

# THE FEDERALIST CONSTITUTION AS A PROJECT IN INTERNATIONAL LAW

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The simple circumstance, that your Constitution forces international law on you, as an integral part of your studies . . . is, in my opinion, an advantage far beyond that of our superior accuracy (if we have it) in our own common law, acquired by the comparatively narrow range of our studies.

—Sir John Taylor Coleridge to Joseph Story<sup>1</sup>

## INTRODUCTION

When early Americans talked governance, they used the language of the law of nations. Representative government was the keystone; republican ideology circulated widely; liberal ideas of trade and rights percolated; and reformed Protestantism and newly scientific notions of race informed early American political thought as well. Early Americans spoke all these languages in their eclectic pursuit of *novus ordo seclorum*. Yet when it came time to *govern*—to imagine the federal state, draft the Constitution, and then to formulate and administer policy—no language was more commonly deployed than that of the law of nations.

Claiming membership in a world of self-denominated “civilized nations,” the revolutionaries had little choice. Necessity, however, was also opportunity. The law of nations was their ticket to membership. This was not just because it was the lingua franca of diplomacy. In addition to mediating relations between nations, the eighteenth-century law of nations also provided resources for envisioning how to govern a nation internally. This language was not just discourse. Its referents included principles, doctrines, dispute resolution institutions, and compendia of “best practices”

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1. Letter from J. T. Coleridge to Joseph Story (Feb. 10, 1842), in 2 LIFE AND LETTERS OF JOSEPH STORY 428, 428 (William W. Story ed., Boston Charles C. Little & James Brown 1851). Coleridge was a judge on the Court of King’s Bench in Britain from 1835 to 1858. J. A. Hamilton, *Coleridge, Sir John Taylor*, in 11 DICTIONARY OF NATIONAL BIOGRAPHY 302 (Leslie Stephen ed., London Smith, Elder & Co. 1887).

circulating through Enlightenment Europe. It also imported a reflective, sociable style of reasoning, in which nations were supposed to make decisions by imagining how other nations would judge them. In sum, the law of nations was a language for working through the process of building a state that was supposed, in concert with others, to contribute to “civilization.”<sup>2</sup>

Three dimensions of the early modern law of nations made it especially useful to American state builders. First was its strictly international dimension, which overlaps with what is now called public international law. Its main elements were treaties and the customary law of nations. A second dimension contained a host of historical examples of domestic governmental institutions and policies, as well as an ongoing transnational conversation about what it meant to be a civilized nation. The founding generation drew on this dimension, which today might be called comparative constitutional law, to build and navigate the complex federal structure of its government. Finally, a third, transnational dimension contained natural law principles and common usages that were supposed to help coordinate cross-border relations among states and their citizens. Commercial and maritime law were exemplary, providing or aspiring to uniform rules for transactions between private actors. Yet unlike today, few in the eighteenth century referred to these bodies of law as “private law.” They too were branches of the general law of “civilized” states.

Recovering this three-stranded language of governance sheds light on the origins and early history of the U.S. Constitution. Most generally, it reveals the pervasiveness of the law of nations within early American governance—its centrality in not only assisting the revolutionary generation to gain independence but also in constructing and implementing a working government. The intense resort to the law of nations also illuminates the connection between the domestic and the foreign, constitution making and diplomacy, commerce and international civilization. In addition, early Americans’ use of the law of nations reveals the complex interplay between rule boundedness, on the one hand, and creativity and rule avoidance, on the other. The law of nations was, like many legal languages, full of self-deceiving aspiration. It was also made to be used and could be remade along the way. Like any functional language, it helped people realize their projects, but because those projects were so diverse and at times contradictory, it could never rationalize them all. The law of nations was, therefore, critical to the founding generation’s attempt to govern the ungovernable. Because legal understandings of the founding generation continue to influence constitutional construction more than two centuries later—and not only among originalists—recovering early Americans’ use of the law of nations facilitates a deeper understanding of their revolutionary project.

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2. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 936–37 (2010).

## I. THE LAW OF NATIONS AND CONSTITUTION MAKING

Few people immersed themselves more deeply in the law of nations than revolutionary Americans. They developed the faith of new, sometimes desperate, converts. From the Declaration of Independence and the writing of state constitutions, to the forging of a confederation to wage war and make treaties, the institutions, forms, and doctrines of the law of nations structured the quest to escape the British Empire and create new republican governments. Peace then opened fissures among the states, which revealed international problems whose solutions, and even apprehension, depended on the law of nations. Consequently, debate over the relationship between republicanism and the legal norms of what the revolutionaries called the “civilized world” featured large when they wrote and ratified the Constitution.<sup>3</sup>

Yet the law of nations only became a basic idiom of American governance when the founding generation turned from constitution making to federal state building and struggled to convert sparse text into effective government. They continually used it to explain, justify, or oppose some policy or institution that was claimed to be necessary or beneficial. Contestation and debate about the meaning and place of the law of nations within American governance then circulated widely throughout American political culture.<sup>4</sup>

The law of nations was a transatlantic language. Americans’ use of it was not exceptional. Yet because of the complexity of American government—its federal structure, separated powers, and cascading claims rights—as well as the distinctive tendency to constitutionalize all manner of controversy in popular debates, the American idiom of this transatlantic language was unusual. If Federalists labored to build a constitution that would fit the nation into a world supposedly operating under law, they did so in ways that complicated the very object sought.

