment of those points, unless other considerations, stronger than abstract reason, afford that satisfaction; nor will it ever be difficult to prove to them . . . that in any practicable commercial [treaty], they give too much, and receive too little.

2 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON, COMMANDER IN CHIEF OF THE AMERICAN FORCES* 364 (Philadelphia, James Crissy, 2d ed. 1836).

³²² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 319 (Max Farrand ed., rev. ed. 1966) (statement of G. Mason).

³²³ See William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695 (1997).

explained how the framers' constitutional engineering had served the dual function of safeguarding the rights of the people and upholding international law. The essay was one of a series of essays theorizing about the role of public opinion and the emergence of parties, and it addressed the question, long a favorite subject of Enlightenment political philosophers, of "universal peace."³²⁴ Rejecting the utopianism of Rousseau and other writers in this tradition, Madison observed that the problem of universal peace could be solved only through the constitutional design of republican governments. He offered the American Constitution as an exemplar illustrating the possibilities, which, "[h]ad Rousseau lived to see," might have enabled him to "escape[] the censure to which his project has [been] exposed."³²⁵

The problem of war, Madison noted, results from two causes, "one flowing from the mere will of the government, the other according with the will of the society itself."³²⁶ The former, he asserted, would remain unsolved until the executive was deprived of all power to decide on war and peace:

[W]hilst war is to depend on those whose ambition, whose revenge, whose avidity, or whose caprice may contradict the sentiment of the community, and yet be uncontroled by it; whilst war is to be declared by those who are to spend the public money, not by those who are to pay it; by those who are to direct the public forces, not by those who are to support them; by those whose power is to be raised, not by those whose chains may be riveted, the disease must continue to be *hereditary* like the government of which it is the offspring.³²⁷

However, this problem was amenable to an "internal," republican remedy—as the U.S. Constitution demonstrated—by assigning to the legislature the power to declare war, to raise armies, and to fund the military forces. By withholding these powers from the executive, the

³²⁴ The essays are reprinted in 14 *THE PAPERS OF JAMES MADISON* (Thomas A. Mason et al. eds., 1983) [hereinafter 14 *MADISON PAPERS*]. For discussion of the public opinion essays, see Colleen A. Sheehan, *Madison and the French Enlightenment: The Authority of Public Opinion*, 59 *WM. & MARY Q.* 925 (2002). Madison's essay is entitled *Universal Peace*. See James Madison, *Universal Peace*, reprinted in 14 *MADISON PAPERS*, *supra*, at 206 [hereinafter Madison, *Universal Peace*].

³²⁵ *Id.* at 207. On the utopian universal peace tradition, see R. Purves, *Prolegomena to Utopian International Projects*, in *GROTIAN SOCIETY PAPERS 1968: STUDIES IN THE HISTORY OF THE LAW OF NATIONS* 100 (C.H. Alexandrowicz ed., 1968). Madison was apparently unaware that Rousseau largely shared his skepticism about the possibility of solving the problem through a scheme of universal confederation.

³²⁶ Madison, *Universal Peace*, *supra* note 324, at 207.

³²⁷ *Id.* at 207.

Constitution made the government's will "subordinate to, or rather the same with, the will of the community."³²⁸

The second cause—war resulting from the will of the society itself, or, in other words, from popular sentiment unconstrained by international justice or the law of nations—was more difficult to solve, but, Madison argued, there were nevertheless republican constitutional solutions that could mitigate this problem as well. This cause, he argued, could "only be controuled by subjecting the will of the society to the reason of the society; by establishing permanent and constitutional maxims of conduct, which may prevail over occasional impressions and inconsiderate pursuits."³²⁹ Here, again, he pointed to the Federal Constitution, finding an implicit principle "that each generation should be made to bear the burden of its own wars, instead of carrying them on, at the expence of other generations" and further "that the taxes composing them, should include a due proportion of such as by their direct operation keep the people awake, along with those, which being wrapped up in other payments, may leave them asleep, to misapplications of their money."³³⁰ These "constitutional maxims" would be effective, Madison observed, because when a nation imposed

such restraints on itself, avarice would be sure to calculate the expences of ambition; in the equipoise of these passions, reason would be free to decide for the public good; and an ample reward would accrue to the state, first, from the avoidance of all its wars of folly, secondly, from the vigor of its unwasted resources for wars of necessity and defence.³³¹

Only if states followed the United States in adopting these mechanisms might "the temple of Janus [] be shut, never to be opened more," and in them lay "the only hope of UNIVERSAL AND PERPETUAL PEACE."³³²

It is therefore incorrect to suggest that the founders believed that democracy and foreign affairs were incompatible or even that international legitimacy was always best served by insulating government decision-making from popular influence. Their theories were far more nuanced. Indeed, in many crucial respects, the Constitution sought to enhance democratic control over the most essential questions that the nation would face as it steered its way through the perils of interna-

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 208.

³³¹ *Id.*

³³² *Id.* Madison returned to these themes only a year and a half later in his *Helvidius* essays. For discussion, see *infra* notes 374–85 and accompanying text.

tional relations. Still, the tension between popular sovereignty and international commitments was real, and its implications for the American constitutional system quickly became both evident and controversial when the new nation faced severe foreign policy crises only a few years after the adoption of its new Constitution.

We turn to two examples of this tension in the 1790s: the Neutrality Crisis and the Jay Treaty controversy.

III

“LIQUIDATING” THE CONSTITUTION: FOREIGN AFFAIRS IN THE FOUNDING GENERATION

The ratification of the Constitution was not the end of the story of the connection between American constitution-making and the pursuit of recognition, but only the beginning. As we have seen, the framers designed the Constitution to create a workable governmental system that could conduct an effective and honorable foreign policy, upholding the new republic’s international duties while at the same time defending its national interests and earning equal standing in the European-centered state system.

Whether the government established under the Constitution actually would achieve these aims remained an open question, no less in the minds of the Federalists who had devised and promoted it than in the minds of foreign governmental officials who had considerable reason to doubt it. Initial hopes on the American side were reflected in early efforts to resolve longstanding diplomatic disputes. For many Federalists, the judiciary figured large in their hopes for a new beginning that would yield a more stable recognition. For example, William Samuel Johnson, a federal senator from Connecticut as well as the president of Columbia College, informed a British diplomat in 1790 that the new federal judiciary would give British creditors “the most perfect satisfaction in their proceedings,” although the impoverishment of many debtors remained a practical obstacle to collection. He added that

it is remarkable that the present Chief Justice (Mr. John Jay) was the Minister for foreign affairs, who reported the various infractions of the Treaty of Peace, by the State Legislatures, and is it possible to suppose, that what he openly acknowledged in his political character, will not equally affect his decisions on the Bench . . . ?³³³

³³³ Letter from Lord Dorchester to Mr. Grenville (May 27, 1790), in *REPORT ON CANADIAN ARCHIVES* 133, 137 (Douglas Brymner ed., Ottawa, Brown Chamberlin 1891); see also Letter from Lord Dorchester to Mr. Grenville (Nov. 20, 1790), in *REPORT ON CANADIAN ARCHIVES*, *supra*, at 163, 165 (communicating Secretary of Northwest Territory Winthrop Sargent’s report that “our Judiciary has declared Treaties with Foreign powers to

Early signs suggested that Europe received these signals as intended. As soon as the Philadelphia Convention completed its business, the three British consuls in America shipped copies of the Constitution across the Atlantic.³³⁴ For at least the next two years, the introduction of an American diplomat to a European court included the transmission of a copy of the Constitution.³³⁵ It seemed to have an effect. For example, some European powers that before had engaged in dilatory negotiations with the United States now moved forward to conclude treaties. The King of Denmark, for instance, informed the congressional emissary that he would renew negotiations for a treaty of commerce “at the instant that the new constitution (this admirable plan, so worthy of the wisdom of the most enlightened men) will have been adopted by the States, to which nothing more was wanted to assure to itself a perfect consideration.”³³⁶ Only a short time after the Constitution came into effect, the American minister to the Netherlands reported on the sudden ability of the United States to obtain loans in Amsterdam on highly favorable terms. He informed Hamilton, in explanation, “that the accounts which are recieved here of the happy effects of our new constitution & the confidence which its present administration has inspired at this place are the real & effi-

be the law of the land; the Judges in general are men whose opinions on this subject are perfectly well ascertained, and nothing but an insurrection in opposition to their decisions can in future prevent the regular and usual course of justice”). For Johnson’s and Winthrop’s identities as the sources quoted in these letters, see *id.* at xli.

³³⁴ Letter from Phineas Bond to the Marquis of Carmarthen (Sept. 20, 1787), Foreign Office 4/5, British National Archives (enclosing Constitution and observing that “the sober and discreet Part of the Community approve of the Plan in its present Form, & where due Consideration is paid to the democratic Temper of the Times, it is perhaps the best Shape in which it could have been handed forth to the People”) (on file with the *New York University Law Review*); Letter from Sir John Temple to the Marquis of Carmarthen, (Oct. 3, 1787), Foreign Office 4/5, British National Archive (enclosing Constitution and noting that “by this New Constitution, which I have no doubt will be adopted, great Powers will indeed rest with the President General of Congress, and Washington will undoubtedly be the first elected to that high station”) (on file with the *New York University Law Review*); Letter from George Miller to the Marquis of Carmarthen (Nov. 17, 1787), Foreign Office 4/5, British National Archives (enclosing Constitution and predicting it would “rescue Congress from that Inefficient situation in which they have long stood, as it grants sufficient powers to comply with, and enforce their Treaties and other National Engagements, without submitting to the Controul of State Legislatures”) (on file with the *New York University Law Review*).

³³⁵ See, e.g., Letter from J.P. Jones to Thomas Jefferson (Mar. 11, 1788), in 3 DCUS, *supra* note 95, at 715, 715–16 (reporting how congressional emissary J.P. Jones presented copy of new constitution to court of Denmark and reply of Danish foreign minister that new constitution improved prospect of treaty of commerce); Letter from J.P. Jones to the Marquis de La Fayette (June 26, 1788), in 3 DCUS, *supra* note 95, at 725, 726 (reporting presentment of new constitution to court of Russia).

³³⁶ Letter from Count de Bernstorff to J.P. Jones (Apr. 4, 1788), in 3 DCUS, *supra* note 95, at 719, 720.

cient causes of the prosperous situation of the credit of the U.S.”³³⁷ Finally, the establishment of the new federal judiciary encouraged British creditors, who believed that they now at least had some chance of recovering pre-revolutionary debts.³³⁸

On the domestic front, the Constitution was an ongoing project. Even putting aside its vulnerability to centrifugal forces in the states, there were gaps and ambiguities in the text that generated substantial uncertainty about how it would operate in practice, as well as an inevitable struggle over how to resolve open questions. For this reason, the Founding, in practical terms, continued well after 1789. Indeed, it took until at least the end of the War of 1812—and the resolution of a series of heated constitutional controversies over the foreign affairs powers—before the full contours of the foreign affairs Constitution were reasonably well settled. It took the same period for the United States to firmly establish the viability of its claim to equal membership in the community of European states.

The framers may well have expected, or at least hoped, that these practical questions about the Constitution’s meaning would be worked out in a relatively harmonious political environment. If so, their hopes were quickly dashed. The outbreak of the Wars of the French Revolution in early 1793 famously divided the country and propelled the creation of the Federalist and Republican parties. The fierce partisan battles that French envoy Edmond Charles Genêt’s arrival in Charleston provoked, however, were only the beginning in a long series of sharp foreign policy disputes that continued until the War of 1812. It was in this inflammatory setting that the constitutional issues had to be debated and resolved. What resulted was a tendency to reargue points that the Constitution’s text and common understandings at the time of ratification had appeared to settle, as well as

³³⁷ Letter from William Short to Alexander Hamilton (Feb. 17, 1791), in 8 *THE PAPERS OF ALEXANDER HAMILTON* 51, 52–53 (Harold C. Syrett, ed., 1965); see also Letter from Lord Dorchester to Mr. Grenville, *supra* note 333, at 140 (reporting American informant’s statement in 1790 that British merchants had begun to “speculate largely in our Continental floating paper of various kinds, from their opinion of our present Government and from the then low value of those securities”).

³³⁸ See, e.g., Letter from George Hammond to Lord Grenville (May 17, 1793), in 7 *DOCUMENTARY HISTORY*, *supra* note 319, at 234 (predicting, in letter from British minister to United States to Prime Minister that Supreme Court would render decision “conformable to the treaty of peace and consequently favorable to the just claims of the British Creditors”); see also Holt, *supra* note 298 (describing establishment of federal judiciary as Federalist attempt to satisfy creditors and recounting British government’s close monitoring of post-adoption developments). However, even when successful in the courts, British creditors did not always receive interest and faced practical obstacles to collection. See Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 *VA. MAG. HIST. & BIOGRAPHY* 176, 193–98 (1984) (describing difficulties faced in collecting debts).

to push arguments beyond what those understandings could reasonably support. At the same time, even in this agitated environment, there was consensus on many important points. Indeed, there was agreement on points that are anything but settled today.

We can only touch on two of the most consequential of the many constitutional disputes of this period here.³³⁹ Taken as a whole, though, the course of events reveals that the framers' original constitutional design was substantially vindicated. As the framers had anticipated, conducting foreign policy in a republican government posed serious difficulties for sustaining the nation's adherence to international legal obligations, producing a state of affairs that repeatedly jeopardized critical national security interests and the nation's image abroad. In part, the problems with state resistance continued, only now the federal government had the upper hand and was ultimately able, through the courts, to bring the states largely into line. As anticipated, juries proved a complicating factor, but one which the Constitution had not, and perhaps could not, have solved completely.³⁴⁰

The most ferocious battles, however, were fought over the limited role assigned to the House of Representatives. Republicans, who for much of this period controlled the House, essentially sought to revisit and revise the Constitution's exclusion of the most popular branch from the treaty process and its embrace of the self-execution doctrine, while Federalists sought to diminish the House's role to the vanishing point. It is hardly surprising that this was the point of greatest controversy, given the tension in the framers' design between democratic ideals and the need to insulate aspects of foreign policy-making from direct dependence on popular opinion. This development was fueled as well by the impulse of the contending factions—especially the Republicans, who imagined that they represented the views of the great majority—to appeal to the public in support of their conflicting policy goals. In this context, for Republicans, the exclusion of the House became well-nigh unacceptable.³⁴¹

At the same time, however, there were many important points of agreement. There was widespread consensus, for example, that the courts should play the role that the framers had contemplated, although that consensus began to fray when the law of nations became

³³⁹ The disputes are too numerous to list. Among the most salient were controversies over the Quasi-War with France, the Jonathan Robbins affair, the Alien Acts, the federal common law, the Jeffersonian embargo policy, the Hartford Convention, and the many disputes that Republican policy leading to the War of 1812 generated.

³⁴⁰ See *infra* Part III.A.

³⁴¹ See *infra* Part III.B.

partially entangled with the great battle over the federal common law.³⁴² There was also agreement that the President's duty faithfully to execute the laws meant that he was constitutionally bound to apply the law of nations, a responsibility that both increased his ability to coerce compliance by U.S. citizens and circumscribed his discretion in conducting foreign affairs.³⁴³ Finally, although the obligation of Congress to legislate in conformity with the law of nations was never the subject of serious discussion, Congress never doubted its duty to comply with the law of nations as it sought to guide the country through two decades of neutrality disputes amidst world war, punctuated by two wars of its own making. On the whole, then, the framers' scheme emerged largely intact, even as its full implications were being worked out and contested.

A. *The Neutrality Crisis of 1793*

The first set of constitutional controversies over diplomatic affairs arose at the outset of the Wars of the French Revolution in 1793.³⁴⁴ The posturing of Edmond Charles Genêt ("Citizen Genêt"), who arrived as the French Convention's envoy to the United States in the spring of 1793, quickly revealed the precariousness of the new nation's strategic position, trapped between the ambitions of competing impe-

³⁴² See Stewart Jay, *Origins of the Federal Common Law* (pts. 1 & 2), 133 U. PA. L. REV. 1003, 1231 (1985) (describing political struggle over common law of crimes); Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 273–85 (1986) (same); Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 46–72 (1978) (same); Kathryn Preyer, *Jurisdiction To Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 232 (1986) (same). For further discussion of the federal common law, see *supra* note 287 and accompanying text and *infra* note 373 and accompanying text.

³⁴³ See generally Golove, *supra* note 281 (describing widespread early understanding that President had both power to enforce law of nations principles against U.S. citizens and duty to comply with law of nations in conducting foreign affairs). For further discussion of the issue, see *supra* notes 307–11 and accompanying text and *infra* notes 375–78 and accompanying text.

³⁴⁴ There are many excellent accounts of the Neutrality Crisis of 1793. See generally HARRY AMMON, *THE GENET MISSION* (1973); ALEXANDER DECONDE, *ENTANGLING ALLIANCE: POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON* (1958); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 303–73 (1993); 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1789–1835*, at 105–18 (1922) [hereinafter 1 WARREN]. For more recent accounts that focus on legal and constitutional aspects of the crisis, see generally WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* (2006) and STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 113–70 (1997).

rial powers and respected by neither.³⁴⁵ At the same time, it revealed the perhaps even greater danger of a divided polity whose opposing factions were passionately allied with one or the other of the warring parties.³⁴⁶ Washington's Proclamation of Neutrality, which announced that the United States considered itself to be at peace with all of the warring parties, provoked heated constitutional bickering but little substance, as Republicans, despite their initial outrage, soon realized the necessity for Washington's action and its constitutional justification.³⁴⁷ The Proclamation did spark a celebrated exchange between

³⁴⁵ On Genêt's background and the circumstances of his appointment as minister to the United States, see generally AMMON, *supra* note 344, at 1–31, CASTO, *supra* note 344, at 5–18, and ELKINS & MCKITRICK, *supra* note 344, at 330–35.

³⁴⁶ It was precisely this danger—which first manifested itself during the Neutrality Crisis—that Washington emphasized in his Farewell Address. See President George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 213, 215 (James D. Richardson ed., Washington D.C., Government Printing Office 1896) (drawing on lessons of Crisis in his speech); see also GILBERT, *supra* note 179, at 121–24 (analyzing Washington's speech). Recalling the harsh disputes over his administration's neutrality policy, Washington warned that

nothing is more essential than that permanent, inveterate antipathies against particular nations and passionate attachments for others should be excluded, and that in place of them just and amicable feelings toward all should be cultivated. The nation which indulges toward another an habitual hatred or an habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest.

President George Washington, Farewell Address, *supra*, at 221.