The constitutional status of the law of nations was from the beginning vexed with ambiguity. Because of its various dimensions, different parts of the law had different degrees of obligation. Constitution makers incorporated some aspects of the law of nations within their design and then acted as though others that defined nationhood in contemporary terms would be obligatory as well. They also drew on the comparative law of nations to build and manage their state and assumed that courts would resort to the transnational law of nations for rules of decision in cases that raised issues within its ambit. The result was a complex incorporation of the law of nations—binding for some purposes, adopted implicitly in others, and privileged or preferred in transnational disputes between private individuals.

The pluralism of the law of nations was part of its attraction. Its capaciousness offered American leaders the illusion, occasionally real, of administrative mastery. Even where the law of nations did not deliver clear answers, it often offered ways to think through problems. Ordinary

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3. *Id.* at 947–49.

4. *See id.* at 1015–61.

Americans and their lawyers similarly grabbed elements of the law of nations to make their way in an unruly and expansive empire. Here, the view from capitols, courts, countinghouses, and quarter sections overlapped: the law of nations offered ways of imagining a more advantageous future, ordering the disordered, and governing spaces and peoples that resisted government.

The mix within the law of nations of mandate and model justifies applying the term “governance” to capture early Americans’ use of that law. Governance connotes the project of managing and ordering in the absence of undisputed sovereign authority or enforcement capacity. The concept originated in scholarship on public administration that analyzed undergoverned or ungovernable areas of the world, from cities to international relations.<sup>5</sup> Even in the absence of a coherent international *government*, for example, institutions of global *governance* have had substantial effects on national government, international commerce, and individual lives.<sup>6</sup> Similarly, in the early United States, the law of nations offered resources for imagining a more ordered future and trying to realize it.

As imaginative as early Americans were in their use of the law of nations, there were limits to how innovative they could be. In contrast to the purely domestic aspects of their constitutional system or, in historically accurate terms, American *municipal* law, the law of nations was never theirs to shape at pleasure. It was a collective, international project. This aspect of the early modern law of nations has been difficult for modern scholars to understand and convey historically. The reasons go beyond the typical complexity of marking out the boundaries and function of a body of law that extended across time and space and whose jurisdiction and substance were continually debated. These problems characterize many bodies of law, including ones familiar to early American lawyers and historians. The “common law” is a prime example. Instead, the difficulty with the law of nations is the aspirational premise: the notion of a common project across borders. One reason for this difficulty might be the twentieth-century development of human rights law, along with independent international courts, which critics, including many in the United States, perceive as encroaching on national sovereignty. Many American scholars who are skeptical of modern human rights law also embrace originalism as a method of constitutional interpretation.<sup>7</sup> The combination sometimes generates extreme denials of legal cosmopolitanism in early America, leaving some to conclude that the

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5. Cf. Anthony Pagden, *The Genesis of “Governance” and Enlightenment Conceptions of the Cosmopolitan World Order*, 50 INT’L SOC. SCI. J. 7 (1998). See generally Marie-Claude Smouts, *The Proper Use of Governance in International Relations*, 50 INT’L SOC. SCI. J. 81 (1998).

6. See generally Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, 99 AM. SOC’Y INT’L L. PROC. 143 (2005); Benedict Kingsbury et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 1.

7. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008).

law of nations in early America was at most a species of state law.<sup>8</sup> Evidence of more robust engagement with the law of nations then becomes a problem to minimize, explain away, or ignore.<sup>9</sup>

Deemphasizing the early American engagement with the law of nations, however, obscures much of what makes the Federalist Constitution intriguing, strange, and almost foreign to modern eyes. Yet recovering that commitment also begins to reveal the complex ambitions of revolutionary constitution making that do resonate with modern ambitions *and* anxieties surrounding global interdependence. Their problems were not ours; their debates and solutions very different. Still, their efforts to draw new jurisdictions to extend across and integrate different polities; their grappling with the law of slavery; their expropriation of indigenous land through treaties; their ambivalence toward a self-righteous Atlantic world shot through with inequality, state-supported violence, and (a favorite catchall) “corruption”—their groping, in other words, to build a nation that would participate in but also claim to improve an extranational project of civilization—sometimes looks familiar, like scattered cognates in an epic composed in a forgotten language.<sup>10</sup> What is lost is the structure of this early American language of governance.

## II. THE FUNCTIONAL LANGUAGE OF THE LAW OF NATIONS

When early Americans turned to the law of nations, what did they find in it? And what was in it for them? Instead of offering an intellectual genealogy of the law of nations or a list of vaunted Enlightenment legal principles that influenced American constitution making, we begin by suggesting how early Americans used it. What sorts of law jobs did they believe the law of nations was fit to perform? The short answer is many—a multitude that only increased after the American Revolution.

The law of nations was familiar to North Americans even before the Revolution. Elements of it had long circulated in the colonies. Prize courts operated during the (frequent) imperial wars. Law of nations treatises were required reading in the capstone course on moral philosophy in the growing number of colonial colleges.<sup>11</sup> In law offices, many mentors assigned the literature of the law of nations to their charges, praising it as essential to the formation of a citizen of the Enlightenment. That does not mean, however, that all students took it on as such. The law of nations, like most fields of law, was usually learned as needed. John Adams gives evidence. After ignoring his esteemed mentor’s advice about the salutary effects of reading

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8. See generally 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).

9. See, e.g., ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* (2017); Eugene Kontorovich, *Originalism and the Difficulties of History in Foreign Affairs*, 53 ST. LOUIS U. L.J. 39 (2008).

10. Cf. David Armitage, *In Defense of Presentism*, in *HISTORY AND HUMAN FLOURISHING* (Darrin M. McMahon ed., forthcoming 2021) (on file with authors).

11. Benjamin C. Lyons, *John Jay and the Law of Nations in the Diplomacy of the American Revolution* (2016) (Ph.D. dissertation, Columbia University) (on file with authors).

the law of nations during his apprenticeship, Adams put himself on a crash course in the 1760s to harness the mythic ideal of European confederation as an argument against parliamentary supremacy.<sup>12</sup> Soon the law of nations became an essential resource for the revolutionaries as they forged a confederation, converted an imperial rebellion into an international war, and negotiated alliances and commercial treaties.<sup>13</sup>

By late 1774, future U.S. attorney general William Bradford wrote college classmate James Madison that the Continental Congress was meeting in the same building that held the “City Library . . . of which the Librarian tells me the Gentlemen make great & constant use.”<sup>14</sup> He went on to report “I was told Vattel, Barlemaqui Locke & Montesquie[u] seem to be the standar[d]s to which they refer either when settling the rights of the Colonies or when a dispute arises on the Justice or propriety of a measure.”<sup>15</sup> The next year, Benjamin Franklin received three copies of Emmerich de Vattel’s treatise, *The Law of Nations*, from a friend and translator in the Netherlands.<sup>16</sup> The book arrived after the first battles of the Revolution had begun, though before the Declaration of Independence.<sup>17</sup> “It came to us in good season,” Franklin wrote in his note of thanks, “when the circumstances of a rising state make it necessary frequently to consult the law of nations.”<sup>18</sup> Serving in the Second Continental Congress, he reported that the book “has been continually in the hands of the members of our congress, now sitting.”<sup>19</sup> It was a book to be used.

When the delegates turned its pages, what did they find? Vattel’s treatise is remembered as an influential primer on what is now called international law. It was that, but it was also much more. Early modern law of nations treatises were moralistic advice manuals written for statesmen and their advisors and were intended to be put to work. They descended from a Renaissance advice book genre known as “mirror for princes.”<sup>20</sup> The treatise writers tried to persuade the prince that it was not primarily his honor and gain that was at stake in his decisions. The honor and flourishing of the nation and its people were paramount. In the new United States, there was no princely sovereign. According to republican theory, sovereignty rested in

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12. Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 799–800 (2014).

13. See *id.*; see also ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 18–20, 79–80, 124–26 (2010).

14. Letter from William Bradford to James Madison (Oct. 17, 1774), in 1 *THE PAPERS OF JAMES MADISON* 125, 126 (William T. Hutchinson et al. eds., ser. 1 1962) (alteration in original).

15. *Id.*

16. Letter from Benjamin Franklin to Charles-Guillaume-Frédéric Dumas (Dec. 9, 1775), reprinted in 22 *THE PAPERS OF BENJAMIN FRANKLIN* 287, 287–91 (William B. Willcox ed., 1982).

17. *Id.*

18. *Id.*

19. *Id.*

20. See Daniel J. Hulsebosch, *Mirror for Presidents: George Washington and the Law of Nations*, in *POLITICAL THOUGHT AND THE ORIGINS OF THE AMERICAN PRESIDENCY* 243, 251 (Ben Lowe ed., 2021).

the people.<sup>21</sup> Yet these treatises remained instructive for advisors of the newly sovereign American people, trying to build a new kind of state.

In his treatise, Vattel detailed the rights and duties of a sovereign. Above all, the sovereign was supposed to protect his people and avoid war. “The end or object of civil society,” Vattel argued,

is to procure for the citizens whatever they stand in need of, for the necessities, the conveniences, the accommodation of life, and, in general, whatever constitutes happiness,—with the peaceful possession of property, a method of obtaining justice with security, and, finally a mutual defence against all external violence.<sup>22</sup>

The sovereign owed the people the protection of life, liberty, and property—and *happiness*.<sup>23</sup>

More specifically, Vattel divided the rules or “maxims” of sovereign duties into four categories. Book I of his treatise covered “Of Nations considered in themselves,” or a nation’s domestic constitution and policies.<sup>24</sup> Book II analyzed “Of a Nation considered in its Relations to others,” or international relations.<sup>25</sup> Book III, “Of War,” discussed when peaceful relations with other nations failed.<sup>26</sup> Book IV, “Of the Restoration of Peace; and of Embassies,” surveyed treaties and the various categories of diplomatic emissaries.<sup>27</sup> The laws of war, which modern scholars often treat as the centerpiece of the law of nations, accounted for less than a third of Vattel’s treatise. In comparison, Part I’s maxims for good government accounted for about the same. Consequently, Vattel’s book provided as much advice about the best policies *within* a nation as it did about peaceful international relations.