³⁴⁷ George Washington, Proclamation of Neutrality (Apr. 22, 1793), reprinted in 10 THE WRITINGS OF GEORGE WASHINGTON 535, 535 (Jared Sparks ed., Boston, Russel, Shattuck, and Williams, et. al. & Co. 1836) [hereinafter Washington, Proclamation]. For further discussion of Washington's Proclamation, see *infra* notes 362, 374, 380–85, and accompanying text. Genêt's arrival in Charleston in April 1793 came shortly after the expansion of the anti-French coalition in the ongoing European war and, in particular, after British entry into the conflict. By that time, the sharp divisions between Federalists and Republicans over financial policy that had emerged during the first Washington administration had begun to expand more directly into the conduct of foreign affairs. Most importantly, Federalists and Republicans held starkly different views about the course of the French Revolution, including the execution of Louis XVI, and about relations with Britain. See, e.g., CASTO, *supra* note 344, at 19–34 (describing emerging conflicts in perspective); ELKINS & MCKITRICK, *supra* note 344, at 308–29 (same); LYCAN, *supra* note 60, at 132–45 (same). The passionate public receptions accorded to Genêt as he slowly made his way from Charleston to Philadelphia reflected the strength of pro-French sentiment in the country. CASTO, *supra* note 344, at 53–54; ELKINS & MCKITRICK, *supra* note 344, at 335–36, 343–45; JAY, *supra* note 344, at 123. Washington's Proclamation immediately struck many Republicans as a betrayal of the French Revolution, the cause of republicanism, and the gratitude that the new nation owed France for its aid during the American Revolution. It provoked heated denunciations, including claims that President Washington had exceeded his constitutional authority. See, e.g., JAY, *supra* note 344, at 120–21 (describing public outcry, including incendiary essays by Veritas that portrayed Washington's Proclamation as monarchical power grab and Madison's similar but more cautious initial reaction); CASTO, *supra* note 344, at 59–60 (describing Republican reac-

Hamilton and Madison, writing as *Pacificus* and *Helvidius*, but the issues they debated had little or nothing to do with the constitutionality of the Proclamation, upon which they both agreed, or with any of the other policies that the administration actually adopted.³⁴⁸

tions); ELKINS & MCKITRICK, *supra* note 344, at 343 (same); 1 WARREN, *supra* note 344, at 112–15 (same). However, Secretary of State Jefferson, the uncontested leader of the Republican faction, supported the Proclamation in Cabinet discussions and embraced the neutrality policy, although he preferred to give it a more pro-French slant than did Hamilton. Ultimately, his view prevailed among Republicans. *See, e.g.,* ELKINS & MCKITRICK, *supra* note 344, at 336–52, 354–65 (discussing Proclamation’s reception among Republicans); JAY, *supra* note 344, at 119–23, 153–57 (same). Jefferson did raise constitutional concerns about the Proclamation and, for this reason, insisted that the Proclamation avoid using the term “neutrality.” Despite his desire to remain out of the European conflict, he argued that the ultimate decision was for Congress to make, in view of its power to declare war, and that a formal declaration of U.S. neutrality would therefore be an invasion of Congress’s sphere of authority. Jefferson nevertheless believed that the Proclamation was constitutionally justified because the country necessarily remained in a neutral posture until Congress determined otherwise. *See, e.g.,* CASTO, *supra* note 344, at 29–32 (describing Jefferson’s views); ELKINS & MCKITRICK, *supra* note 344, at 337–39 (same).

³⁴⁸ The widely misunderstood *Pacificus-Helvidius* debate had little to do with what Washington had done but much to do with the behind-the-scenes maneuvering of the feuding Secretaries of State and Treasury. For Hamilton’s seven *Pacificus* essays, see 15 THE PAPERS OF ALEXANDER HAMILTON 33–43, 55–63, 65–69, 82–86, 90–95, 100–06, 130–35 (Harold C. Syrett ed., 1969) [hereinafter 15 HAMILTON PAPERS] (reprinting essays dated June 29, 1793; July 3, 1793; July 6, 1793; July 10, 1793; July 13–17, 1793; July 17, 1793; and July 27, 1793). Only the first of these addressed constitutional issues. *See* Alexander Hamilton, *Pacificus Number I* (June 29, 1793), reprinted in 15 HAMILTON PAPERS, *supra*, at 33, 33–43 [hereinafter *Pacificus Number I*]. For Madison’s five responding *Helvidius* essays, see 15 MADISON PAPERS, *supra* note 320, at 66–73, 80–87, 95–103, 106–10, 113–20 (reprinting essays dated Aug. 24, 1793; Aug. 31, 1793; Sept. 7, 1793; Sept. 14, 1793; and Sept. 18, 1793). Madison limited his discussion to constitutional questions. *See, e.g., Helvidius Number I*, *supra* note 320, at 66, 68.

In the Cabinet, Hamilton had pushed for a narrow interpretation of Article XI of the 1778 Treaty of Alliance with France, which committed the nation to the defense of French possessions in the West Indies. Treaty of Alliance, U.S.-Fr., art. XI, Feb. 6, 1778, 8 Stat. 6. Hamilton’s interpretation would have rendered the clause inapplicable to the ongoing war with Great Britain, and he argued relentlessly in the Cabinet that this interpretation of the Treaty should be made the basis for the Neutrality Proclamation. *See, e.g.,* CASTO, *supra* note 344, at 25–31; JAY, *supra* note 344, at 117–23; LYCAN, *supra* note 60, at 152–59. In response, Jefferson insisted that Congress had sole authority over the interpretation of Article XI because its construction affected the power to declare war. The Treaty, therefore, could not be the basis for the Proclamation. Instead, Jefferson justified the Proclamation on the narrower ground that the President was bound to uphold neutrality until Congress decided to declare war. *See, e.g.,* CASTO, *supra* note 344, at 29–33 (describing Jefferson’s approach); ELKINS & MCKITRICK, *supra* note 344, at 337–39 (same). Washington showed little interest in this dispute, handing Jefferson a practical victory when he approved a Proclamation that refrained from mentioning the Treaty. However, not satisfied to let matters rest there, Hamilton sought to reargue the point in the public arena, penning his *Pacificus* essays to defend the claim that the Proclamation did, in fact, rest on the narrow interpretation of the Treaty and that it was well within the President’s powers so to interpret it. *See, e.g.,* CASTO, *supra* note 344, at 60–67; JAY, *supra* note 344, at 156–57. It was these claims that prompted Jefferson urgently to press Madison

Nevertheless, the Genêt Affair did force a wide range of constitutional issues into the open, and the general pattern of their resolution was consistent with the framers' design to insulate treaty and law of nations issues from popular pressure. In view of the exuberance with which the people greeted him, Genêt concluded that he could harness public opinion to bring pressure on the administration to modify or even abandon, its neutral posture.³⁴⁹ Indeed, in response to Washington's resistance to his plans for a Franco-American alliance, Genêt declared his intention to appeal directly to Congress and ultimately to the people.³⁵⁰ In responding to Genêt's machinations, the Washington administration informed him that he had misunderstood the nature of the new constitutional system and was improperly inter-

to offer a public refutation of Hamilton's arguments. See Letter from Thomas Jefferson to James Madison (July 7, 1793) in 15 MADISON PAPERS, *supra* note 320, at 43 (imploping Madison, "[f]or god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to peices in the face of the public"). The result was a wide-ranging constitutional debate in which Hamilton and Madison agreed upon the constitutionality of the Proclamation but disagreed about its constitutional grounding and about the relative powers of the President and Congress in foreign affairs. For further discussion, see *supra* notes 311 and 320 and *infra* notes 366, 374–85, and accompanying text.

³⁴⁹ Exploiting the enthusiastic reception he received as he traveled through the South from Charlestown to Philadelphia, Genêt quickly initiated a series of actions that were inconsistent with U.S. neutrality and were likely to drag the United States into the war on France's side. Among other measures, he began issuing commissions to privateers to prey on British shipping, arranging for merchant vessels to be outfitted with guns to serve as privateers, recruiting U.S. citizens to man the privateers, authorizing French consuls to constitute themselves as Prize Courts with power to condemn captured ships and their cargo, and scheming with U.S. citizens (including even Jefferson) to mount an attack on Spanish possessions in the West. All of these actions were well underway before he had arrived in Philadelphia and been received as minister from France. See, e.g., CASTO, *supra* note 344, at 17–18, 35–55 (describing Genêt's activities); ELKINS & MCKITRICK, *supra* note 344, at 335–36, 349–50 (same).

³⁵⁰ As Jefferson described it to Monroe, Genêt seemed to believe that "he has an appeal from the Executive to Congress, and from both to the people." Letter from Thomas Jefferson to James Monroe (June 28, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 392, 393 (John Catanzariti ed., 1995) [hereinafter 26 JEFFERSON PAPERS]; see also Letter from Thomas Jefferson to James Madison (July 7, 1793), in 15 MADISON PAPERS, *supra* note 320, at 43 (complaining of Genêt's disrespectful attitude towards Washington and of his "talking of appeals from him to Congress, from them to the people"). Based on the outpouring of support and on Jefferson's initial advice, Genêt believed that the policy of the Washington administration was out of step with public opinion, and he assumed that once Congress convened, a more favorable policy would be forthcoming. See, e.g., CASTO, *supra* note 344, at 55–58 (describing Genêt's thinking); ELKINS & MCKITRICK, *supra* note 344, at 343–47 (same). Genêt consistently questioned the administration's actions on these grounds, even doubting the constitutional authority for the administration's measures. See, e.g., Letter from Edmond Charles Genêt to Thomas Jefferson (June 8, 1793), in 26 JEFFERSON PAPERS, *supra*, at 260. But it was only at the height of his frustration that he purportedly directly threatened to appeal from the President to the people. The threat was the last straw and finally led the administration to seek his recall. CASTO, *supra* note 344, at 104–07, 146–50; ELKINS & MCKITRICK, *supra* note 344, at 350–52.

fering with the nation's fundamental law. Secretary of State Jefferson's diplomatic notes to Genêt are a virtual seminar in U.S. constitutional law. For example, Jefferson insisted on what is now established doctrine, but which was not stated explicitly in the constitutional text, that the President is the sole representative of the nation in communicating with foreign diplomats. Genêt's efforts to speak directly to Congress thus were not only offensive but also doomed to failure, Jefferson maintained, for Congress had no constitutional authority to listen on behalf of the United States.³⁵¹ In adopting this position, the administration signaled its concern about the dangers of direct foreign appeals to the populace (and of indirect appeals to them through the Congress) and insisted on a constitutional rule that would discourage foreign nations from manipulating the nation's republican institutions in order to gain leverage over the executive branch.

A similar motivation underlay the resolution of another famous constitutional incident that was also provoked by Genêt. Recall that, in response to the legal issues Genêt's conduct raised, President Washington sought an advisory opinion from the Supreme Court on a detailed list of questions about the application of the French and British treaties and the law of nations to the situation of the United States as a neutral in the ongoing war in Europe.³⁵² It is striking that

³⁵¹ Jefferson made the point bluntly, informing Genêt that being the only channel of communication between this country and foreign nations, it is from [the President] alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such they have a right and are bound to consider as the expression of the nation

Letter from Thomas Jefferson to Edmond Charles Genêt (Nov. 22, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 414, 414 (John Catanzariti ed., 1997) [hereinafter 27 JEFFERSON PAPERS]. Jefferson reiterated this crucial point only a month later, observing that

your functions as the missionary of a foreign nation here, are confined to the transaction of the affairs of your nation with the Executive of the United States, that the communications, which are to pass between the Executive and Legislative branches, cannot be a subject for your interference, and that the President must be left to judge for himself what matters his duty or the public good may require him to propose to the deliberations of Congress.

Letter from Thomas Jefferson to Edmond Charles Genêt (Dec. 31, 1793), in 27 JEFFERSON PAPERS, *supra*, at 649, 649.

³⁵² See *supra* notes 305–06 and accompanying text. For the most thorough recent treatment of the famous incident, see JAY, *supra* note 344, at 113–70; see also CASTO, *supra* note 344, at 107–21. For an earlier account, see 1 WARREN, *supra* note 344, at 108–11. The privateering activities encouraged by Genêt paid quick dividends in captured British prizes brought into U.S. ports and provoked heated protests from the British minister George Hammond. As a result, the administration was pressed on both sides to resolve a large number of difficult legal questions under existing treaties and the law of nations. Its initial response was to shift much of the burden onto the judiciary, and it repeatedly referred the British and French ministers to the federal courts, which, it asserted, would rule on the

the administration preferred to turn to the Court, rather than to call Congress into session to obtain legislative answers to its questions.³⁵³ In any case, it was this request that prompted the Justices' celebrated letter declining to provide the requested advice. Judicial independence, they suggested, required that the Justices avoid giving advisory opinions.³⁵⁴ There has been much speculation about precisely what

legality of the captures. CASTO, *supra* note 344, at 85–86; JAY, *supra* note 344, at 126–32. As the administration was aware, however, it was an open question whether the law of nations recognized jurisdiction in U.S. courts over captures made by French commissioned privateers, and the initial decisions of the lower federal courts rejected jurisdiction for this reason. CASTO, *supra* note 344, at 85–90; JAY, *supra* note 344, at 131–32. Although the Supreme Court ultimately rejected the view of the lower courts, *see infra* notes 357–59 and accompanying text, the administration, in the interim, had no choice but to resolve the disputed issues on its own. Its continuing hesitation about assuming this responsibility led to the request for an advisory opinion from the Justices on the full range of outstanding legal issues that Genêt's activities had generated. In his letter inquiring whether the Justices would provide an advisory opinion, Jefferson invoked the jurisdictional obstacles that had arisen as the reason for the request:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the [United States]. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land; and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the Executive, as to occasion much embarrassment and difficulty to them.

Letter from Thomas Jefferson to Justices of the Supreme Court (July 18, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 350, at 520, 520.

³⁵³ The Cabinet was initially unanimous in rejecting the idea of calling Congress into session. Notes on Washington's Questions on Neutrality and the Alliance with France (May 6, 1793), *in* 25 THE PAPERS OF THOMAS JEFFERSON 665, 666 (John Catanzariti ed., 1993) [hereinafter 25 JEFFERSON PAPERS]. Once he recognized that the Justices were unlikely to answer the cabinet's questions, Jefferson changed his view, arguing, albeit unsuccessfully, for calling Congress into session. *See* Opinion on Convening Congress (Aug. 4, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 350, at 615 (making argument for convening Congress). He directed Madison to be prepared to answer the questions "which may come into discussion perhaps at the next session of Congress." Letter from Thomas Jefferson to James Madison (Aug. 3, 1793), *in* 26 JEFFERSON PAPERS, *supra* note 350, at 606, 607. By this time, however, the administration, with some support from the judiciary, had resolved most of the disputed questions. *See, e.g.,* ELKINS & MCKITRICK, *supra* note 344, at 352–53 (describing later developments).

³⁵⁴ The Justices cited the "Lines of Separation drawn by the Constitution between the three Departments of government—their being in certain Respects checks on each other—and our being Judges of a Court in the last Resort" as the basis for their decision to decline providing the requested advice. Letter from John Jay, James Wilson, John Blair, James Iredell, & William Paterson to George Washington (Aug. 8, 1793), *in* 15 HAMILTON PAPERS, *supra* note 348, at 111 n.1. The burden of Stewart Jay's book, however, is to demonstrate that the separation of powers argument was actually quite weak. *See* JAY, *supra* note 344, at 150 ("[T]he theory of powers separation as developed through the 1780s did not preclude advisory opinions, much less a cooperative relationship on other official matters between the judiciary and the political branches.").

motivated the Justices to refuse Washington's request, but it seems likely, in the crisis atmosphere in which they were acting, that a substantial part of their concern was with preserving the ability of the Court to resolve disputed international law issues in a manner that would be persuasive in the eyes of the European belligerents.³⁵⁵ This interpretation is supported by the fact that, having declined to give the requested advisory opinion, the Justices then sought to resolve, in the context of court cases, the very questions Washington had forwarded to them.³⁵⁶ Indeed, in the landmark decision *Glass v. The Sloop*

³⁵⁵ In his letter forwarding the Cabinet's questions, Jefferson had indicated that one reason for the President's request was his conviction that the Justices' "authority [would] ensure the respect of all parties." Letter from Thomas Jefferson to John Jay and the Justices of the Supreme Court (July 18, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 520. It seems likely that the Justices agreed on the value of their "authority" but thought that the better approach was to avoid entanglement with the political branches, preserving the Court's authority by remaining aloof from the appearance of political engagement.

Both Stewart Jay and William Casto express doubts about whether Genêt would have shown respect for the Justices' "authority" in any case and, therefore, whether persuading Genêt specifically could have been the administration's real intention. See, e.g., CASTO, *supra* note 344, at 109, 111 (recalling that Genêt dismissed role of federal judiciary in disputes between nations); JAY, *supra* note 344, at 159 (noting Genêt's stubborn convictions and disregard of lower court opinions on relevant issues). However, this view not only dismisses the most direct evidence of the administration's reasoning—that is, Jefferson's explicit explanation to the Justices of what prompted the President to seek their advice—but also assumes too narrow a perspective on the diplomatic context in which the administration acted. It is probably true that Genêt would have formally rejected the Justices' answers to the questions insofar as they adopted views inconsistent with those he was pressing, but the administration was likely of the view that its diplomatic position would nevertheless be strengthened if it could act strictly in accordance with the reasoned conclusions of the nation's highest judicial authority. Not the least important reason for that view would have been the more unified domestic political support for the administration's measures that acting in accordance with the Justices' opinions would have generated. See, e.g., CASTO, *supra* note 344, at 109, 111 (noting importance of unified public support). In this respect, it is noteworthy that Jefferson specifically asked not for private advice but whether the "public may, with propriety, be availed of" the Justices' advisory opinion. Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 520, 520.

³⁵⁶ See, e.g., CASTO, *supra* note 344, at 90 (describing Supreme Court's decision in *Glass*); JAY, *supra* note 344, at 159 (describing cases). Even before the administration's request, several of the Justices had already gone a considerable distance in this direction in grand jury charges, in which they had endorsed a number of the administration's legal positions on the law of nations and the French treaty. See CASTO, *supra* note 344, at 84–85, 91–97 (discussing grand jury charges); JAY, *supra* note 344, at 127–28, 136–41 (same); see also *supra* notes 150, 159, 176, 310, and accompanying text (discussing various grand jury charges). The administration distributed these charges to American diplomats for use in Europe in justifying the government's policies. See CASTO, *supra* note 344, at 85, 89 (noting transmittal of charges to Europe). The most important of these charges, in the famous *Henfield's Case*, were delivered just as the Justices were considering the administration's request. CASTO, *supra* note 344, at 91–97; JAY, *supra* note 344, at 136–41. In any case, despite these helpful efforts, the administration preferred to obtain an opinion of the Supreme Court as an institution, rather than relying upon the grand jury charges of indi-

Betsey, decided shortly after the Justices' letter to Washington, the Court boldly extended the scope of the federal court's prize jurisdiction to rule on the legality of French captures brought into American ports.³⁵⁷ This ruling permitted it to take up the very questions that Washington had propounded, only in the context of litigated disputes. Moreover, this explanation helps unravel a puzzle in how the Court handled the proceedings in *Glass*. After the case was submitted for decision, the Court requested special briefing on questions of consular authority that the parties had not themselves understood to be relevant and that, in response, they declined to offer.³⁵⁸ Nonetheless, in his opinion for the Court, Chief Justice Jay reached out to condemn Genêt for engaging in consular activities that, he opined, violated the sovereign authority of the United States as defined under the law of nations, thus answering one of the central questions that the adminis-

vidual Justices. Moreover, it sought advice on a range of questions that would not likely arise in criminal cases.