The early modern law of nations as the revolutionaries encountered it, therefore, embraced far more than law between states. It also included comparative examples indicating how to govern in an “enlightened” manner, and in this sense was a precursor of modern comparative constitutional law. It was filled with historical examples, abstract principles, and disagreement carried out in indirect conversations among jurists, leaders, and not least, writers who wished to advise leaders and administer their governments. This dimension was a legacy of the oldest connotation of the law of nations: the *jus gentium*, or the law that the Romans claimed was, or should be, common to all peoples.<sup>28</sup> The concept is echoed in the modern international law notion of *jus cogens*, as well as in “best practices,” and other aspects of

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21. See, e.g., EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 49–57 (1988).

22. EMER DE VATTEL, *LAW OF NATIONS* 86 (Béla Kapossy et al eds., Liberty Fund 2008) (1758) (emphasis omitted).

23. See *id.*

24. *Id.* at 81.

25. *Id.* at 259.

26. *Id.* at 469.

27. *Id.* at 651.

28. See, e.g., Jeremy Waldron, Comment, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 133 (2005).

modern transnational law.<sup>29</sup> It was here that the law of nations literature retained its closest connection to those Renaissance instructional guides, the most (in)famous—but also most unrepresentative—example of which was Niccolò Machiavelli's *The Prince*.<sup>30</sup> Indeed, Vattel explicitly criticized Machiavelli for celebrating Caesar Borgia's "mischievous" policies.<sup>31</sup> In contrast, Vattel instructed the good ruler to promote agriculture, commerce, education, immigration, and infrastructure that would transport the people and their goods.<sup>32</sup> That infrastructure should include granaries, public markets, and even banks.<sup>33</sup> Sovereigns should also control coinage and public spending and protect the liberty of religious conscience even if they established one denomination.<sup>34</sup> It was not an exclusive enumeration. Vattel recommended all these domestic policies, and others, before any mention of diplomacy. The premise, however, was that good domestic policy conditioned foreign policy, and the elements of good policy were transnational. It was the sovereign's duty to help its subjects reach their potential, as individuals and together as a nation.<sup>35</sup> Then they could participate productively in the wider world.

Vattel's book was only one among many, of course, and there was much more to the law of nations than books. Still, the multidimensionality of his treatise, its compendium of principles for governance at home and abroad, and its guidance for promoting interactions between individuals in different states captured central and, to the founders, attractive aspects of the early modern law of nations. Although nominally addressed to sovereigns, the real audience comprised men who would be advisors to the prince, rather than the prince himself. In a new republic in which the sovereign was an abstraction—the people themselves—there was a ready audience for a resource meant to aid those advising others. They could serve the people, construct the state, and then govern that state, all the while positioning themselves, at home and abroad, as civilized men of the Enlightenment.

A legal regime is more than a compendium of principles and rules, maxims and examples. It also conveys a style of reasoning. Early Americans believed that the law of nations contained a distinct form of legal reasoning that tended to improve each nation over time: comparative analysis, with the goal of identifying the best institutions, all to the end of increasing the sovereign's reputation.<sup>36</sup>

As a law that crossed borders and regulated interactions between different nations and their peoples, the law of nations depended on reflexive self-

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29. *See id.* at 130–31.

30. NICCOLÒ MACHIAVELLI, *THE PRINCE* (Peter Bondanella trans. & ed., 2005) (1532).

31. VATTEL, *supra* note 22, at 289.

32. *Id.* at 128–46.

33. *Id.*

34. *Id.* at 142, 156–61.

35. *Id.* at 126.

36. David M. Golove & Daniel J. Hulsebosch, "The Known Opinion of the Impartial World": *Foreign Relations and the Law of Nations in The Federalist*, in *THE CAMBRIDGE COMPANION TO THE FEDERALIST* 114, 124–29 (Jack N. Rakove & Collen A. Sheehan eds., 2020).



enforcement within each nation. The motivation was not, however, blind rule fealty, on the one hand, or fear of retaliation from other nations in the form of war, on the other. In between habit and fear lay reputation, which in turn depended on the presumed collective judgment of those nations. Because nations were only abstractions, the real motor force was the perceived reputation of a nation's people. The first line of federal decision makers was crucial. This helps explain why federal constitution makers divided and separated foreign affairs powers and why they created a judiciary more independent from the political branches than those in the states. Buffered from everyday politics, federal decision makers were supposed to imagine the response of the civilized world to their policy choices. James Madison captured this decision-making ethic in *Federalist No. 63* when, defending the six-year tenure of senators, he underscored the importance of "the national councils . . . possess[ing] that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence," adding that "the presumed or known opinion of the impartial world may be the best guide that can be followed."<sup>37</sup>

Knowledge of the law of nations could not be confined, however, to a small cadre of federal officials. In a representative republic, the concentric circles of decision-making expanded beyond government officials to include ordinary lawyers and even the people themselves. In a republic, all of these actors had leverage over government personnel or policy. Hence there was an ambitious project in the early Republic of educating lawyers and the broader public in the principles and rules encompassed in treaties and the law of nations. Law teachers like James Wilson, James Kent, and Joseph Story organized their lectures and treatises around the international and transnational aspects of the law of nations. They emphasized, as James Wilson put it, that "[t]o love and to deserve honest fame, is another duty of the people."<sup>38</sup> Only if the people themselves identified with the nation's reputation would they participate in republican governance in the right way. Doing so was in their collective interest because "[t]he reputation of a state is not only . . . pleasant, it is also a valuable possession" that is acquired by the virtue expressed in "the public transactions of the state," as well as "the private behavior of its members."<sup>39</sup> Similarly, James Kent instructed students at Columbia College that "the faithful observance of [the law of nations] is essential to universal happiness" and that "[i]ts noble aim is to preserve peace, kind offices, and good faith, amongst mankind in their national intercourse."<sup>40</sup> Judges and jurists propounded the law of nations in jury charges and a stream of public print because, again in Wilson's terms, "[a] weighty part of the public business is transacted by the citizens at large,"

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37. THE FEDERALIST NO. 63, at 423 (James Madison) (Jacob E. Cooke ed., 1961).