³⁵⁷ 3 U.S. (3 Dall.) 6 (1794). As already noted, most of the lower courts to consider the matter—most prominently Judge Peters, one of the nation's leading authorities in admiralty law—had rejected prize jurisdiction. See *supra* note 352. It was widely agreed that the law of nations accorded the courts of the captor exclusive jurisdiction over the question of prize or no prize and, as a consequence, that the prize courts of a neutral state could not assert jurisdiction over prizes brought into its ports by belligerent vessels. It was for this reason that, despite the administration's clear preference, Judge Peters ruled in *Findlay v. The William*, 9 F. Cas. 57, 60–61 (D. Pa. 1793) (No. 4790), that the federal courts could not exercise prize jurisdiction. CASTO, *supra* note 344, at 86–90; JAY, *supra* note 344, at 131–32. The uncertainty surrounding the issue stemmed largely from the special context, which involved the bringing of captures that had been made in violation of the nation's neutral status into its own ports. Judge Peters adopted the conventional view that upheld the exclusive jurisdiction of the captor's courts and left efforts to obtain satisfaction for breach of American neutrality to the executive branch, employing diplomatic remedies. See CASTO, *supra* note 344, at 89 (describing Judge Peter's view). The Supreme Court in *Glass* took a more assertive approach, ordering the lower courts to assume prize jurisdiction in these cases. On the importance of the *Glass* case, see 1 WARREN, *supra* note 344, at 115–18, which observes that “[n]o decision of the Court ever did more to vindicate our international rights, to establish respect amongst other nations for the sovereignty of this country, and to keep the United States out of international complications.” For an instructive recent account of the impact of *Glass*, see David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 160–71 (2008).

³⁵⁸ 3 U.S. (3 Dall.) at 15–16. One of Genêt's measures, to which the administration objected vehemently, was to give French Consuls authority to constitute themselves as prize courts and to condemn the captures made by French naval vessels and privateers. At the conclusion of the lengthy argument in *Glass*, the Court indicated its interest in the question, not addressed by the parties: “whether any foreign nation had a right without the positive stipulations of a treaty, to establish in this country, an admiralty jurisdiction for taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its enemies?” *Id.* It added that “[t]hough this question had not been agitated, THE COURT deemed it of great public importance to be decided; and, meaning to decide it, they declared a desire to hear it discussed.” *Id.*

tration had posed in its letter.³⁵⁹ It seems fair to infer that the Justices' refusal to play an advisory role was motivated at least in part by their sense that the judiciary could more effectively establish the good faith of the nation in administering the law of nations—and thus boost the credibility of the government—if it drew sharp lines separating itself from the more politically oriented executive branch.³⁶⁰

³⁵⁹ See *id.* at 16. The Court declared that “being further of opinion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties.” *Id.* (emphasis omitted).

³⁶⁰ The President's request generated bitter protests from the pro-French, Republican press, which preferred a more populist approach to determining U.S. duties under the law of nations. For example, one writer, Juba, thought “[i]t a little strange that lawyers alone should be supposed capable of deciding upon common sense and plain language, for such is the treaty.” Juba, Letter to the Editor, *NAT'L GAZETTE*, July 27, 1793, quoted in JAY, *supra* note 344, at 138. If the executive was uncertain about the meaning of the French treaty, he added,

the *voice of America* would be the best interpretation of the treaty, and surely this is not to be obtained from a few interested individuals buzzing in the sunshine of court favour . . . or from a bench of judges, who can speak their own sense of it, but not the sense of the people.

Id. Indeed, he continued, the administration, had it been uncertain about the meaning of the nation's legal duties, should have convened Congress to obtain the necessary answers: “If instead of *legislating* himself, the President had convened Congress, the people would not have beheld the arbitrary use of power which has excited alarm, and he would have escaped the censure which has been so generally bestowed.” *Id.*

Stewart Jay and William Casto offer a different explanation for the Justices' refusal to provide the requested opinion. They both suggest that, under Chief Justice Jay's leadership, the Justices were covertly seeking to shore up an expansive, Hamiltonian conception of executive power over foreign affairs, in which the courts would have little role. On their view, the Justices chose to refuse their advice in order to force the President to resolve the delicate legal issues on its own, anticipating that the Court's involvement would weaken the executive in the long run and would pose a risk of judicial interference in the exercise of the foreign affairs powers. See CASTO, *supra* note 344, at 118; JAY, *supra* note 344, at 157–60. They also speculate that Jay was aware that Hamilton's approach was dominant in the Cabinet and that the Court's involvement risked undermining his position, which they politically preferred to Jefferson's. Their refusal was, thus, a partisan strategic maneuver. See CASTO, *supra* note 344, at 117–21 (making this argument); JAY, *supra* note 344, at 167–69 (same).

The first of these explanations seems only weakly supported by the facts. It postulates that the Justices were covertly engaged in self-denying behavior in order to strengthen the hand of the executive branch and that they so acted in spite of the fact that President Washington, who was Chief Justice Jay's close friend and ally, had explicitly requested their aid in dealing with a grave foreign policy crisis. Moreover, it is inconsistent with the fact that the Justices, including Jay, were already, in the context of litigated cases, actively engaged in giving judicial answers to the Cabinet's questions and, in the wake of their refusal, would act even more aggressively to assert a judicial role to that end. The second explanation seems only somewhat more plausible. The Justices could easily have bolstered Hamilton's position in the Cabinet simply by answering the questions in ways that upheld his positions, or, alternatively, they could have declined on a more selective basis to answer those questions that posed a risk of undermining his positions. It is difficult to square the

For present purposes, perhaps the most telling of the measures prompted by the Neutrality Crisis was the administration's decision to prosecute citizens for violations of American neutrality.³⁶¹ The outbreak of the Wars of the French Revolution, and particularly England's entry into the war in alliance with the continental monarchies, caused a storm of protest in the United States, and passionate outpourings of support for the French Revolution and for Genêt. At the latter's urging, a number of Americans agreed to join the French cause, "fitting out" merchant vessels with arms in U.S. ports and then cruising as privateers, under commission from Genêt, against British shipping in the West Indies. Their conduct threatened to bring the United States into the war on the French side, as the British government would not long tolerate breaches of the nation's neutrality obligations. Washington issued his Neutrality Proclamation in large part to put an end to these "unneutral" acts. As he vowed in the Proclamation, he instructed the Federal District Attorneys (as they were then known) to prosecute "all persons, who shall within the cognizance of the courts of the United States violate the law of nations, with respect to the powers at war, or any of them."³⁶²

The administration pursued this course despite the fact that there was no federal statute that made it a crime for a citizen to engage in unneutral conduct. The decision to prosecute reflected the administration's confidence that the law of nations was incorporated into the law of the United States not only as part of the civil law, but also as part of the criminal law.³⁶³ There was certainly precedent for this approach in

Justices' public explanation for their refusal, and their subsequent behavior, with the narrowly partisan agenda that Jay and Casto hypothesize.

More apt is Charles Warren's conclusion that the Justices acted to ensure that "decisions of the Court on questions involving matters which have become the subjects of political controversy [would be] less likely to arouse suspicion and distrust than if the Court exercised the power to decide such questions without litigation and argument by parties having a direct interest in the result." 1 WARREN, *supra* note 344, at 111. Warren may have erred in the opposite direction, ascribing to the Justices purposes that too sweepingly transcend the historical context that gave rise to their refusal. However, as argued in the text, it seems likely that considerations of this kind, tied more directly to the international controversy that prompted Washington's request, best explain the Justices' decision.

³⁶¹ There have been many accounts of the neutrality prosecutions, especially the famous *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793). See, e.g., CASTO, *supra* note 344, at 91-102; JAY, *supra* note 344, at 127, 138-42; 1 WARREN, *supra* note 344, at 112-15; Bellia & Clark, *supra* note 7, at 50-53; Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 48-58 (1978).

³⁶² Washington, Proclamation, *supra* note 347, at 535.

³⁶³ In more precise terms, the administration assumed that civil and criminal jurisdictional statutes gave the courts equal authority to apply the law of nations. However, it was arguably one thing to assume that the ambassadorial, admiralty, and alien diversity jurisdictional statutes presumed that the courts would apply the law of nations as rules of deci-

English practice and in the decisions of the state courts during the

sion in civil actions, but another to assume that section nine of the Judiciary Act of 1789—which granted the district courts jurisdiction over “all crimes and offences that shall be cognizable under the authority of the United States”—contemplated that the courts would criminalize acts that Congress had not yet declared by statute to warrant criminal sanction. An Act to Establish the Judicial Courts of the United States, ch. XX, § 9, 1 Stat. 73, 76 (1789).

The administration’s criminal prosecutions have understandably been the focus of academic attention, but, in fact, the administration simultaneously pursued civil litigation to prevent privateers that had been outfitted in U.S. ports from carrying out their intended activities. In these cases, the administration acted on the assumption that the law of nations was part of the law of the United States and could be enforced by the federal courts pursuant to their admiralty jurisdiction. Thus, for example, upon learning that the British merchant vessel the *Polly* had been renamed the *Republican* and was being fitted out with arms to cruise against British shipping, the Cabinet directed the Governor of New York to seize it. Then, on June 12, the Cabinet unanimously decided to request the Governor to deliver the vessel “over to the civil power . . . to be dealt with according to law” and to direct the Federal District Attorney for New York to institute legal proceedings to “prevent[] the said vessel and appurtenances from being applied to the destined purpose” Cabinet Opinions on the *Republican* and the *Catharine* (June 12, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 259, 260. Following the Cabinet’s decision, Jefferson directed the Federal District Attorney to “institut[e] such proceedings at law against the vessel and her appurtenances as may place her in the custody of the law, and may prevent her being used for purposes of hostility against any of the belligerent powers.” Letter from Thomas Jefferson to Richard Harison (June 12, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 261, 261; *see also* Letter of Thomas Jefferson to Edmond Charles Genêt (June 17, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 297, 297–98 (explaining these legal proceedings). For discussion of these and other similar legal measures, *see* JAY, *supra* note 344, at 127, 130 (describing various legal measures adopted by Washington administration).

As previously noted, the administration also directed the British and French ministers to pursue the legal claims of their nationals through prize suits in federal court. *See supra* note 352. Here, again, the administration’s assumption was that the law of nations was incorporated into the law of the United States and would be applied by the courts. As Jefferson explained to Genêt,

By the laws of this Country every individual claiming a right to any Article of property, may demand process from a court of Justice Individuals claiming a right to the prizes, have attached them by process from the court of Admiralty, which that Court was not free to deny, because justice is to be denied to no man. . . . It happens in this particular case that the rule of decision will be, not the municipal laws of the United States but the law of nations, and the law maritime, as admitted and practised in all civilized countries; that the same sentence will be pronounced here that would be pronounced in the same case in the Republic of France, or in any other country of Europe I will add that if the seizure should be found contrary to the treaties subsisting between France and the [U]nited States, the Judges will consider these treaties as constituting a conventional Law for the two Nations, controuling all other law, and will decree accordingly.

The functions of the Executive are not competent to the decision of Questions of property between Individuals. These are ascribed to the Judiciary alone, and when either persons or property are taken into their custody, there is no power in this country which can take them out. You will therefore be sensible, Sir, that though the President is not the Organ for doing what is just in the present case, it will be effectually done by those to whom the constitution has ascribed that duty.

Confederation.³⁶⁴ But Article I's explicit grant to Congress of the power to define and punish offenses against the law of nations might well have suggested that those precedents did not carry over to the new constitutional system and that an act of Congress was necessary before a criminal prosecution could be sustained.³⁶⁵ Of course, had such an inference been warranted, the President would have had to call Congress into special session and seek new legislation, an approach that would have generated a host of practical complications and which, in the intensely pro-French political environment of the country at that moment, might have proved futile. Here, too, the administration decided to avoid appealing to Congress and, instead, found sufficient constitutional warrant to enforce the law of nations in executive authority acting in cooperation with the courts. It is especially noteworthy that on this crucial point, there was relatively little controversy. Indeed, despite the widespread protests of Republican activists, both Jefferson and Madison embraced the administration's legal position, even while the former discreetly left Hamilton and Attorney General Edmund Randolph in charge of implementing the policy.³⁶⁶

Letter from Thomas Jefferson to Edmond Charles Genêt (June 17, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 301, 301.

³⁶⁴ For further discussion of the incorporation doctrine, see *supra* notes 115–18, 284–93, 299–304, 342, and accompanying text. On offenses against the law of nations in English law, see BLACKSTONE, *supra* note 13, at *68–73 (identifying violation of safe-conducts, infringement of rights of ambassadors, and piracy as “the principal cases[] in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law”). For a nonstatutory criminal prosecution brought during the Confederation in Pennsylvania state court, see *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (PA 1784), in which the Court upheld a non-statutory prosecution for an attack against an ambassador in violation of the law of nations. *Id.* The Court stated that the case “must be determined on the principles of the laws of nations, which form a part of the municipal law of Pennsylvania.” *Id.* (emphasis omitted). For further discussion of *Respublica*, see *supra* note 301.

³⁶⁵ See U.S. CONST. art. I, § 8, cl. 10 (providing Congress with power “[t]o define and punish . . . Offences against the Law of Nations”).

³⁶⁶ For Jefferson's view, see *supra* note 363. Jefferson expressed his understanding of the legal situation at some length in a letter to Attorney General Randolph:

[T]he acts of our own citizens infringing the laws of neutrality, or contemplating that, are offences against the ordinary laws and cognisable by them. . . . The Judges generally, by a charge, instruct the Grand jurors in the infractions of law which are to be noticed by them; and our judges are in the habit of printing their charges in the newspapers. The Judges having notice of the proclamation, will perceive that the occurrence of a foreign war has brought into activity the laws of neutrality, as a part of the law of the land. This new branch of the law they will know needs explanation to the grand juries more than any other. They will study and define the subject to them and to the public. The public mind will by this be warned against the acts which may endanger our peace, and foreign nations will see a much more respectable evidence of our bonâ fide intentions to preserve neutrality

The administration's approach reflected its sense of unease about the deteriorating relationship with Britain and the need to act promptly and aggressively to avoid war. It also reflected a recognition that popular sentiment had to be managed lest the public push the country into a foreign policy fiasco. Indeed, in warning Madison of the administration's neutrality measures, even the francophile Jefferson recognized that such measures would "prove a disagreeable pill to our friends, tho' necessary to keep us out of the calamities of a war."³⁶⁷ And, despite his gratification with the growing public displays of enthusiasm for the French, he worried about the potential consequences, anxiously expressing to James Monroe his "wish [that] we may be able to repress the spirit of the people within the limits of a fair neutrality."³⁶⁸ All of the leading political actors thus perceived

Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 JEFFERSON PAPERS, *supra* note 353, at 691, 692; see also Letter from Thomas Jefferson to James Madison (June 2, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 167 (expressing support for prosecutions, though noting disagreement with certain measures as not required by law of nations); Letter from Thomas Jefferson to Edmond Charles Genêt (June 5, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 195, 196 (noting that violations of neutral duties are "offense to the laws of the land, of which the law of nations makes an integral part"); Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 649–50 (expressing support for Washington's Proclamation and neutrality prosecutions). For Madison's view, see *infra* notes 374–85 and accompanying text.

³⁶⁷ Letter from Thomas Jefferson to James Madison (Apr. 28, 1793), in 25 JEFFERSON PAPERS, *supra* note 353, at 619, 619.

³⁶⁸ Letter from Thomas Jefferson to James Monroe (May 5, 1793), in 25 JEFFERSON PAPERS, *supra* note 353, at 661. Jefferson made these remarks immediately after enthusiastically noting that

[a]ll the old spirit of 1776[] is rekindling. . . . A French frigate took a British prize off the capes of Delaware Upon her coming into sight thousands and thousands of the yeomanry of the city crowded and covered the wharfs . . . and when the British colours were seen reversed, and the French flying above them they burst into peals of exultation.

Id. (footnotes omitted). Jefferson's ambivalence about the public fervor did not prevent him from making strategic use of, and even encouraging, popular displays to put pressure on the President to adopt more pro-French policies. See, e.g., Letter from Thomas Jefferson to James Madison (June 2, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 167, 167–68 (describing plans for using public pressure in Virginia to influence Edmond Randolph, whose votes in the Cabinet were often decisive). Nor did Hamilton's far deeper ambivalence stop him from doing the same, when Genêt's blunders opened up the possibility of turning the public around to a position more favorable to the Federalists. With the tables turned, it was Jefferson who expressed outrage at Hamilton's direct appeal to the public. See Letter from Thomas Jefferson to James Madison (Aug. 3, 1793), in 26 JEFFERSON PAPERS, *supra* note 350, at 606, 606 (expressing concern about Hamilton's plan to make public Genêt's threat to appeal from President to people). On the strategic use of public opinion by both sides during the crisis, see, for example, TODD ESTES, THE JAY TREATY DEBATE, PUBLIC OPINION, AND THE EVOLUTION OF EARLY AMERICAN POLITICAL CULTURE 35–53 (2006) (discussing appeals to, and manipulation of, public opinion by both sides and noting both greater success of Federalists' efforts and their greater ambiva-

nonstatutory criminal prosecutions founded on the law of nations as constitutionally appropriate measures that would both obviate the need for legislative endorsement of the administration's policy and demonstrate to the European powers the capacity of the federal government to fulfill the nation's international responsibilities.

Notwithstanding this unanimity in the cabinet, the success of these measures still depended on the attitude of the federal judiciary toward the administration's constitutional approach. That response was swift and unequivocal. In a series of widely publicized grand jury charges, Chief Justice Jay and Justices James Wilson and James Iredell fully embraced the administration's view of the Constitution.³⁶⁹ Simi-

lence about making such appeals); *see also* CASTO, *supra* note 344, at 139–43 (describing efforts by both parties to galvanize public opinion); ELKINS & MCKITRICK, *supra* note 344, at 355–65 (describing public relations efforts and noting Jefferson's insistence, as condition of prolonging his term as Secretary of State, that Washington restrain Hamilton's manipulation of public opinion through publicization of Genêt's threats).

³⁶⁹ As early as 1790, Chief Justice Jay had delivered grand jury charges on circuit in which he had enjoined the grand jurors "that the Laws of Nations make Part of the Laws of this, and of every other civilized Nation." Jay's Charge, New York, *supra* note 310, at 29. He added that "as in private Life a fair and legal Contract between two Men, cannot be altered or annulled nor altered by either without the Consent of the other, so neither can Treaties between Nations." *Id.* Since the United States was now a nation, it "equally becomes us to perform our Duties, as to assert our Rights." *Id.* This charge was delivered to several grand juries and was widely printed in newspapers and published in pamphlet form. *Id.* at 25. For discussion, see Presser, *supra* note 361, at 48–49.

At the outset of the Neutrality Crisis—and after having consulted with Hamilton privately on whether the President should issue a neutrality proclamation—Jay returned to these issues in another grand jury charge that offered a wide-ranging discussion of the law of nations and a defense of Washington's Proclamation. *See* John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793) in 2 DOCUMENTARY HISTORY, *supra* note 310, at 380 [hereinafter, Jay's Charge, Virginia]; *see also* *Henfield's Case*, 11 F. Cas. 1099, 1099–1105 (C.C.D. Pa. 1793) (reprinting Jay's Grand Jury Charge, even though not delivered in *Henfield's Case*). Once again, he asserted that the law of nations "form[s] a very important part of the Laws of our nation," and he emphasized the inviolability of treaties as national compacts that "cannot be altered or annulled by one of the Parties, without the Consent & Concurrence of the other." Jay's Charge, Virginia, *supra*, at 381, 382. He then took the opportunity to underscore the normative force of international commitments:

The Peace Prosperity and Reputation of the U.S. will always greatly depend on their Fidelity to their Engagements, & every virtuous Citizen (for every Citizen is a Party to them) will concur in observing & executing them with Honor and good Faith, and that whether they be made with nations respectable and important, or with Nations weak & inconsiderable[,] our Obligation to keep our faith results from our having pledged it, & not from the Character or Description of the State or People to whom neither Impunity nor the Right of Retaliation can sanctify Perfidy, for although Perfidy may deserve Chastisement, yet it can never merit Imitation.

Id. at 382. Jay closed with a warning about how inflamed national passions, and conflicting attachments to foreign nations among citizens, "often cause Indiscretions," adding that "[t]here is not a History of any nation which does not record the Mischiefs they experienced from such Parties." *Id.* at 389; *see also* Draft of John Jay's Charge to the Grand Jury

of the Circuit Court for the District of Virginia, in 2 DOCUMENTARY HISTORY, *supra* note 310, at 359, 360–62 (covering, in draft form, many of same points, including that “[t]he Constitution, the Statutes of Congress, the Laws of Nations, and Treaties constitutionally made, compose the Laws of the United States;” that the law of nations derives from “he from whose will proceed all moral Obligations, and which will is made known to us by Reason or by Revelation;” that “[a]n unjust War is among the greatest of Evils, and for this & numerous other Reasons, because the Blood & misery caused by it must rest on the Heads of those who wage it[.]”; and that “Every Nation in like Manner is obliged by a due Regard to its own Dignity and Character, to behave towards other Nations with Decorum[.] Insolence and Rudeness will not only degrade and disgrace nations & Individuals, but also expose them to Hostility & Insult[.] It is the Duty of both to cultivate Peace and good Will, and to this nothing is more conducive than Justice Benevolence and good Manners[.] Indiscretions of this kind have given Occasion to many Wars”). Only two weeks later, Jay repeated these themes in his opinion on circuit in the leading case *Ware v. Hylton*, which dealt with state compliance with the Treaty of Peace. See John Jay’s Circuit Court Opinion (June 7, 1793), in 7 DOCUMENTARY HISTORY, *supra* note 319, at 292–94, 300, 304–05 (addressing such issues). On Jay’s grand jury charges, and the administration’s decision to circulate them in Europe, see, for example, CASTO, *supra* note 344, at 83–85, JAY, *supra* note 344, at 127–28, 139, 141–42, and Presser, *supra* note 361, at 48–50.

A month after Jay’s Grand Jury Charge, Justice Wilson delivered a similar charge that led to the indictment of Henfield for offenses against the law of nations. See James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (July 22, 1793), in 2 DOCUMENTARY HISTORY, *supra* note 310, at 414 [hereinafter Wilson’s Charge, Pennsylvania]; see also *Henfield’s Case*, 11 F. Cas. 1099, 1105 (C.C.D. Pa. 1793) (reprinting Wilson’s charge). Wilson touched on virtually all of the same points, including, for example, a defense of the Proclamation and a declaration that the law of nations was part of the laws of the United States and that it was derived from the natural law: “The Law of Nations as well as the Law of Nature is of Obligation indispensable: The Law of Nations as well as the Law of Nature is of Origin divine.” Wilson’s Charge, Pennsylvania, *supra*, at 417. He then added:

How great—how important—how interesting are these Truths! They announce to a free People how . . . solemn their Duties are. If a practical Knowledge and a just Sense of those Rights and those Duties were diffused universally among the Citizens; how beneficial and lasting would the Fruits be!

Id. at 418. Recognizing the nation’s duty under the law of nations would earn it “an honest Fame,” which is “a valuable and an agreeable Possession . . . [that] represses Hostility; and secures Esteem. In Transactions with other Nations, the Dignity of a State should never be permitted to suffer the smallest Diminution.” *Id.* at 418–19. Indeed, by recognizing the status of the law of nations in the Constitution and laws, the United States may, by example,

diffuse Happiness over the whole terrestrial Globe. These Maxims of national Law, though the sacred Precepts of Nature, and of Nature’s God, have been too often unknown and unacknowledged by Nations. Even where they have been known and acknowledged, their calm still Voice has been drowned by the Clamours of Ambition, and by the Thunder of War.

Id. at 419.

Like Jay, Wilson, in his charge, was largely repeating legal understandings that he had developed in his earlier writings. See Wilson, Law Lectures, *supra* note 173, at 128–58 (providing material Wilson used in preparing his grand jury charge). For discussion of Wilson’s Charge, see, for example, CASTO, *supra* note 344, at 93–94 and Presser, *supra* note 361, at 50–51. For a similar grand jury charge by Justice Iredell, see Justice Iredell’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina (May 12, 1793), in 2 DOCUMENTARY HISTORY, *supra* note 310, at 454, 458–59, 467–69. Iredell covers the same ground as Jay and Wilson, though with a somewhat different theory of federal

larly, in *Henfield's Case*, Justice Wilson, speaking on behalf of himself, Justice Iredell, and District Judge Peters, explicitly declared:

It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed.³⁷⁰

Despite the concurrence of the executive and judicial branches, success also hinged on federal juries, and in this respect the administration came up short. Hamilton and other framers had foreseen that juries might prove not “competent to investigations, that require a thorough knowledge of the laws and usages of nations;” would “sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their enquiries;” and would pose a “danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war.”³⁷¹ As if on cue, the jury in *Henfield's Case* returned an acquittal, which was widely interpreted as proof that the pro-French sentiment in the country made any such prosecutions extremely difficult, if not impossible, to sustain. Still, the administration's efforts, although ultimately unsuccessful, did help mollify the British and perhaps helped keep the United States out of war.³⁷² In any case, in the years following, the great political disputes

jurisdiction over non-statutory offenses against the law of nations, and he similarly extols the law of nations as “a law of so much moment to the peace and happiness of mankind if sacredly regarded” and which can be ascertained by “enquir[ing into] what reason dictates.” *Id.* at 459.

³⁷⁰ 11 F. Cas. at 1119–20. The prosecution of Henfield was the first of the neutrality prosecutions against U.S. citizens who had joined the French side as privateers under commissions issued by Genêt. CASTO, *supra* note 344, at 85–86. Ultimately, the jury acquitted Henfield. *See infra* note 372 and accompanying text. Both Hamilton and Attorney General Randolph had a large hand in framing the indictment and managing the case. JAY, *supra* note 344, at 139; 1 WARREN, *supra* note 344, at 112–15. For discussion of the case and its background, see, for example, CASTO, *supra* note 344, at 91–102, JAY, *supra* note 344, at 138–42, and Presser, *supra* note 361, at 50–58.

³⁷¹ THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 1, at 568; *see also supra* notes 294–98 and accompanying text.

³⁷² *See, e.g.*, CASTO, *supra* note 344, at 97–102 (describing public reaction and administration efforts to explain acquittal); JAY, *supra* note 344, at 139–42 (same); Presser, *supra* note 361, at 53–56 (same). The administration went to great lengths to try to minimize the

over the federal common law of crimes, although not focused on the law of nations, gave the whole issue a new and more controversial complexion and led ultimately to the ruling in *U.S. v. Hudson and Goodwin* that there is no federal common law of crimes.³⁷³

If the administration's position that the law of nations provided the foundation for non-statutory criminal prosecutions represented the most vulnerable outer edge of the incorporation doctrine, the fact that it generated unanimous support among Federalist and Republican leaders in the administration and the judiciary reflected the depth of the assumption that the law of nations was incorporated into the law of the land. None of the leading actors ever questioned this point, and, indeed, it was one of the few points on which Hamilton and Madison agreed in their *Pacificus-Helvidius*

significance of the verdict, explaining it—not entirely implausibly—as resulting from special circumstances applicable to Henfield himself and warning of further prosecutions, which were instituted in several instances, although these too apparently failed to result in convictions. *E.g.*, CASTO, *supra* note 344, at 99–102; JAY, *supra* note 344, at 141–42. Jefferson forwarded copies of Jay's and Wilson's grand jury charges, as well as an official opinion by Attorney General Randolph, to the U.S. minister in England, Gouverneur Morris, to enable him to establish that actions like those in which Henfield had engaged were still “punishable by law.” He also instructed Morris to explain that the acquittal resulted from special circumstances applicable to Henfield's case, including his ignorance of the unlawfulness of his actions at the time he undertook them. JAY, *supra* note 344, at 141–42; *see also* CASTO, *supra* note 344, at 99–100; Presser, *supra* note 361, at 55.

In contrast, the Republican press used the acquittal to strengthen their attacks on the federal judiciary and its authority over the interpretation of treaties and the law of nations, *see supra* note 360, and to celebrate the power of juries over judges. One writer caustically located the origin of the prosecutions “in the fertile imaginations and creative minds of federal judges, whose wonderful sagacity in the construction of *treaties*, and of the *law of nations*, place their discoveries in the science of law, beyond the comprehension of common capacities.” A South Carolinian, *For the State Gazette*, ST. GAZETTE OF S.C., Sept. 5, 1793, at 2. Recalling the Zenger trial, he then went on to extol the virtues of the jury trial as “the great palladium of liberty, and security of life and property,” *id.*, and defended the power of the jury to decide not only the facts but the law, including the power to override the judges' interpretation of treaties and the law of nations. *See id.* Other writers claimed that the jury verdict had precedential value and established authoritatively the right of American citizens to join French privateers cruising against British vessels. For discussion, and additional citations, *see*, for example, CASTO, *supra* note 344, at 98–99, JAY, *supra* note 344, at 140–41, and Presser, *supra* note 361, at 53–55.

³⁷³ 11 U.S. (7 Cranch) 32 (1812); *see also* United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416–17 (1816) (extending *Hudson & Goodwin* to nonstatutory maritime crimes). On the early controversy over the federal common law of crimes, *see generally supra* notes 287 and 342 (citing sources). The implications of *Hudson & Goodwin* for the status of the law of nations in non-criminal contexts were uncertain even at the time and have remained the source of much debate ever since. *See* Jay, *supra* note 7, at 843–44 (noting ambiguity of *Hudson's* impact on status of law of nations). It is clear, however, that the law of nations continued to govern the conduct of foreign affairs and, as intended by the framers, was applied by the federal courts in many cases, without the need for statutory authorization.

exchange.³⁷⁴ Both also agreed that the President's duty faithfully to execute the laws included the duty to uphold the law of nations. Again, this meant that the President and the courts would have substantial nonstatutory powers to ensure respect for the law of nations, but it also implied that the President was constitutionally obligated to uphold the law of nations. Hamilton repeatedly made this point in his essays, observing that "[t]he Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws."³⁷⁵ He added that it belongs to the executive to do whatever "the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the U[nited] States with foreign Powers."³⁷⁶ On this point, Madison entirely agreed. After quoting *Pacificus* on precisely this point, he elaborated further:

That the executive is bound faithfully to execute the laws of neutrality . . . is true It is bound to the faithful execution of these as of all other laws internal and external, by the nature of its trust and the sanction of its oath, even if turbulent citizens should consider its so doing as a cause of war at home, or unfriendly nations should consider its so doing, as a cause of war abroad. The duty of the

³⁷⁴ In the course of defending Washington's Proclamation, Hamilton repeatedly noted that the law of nations was incorporated into the law of the United States. "Our Treaties and the laws of Nations," he declared, "form a part of the law of the land." Alexander Hamilton, *Pacificus Number I* (June 29, 1793), reprinted in 15 HAMILTON PAPERS, *supra* note 348, at 33, 43; see also *id.* at 34 (observing that purpose of Proclamation was to inform citizens that nation continued to be in state of peace and "to give warning to all within its jurisdiction to abstain from acts that shall contravene those duties, under the penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention"); *id.* at 43 ("The Proclamation has been represented as enacting some new law. This is a view of it entirely erroneous. It only proclaims a *fact* with regard to the *existing state* of the Nation, informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the Infractioners of them."). Madison fully concurred. In his view, the "obvious and legal" purpose of the Proclamation was to carry out "the duty of the Executive to preserve peace by enforcing [the laws of neutrality], whilst those laws continued in force," a necessity created by "the danger that indiscreet citizens might be tempted or surprised by the crisis, into unlawful proceedings, tending to involve the United States in a war." James Madison, *Helvidius Number V* (Sept. 18, 1793), reprinted in 15 MADISON PAPERS, *supra* note 320, at 113, 115. Madison repeatedly affirmed that the law of nations is part of the law of the land, including by expressing agreement with Hamilton that "*the municipal law . . . recognizes and adopts*" the law of nations. James Madison, *Helvidius Number II* (Aug. 31, 1793), reprinted in 15 MADISON PAPERS, *supra* note 320, at 80, 86 [hereinafter *Helvidius Number II*] (quoting *Pacificus Number I*, *supra* note 348, at 40). For further discussion of the incorporation doctrine, see *supra* notes 115–18, 284–93, 299–304, 342, and accompanying text.

³⁷⁵ *Pacificus Number I*, *supra* note 348, at 40.

³⁷⁶ *Id.* at 42. Elsewhere, Hamilton repeated this point and attributed it to the Take Care Clause: "The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land." *Id.* at 43.

executive to preserve external peace, can no more suspend the force of external laws, than its duty to preserve internal peace can suspend the force of municipal laws.³⁷⁷

Indeed, the basic premise of Madison's entire argument in *Helvidius* is that the law of nations limited the President's powers and helped define the line between powers held by the President and those held by Congress. These views were uncontroversial and reflected the widespread assumption that the executive would consult the law of nations as the rule governing his foreign policy actions, an assumption that was in evidence throughout the Neutrality Crisis and, indeed, throughout this whole period and beyond.³⁷⁸

Although for present purposes it is perhaps most illuminating to focus on the points on which Hamilton and Madison agreed, it is also instructive to consider their profound disagreements, which revealed the extreme jealousy with which the nascent Republicans sought to protect the legislature's exclusive power over war. Both were unequivocal in recognizing that the Constitution's grant to Congress of the power to declare war gave it exclusive authority over the decision to go to war.³⁷⁹ Nevertheless, Hamilton's aim was to carve out constitutional space for the President, in the independent exercise of his own constitutional functions, to take measures that might practically affect the scope of congressional discretion. In Hamilton's words, the Executive, "in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions."³⁸⁰ Indeed, he wished to see in Washington's Proclamation such an exercise of concurrent authority. In Hamilton's view, the Proclamation amounted to an announcement by the President of his opinion that nothing in the existing treaties between the United States and France required the nation go to war on behalf of the latter. On this point, Hamilton was on tenuous ground and pushed beyond what

³⁷⁷ *Helvidius Number II*, *supra* note 374, at 86.

³⁷⁸ Golove, *supra* note 281, at 11–28. For further discussion of the President's duty to comply with the law of nations, see *supra* notes 307–11, 343, and accompanying text.

³⁷⁹ Hamilton was explicit on this point:

[T]he Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War . . . It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War.

Pacificus Number I, *supra* note 348, at 42. Despite this concession, Madison reminded his readers of the "necessity of a rigid adherence to the simple, the received and the fundamental doctrine of the constitution, that the power to declare war including the power of judging of the causes of war is *fully* and *exclusively* vested in the legislature." James Madison, *Helvidius Number IV* (Sept. 14, 1793), *reprinted in* 15 MADISON PAPERS, *supra* note 320, at 106, 108.

³⁸⁰ *Pacificus Number I*, *supra* note 348, at 42.

Washington had actually intended. Indeed, it was this claim that provoked the ire of Jefferson and Madison, who viewed it as an underhanded effort to extend the meaning of the Proclamation.³⁸¹ Even while insisting on this interpretation of the Proclamation, however, Hamilton did not claim that the President's supposed interpretation of the treaties could bind Congress.³⁸² Rather, his point was that the President, in publicly pronouncing his interpretation of the treaties, had rightly adopted a measure that should affect congressional deliberation over whether the country should join France as an ally in the ongoing European conflict. In Hamilton's view, the fact that the President's action would embarrass any congressional effort to adopt a declaration of war was simply not a legitimate objection to his course of action.

In view of the pervasiveness of concurrent legislative and executive powers in modern constitutional practice—not to mention the post–World War II rise of the imperial presidency—it is difficult for constitutional scholars today to understand the fierceness of Madison's objection to Hamilton's argument. Madison immediately perceived the direction in which Hamilton's argument could go: If the President had authority to pronounce his interpretation that the treaties with France did not require the United States to go to war, Madison worried, then the President presumably had equal authority to pronounce the opposite conclusion, in which case Congress would find itself in a much more awkward situation. How could it resist declaring war after the President had publicly proclaimed that the United States was bound to do so by treaty? This “antecedent state of things” was precisely what Madison feared, because it gave the executive room to maneuver in advance of legislative deliberation and perhaps even the practical ability to force its hand.³⁸³ For Madison, such a degree of executive influence over the question of war or peace struck to the core of the republican ideal that he had articulated in his essay *Universal Peace*,³⁸⁴ and he devoted the central part of his long *Helvidius* essays to elaborating further on republican theory of the war powers and combating this aspect of Hamilton's constitutional argument. The dispute prompted some of the most eloquent passages

³⁸¹ For discussion, see *supra* note 348.