38. JAMES WILSON, *Lectures on Law, Part 1, Chapter 4: Of the Law of Nations, reprinted in 1 THE WORKS OF JAMES WILSON* 128, 142 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

39. *Id.*

40. JAMES KENT, *DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES* 51 (Fred B. Rothman & Co. 1991) (1795).

not least in selecting their representatives.<sup>41</sup> This didactic effort presumed that the public sought “general and just knowledge” of the law of nations and could “form a rational judgment” about how it had been or should be applied.<sup>42</sup> Paradoxically, Wilson observed, the law of nations, though originally the law of kings in monarchical states, was “of peculiar importance in free ones,” for “the practice of the law of nations . . . must, in a free government, depend very considerably on the acts of the citizens.”<sup>43</sup> The constitutional project would only succeed if the people, and not just their leaders, incorporated the law of nations into their thought and behavior.

### III. THE MULTIPLE FUNCTIONS OF THE LAW OF NATIONS IN FEDERAL STATE-BUILDING

The founding generation made use of the law of nations in many ways. Three areas in which the law of nations played a central role in federal governance were: structuring its international relations, designing the structure and institutions of the federal state, and providing the law that governed an array of transnational legal subjects.

The role of the law of nations in international relations corresponds closely to the role of modern international law in contemporary international relations, only the law of nations was conceived of more capaciously. Like modern international law, the law of nations specified the binding obligations states owed to one another and framed their diplomacy. Equally important, however, were its nonbinding rules and maxims. Like the now much-discussed role of nonbinding norms in enforcing the spirit of the Constitution, the law of nations’ maxims were supposed to inform and guide the foreign policy of nations and help achieve the larger pacific aims of the system. Early American statesmen and lawyers were fully aware of the difference between binding and nonbinding obligations, but it is striking how little attention they paid to the distinction, freely invoking the law of nations in general without, at least much of the time, noticing the difference.<sup>44</sup> This Essay only touches on the use of the law of nations in this area, not because it is less important than its use in the others but rather, because it is the most familiar and best understood of the areas and, therefore, less necessary to develop here.

The role of the law of nations in the second area—constructing the federal state—is less familiar. Much has been written about the influence of the

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41. WILSON, *supra* note 38, at 128; *see also* Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

42. WILSON, *supra* note 38, at 129.

43. *Id.* at 128–29.

44. On early understandings of the distinction between the binding and nonbinding parts of the law of nations, see generally William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169 (2010); Golove & Hulsebosch, *supra* note 36, at 116. For an example of the use of nonbinding, typically prudential, maxims in debates over foreign policy in the founding era, see Alexander Hamilton, *The Defence No. II*, in 18 THE PAPERS OF ALEXANDER HAMILTON 493, 494 (Harold C. Syrett ed., 1973) (observing that “[w]hen one nation has cause of complaint against another, the course marked out by practice, the opinion of writers, and the principles of humanity, the object being to avoid War, is to precede reprisals of any kind by a demand of reparation”).

common law in the design of the Constitution, but the arguably more pervasive influence of the law of nations over the Constitution is much less appreciated. In this area, the founders drew on portions of the law of nations that resemble what we today call comparative constitutional law but was then understood as an aspect of the general public law—the part of the law of nations that conveyed general principles of governance. Whether it was in designing the mechanisms through which the law of nations and treaties would be incorporated into municipal law or war would be initiated and waged or in structuring the federal system in both its vertical and horizontal dimensions, they turned to the law of nations to guide their thinking.

Finally, the eighteenth-century law of nations included legal principles and rules governing transactions across national boundaries—transactions that today would be categorized under private law. These included the law merchant, the maritime law, the conflict of laws, and parts of the laws of war governing the conduct of a nation's own citizens. Here, again, states were not obligated to adopt and apply these parts of the law of nations, but the founders expected and intended that in some form they would be applicable in the new federal system. How that was supposed to work raises many difficulties in reconstruction, which we do not pursue here. The point we emphasize is that the adoption of these bodies of law meant that the law of nations would play an outsize role in regulating even private transactions between individuals and would consequently be the subject of ongoing debate, especially in the courts, which were responsible for applying them.

#### *A. The Law of Nations in American Diplomacy and Foreign Policymaking*

The role of the law of nations in imposing legal obligations on states in their interactions—the violation of which rendered them legally accountable—was central to the conduct of the new nation's foreign relations. Although strangely underappreciated in much contemporary scholarship, this point is neither new nor surprising. Any review of the debates and discussions about American foreign policy among executive officials and diplomats, and in Congress and the courts, from the outset of the American Revolution to the conclusion of the War of 1812—what we call the “Extended Founding”—leaves no room for debate. The law of nations appears everywhere—its importance was recognized by all, its influence on policy and discourse was pervasive, and its veneration among the Enlightenment-inspired and increasingly legally fluent political class was sometimes over the top.

That discussion and debate about the law of nations appeared so centrally in the early Republic's foreign policy crises should seem revelatory only to those whose experience in foreign affairs is limited to recent decades, when so many government officials and legislators—and even judges—express antipathy and contempt for international law. Indeed, the law of nations played a critical role in each of the new country's many foreign policy challenges, including the early effort to conclude a military alliance with France during the American Revolution; the 1783 Treaty of Peace with Great

Britain; the humiliations that American diplomats suffered in Europe; the crisis over state violations of the Treaty of Peace under the Confederation government that provided a crucial prompt for the convening of the Philadelphia Convention; the first major foreign policy crisis after adoption of the Constitution—the so-called Nootka Sound affair; the Neutrality Crisis of 1793, in which the fate of the French alliance seemed to turn on the interpretation of an “ill-understood scrap in Vattel”;<sup>45</sup> the Louisiana Purchase; and the long decade of disputes with Great Britain over impressment and American neutral rights that culminated in the War of 1812.<sup>46</sup> The law of nations was front and center in each of these challenges, providing not only the system of rules within which the nation was obliged to proceed as it sought to advance its interests and ideals but also the precepts, maxims, and forms of discourse for conducting diplomacy and for debating among themselves the policy decisions with which they were confronted. When considering foreign relations, federal officials in the executive branch, Congress, and the federal judiciary turned continually to the law of nations to locate governing rules and principles to guide them whenever international questions arose in their respective domains.<sup>47</sup> Measuring federal decision-making against the law of nations was pervasive and uncontroversial.

*B. Constitutional Construction and the Law of Nations as the Public Law of the Civilized World*

In addition to its central role in international affairs, the law of nations played a pervasive role in the construction of the federal state. The founders wished to ensure that the federal government was fully empowered to act the part of a civilized nation.<sup>48</sup> In the first instance, that meant resorting to the law of nations for aid in developing institutional mechanisms, sometimes quite innovative, to ensure that the United States would conduct itself in accordance with the standards demanded by the European state system.<sup>49</sup>

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45. Letter from Thomas Jefferson to James Madison (Apr. 28, 1793), in 15 THE PAPERS OF JAMES MADISON, *supra* note 14, at 10, 10.

46. For discussions of these various controversies, see generally BRADFORD PERKINS, PROLOGUE TO WAR: ENGLAND AND THE UNITED STATES, 1805–1812 (1961); ROBERT W. TUCKER & DAVID C. HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON (1990).

47. For a small sample of the literature discussing portions of the relevant history, see generally MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS (2019); Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1; Golove & Hulsebosch, *supra* note 2; Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704 (2012); Thomas H. Lee, *The Supreme Court of the United States as a Quasi-international Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765 (2004); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373 (2012); David L. Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

48. See Golove & Hulsebosch, *supra* note 2.

49. See David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1616–23 (2018).

The founders were concerned not only with incorporating these aspects of the law of nations into the very definition of the granted powers, thereby making the law of nations part of the law of the land, but also with developing institutional arrangements that would facilitate its enforcement.<sup>50</sup>

More broadly, when envisioning how to structure their own complex polity, the founders reached reflexively for assistance to resources in the law of nations. In this respect, the law of nations did not purport to offer binding mandates for states. Instead, it consisted of an amorphous body of learning and examples derived from the publicists on the law of nations, Enlightenment philosophers and theorists, and the evolving customs, or best practices, of “civilized nations.” As a kind of comparative public or constitutional law, it yielded concepts, principles, maxims, and discourses supposed to guide the organization and administration of an effective and just state.

Those resources were not relevant only with respect to institutional arrangements for the conduct of foreign relations. In this dimension, the law of nations had an open-ended quality, which left room for considerable variation in practice and for developing its principles. American statesmen drew from these ideas and discourses in designing and implementing many of the fundamental structural arrangements in the Constitution and, at the same time, viewed themselves as contributing to its progressive development. They extolled the advances in understanding reflected in the law of nations but also insisted that the American Revolution had generated advances in political thinking, derived mostly from republicanism.

#### 1. The Incorporation of the Law of Nations into American Municipal Law

In this section, we explore some of the mechanisms by which the founders sought to ensure that the new nation would comply with its international legal obligations, and we emphasize how they drew inspiration from the law of nations in carrying out this part of their plan.

##### *a. Direct Incorporation of the Law of Nations into the Constitutional Text*

Less well appreciated than the role of the law of nations in American foreign policy is the extent to which the founders incorporated its principles and institutions into the text of the Constitution. This incorporation signaled to a watchful international audience the nation’s commitment to uphold its legal duties, exercise concomitant national powers, and embrace the role of a civilized nation. Famously, the term “law of nations” only appears once in the text—in the relatively obscure Offenses Clause—which grants Congress the power “[t]o define and Punish . . . Offences against the Law of Nations.”<sup>51</sup> This textual lacuna has provided the grounds in modern constitutional law for the diminishing constitutional status of the law of

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50. *See id.* at 1624–29.