³⁸² “The Legislature is free,” Hamilton fully acknowledged, “to perform its own duties according to its own sense of them.” *Pacificus Number I*, *supra* note 348, at 42.

³⁸³ E.g., James Madison, *Helvidius Number IV* (Sept. 14, 1793), reprinted in 15 MADISON PAPERS, *supra* note 320, at 106–10 [hereinafter *Helvidius Number IV*].

³⁸⁴ For discussion of Madison's *Universal Peace* essay, see *supra* notes 324–32 and accompanying text.

in his writings, explaining why republicanism required that the power to declare war be lodged in the legislature:

War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.³⁸⁵

The debate between *Pacificus* and *Helvidius* was, in this respect, about democratic control over war-making. It underscored the sensitivity of Republicans to any signal that the President might assert powers that, however indirectly, could push the country into war. That sensitivity, however, was entirely consistent with—indeed, it was partly grounded on—their commitment to upholding the fundamental principles of the law of nations. In this context, direct popular influence worked in tandem with the cosmopolitan aims of the law of nations, safeguarding the people from executive ambition while simultaneously discouraging unjust war.

B. *The Jay Treaty Controversy*

Although the Genêt Affair came first in time, it was not the most politically explosive diplomatic policy crisis of the Washington administration. That distinction was reserved for the Jay Treaty.³⁸⁶ Signed in late 1794, but made public only in the summer of 1795, it provoked a nearly year-long political controversy of an intensity that has been

³⁸⁵ *Helvidius Number IV*, *supra* note 383, at 108–09.

³⁸⁶ For an in depth discussion of the constitutional aspects of the Jay Treaty debate, see Golove, *supra* note 71, at 1154–88. For leading historical accounts of the Jay Treaty controversy, see generally, for example, BEMIS, *supra* note 26, JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS* (1970), DECONDE, *supra* note 344, at 101–40, and ESTES, *supra* note 368. For additional background, see also ELKINS & MCKITRICK, *supra* note 344, at 441–49; STEPHEN G. KURTZ, *THE PRESIDENCY OF JOHN ADAMS: THE COLLAPSE OF FEDERALISM, 1795–1800*, at 19–77 (1957), JAMES TAGG, *BENJAMIN FRANKLIN BACHE AND THE PHILADELPHIA Aurora* 239–74 (1991), and ALFRED F. YOUNG, *THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS, 1763–1797*, at 445–67 (1967).

matched in American history only rarely.³⁸⁷ At the same time, the Jay Treaty dispute was also a constitutional crisis of a much more profound kind than the dispute over Washington's neutrality policy had ever proven to be. Viewing the treaty as a national humiliation that would align the United States with Great Britain against revolutionary France, the Republican leadership launched a coordinated, all-out attack in an effort to defeat it, and neither the treaty's approval in the Senate, nor its ratification by the President, could quiet their efforts. Jefferson and Madison, abandoning any scruples that they may have had about turning a foreign policy dispute into an occasion for direct appeals to the people, encouraged the organization of nationwide protests against the treaty, which sometimes verged on violence.³⁸⁸ Their end-game strategy was to block the treaty in the Republican-controlled House by refusing to provide necessary funding, a move guaranteed, in view of existing constitutional arrangements, to provoke a major constitutional confrontation.

Initially, before Washington had ratified the treaty, the nascent Republican Party sought to convince him to change course and reject the treaty. Republican polemicists launched energetic attacks on every aspect of the treaty, and they coupled critiques of its merits with fervid denunciations of its constitutionality. At this stage, they were less concerned about justifying action by the House than about convincing Washington (and the public) that the treaty was unconstitutional.³⁸⁹ In the heat of the moment—and undoubtedly with Jefferson's encouragement—they pressed every conceivable argument that they could devise to impugn its constitutional validity.³⁹⁰ In response, Federalists,

³⁸⁷ The Jay Treaty, *supra* note 32. For discussion, see Golove, *supra* note 71, at 1154–58, 1161–66. Jay completed the negotiations in late 1794, but the treaty did not reach Philadelphia until March 1795. Washington kept the terms secret and called for a special session of the Senate to consider the treaty, which was set to convene on June 8, 1795. COMBS, *supra* note 386, at 159–60. After it received the consent of the Senate on June 24, the Washington administration, in a serious blunder, delayed publication for a week, and, in the meantime, a Republican senator leaked the text to the press. Its publication set off an uproar. Golove, *supra* note 71, at 1159, 1161 & n.259.

³⁸⁸ On Republican objections to the treaty, see Golove, *supra* note 71, at 1154–56, 1161–68. On the role of Jefferson and Madison, see *id.* at 1178–88 and ESTES, *supra* note 368, at 92–96. Reportedly, a crowd threw stones at Hamilton as he sought to address a public meeting about the Jay Treaty in New York City, preventing him from speaking. CHERNOW, *supra* note 146, at 489–90 (2004); Golove, *supra* note 71, at 1156 n.241. Jay and even Washington were burned in effigy in many parts of the country. For a vivid account of Republican tactics, see ESTES, *supra* note 368, at 71–78, 104–11, 118–22 and ELKINS & MCKITRICK, *supra* note 344, at 415, 432–36, 442–46.

³⁸⁹ See ESTES, *supra* note 368, at 72 (describing emphasis of early public opinion campaign on influencing President Washington).

³⁹⁰ On the constitutional claims of Republican essayists, see Golove, *supra* note 71, at 1161–68. For further discussion, see *infra* notes 401–16 and accompanying text. The single

led by Hamilton, who by this time was no longer serving in the administration, countered with a powerful defense of the treaty and devastating replies to the Republicans' constitutional claims.³⁹¹ Hamilton's constitutional arguments had their intended effect. By the time the treaty finally made it to the House for implementation of its monetary obligations, the Republicans had abandoned the constitutional arguments that they had so ardently pressed in the wake of the treaty's publication. Instead, under Madison's cautious leadership, they reduced their ambitious constitutional agenda down to one core claim: asserting an active role for the House in implementing treaties. This shift, in turn, set the stage for an extended national debate over whether the House had constitutional authority to check the President and Senate, including, if necessary, by forcing the nation to breach its treaty commitments.³⁹²

Ultimately, to the Republicans' disappointment, even this more moderate agenda failed to gain much traction. They were left to confront the stark facts that their effort to interpret the Constitution in accordance with their version of republican theory had been the subject of fierce dispute in the House, had received a serious blow when the Supreme Court rendered its decision in *Ware v. Hylton*³⁹³ at the height of the controversy, and, perhaps most importantly, had met with Washington's firm and unequivocal rejection. On the political front, moreover, the Federalists had outmaneuvered the Republicans. In part by skillfully exploiting both Washington's great prestige and the real fear of war, they successfully reversed the direction of public opinion, enabling them to overwhelm Republican resistance in the House. The Republicans' debilitating defeat in the battle over the

best source for the debates is 1–3 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C., RELATIVE, OR HAVING AN AFFINITY, TO THE TREATY WITH GREAT BRITAIN (Mathew Carey ed., Philadelphia, Henry Tuckniss 1795–1796). It reprints in serial form some of the more important essays produced during the Jay Treaty controversy and was widely distributed during the controversy.

³⁹¹ On Hamilton's long series of responding essays, written under the name *Camillus* and entitled *The Defence*, see Golove, *supra* note 71, at 1168–74. For further discussion, see *infra* notes 406–16 and accompanying text. Along with Hamilton, Noah Webster, writing as *Curtius* (with the aid of James Kent), published an important series of essays defending the treaty. See Noah Webster, *Vindication of the Treaty of Amity, Commerce and Navigation with Great Britain, Nos. I–XII*, reprinted in COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 179–224 (New York, Webster & Clark 1843) [hereinafter WEBSTER, COLLECTION].

³⁹² See Golove, *supra* note 71, at 1174–88 (providing overview of developments in debate during this period and discussing Madison's role). For further discussion, see *infra* notes 415–43 and accompanying text.

³⁹³ 3 U.S. (3 Dall.) 199 (1796). For discussion, see *infra* notes 438–47.

treaty presaged their larger political setback in the presidential and congressional elections held later that year.³⁹⁴

The Jay Treaty was the fruit of the extended diplomatic dispute between the new nation and its former imperial ruler that began with the Treaty of Paris in 1783 and that, by 1794, had pushed the two countries to the brink of war. On the British side, the failure of the states to comply with Articles IV and VI of the treaty were the main irritants. In supposed retaliation for these violations, the British government had refused to execute some of Britain's treaty obligations, most notably its obligation to withdraw from the western forts.³⁹⁵ Beyond the national insult that retention of the forts implied, it posed a strategic threat to the United States, permitting (at least in American eyes) the British to influence the Indian tribes in the region and encourage their attacks on the western settlements. It also seemed to reveal the limited commitment of the British government to the recognition of American independence. Adding to American complaints were Britain's continuing refusal to enter into a commercial treaty, its persistent policy of excluding American merchants from the West Indian trade, and, most immediately pressing, its belligerent seizures of merchant vessels in violation of American neutral rights. By 1794, in the wake of the neutrality disputes sparked by Genêt and the outbreak of the Wars of the French Revolution, the Anglo-American disputes had reached the boiling point. In a last-ditch effort to avert war, Washington appointed Chief Justice Jay to negotiate a treaty with the British to settle some of the outstanding disputes.³⁹⁶

Given the weak position of the United States, Jay lacked much leverage with the British, and, though it did avert war, the treaty he negotiated reflected this imbalance of power.³⁹⁷ The inequalities in many of the stipulations, combined with the widespread and deeply felt resentment against the British generated by memories of its conduct during the Revolutionary War, made it inevitable that the treaty would arouse intense national passions. From the Republican perspec-

³⁹⁴ Golove, *supra* note 71, at 1154–56; *see also* ESTES, *supra* note 368, at 155–81 (describing bitter campaign leading House to vote to fund treaty); ELKINS & MCKITRICK, *supra* note 344, at 441–49. For further discussion, *see infra* notes 434–37 and accompanying text.

³⁹⁵ *See supra* notes 38–42 and accompanying text.

³⁹⁶ Bemis's study of the Jay Treaty recounts these developments. *See* BEMIS, *supra* note 62; *see also* Golove, *supra* note 71, at 1154–55 (providing brief summary of lead-up to Jay Treaty).

³⁹⁷ Most historians have concluded that the treaty was probably as good as could have been expected and that it served U.S. interests effectively in the long run. *See, e.g.*, ESTES, *supra* note 368, at 210–11 (noting that “scholars have tended to validate Federalist claims on behalf of the treaty”); *see also* ELKINS & MCKITRICK, *supra* note 344, at 410–14 (reaching similar conclusion); HERRING, *supra* note 3 at 76–77, 81 (2008) (same).

tive, it only aggravated matters that the treaty was negotiated by the anti-French Jay, seemed to position the nation in a pro-British direction in the ongoing conflict, and effectively ruled out the policy of commercial retaliation against Britain that had been the centerpiece of Madison's legislative program in the House.³⁹⁸ When added to the ongoing battles over financial policy and the growing Republican distrust of the "monarchical" President and the "aristocratic" Senate, the situation was combustible. Once the explosion occurred, it would no longer be possible to suppress Republican challenges to the framers' foreign affairs Constitution and the particular balance between popular politics and insulated diplomacy reflected in the Treaty and Supremacy Clauses.³⁹⁹ In contrast, to Federalists, the public's response to the Jay Treaty was intemperate and ill-considered and had been egged on by Republican politicians seeking to exploit national sentiment for political gain. In their view, the whole crisis illustrated the wisdom of the framers' design and the importance of defending it as vigorously as possible.⁴⁰⁰

³⁹⁸ See BEMIS, *supra* note 62, at 258–71 (discussing Madison's proposed legislation, which was passed in House but, after Washington's public announcement of his decision to send Jay to London to seek negotiated resolution to controversy, was defeated in Senate by tie-breaking vote of Vice President Adams). By establishing normal commercial relations, the treaty ruled out Madison's strategy for confronting Britain through the imposition of trade restrictions. See Jay Treaty art. 11, *supra* note 32, at 254.

³⁹⁹ To Republicans, the treaty was a frontal assault on the rights of the people and their representatives in the House. Pointing to "Hamilton, Jay &c.," Jefferson charged that it was

the boldest act they ever ventured on to undermine the constitution . . . For it certainly is an attempt of a party which finds they have lost their majority in one branch of the legislature to make a law by the aid of the other branch, and of the executive, under color of a treaty, which shall bind up the hands of the adverse branch from ever restraining the commerce of their patron-nation.

Letter from Thomas Jefferson to James Madison (Sept. 21, 1795), in 28 THE PAPERS OF THOMAS JEFFERSON 475, 475–76 (John Catanzariti ed., 2000). One typical Republican writer asked readers, "Will you support your representatives in Congress, or put all power in the hands of twenty Senators and the President?" ESTES, *supra* note 368, at 170 (quoting *Boston Gazette* and several other newspapers). For other Republican reactions, see *id.* at 109–11, 170.

⁴⁰⁰ Federalists emphasized the fact that Republicans had begun criticizing the treaty even before its terms were known and had encouraged its denunciation at public meetings that were held in the immediate wake of its publication before citizens had time to digest, or even to read, its complicated provisions. This approach demonstrated, Federalists argued, the demagogic nature of Republican political leaders and underscored the wisdom of the Constitution's decision to place the treaty power in the President and Senate. Hamilton articulated the Federalist view at the outset of his essays defending the treaty: "It was to have been expected," he observed, that some men "counting more on the passions than on the reason of their fellow citizens, and anticipating that the treaty would have to struggle with prejudices, would be disposed to make an alliance with popular discontent, to nourish it, and to press it into the service of their particular views." Alexander Hamilton, *The Defence Number 1* (July 22, 1795), reprinted in 18 THE PAPERS OF ALEXANDER

In their initial fury, Republicans, rather than defending a role for the House, sought to eviscerate the treaty power altogether. Their essayists claimed that virtually every article of the lengthy treaty was unconstitutional and that the Constitution was full of unexpressed limits on the types of treaties that the United States could make.⁴⁰¹ For example, according to Republican writers, the crucial provisions submitting disputed claims to arbitration before mixed commissioners were unconstitutional invasions of the Article III judicial power and the Article II appointments power and, because the commissioners were not bound by ordinary rules of evidence, were a violation of due process as well.⁴⁰² The provisions permitting British nationals to own

HAMILTON 479, 480 (Harold C. Syrett ed., 1973) [hereinafter 18 HAMILTON PAPERS]. Their task was made all the easier in view of widespread enthusiasm for the French Revolution. See *id.* at 481. As a result, it was not to have been expected

that the treaty would be generally contemplated with candor and moderation, or that reason would regulate the first impressions concerning it. It was certain, on the contrary, that however unexceptionable its true character might be, it would have to fight its way through a mass of unreasonable opposition; and that time, examination and reflection would be requisite to fix the public opinion on a true basis. It was certain that it would become the instrument of a systematic effort against the national government and its administration; a decided engine of party to advance its own views at the hazard of the public peace and prosperity.

Id. at 483. Indeed, Hamilton concluded, this is precisely what had occurred. Opposition to the treaty could not “be considered as any thing more than a sudden ebullition of popular passion, excited by the artifices of a party, which had adroitly seized a favourable moment to surprize the public opinion.” *Id.* at 483–84. Hamilton’s arguments were repeated over and over again by Federalist writers. See NOAH WEBSTER, *Vindication of the Treaty of Amity, Commerce and Navigation with Great Britain No. XI*, reprinted in WEBSTER, COLLECTION, *supra* note 391, at 215, 218 (“The great mass of people are not competent to decide what is, or is not for our public interests, in complicated negotiations and national compacts; and unless [the people] repose confidence in public characters, we shall forever be embroiled with factions.”); A Country Moderate, *For the Gazette of the United States*, GAZETTE OF THE U.S. (Phila.), Sept. 12, 1795, at 2 (making similar argument); see also ESTES, *supra* note 368, at 85–88 (discussing appeals by Federalist writers). Historians have generally affirmed the accuracy of the Federalist view. See, e.g., ELKINS & MCKITRICK, *supra* note 344, at 415 (“The opposition, when it first took form, was in no way a response to the actual terms of the treaty. Such opposition was fully in being before anyone had the least idea how Jay’s efforts would turn out . . .”).

⁴⁰¹ For discussion, see Golove, *supra* note 71, at 1164–68. In the outburst of writings, the essays of Robert and Brockholst Livingston (under the signatures of *Cato*, *Decius*, and *Cinna*) and of Alexander Dallas (who wrote the series *Features of Mr. Jay’s Treaty*), were the most sophisticated. However, to his frustration, Jefferson recognized that they were only “midling performances” and that their authors’ abilities were no match for Hamilton’s formidable talents. Letter from Thomas Jefferson to James Madison (Sept. 21, 1795), in 16 THE PAPERS OF JAMES MADISON 88, 88 (J.C.A. Stagg, Thomas A. Mason & Jeanne K. Sisson eds., 1989) [hereinafter 16 MADISON PAPERS]. Jefferson had, he told Madison, given “a copy or two by way of experiment to honest sound hearted men of common understanding, and they were not able to parry [Hamilton’s] sophistry.” *Id.*

⁴⁰² See Golove, *supra* note 71, at 1165 n.272, 1167 n.278 (discussing claims of *Cato* and Alexander Dallas (“*Dallas*”).

real property in the United States were unconstitutional infringements on the reserved powers of the states.⁴⁰³ Moreover, the articles assuming national responsibility for the payment of private debts were unconstitutional, as were those which allowed British subjects living in the districts around the forts from which Britain had agreed to withdraw to opt either to retain their British nationality or become U.S. citizens. Among other defects, the latter violated the requirement that naturalization laws be uniform.⁴⁰⁴

The Republicans' most far-reaching argument, however, was stunning in its breadth, leaving the treaty power barely standing. According to Republican polemicists, treaties could not constitutionally touch on any subject that fell within the legislative powers of Congress.⁴⁰⁵ Such an approach would have rendered the treaty power virtually nugatory, and those who advocated this position had to go to extreme lengths to explain away the clear language of the text, the understandings expressed throughout the ratification debates, the practice under the Confederation, and the well-known background circumstances that gave rise to the Constitution in the first place. Indeed, their approach all but ruled out the three most common treaties at that time—commercial treaties, alliances, and peace treaties—all of which the nation had concluded during the Confederation and which the Treaty Clause was meant to facilitate.⁴⁰⁶ On this view, commercial treaties infringed Congress's power over foreign commerce (which, on this basis alone, meant that more than half of the articles in the Jay Treaty were invalid); treaties of alliance infringed Congress's war powers; and treaties of peace, or at least many of the stipulations which they typically contained, infringed a whole variety of congress-

⁴⁰³ See *id.* at 1163–68 (focusing on claims of many writers that treaty violated states' rights).

⁴⁰⁴ See *id.* at 1165 n.272, 1167 n.278 (discussing the claims of *Cato* and *Dallas*).

⁴⁰⁵ For a discussion of Republican writers' condemnation of the treaty on this ground, see *id.* at 1163–67.

⁴⁰⁶ In his essays defending the treaty, Hamilton decimated this position, unsparingly demonstrating its implausibilities in every relevant dimension of constitutional argument. See Golove, *supra* note 71, at 1168–74 (discussing Hamilton's extended arguments). For Hamilton's *Camillus* essays addressing constitutional issues, see Alexander Hamilton, *The Defence Number XXXVI* (Jan. 2, 1796) [hereinafter *Defence Number XXXVI*], reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON 3 (Harold C. Syrett ed., 1974) [hereinafter 20 HAMILTON PAPERS], *The Defence Number XXXVII* (Jan. 6, 1796), reprinted in 20 HAMILTON PAPERS, *supra*, at 13 [hereinafter *Defence Number XXXVII*], and *The Defence Number XXXVIII* (Jan. 9, 1796), reprinted in 20 HAMILTON PAPERS, *supra*, at 22. Indeed, by focusing on this argument—rather than on what would emerge as the Republican's weightier and more important claim for a broad, discretionary role for the House in implementing treaties—Hamilton may have made his own argument too easy and mistakenly missed an opportunity to address the crucial point fully in his public writings. Some of his Federalist allies certainly thought so. See *infra* note 411.

sional powers, including the power of the purse.⁴⁰⁷ Unsurprisingly, the arguments of the Republican polemicists were hastily drawn and filled with errors and implausible arguments. There was a flippant quality to their writings that was captured in Jefferson's frank acknowledgment that he saw "not much harm in annihilating the whole treaty making power."⁴⁰⁸ He later quipped, in a reference to the Republican argument rejecting treaties that touched on congressional powers, that "[t]his last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others."⁴⁰⁹

If the animating motivation for all of these arguments was the desire to enlarge popular control over treaties, the Republicans' frustration with the Constitution's exclusion of the House from the treaty process pushed them to assert extreme arguments that would virtually have eliminated the treaty power altogether. This solution to their quandary, however, left their arguments vulnerable to attack, and Hamilton was there to oblige.⁴¹⁰ Writing as *Camillus*, he penned a book-length series of essays providing a comprehensive defense of the Jay Treaty, which concluded with an extended and painstakingly thorough refutation of each of the constitutional claims the leading Republican polemicists had made. By the time it was over, he had demonstrated beyond fair dispute that their arguments were without foundation.⁴¹¹ Moreover, appreciating the larger underlying purpose of the Republican attacks, he insisted throughout on the broad and unrestricted nature of the Constitution's grant of the treaty power:

⁴⁰⁷ For Hamilton's detailed demonstration of this implication of the Republican argument, see *Defence Number XXXVII*, *supra* note 406, at 17–20.

⁴⁰⁸ Letter from Thomas Jefferson to James Madison (Mar. 27, 1796), in 16 MADISON PAPERS, *supra* note 401, at 280.

⁴⁰⁹ THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 52 (Washington D.C., Samuel Harrison Smith 1801).

⁴¹⁰ The relatively weak performance of the Republican polemicists was evident even to Jefferson. See *supra* note 401 (describing Jefferson's frustration with "midling performances" of leading Republican writers). Indeed, for this reason, he pleaded unsuccessfully with Madison to respond to Hamilton's essays. See Letter from Thomas Jefferson to James Madison (Sept. 21, 1795), in 16 MADISON PAPERS, *supra* note 401, at 88–89 (imploping Madison: "For god's sake take up your pen, and give a fundamental reply to Curtius & Camillus"). Contemporary historians have reached a similar conclusion. See, e.g., ELKINS & MCKITRICK, *supra* note 344, at 433–36 (describing weakness of Republican efforts and strength of Hamilton's); ESTES, *supra* note 368, at 105–06, 116–17 (same).

⁴¹¹ Indeed, the refutation was so complete that it prompted Fisher Ames, a leading Massachusetts Federalist, to question whether the undertaking had been worthwhile in the first place. See Letter from Fisher Ames to Jeremiah Smith (Jan. 18, 1796), quoted in Introductory Note to *The Defence Number I*, in 18 HAMILTON PAPERS, *supra* note 400, at 478. Ames pointedly observed that Hamilton "holds up the aegis against a wooden sword. Jove's eagle holds his bolts in his talons, and hurls them, not at the Titans, but at sparrows and mice." *Id.*

It was impossible for words more comprehensive to be used than those which grant the power to make treaties. They are such as would naturally be employed to confer a *plenipotentiary* authority. A power “to make Treaties,” granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess. . . . With regard to the objects of the Treaty, there being no specification, there is of course a *charte blanche*.⁴¹²

In introducing his discussion of the constitutional issues, Hamilton had noted that of all the objections which had been raised against the treaty, “those relating to [its constitutionality] are the most futile. If there be a political problem capable of complete demonstration, the constitutionality of the Treaty in all its parts is of this sort.”⁴¹³ He then predicted that when the House debate finally began, no respectable member of Congress would be willing to publicly defend these constitutional objections: “It is even difficult to believe that any man in either House of Congress who values his reputation for discernment or sincerity will publicly hazard it by a serious attempt to controvert the position.”⁴¹⁴

Although perhaps meant as rhetorical flourish, Hamilton’s remarks were prescient. Throughout the long public debate leading to the House proceedings in spring 1796, Madison—to whom Hamilton’s challenge was most pointedly directed—had remained resolutely silent on the constitutional controversies being aggressively pursued by his Republican allies. Although he had criticized the treaty in harsh terms, he resisted numerous attempts by his allies to induce him to embrace their arguments either publicly or privately, and he even declined Jefferson’s urgent entreaties to respond to Hamilton’s *Camillus* essays. Indeed, with the overzealousness of their constitutional arguments at least partly in mind, Madison gently cautioned his allies “to avoid laying too much stress on minute or doubtful objections, which may give an occasion to the other party to divert the public attention from the palpable and decisive ones.”⁴¹⁵ When the House finally convened, he seems to have convinced the Republican caucus to abandon the discredited constitutional objections to the

⁴¹² *Defence Number XXXVI*, *supra* note 406, at 6.

⁴¹³ *Id.* at 3.

⁴¹⁴ *Id.*

⁴¹⁵ Letter from James Madison to an Unidentified Correspondent (Aug. 23, 1795), in 16 MADISON PAPERS, *supra* note 401, at 57; see also Golove, *supra* note 71, at 1180–82 & n.325 (describing Madison’s activities during this period and his consistent refusal to criticize Jay Treaty on constitutional grounds).

treaty,⁴¹⁶ and to focus instead on the real point of republican principle: defending an enhanced role for the House in the treaty-making process. This shift in strategy set the stage for the monumental debate that followed and brought into the open the conflicting philosophies that underlay the two parties' conceptions of the conduct of foreign affairs in a republican government.

Madison and the House Republicans had no choice but to recognize the text's explicit exclusion of the House from the power to make treaties and its express declaration that treaties were the "supreme Law of the Land."⁴¹⁷ Their crucial move was to claim that what these provisions implied for a number of important questions was uncertain, and that ambiguities should be resolved in light of their interpretation of republicanism.⁴¹⁸ Although there was much confusion about the legal details, the Republicans eventually settled on two core claims: First, although only the President and Senate could "make" treaties, those treaty stipulations that touched on subjects within Congress's legislative authority were not the law of the land until an act of Congress implemented them. This position threatened to eviscerate the self-executing treaty doctrine.⁴¹⁹ Second, they claimed that the

⁴¹⁶ With one minor exception, Republicans never mentioned the constitutional objections in the course of the month-long debate, despite the constant taunting by Federalists who could not stop reminding Republicans of the bitter cries of unconstitutionality that had followed publication of the treaty. For discussion, see Golove, *supra* note 71, at 1174–78, 1183–84. In response to the Republicans' studied silence, Federalists repeatedly observed that the constitutionality of the treaty was now "allowed on all hands." 5 ANNALS OF CONGRESS OF THE UNITED STATES 1204 (1849) [hereinafter 5 ANNALS OF CONG.] (remarks of Rep. Gilbert). Indeed, Representative Tracy noted, "[a]t first the cry had been, the Treaty was unconstitutional, that ground was now given up." *Id.* at 1224 (remarks of Rep. Tracy). For further discussion and citations, see Golove, *supra* note 71, at 1175–76 & nn.307–10.

⁴¹⁷ U.S. CONST. art. VI.

⁴¹⁸ Albert Gallatin's invocation of the republican ideal was typical:

[A]nother essential principle of our Constitution . . . which was the basis of our Revolution, and of all our Governments, the sacred principle that the people could not be bound without the consent of their immediate Representatives, was also prostrated by that truly novel doctrine in America, that those immediate Representatives were bound by the mandates of the Executive; and that, deprived of their discretion, of the freedom of their will, they must implicitly obey and execute laws made by another set of agents of the people, and not immediately chosen by them.

5 ANNALS OF CONG., *supra* note 416, at 738 (remarks of Rep. Gallatin); *see also id.* at 511 (remarks of Rep. Giles) (arguing in similar vein); *id.* at 543–44 (remarks of Rep. Holland) (same). By no means did Federalists concede that republicanism, properly understood, supported the pretensions of House Republicans. *See, e.g., id.* at 518 (remarks of Rep. Sedgwick) (contesting claim that Federalists' position was in any respect inconsistent with republicanism); *id.* at 552 (remarks of Rep. Bradbury) (same).

⁴¹⁹ Conversely, House Republicans generally conceded that treaties dealing with subjects beyond Congress's powers are law of the land even without congressional implementation. How much ground this concession actually covered, however, was unclear.

House, as a legislative body, necessarily had discretion in deciding whether to implement a treaty. It could therefore revisit the policy question of whether the treaty was a good or a bad one according to its independent judgment of the treaty's merits.⁴²⁰

There were many difficulties with the House Republicans' claims. Among them was the inability to explain how their position was con-

⁴²⁰ These claims were embodied in a resolution that the House adopted in response to President Washington's refusal to comply with an earlier House request for documents pertaining to the treaty negotiations. For the House resolution, see 5 ANNALS OF CONG., *supra* note 416, at 771–72 (disclaiming any pretension that House has any agency in making treaties, but asserting that when treaty stipulations touch on subjects within Congress's delegated powers, they must be implemented by Congress and that House has constitutional authority to exercise discretion as to whether to adopt necessary legislation). For further discussion, see Golove, *supra* note 71, at 1157 and 1175 and *infra* note 433 and accompanying text.

The House debate over the constitutional issue was remarkably sophisticated and consumed over 350 pages in the *Annals of Congress*. See 5 ANNALS OF CONG., *supra* note 416, at 426–783. On the Republican side, Madison and his chief lieutenant Albert Gallatin took the lead, although there was widespread participation and lengthy speeches from many Republican members of the House. For Madison's major speeches on the constitutional issue, see James Madison, Jay's Treaty (Mar. 10, 1796) [hereinafter Madison, Jay's Treaty I], *reprinted in* 16 MADISON PAPERS, *supra* note 401, at 255–63 and James Madison, Jay's Treaty (Apr. 6, 1796) [hereinafter Madison, Jay's Treaty II], *reprinted in* 16 MADISON PAPERS, *supra* note 401, at 290–301. For Gallatin's major speeches, see 5 ANNALS OF CONG., *supra* note 416, at 464–74 (remarks of Rep. Gallatin) and *id.* at 726–46 (remarks of Rep. Gallatin).

The Republican theory, in essence, was that there was a potential conflict between, on the one hand, the Treaty and Supremacy Clauses—which assigned the power to make treaties to the President and Senate and made treaties supreme law of the land—and on the other hand, Article I, Section 1—which provided that “[a]ll legislative Powers herein granted shall be vested in” Congress, U.S. CONST. art. I, § 1, and which, in Section 8, granted Congress substantive powers over a wide range of important subjects. If treaty stipulations regulating subjects falling within Congress's legislative powers were the law of the land, then the President and Senate would exercise legislative powers in conflict with Article I's assignment of all legislative powers to Congress, and Congress's legislative powers in Article I, Section 8 would be rendered nugatory because the President and Senate could preempt them by making a treaty restraining the future discretion of Congress to legislate in conflict with the requirements of the treaty. See, e.g., Madison, Jay's Treaty I, *supra*, at 255–56, 257–62; 5 ANNALS OF CONG., *supra* note 416, at 465–67 (remarks of Rep. Gallatin); *id.* at 726 (remarks of Rep. Gallatin). In the Republican view, in order to harmonize these constitutional provisions, it was necessary to deny that treaty stipulations regulating subjects touching on congressional powers were law of the land until implemented by Congress. See, e.g., Madison, Jay's Treaty I, *supra*, at 261–62; 5 ANNALS OF CONG., *supra* note 416, at 468, 473 (remarks of Rep. Gallatin); *id.* at 727, 738–46 (remarks of Rep. Gallatin). Furthermore, the Federalist argument that, even as to those stipulations that required congressional implementation, Congress had no discretion but, rather, was under a constitutional duty simply to execute whatever provisions the President and Senate had agreed to, was inconsistent with the nature of the legislative power and would effectively preclude the people's immediate representatives in the House from safeguarding their interests. See, e.g., Madison, Jay's Treaty I, *supra*, at 259, 262; 5 ANNALS OF CONG., *supra* note 416, at 472 (remarks of Rep. Gallatin). For further discussion of the self-execution doctrine, see *supra* notes 261–63, 265–77, and accompanying text.

sistent with the President and Senate's conceded exclusive power to make treaties. When House Republicans argued that treaties made by the President and Senate were not the law of the land until implemented by an act of Congress, they could have meant only one of two things. On the first interpretation, an unimplemented treaty was not yet in force as a matter of the law of nations, and the House was free to prevent it from taking effect or, at least, to prevent it from taking effect with whatever provisions the House objected to intact. But that was really just another way of saying that the House did, in fact, participate in the making of treaties, and it therefore ran afoul of their initial concession that the power to make treaties is exclusively vested in the President and Senate.⁴²¹ Alternatively, the House Republicans could have been arguing that the House retained an unconstrained power simply to breach a treaty that the President and Senate had just concluded with a foreign power, without even a pretense that such an action could be justified by any of the excuses for treaty non-observance recognized by the law of nations.⁴²² But House

⁴²¹ Federalists repeatedly pointed out the inconsistency in this version of the Republican's argument. As Representative William Vans Murray put it:

The President ratifies a Treaty, with the advice and consent of the Senate, touching the objects granted to the Legislative branches; but that he may not be entangled by the force which the Law of Nations attaches to a ratification of the instrument, he ratifies *sub modo*, under a proviso annexed, that the compact shall be obligatory if Congress shall pass laws to give it effect, or shall consent to it. He sends in the instrument to this House for their approbation, consent, or co-operation—call it what you will The first question would be, is this a Treaty? No, it is not a Treaty unless you consent to it; it depends for its existence on you; it has no obligation without your intervention. Were it a Treaty it would be obligatory; but it is not a Treaty, nor binding, till you consent. Could this House do anything agreeably to their Constitutional powers in the making of Treaties? No; that authority, which by its agency is to give validity to a Treaty, is concerned in the *making* of it. Yet here is a case in which the instrument is to receive its validity as a Treaty, its quality by which only it can be a Treaty in the view of the Law of Nations, its force of obligation, from your act.

5 ANNALS OF CONG., *supra* note 416, at 693–94 (remarks of Rep. Murray); *see also* Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), in 20 HAMILTON PAPERS, *supra* note 406, at 85, 89–90 (including enclosure of lengthy draft memorandum prepared for President Washington in response to House's request for documents and expressing same view as Rep. Murray).

⁴²² Only a few Republicans were willing openly to embrace this view. *See, e.g.*, 5 ANNALS OF CONG., *supra* note 416, at 507 (remarks of Rep. Giles) (arguing that Congress may annul treaties, although only as a whole and not, apparently, provision by provision). Federalists responded harshly to this claim. *See id.* at 522 (remarks of Rep. Sedgwick) (charging Representative Giles with defending doctrine that was “in defiance of every principle of morality and common honesty” and that would “prostrate national honor” and “sport[] with the public faith”). Moreover, this position came up against the further objection that the House would be asserting a power to act on the authority of a single house of Congress, even though, with the exception of the Senate in treaty-making and appoint-

Republicans neither wished to embrace this position, nor to suggest that the House would ever act in such a disreputable fashion.⁴²³ They therefore found themselves on the horns of a logical dilemma from which there was no obvious escape.⁴²⁴ Yet, given the overriding

ments, two houses acting together is the only constitutional method by which Congress can adopt binding legislative measures. If treaties, once made, were supreme law of the land, then the House's refusal to implement a treaty was the equivalent of a one-house repeal of an existing law. At a minimum, to repeal a treaty as law of the land, it would take a majority vote in both houses, though many Federalists were unwilling to concede that even Congress as a whole had that power. *See* Letter from Alexander Hamilton to George Washington, *supra* note 421, at 94, 98–99 (making this argument and noting that, at most, power to declare treaty no longer of obligatory force belongs to Congress, not House acting alone).

⁴²³ Many Republicans did point out, however, that the law of nations recognized legitimate grounds for considering a treaty to be invalid and for disregarding its obligations and that Congress had power to exercise American rights in such cases. *See, e.g.,* 5 ANNALS OF CONG., *supra* note 416, at 485 (remarks of Rep. Havens) (observing that under law of nations all independent nations have right to break treaties “whenever either of the parties do not, in the opinion of the other, observe” them and arguing further that power to exercise this right is in Congress, not President and Senate); *id.* at 548 (remarks of Rep. Holland) (taking similar view); *id.* at 558–86 (remarks of Rep. Freeman) (same).