51. U.S. CONST. art. I, § 8, cl. 10.

nations, which has accompanied the rise of the United States as a superpower.<sup>52</sup>

In fact, viewed in historical perspective, the text is filled with references to the law of nations, which, like cognate references to the common law (such as the “jury” trial),<sup>53</sup> were meant to incorporate the bodies of law to which they referred. The term “treaties” in the Treaty Clause,<sup>54</sup> for example, was manifestly borrowed from the law of nations,<sup>55</sup> and it was not only a grant of power to make the kinds of treaties deemed permissible in the law of nations but also an incorporation of the international law of treaties, with its well-adumbrated rules for treaty interpretation, breach, force majeure, countermeasures, and so on. Similarly, Congress’s power “[t]o declare War”<sup>56</sup> and the president’s role as “Commander in Chief,”<sup>57</sup>—terms again drawn from the law of nations—were not only specifications of the branch with authority to exercise these functions but incorporations of the laws of war and neutrality into the municipal law of the United States.<sup>58</sup>

Another example is the Constitution’s grant of admiralty jurisdiction to the federal courts,<sup>59</sup> which was a reference, in part, to the law of nations institution of prize courts and to the body of law they were charged by the law of nations to apply. Prize courts were among the most important institutions of the law of nations, holding out a promise that in wartime belligerents would accord fair treatment equally to all neutral nations by faithfully executing the laws of war and neutrality.<sup>60</sup> In this respect, the institution reflected the larger pacific aspirations of the law of nations to minimize and limit the scope of war. By mandating that civilized nations maintain prize tribunals that would apply the law of nations in resolving disputes over neutral rights, the law of nations discouraged belligerent nations from engaging in conduct that would inevitably draw neutral nations into their conflicts and expand the scope of war.<sup>61</sup> Evidencing the

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52. For discussion, see *supra* notes 7–9 and accompanying text.

53. U.S. CONST. art. III, § 2, cl. 3.

54. *Id.* art. II, § 2, cl. 2.

55. See Golove & Hulsebosch, *supra* note 2, at 1000; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1089 (2000).

56. U.S. CONST. art. I, § 8, cl. 11.

57. *Id.* art. II, § 2, cl. 1.

58. For discussion, see Golove & Hulsebosch, *supra* note 2, at 1000. Much the same applies to the text’s references to Congress’s power to issue “Letters of Marque and Reprisal,” to make “Rules concerning Captures,” “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,” and to regulate “Commerce with foreign Nations.” U.S. CONST. art. I, § 8, cls. 3, 10–11. It applies as well to the president’s powers to “appoint Ambassadors, other public Ministers and Consuls” and to “receive Ambassadors and other public Ministers.” *Id.* art. II, §§ 2–3. These terms were taken from the law of nations—in particular from Vattel’s treatise—and each thereby incorporated relevant portions of the law of nations into the very definition of the powers granted as well as into the municipal law of the United States.

59. See U.S. CONST. art. III, § 2, cl. 1.

60. See Golove & Hulsebosch, *supra* note 2, at 1001–04.

61. On the history of prize courts, see, for example, PHILLIP C. JESSUP & FRANCIS DEAK, 1 NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (1935); see also KENT, *supra* note 40, at

international basis of prize law, the founders simply extended the judicial power to admiralty and maritime cases without including a corresponding power in Congress to provide or alter the substantive law the courts would apply.<sup>62</sup> The relevant jurisprudence was not supposed to be subject to municipal amendment.

Sir William Scott captured the premise underlying the institution of prize courts when he declared in 1799 that they do not

deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally here in the belligerent country, according to the known law and practice of nations: but the law itself has no locality.<sup>63</sup>

Americans eagerly embraced the sentiment. Immediately after the Revolution commenced, the Confederation created a complicated prize court system, partly state and partly federal in character.<sup>64</sup> The Constitution regularized those courts and gave federal courts exclusive jurisdiction over all prize proceedings. Thereafter, following established international practice, the federal courts uniformly applied the law of nations as their rules of decision in prize proceedings.<sup>65</sup>

The Confederation's approach to prize adjudication was, in one respect, in tension with international practice. It had permitted the use of juries in deciding prize cases, a revolutionary experiment that was not countenanced by European nations, including Great Britain, and indeed, was roundly decried as a failure.<sup>66</sup> In response, the Constitution's drafters left Congress discretion over the use of civil jury trials in the federal courts, expecting it would employ them widely but not, for example, in prize proceedings.<sup>67</sup> As Alexander Hamilton explained in *Federalist No. 83*, the need for this

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68 (observing that the "excesses" of privateering are "endeavoured to be checked by requiring security from the owners of privateers, and rendering some judicial condemnation of the property captured requisite to complete transfer").

62. See Golove & Hulsebosch, *supra* note 2, at 1002–04.

63. *The Maria* (1799) 165 Eng. Rep. 199, 202, 1 C. Rob. 340, 350 (emphasis omitted). Justice Joseph Story, the nation's leading prize jurist, expressed the same view: "The Court of prize is emphatically a Court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country." *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815). At the height of the Napoleonic Wars, federal district judge Richard Peters and minister to Britain Rufus King arranged and subsidized the republication of Scott's admiralty reports in the United States precisely to instruct American merchants and lawyers in the law and practice of prize jurisdiction. See John D. Gordan III, *Publishing Robinson's Reports of Cases Argued and Determined in the High Court of Admiralty*, 32 LAW & HIST. REV. 525 (2014).