⁴²⁴ In the face of this dilemma, many House Republicans expressed different views, and some expressed both views simultaneously. There was considerable confusion on this subtle point, and Madison and Gallatin only partially succeeded in clarifying the issues in their extended remarks during the House debate. Thus, for example, Madison maintained, ambiguously, that Congress's powers should “be viewed as co-operative with the Treaty-power, on the Legislative subjects submitted to Congress by the Constitution” and that this view left the power to make treaties exclusively in the President and Senate but “required at the same time the Legislative sanction & co-operation, in those cases where the Constitution had given express & specific powers to the Legislature.” Madison, Jay's Treaty I, *supra* note 420, at 256, 261. This formulation left uncertain what status the treaty had before it was acted upon by Congress, and Madison only compounded the uncertainty in his later speech when he reformulated his position as insisting that the House's “assent [was] necessary to the validity of treaties” regulating subjects falling within Congress's powers, Madison, Jay's Treaty II, *supra* note 420, at 293, and that such treaties were not “operative without a law to sanction [them].” *Id.* at 295. Gallatin's efforts to clarify matters were, if anything, even less successful. *See* 5 ANNALS OF CONG., *supra* note 416, at 465 (remarks of Rep. Gallatin) (arguing that House's “co-operation and sanction was necessary to carry the Treaty into full effect, to render it a binding instrument, and to make it, properly speaking, a law of the land”). Indeed, both Madison and Gallatin deliberately fudged the issue when pressed. For example, in responding to Representative Murray, Gallatin strenuously objected to the Federalist claim that the House, if it failed to execute the treaty, would be choosing “to break a compact, to be guilty of a breach of faith.” *Id.* at 743. He then offered a notably equivocal answer to the question, “in what situation a Treaty was, which had been made by the PRESIDENT and Senate, but which contained stipulations on Legislative objects, until Congress had carried them into effect? Whether it was the law of the land, and binding upon the two nations?” *Id.* at 745. His answer was a transparent attempt to have it both ways:

[I]t was, in some respects, an inchoate act. It was the law of the land and binding upon the American nation in all its parts, except so far as related to those stipulations. Its final fate in case of refusal, on the part of Congress, to carry those stipulations into effect, would depend on the will of the other nation. If they were satisfied that the Treaty should subsist, although some of

republican principles that were at stake, quibbling about the details struck them as unseemly at best.

To Federalists, the House Republicans' position constituted virtually an attempted *coup d'état*. As Hamilton observed, if the Republican position were accepted,

adieu to all the securities which nations expect to [derive] from Constitutions of Government. They become mere bubbles subject to be blown away by every breath of party. The precedent would be a fatal one. Our Government from being fixed and limited would become revolutionary and arbitrary. All the provisions, which our Constitution with so much solemnity ordains "for forming a more perfect union, [etc.]," evaporate and disappear.⁴²⁵

If Republicans focused on the supposed ambiguity of the text and emphasized republican principles, Federalists were content to rest on the clarity of the text and the uniform understanding of its meaning, and the meaning of the similar provision in the Articles of Confederation, from the origins of the government until the release of the Jay Treaty to the public. The indefatigable Hamilton once again took the lead, developing the Federalists' constitutional analysis, which House Federalists both repeated and elaborated upon at great length in the House debate.⁴²⁶ The Constitution not only clearly speci-

the original conditions should not be fulfilled on our part, the whole, except those stipulations embracing Legislative objects, might remain a Treaty. But if the other nation chose not to be bound they were at liberty to say so, and the Treaty would be defeated.

Id. at 745–46. Madison similarly equivocated, rejecting the argument that, in case the House failed to implement a treaty concluded by the President and Senate, a foreign state would have grounds of complaint. *See* Madison, Jay's Treaty II, *supra* note 420, at 300 (arguing that states, under law of nations, were entitled to interpret their own constitutional arrangements and that other states were "bound to understand them accordingly"). The unavoidable inference was that the House would not thereby have breached the treaty.

⁴²⁵ Alexander Hamilton, *The Defence Number XXXVI* (Jan. 2, 1796), *reprinted in* 20 HAMILTON PAPERS, *supra* note 406, at 4–5. Hamilton began his essays defending the constitutionality of the treaty by insisting that the Supremacy Clause placed members of each house of Congress under a constitutional obligation to give effect to treaties. "If they act otherwise," he observed, "they infringe the constitution; the theory of which knows in such case no discretion on their part." *Id.* at 4. The admonition quoted in the text followed thereafter. However, Hamilton chose not to elaborate on this point in his *Camillus* essays, leaving his fully developed constitutional argument to the draft memorandum he prepared for Washington responding to the House's request for information on the negotiation of the treaty. *See* Letter from Alexander Hamilton to George Washington, *supra* note 421, at 89–101.

⁴²⁶ *See* Letter from Alexander Hamilton to George Washington, *supra* note 421, at 89–101. House Federalists largely tracked the arguments Hamilton developed in his draft memorandum to Washington, or had elaborated in his *Camillus* essays, though in some cases they delved more deeply into the relevant history and precedents. For some of the leading, and most learned, Federalist addresses during the debate, see 5 ANNALS OF

fied that the treaty power was exclusively in the President and Senate, but also explicitly declared treaties to be supreme law of the land. That provision was an unequivocal direction that treaties were to be self-executing and to bind every department of the government.⁴²⁷ For the most part, as laws, treaties were subject to judicial and executive enforcement without the need for any implementing legislation. However, in a few instances, the Constitution specifically mandated that an act of Congress would be necessary, as, for example, in the requirement of Article I, Section 9, that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁴²⁸ Indeed, it was the need for an appropriation of money to carry out the stipulations of the Jay Treaty that explained why the treaty had ever come before the House in the first place. Nevertheless, the treaty was supreme law of the land, and as such it was binding on the House. The House consequently was under both a constitutional and a moral duty to implement it in good faith.⁴²⁹ Its discretion only went so far as to permit it to refuse implementation if it concluded that the treaty was unconstitutional—which Republicans were no longer willing to claim—or it was otherwise void under the law of nations.⁴³⁰ A refusal

CONG., *supra* note 416, at 514 (remarks of Rep. Sedgwick); *id.* at 593 (remarks of Rep. Smith of New Hampshire); *id.* at 654 (remarks of Rep. Coit); *id.* at 676 (remarks of Rep. Gilbert); *id.* at 684 (remarks of Rep. Murray).

⁴²⁷ As Hamilton put it, “[t]he sound conclusion appears to be—that when a Treaty contains nothing but what the constitution permits, it is conclusive upon ALL and ALL are bound to give it effect.” Letter from Alexander Hamilton to George Washington, *supra* note 421, at 100.

⁴²⁸ U.S. CONST. art. I, § 9, cl. 7. Federalists did not deny that only Congress could appropriate money under this provision. Their position was that the House was constitutionally obliged to appropriate monies to fulfill obligations that the President and Senate, acting within the scope of their constitutional powers under the Treaty Clause, had undertaken on behalf of the nation. *See* Letter from Alexander Hamilton to George Washington, *supra* note 421, at 92, 95–98; 5 ANNALS OF CONG., *supra* note 416, at 600 (remarks of Rep. Smith of New Hampshire).

⁴²⁹ *See* Letter from Alexander Hamilton to George Washington, *supra* note 421, at 97 (noting that, though “the Constitution provides no method of compelling the legislative body to act,” the House “is not the less under a Constitutional legal and moral obligation to act, where action is prescribed” by treaty); 5 ANNALS OF CONG., *supra* note 416, at 595 (remarks of Rep. Smith) (arguing treaty is “paramount to a law of the United States and annuls all pre-existing laws contrary to it, and, as long as it remains in force, limits and restricts the power of the Legislature of the United States to pass any laws in contravention of it”); *id.* at 655–56 (remarks of Rep. Coit) (taking similar view of House’s duty); *id.* at 683–84 (remarks of Rep. Gilbert) (same); *id.* at 696–97 (remarks of Rep. Murray) (same).

⁴³⁰ *See, e.g.,* 5 ANNALS OF CONG., *supra* note 416, at 600 (remarks of Rep. Smith) (acknowledging exception to House’s constitutional duty to implement treaties for treaties that are invalid on natural law principles or in cases where another party has violated it); *id.* at 655–56 (remarks of Rep. Coit) (same); *id.* at 683–84 (remarks of Rep. Gilbert) (same); *id.* at 693, 696–97 (remarks of Rep. Murray) (observing that there are cases in which House might refuse to implement treaty, but that those instances “would only be either in the extreme case, wherein necessity overcame all other law; or where the act was

to implement the treaty would, therefore, be a breach of the House's constitutional obligations. In fact, many Federalists went a step further and argued that neither the House, nor Congress as a whole, had any power to legislate in violation of treaty commitments—except possibly where the law of nations justified noncompliance on the nation's part. Even then, Federalists were unwilling to concede, although they did not deny, that the power to exercise American rights in such a situation devolved to Congress.⁴³¹ Faced with precisely the kind of inflamed political conditions about which the framers, in view of their experience under the Confederation, were concerned, the Federalists defended a strong version of the original foreign affairs Constitution and sought, in the context of treaties, to fortify the framers' goal of insulating compliance with international legal obligations from direct popular control.⁴³²

not a Treaty, because contrary to the Constitution, or the necessary Law of Nations," whereas, in all other instances, "the only doctrine which, in his mind, did not carry with it a deadly poison to both the Constitution, and the character of the nation for honor and good faith, was, that we were bound to execute the Treaty"). Similarly, Hamilton conceded that the House could decline to implement a treaty that was unconstitutional or, invoking the law of nations, the binding character of which had been dissolved by a "change of circumstances." Letter from Alexander Hamilton to George Washington, *supra* note 421, at 94, 100.

⁴³¹ Hamilton refused to concede that Congress had power to violate treaty commitments, but, in denying that the House had any such power, he did assume such a power in Congress for the sake of argument, because "[a] right in the whole Legislative body . . . by a collective act to pronounce the cases of non operation & nullity of a Treaty asserts every thing that can reasonably be claimed in favour of the legislative Power." Letter from Alexander Hamilton to George Washington, *supra* note 421, at 99. However, his general argument clearly implied that, even if Congress had such a power, it would have to be exercised consistently with the requirements of the law of nations. Thus, for example, he argued against the House's power to contravene treaty obligations on the ground that such a power would imply "the contradiction that a Nation may rightfully pledge its faith through one organ, and without any change of circumstances to dissolve the obligation may revoke the pledge through another organ." *Id.* at 94. Likewise, he dismissed the Republican argument that, as a deliberative legislative body, the House necessarily could exercise discretion in deciding whether to carry a treaty into execution, by observing that "it would result from it that the Nation could never be conclusively bound by a Treaty." *Id.* at 98. He then added, "[w]hy should the inherent discretion of a future legislature be more bound by the assent of a preceding one than this was by a pledge of the public faith through the President & Senate." *Id.* For further discussion of congressional duty to observe treaties and the law of nations, see *supra* notes 281, 290–91, 312–19, 422–23, and accompanying text.

⁴³² Representative Murray captured the Federalist view of the importance of compliance with the law of nations in concluding his lengthy remarks:

The people knew the value of national reputation for good faith; they know the sanctity of the Law of Nations. They would not . . . be pleased by the adoption of a principle in this House . . . that sets national faith at hazard; that produced a solecism in the eye of the Law of Nations – a Treaty ratified and fully accomplished, not obligatory, if those who are bound by it do not choose to execute it. That Law of Nations they would insist on to be inviolate as the

The one important success that the Republicans achieved in the debate was the adoption of a House resolution that affirmed their claims. In the resolution, the House disclaimed “any agency in making Treaties,” but it insisted that:

when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.⁴³³

The resolution thus embodied the two claims that the Republicans were asserting: their denial of the self-executing treaty doctrine, at least insofar as a treaty stipulation touched on a subject falling within Congress’s legislative powers, and their insistence on the House’s constitutional discretion to refuse treaty implementation on policy grounds. These claims formed the core of their republican interpretation of the treaty power.

In view of the direction in which events had proceeded, however, the resolution could provide Republicans with only limited comfort. In the first place, despite the institutional interests of the House, which might have been expected to sway House members broadly to favor an assertion of its constitutional authority, the resolution passed by a vote of only 57 to 35.⁴³⁴ Federalists were adamantly opposed, and the resolution was therefore a largely partisan affair. More important, however, was the fact that Washington’s public rejection of the Republicans’ position prompted the resolution. A motion made by the young Republican firebrand Edward Livingston requesting that Washington provide the House with his instructions to Jay and the other negotiating records pertaining to the treaty set off a heated debate in the House. In the course of the debate over the motion, it became clear that the only justification for the House’s request was its desire to reexamine the expediency of the treaty.⁴³⁵ In response to the House’s passage of Livingston’s motion, Washington took the unusual step not only of denying the requested information, but also of

great charter, not of one nation only, but of the human race. . . . [He considered] the resolution as predicated upon a right in this House, which he deemed a violation of the Constitution

⁵ ANNALS OF CONG., *supra* note 416, at 703 (remarks of Rep. Murray).

⁴³³ *Id.* at 771.

⁴³⁴ *Id.* at 782–83.

⁴³⁵ For background, see Golove, *supra* note 71, at 1176 n.309 and ELKINS & MCKITRICK, *supra* note 344, at 444.

sending a message to the House explaining the reasons for his refusal and his understanding of the treaty provisions of the Constitution. Washington's message is worth quoting at some length:

Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject, and from the first establishment of the Government to this moment, my conduct has exemplified that opinion, that the power of making Treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every Treaty so made, and promulgated, thenceforward became the law of the land. . . . [W]hen ratified by the President, with the advice and consent of the Senate, [treaties] become obligatory. In this construction of the Constitution every House of Representatives has heretofore acquiesced, and until the present time not a doubt or suspicion has appeared to my knowledge that this construction was not the true one. . . .

There is also reason to believe that this construction agrees with the opinions entertained by the State Conventions when they were deliberating on the Constitution

. . . .

If other proofs than these, and the plain letter of the Constitution itself, be necessary to ascertain the point under consideration, they may be found in the Journals of the General Convention, which I have deposited in the office of the Department of State. In those Journals it will appear, that a proposition was made, "that no Treaty should be binding on the United States which was not ratified by a law," and that the proposition was explicitly rejected.

As, therefore, it is perfectly clear to my understanding, that the assent of the House of Representatives is not necessary to the validity of a Treaty; as the Treaty with Great Britain exhibits in itself all the objects requiring Legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the Government, that the boundaries fixed by the Constitution between the different departments should be preserved—a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request.⁴³⁶

By categorically denying the validity of the House's pretensions, and invoking not only his own memory of the proceedings in Philadelphia, over which he had presided, but also the Convention Journals, Washington placed House Republicans in an unenviable

⁴³⁶ 5 ANNALS OF CONG., *supra* note 416, at 760–62 (reprinting Washington's message).

position. It is no surprise that Madison found his troops reeling; nor was it a small achievement that he managed to rally them behind the House's responding resolution.⁴³⁷ Still, given Washington's towering influence, the damage was done, and it presaged more trouble down the line.

But even Washington's dramatic intervention was not the last of the House Republicans' setbacks. At the very outset of the debate, the Supreme Court rendered its decision in the great case of *Ware v. Hylton*,⁴³⁸ and the various opinions of the Justices cast a long shadow over the Republicans' entire legal approach.⁴³⁹ *Ware* was yet another installment of the long-standing effort to enforce the duties of the United States under Article IV of the Treaty of Peace. At issue was whether a Virginia debtor was obliged to pay his British creditor, notwithstanding the fact that during the Revolutionary War he had paid the debt to the state under a Virginia statute that purported to discharge him from any further liability for the debt. The whole problem of state violations of the Treaty of Peace was at the core of the issues dealt with in the Jay Treaty, and it was now up to the Supreme Court to determine how far the former treaty would be judicially enforced. Strictly speaking, the case dealt with a conflict between the Treaty of Peace and state law, not federal law. But there is little doubt that the subject of wartime confiscation of debts fell within the scope of Congress's war powers. Therefore, if, as the House resolution claimed, treaty stipulations "on any of the subjects submitted by the Constitution to the power of Congress" necessarily depend for their "execution . . . on a law or laws to be passed by Congress,"⁴⁴⁰ then

⁴³⁷ See ELKINS & MCKITTRICK, *supra* note 344, at 445 (describing difficulties of Madison's task).

⁴³⁸ 3 U.S. (3 Dall.) 199 (1796).

⁴³⁹ The decision was rendered on March 7, 1796, just as the House debate got underway. However, the Justices delivered their lengthy opinions orally, making it uncertain how widely their rulings on self-execution were known as the debate progressed. The written versions of the opinions were not published until later. 7 DOCUMENTARY HISTORY, *supra* note 319, at 219 n.78. However, it seems that at least some members of Congress were aware of the decision and of its implications for the Jay Treaty debate. See 5 ANNALS OF CONG., *supra* note 416, at 528 (remarks of Rep. Sedgwick) (noting, apparently in reference to *Ware*, "that it was well understood to be the opinion of that tribunal which the Constitution had authorized to pronounce the law, the Supreme Court, that the Treaty from its own powers, repealed all antecedent laws which stood in the way of its execution"). This is not entirely surprising, given the wide appreciation of the importance of the case. With some exaggeration, Justice Iredell reportedly characterized the case as "the greatest Cause which ever came before a Judicial Court in the World." 7 DOCUMENTARY HISTORY, *supra* note 319, at 203 (quoting Letter from Jeremiah Smith to William Plumer (Feb. 7, 1795)). Certainly, the Justices were fully aware of the important implications of their decision for the constitutional issues at stake in the debate.

⁴⁴⁰ 5 ANNALS OF CONG., *supra* note 416, at 771–72.

Article IV of the Treaty of Peace, never having been implemented by Congress, was not supreme law of the land subject to judicial enforcement.

In rejecting this claim, the Justices were unanimous and unequivocal. Although they disagreed about whether the self-executing treaty doctrine had applied under the Confederation—as Jay and the Confederation Congress had long ago claimed⁴⁴¹—they all agreed that the Supremacy Clause made treaties supreme law of the land and judicially enforceable without any necessity for an implementing act of Congress.⁴⁴² On that basis, with the exception of Justice Iredell, who interpreted Article IV differently from the majority,⁴⁴³ they dismissed Virginia’s law and enforced the debt. By thus affirming the Federalists’ claim that the Supremacy Clause makes treaties self-executing, the Justices directly undermined, at a minimum, one of the two planks in the Republicans’ constitutional vision.

Beyond that, and in light of the ongoing public debates, the Justices took the opportunity to affirm the importance of compliance with the law of nations and treaty obligations. Justice Wilson, for example, declared that “[w]hen the [United States] declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”⁴⁴⁴ And Justice Iredell waxed rhapsodic on the subject of treaties, reserving special reverence for the Treaty of Peace:

⁴⁴¹ See *supra* notes 139–41 and accompanying text.

⁴⁴² Justices Chase and Iredell wrote the leading opinions. Justice Chase ruled treaties were self-executing even under the Confederation. See *Ware*, 3 U.S. (3 Dall.) 236 (opinion of Chase, J.). There was no doubt, he further held, that they were also self-executing under the Constitution. *Id.* at 236. Rejecting the view expressed in Jay’s report and in the subsequent resolution of Congress, Justice Iredell argued that treaties were not self-executing under the Confederation, see *id.* at 266 (opinion of Iredell, J., Circuit Justice, published in whole on appeal), but were under the Supremacy Clause of the Constitution: “Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for . . .” *Id.* at 277; see also *id.* at 284 (opinion of Cushing, J.) (upholding self-execution). Justices Patterson and Wilson did not address the self-executing issue directly, but simply assumed that the treaty was self-executing. On the issue of self-execution under the Confederation, see *supra* notes 110–14, 139–40, 262, 265, 267–70, 275, and accompanying text. On the issue of self-execution under the Supremacy Clause, see *supra* notes 261–63, 271–77, and accompanying text. For further discussion of the decision in *Ware*, see *supra* notes 151, 266, 269, 393, and accompanying text.

⁴⁴³ Justice Iredell interpreted the treaty to permit recovery only against debtors whose debts had not already been discharged at the time the Treaty of Peace was concluded. See *id.* at 279–80. The other Justices rejected this view. See, e.g., *id.* at 239–45 (opinion of Chase, J.).

⁴⁴⁴ *Id.* at 281 (opinion of Wilson, J.).

None can reverence the obligation of treaties more than I do. The peace of mankind, the honour of the human race, the welfare, perhaps the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. If ever any people on account of the importance of a treaty, were under additional obligations to observe it, the people of the United States surely are to observe the Treaty in question. . . . It insured, so far as peace could insure them, the freest forms of government, and the greatest share of individual liberty, of which, perhaps, the world had seen any example. It presented boundless views of future happiness and greatness, which almost overpower the imagination, and which, I trust, will not be altogether unrealized⁴⁴⁵

Justice Chase, with the charges of the unconstitutionality of the Jay Treaty still in mind, went out of his way to suggest how far he would go in upholding the constitutionality of treaty stipulations. Indeed, the effect of the Court's interpretation of Article IV was to undo the vested right of a debtor, who by state law had paid his debt to the state in return for a statutory discharge, but whose debt the treaty revived. The case, therefore, presented a genuine constitutional issue about how far treaties could go in overriding ordinarily protected constitutional rights. Observing that striking down a treaty provision as invalid would give the other party the power to declare its own obligations void, he cautioned "how very circumspect the court ought to be before they would decide against the [right] of Congress to make [such a] stipulation."⁴⁴⁶ Indeed, he was even unwilling to decide whether the Court had any such power, but noted that, if it did, "I shall never exercise it, but in a very clear case indeed."⁴⁴⁷

It was clear, then, that the House Republicans faced formidable obstacles as they sought to reinterpret the framers' design of the foreign affairs Constitution in a direction more consistent with their developing understanding of republican principles. On all sides, they found their claims assailed as inconsistent with the purposes of the Constitution and as violating its text. Even politically, they were ultimately unable to carry through on their threat to disrupt the treaty. Nevertheless, both the Jay Treaty controversy and the earlier Neutrality Crisis revealed the difficulty in sustaining the framers' design in a highly politically charged environment. It was a testament to the continuing force of the original constitutional settlement that it survived these explosive controversies reasonably intact. Yet, at the same time, these episodes revealed the delicacy involved in insulating

⁴⁴⁵ *Id.* at 270 (opinion of Iredell, J., Circuit Justice, published in whole on appeal).

⁴⁴⁶ *Id.* at 237 (opinion of Chase, J.).

⁴⁴⁷ *Id.*

compliance with international obligations from direct popular control in a republican constitutional system. Whether the framers' approach could survive another crisis of this magnitude must have appeared as at least doubtful to the victorious Federalists, even as they basked in the warm glow of their successes.⁴⁴⁸ What the implications were for their desire to be embraced as representatives of a respectable nation and for their efforts to enable the United States to claim equal standing in the European order of states, no one, at that moment, could have said.

At the same time, it would be a mistake to suppose that the Republican leadership was hostile to the law of nations. Quite the contrary. The House's claim of constitutional discretion to decide whether to implement treaties has been widely understood in contemporary scholarship to imply that the House was asserting a power, and proclaiming a willingness, to disregard valid treaty stipulations. This interpretation, however, rests on a misunderstanding of both the House's resolution and of what Republicans perceived to be at stake in the debate. Notwithstanding their disclaimers, House Republicans were really concerned about the making of treaties, not about the Constitution's mechanisms for ensuring compliance with them. They objected to the substance of the Jay Treaty, and it was the ability of the President, in league with the more insulated Senate, to go forward

⁴⁴⁸ For a description of the anxious contemplations of some perceptive Federalists, see ESTES, *supra* note 368, at 202–09. Noah Webster, in particular, seemed to anticipate the future risks:

The appeal to the people by the disorganizers the last summer, was a gross violation offered to Freedom of Deliberation, in the constituted authorities. . . . [I]t is an extraneous influence, unknown to the regular governmental proceedings; one that is liable to be misused and perverted to dangerous purposes. Besides, such a resort to the people, weakens the operations of law and constitution; diminishes the confidence that foreign nations and our own citizens ought to place in government, and in short exhibits our system of government in a ludicrous light.

ESTES, *supra* note 368, at 206 (quoting THE MINERVA & MERCANTILE EVENING ADVERTISER, May 3, 1796); see also Letter from Representative Jeremiah Smith to Samuel Smith (April 29, 1796), reprinted in JOHN H. MORISON, LIFE OF THE HON. JEREMIAH SMITH, LL.D.: MEMBER OF CONGRESS DURING WASHINGTON'S ADMINISTRATION, JUDGE OF THE UNITED STATES CIRCUIT COURT, CHIEF JUSTICE OF NEW HAMPSHIRE, ETC. 96 (Boston, Charles C. Little & James Brown 1845). In a letter written immediately after the House vote, Representative Smith likewise observed that "every citizen [has] good sense enough to know that it is his duty, and certainly it is his interest, to be temperate, sober, and virtuous . . ." *Id.* The nation, moreover, has had "a thousand escapes, miraculous escapes, since the formation of the present government," and has "been within an ace of tarnishing the national character and honor—a stain which all the water in the ocean could never wash out." *Id.* "The Jay Treaty crisis" he concluded, proved that "our prejudices are an overmatch for our judgment, our interest, and even our sense of national honor and character." *Id.*

without regard to the House's objections to the treaty that they struggled to resist. The greater democracy they sought was thus not the right to violate treaties, but to veto bargains that the peoples' representatives believed were inconsistent with their values and against their interests. To be sure, House Republicans were forced to concede that the President and Senate had in some sense "made" the Jay Treaty, but their point was that the treaty was not really made—not supreme law of the land—until the House gave its imprimatur.⁴⁴⁹ However offended the British government might be by the irregularity of the treaty process—which, as the House Republicans tirelessly pointed out, was consistent with English constitutional practice—Republicans assumed that Britain would interpret the House's action as effectively a veto over the treaty, not as a breach of existing obligations.⁴⁵⁰ Certainly, that would be true going forward. Foreign governments would be on notice that treaties were not truly binding on the United States until the House had passed on them.

Nothing in the Neutrality Crisis of 1793 or the Jay Treaty controversy of 1795 to 1796 suggested that Republican leaders had lost their commitment to the sanctity of treaties and the law of nations, and when they finally assumed control over the political branches of the national government after the election of 1800, they fully embraced the essentials of the framers' design of the foreign affairs Constitution and were careful to comply with the nation's international duties. As a result, although a matter for future work to establish, the original constitutional settlement remained largely in place throughout the entire period of the long American Founding and beyond.

IV

CONSTITUTIONS AND THE INTERNATIONAL RECOGNITION OF POSTCOLONIAL NATIONS

The United States was the first postcolonial republic in which constitution-making was inextricably linked to the pursuit of international recognition, but it was not the last. Because the United States was first, the connection between the Federal Constitution and international recognition may shed light on constitution-making across the

⁴⁴⁹ See *supra* notes 421–24 and accompanying text.

⁴⁵⁰ Both Madison and Gallatin were careful to insist on this point. See Madison, Jay's Treaty II, *supra* note 420, at 300 ("[O]f all nations Great Britain would be least likely to object to this principle, because the construction given to our government, was particularly exemplified in her own."); 5 ANNALS OF CONG., *supra* note 416, at 469–72 (remarks of Rep. Gallatin); *id.* at 745–46 (remarks of Rep. Gallatin).

globe since 1787.⁴⁵¹ We are in no position now to trace this connection; that must await further research, by ourselves and others. In this brief section we merely point out the connection between constitutions and recognition that the United States established. The pattern appears to have become more formalized since the late eighteenth century, but the basic underlying dynamic remains: Constitution-makers undertake their projects not only to consolidate power at home, but also to gain recognition abroad. To do so, they incorporate commitments to international law in their domestic constitutions.

Each wave of colonial revolution, from the Spanish American revolutions in the early nineteenth century to the decolonization movement of the twentieth century, has—our preliminary research suggests—ushered in with it a series of national constitutions that simultaneously establish new governments independent of the former imperial ruler and pledge respect to leading principles or institutions of international law. The exact form of those constitutions has varied greatly as has their content. But the connection has also become even more explicit over time.

As in the early United States, recognition brings more than legal status. It also has powerful existential dimensions. The desire for recognition, as Clifford Geertz observes, unites the vast majority of postcolonial nations. “[T]he peoples of the new states,” Geertz argued,

are simultaneously animated by two powerful, thoroughly interdependent, yet distinct and often actually opposed motives—the desire to be recognized as responsible agents whose wishes, acts, hopes, and opinions “matter,” and the desire to build an efficient, dynamic modern state. The one aim is to be noticed: it is a search for an identity, and a demand that the identity be publicly acknowledged as having import, a social assertion of the self as “being somebody in the world.” The other aim is practical: it is a demand for

⁴⁵¹ There is a growing literature on the influence of American constitutionalism on other nations. See generally BILLIAS, *supra* note 55; MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY* (2008); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). That literature usually focuses on the construction of domestic authority and the degree to which other nations have patterned their constitutions on that of the United States. The ongoing work of the Comparative Constitutions Project takes a different approach, measuring the incidence of common provisions in all national constitutions since 1789. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009). The connection between the very process of constitution-making and recognition, however, suggests a previously unrecognized influence of the United States on global constitutionalism—not necessarily its particular structures or doctrines, but the drafting and implementation of a constitution itself as part of the process of obtaining international recognition.

progress, for a rising standard of living, [and a] more effective political order, [and] greater social justice⁴⁵²

Geertz wrote in 1963 about the new African and Asian nations of the mid-twentieth century, nations that broke free of European empires. Without ignoring all the differences between those independence movements and American independence—indeed, despite those many differences—the similarities in the legal forms of independence are striking.⁴⁵³ The United States, therefore, appears to have established the pattern for future postcolonial nations seeking recognition. First, a candidate nation issues a declaration of independence, similar to (and often modeled on) the American Declaration. This remains the opening bid for recognition.⁴⁵⁴ Second, the candidate nation drafts and circulates a written constitution, which carries forward the bid to the next stage, where the candidate state claims the capacity to govern itself and to abide by international norms. Finally, the nation must successfully implement that constitution.

The relationship between constitution-making and recognition continues to this day. In 2008, Kosovo declared its independence from Serbia,⁴⁵⁵ and, soon after, it promulgated a new national constitution.⁴⁵⁶ This constitution is, like most of the other constitutions written by the nations that emerged out of the former Yugoslavia, an internationalist document both in the way it was crafted and in its substantive provisions.⁴⁵⁷ Its Preamble explicitly relates the new republic to the larger world around it—especially to the United Nations, the

⁴⁵² Clifford Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in GEERTZ, *supra* note 11, at 258 (internal footnotes omitted).

⁴⁵³ Cf. RICHARD B. MORRIS, *THE EMERGING NATIONS AND THE AMERICAN REVOLUTION* (1970) (describing similarities between American Revolution and later colonial revolutions). There is a lively debate about whether it is possible to view the early United States in postcolonial terms. Most of the debate concerns the characterization of early American literature. See generally Lawrence Buell, *Postcolonial Anxiety in Classic U.S. Literature*, in POSTCOLONIAL THEORY AND THE UNITED STATES 196 (Amritjit Singh & Peter Schmidt eds., 2000); Michael Warner, *What's Colonial About Colonial America?*, in POSSIBLE PASTS: BECOMING COLONIAL IN EARLY AMERICA 49 (Robert Blair St. George ed., 2000); EDWARD WATTS, *WRITING AND POSTCOLONIALISM IN THE EARLY REPUBLIC* (1998). For its application to law, see HULSEBOSCH, *supra* note 6, at 203–06.

⁴⁵⁴ ARMITAGE, *supra* note 9, at 103–38 (describing proliferation since 1776 of “declarations of independence generically similar to—and sometimes modeled on—a document that Americans came to revere as their own”).

⁴⁵⁵ See Declaration of Independence (Kosovo 2008), available at http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf (last visited Aug. 2, 2010).

⁴⁵⁶ See CONSTITUTION OF THE REPUBLIC OF KOSOVO, available at <http://www.kushtetutakosoves.info/?cid=2,245> (last visited July 17, 2010). The Constitution formally went into effect in June 2008.

⁴⁵⁷ On the international aspects of the Yugoslav breakup and international recognition of the successor states, see RICHARD CAPLAN, *EUROPE AND THE RECOGNITION OF NEW STATES IN YUGOSLAVIA* (2005).

European Union, and NATO—proclaiming that “the state of Kosovo will be a dignified member of the family of peace-loving states in the world” and declaring the “intention of having the state of Kosovo fully participating in the processes of Euro-Atlantic integration.”⁴⁵⁸ Article 22 then states that the Constitution directly incorporates at the constitutional level all of the leading international human rights instruments, including, among others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.⁴⁵⁹ Not only are these instruments incorporated into Kosovo law, they are made “directly applicable” and are given “priority over provisions of laws and other acts of public institutions.”⁴⁶⁰ Moreover, the Constitution ensures that these treaty obligations will be interpreted in accordance with internationally recognized standards, providing, in Article 53, that they be “interpreted consistent with the court decisions of the European Court of Human Rights.”⁴⁶¹ In Article 125, on national security, the Constitution continues to show deference to international law, mandating that “[s]ecurity institutions in the Republic of Kosovo shall . . . operate . . . in accordance with internationally recognized democratic standards and human rights” and that “[t]he Republic of Kosovo fully respects all applicable international agreements and the relevant international law and cooperates with the international security bodies and regional counterparts.”⁴⁶² Finally, Article 19 provides that international law—including both treaties and customary international law—has “superiority over the laws of the Republic of Kosovo.”⁴⁶³

These provisions illustrate the international character of Kosovo’s constitution. As with eighteenth-century America, however, the adoption of the Kosovo constitution was not sufficient to gain recognition by itself.⁴⁶⁴ Still, as in the American case, these provisions were

⁴⁵⁸ CONSTITUTION OF THE REPUBLIC OF KOSOVO, *supra* note 456, pmb1.

⁴⁵⁹ The other human rights instruments listed include the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the Council of Europe Framework Convention for the Protection of National Minorities; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; and the Convention on the Rights of the Child. *See id.* art. 22.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* art. 53.

⁴⁶² *Id.* art. 125.

⁴⁶³ *Id.* art. 19.

⁴⁶⁴ Nikolas K. Gvosdev, *Unfreezing Kosovo: Reconsidering Boundaries in the Balkans*, FOREIGN AFF. (Apr. 26, 2010), <http://www.foreignaffairs.com/articles/66392/nikolas-k-gvosdev/unfreezing-kosovo>.

designed to carry part of the burden of proof that Kosovo is and should be considered a fully sovereign member of the international community of states. Our supposition is that the American and Kosovo cases are bookends of a still untold history.

CONCLUSION

This Article has begun to recover the international dimensions of American constitution-making. Starting with the Declaration of Independence and continuing through the ratification of the Jay Treaty—and beyond—constitution-making in the United States was deeply intertwined with international affairs, particularly the aim of establishing a republic premised on the consent of the people and also capable of gaining the respect of the established states of Europe.

A core purpose of the Federal Constitution was to complete the process of international recognition that the Declaration and Revolutionary War had initiated. By 1787, the important, though still limited, gains that the United States had achieved were dissipating due to the refusal of the states to comply with treaties and the law of nations. The founders sought to reconfigure their constitutional system to signal to the world the new government's willingness and ability to carry out the international responsibilities of the United States. In part, they recognized that unless the republic could do so, it would remain weak, disrespected, and vulnerable to the machinations of competing European empires. But realism does not capture the full complexity of their motivations. Federalists, in particular, valued honorable behavior in the conduct of foreign affairs in its own right and sought admission, both as individuals and as a nation, into what they imagined as the "civilized world."

Many constitution-makers, and prominently the Federalists, hoped that the Federal Constitution would enable them to achieve these purposes. Centralizing foreign affairs powers in the federal government was an important step, but it was not sufficient. Based on their experience at home and abroad during the critical period, Federalists had come to see the problem in more systematic terms and sought to refine republican government in a way that would reconcile the principle of popular sovereignty with the demands of international legitimacy. They therefore devised a host of constitutional mechanisms to ensure that the federal government complied with the nation's international obligations. Among these were an independent judiciary with jurisdiction over cases involving treaties and the law of nations; self-executing treaties made without participation by the House of Representatives; and an executive charged with executing

the laws, including the law of nations. Yet the point was not to insulate all foreign affairs decisions from the people. In perhaps the most revolutionary feature of the Federal Constitution, the founders invested the ultimate power of statehood—the power to declare war—in Congress.

Constitution-making, however, entailed more than simply drafting the Constitution. Lasting recognition depended upon how the system of government the framers designed actually functioned. That question was quickly posed, as the Wars of the French Revolution provoked political crises that forced a “liquidation” of the Constitution’s many ambiguous terms. Despite the intensity of the constitutional disputes that ensued—most importantly, in the Neutrality Crisis and Jay Treaty controversy—the Washington administration managed to construct a government that faithfully tracked the framers’ constitutional design.

This account of the Founding departs from the conventional wisdom. Modern Americans view the Constitution from an internal perspective and, more or less consciously, attribute that perspective to the founders. This understanding of the Constitution is at the heart of American exceptionalism. Americans are, of course, aware of the foreign affairs Constitution because it periodically enters public consciousness during recurring struggles over the scope and exclusivity of executive war and foreign affairs powers. But Americans tend to see these controversies as intramural disputes in which foreign states do not have, and have never had, any legitimate interest. In this conventional view, the point of the foreign affairs Constitution is, and has always been, to enable the United States to defend itself against hostile foreign forces. The fact that the founders designed the Constitution to facilitate American integration into the wider community of civilized states and ensure that the nation would comply with its international obligations is all but lost. So too is an appreciation of their success in achieving the twin goals of the American Revolution, announced in the Declaration of Independence and adhered to throughout the long founding period, of republican government and international respectability. The exceptionalist story remains strong. This Article begins an effort to dispel that myth.