64. For a history of the Confederation prize courts, see generally HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775–1787* (1977); see also Golove & Hulsebosch, *supra* note 2, at 1004–05.

65. For discussion, see Golove & Hulsebosch, *supra* note 2, at 1001–05.

66. See *id.* at 1104–05.

67. *THE FEDERALIST NO. 83*, *supra* note 37, at 559–61, 568–69 (Alexander Hamilton).

discretion was directly connected to the law of nations.<sup>68</sup> Some kinds of cases turned “wholly on the laws of nations.”<sup>69</sup> But juries could not “be supposed competent to investigations, that require a thorough knowledge of the laws and usages of nations.”<sup>70</sup> More pointedly, he added, they would “sometimes be under the influence of impressions” that would bias their inquiries, creating the “danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war.”<sup>71</sup> Accordingly, in defending the absence of a guarantee of a jury trial in all civil cases against anti-Federalist criticism during the ratifying debate, Hamilton observed that:

It will add great weight to this remark in relation to prize causes to mention that the method of determining them 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.<sup>72</sup>

This point “alone demonstrates,” he insisted, “the impolicy” of including in the Constitution a right to a jury trial in civil cases.<sup>73</sup>

The Seventh Amendment reversed the Framers’ initial judgment, but only partially and with regard for Hamilton’s point: the amendment extended the civil jury trial right only to “Suits at common law,”<sup>74</sup> leaving intact the discretion Hamilton defended for the kinds of cases he identified as most clearly in tension with the principles and practices of other civilized nations—in particular, admiralty cases.

*b. The Incorporation Doctrine: The Law of Nations as Law of the Land and Self-Executing Treaties*

The founders also created a series of innovative institutional mechanisms designed to encourage the nation to comply with its law-of-nations obligations and fulfill its treaty commitments. Although not mandated by the law of nations, which mostly left internal political arrangements to the discretion of each nation-state, these mechanisms were nevertheless drawn from the law of nations in its more capacious sense, including its principles for the effective management of a state’s foreign relations. When designing and implementing these innovations, the founders self-consciously resorted to ideas and concepts of the law of nations.

Though comprising the great bulk of litigated cases arising under the law of nations during the founding period, prize was nevertheless a special category. With respect to other areas—for instance, the rights of foreign

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68. *Id.* at 568.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. U.S. CONST. amend. VII.



ambassadors—there were few directory principles in the law of nations that specified the mechanisms by which its rules were to be made enforceable as municipal law in every nation. The law of nations provided rules of decision, not rules of jurisdiction and institutions of enforcement.<sup>75</sup> Nevertheless, European practice was not silent on the matter. As Chief Justice John Jay emphasized as early as 1790, “the Laws of Nations make Part of the Laws of this, *and of every other civilized Nation.*”<sup>76</sup> English constitutional practice was in accord, as reflected in Lord Mansfield’s holding that “the law of nations, in its full extent was part of the law of England”<sup>77</sup> and Blackstone’s dictum that the law of nations “is here adopted in it’s [sic] full extent by the common law, and is held to be a part of the law of the land.”<sup>78</sup>

From the beginning—even during the Confederation—American courts administered the law of nations in cases falling within their jurisdiction.<sup>79</sup> They followed European custom when doing so, but they also claimed to improve on the European model and thereby to make another contribution to the law of nations.<sup>80</sup> Most pointedly, as American statesmen would emphasize over the next several decades, federal court judges, in contrast to their English (and other European) counterparts, were independent of the executive branch and enjoyed life tenure. This status, Americans argued, made their courts more likely to be impartial interpreters of the law of nations, capable of resisting the influence of executive officials, popular

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75. The law of nations did insist, however, that when one of its citizens violated the rights of another country under the law of nations, including the laws of war, that nation was bound either to prosecute or extradite the perpetrator or risk being held responsible for the misconduct. VATTEL, *supra* note 22, at 300–01. This understanding was pervasive in the law-of-nations literature at the time. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES \*68.

76. John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 25, 29 (Maeva Marcus et al. eds., 1988) (emphasis added). A leading commentator of the era put this commonly expressed understanding succinctly, noting that “[t]he law of nations, being the common law of the civilised world, may be said, indeed, to be a part of the law of every civilised nation.” PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 3 n.\* (Philadelphia, Abraham Small 1824).

77. *Triquet v. Bath* (1764) 97 Eng. Rep. 936, 938, 3 Burr. 1478, 1482 (quoting *Barbuit’s Case* (1737) 25 Eng. Rep. 777, 778 n.1).

78. 4 BLACKSTONE, *supra* note 75, at \*67.

79. For discussion, see Golove & Hulsebosch, *supra* note 49, at 1612–33. As to federal jurisdiction over prize cases, see generally BOURGUIGNON, *supra* note 64.

80. In one respect, however, some early American lawyers followed the English approach too literally, repeating Blackstone’s dictum that the law of nations was part of the common law in explaining why it was also part of the law of the United States. Blackstone had not meant to weaken the authority of the law of nations in English law by so claiming. He was not making a point about the hierarchical status of the law of nations in English law but, rather, asserting the authority of the common-law courts, like the admiralty courts and the Privy Council, to apply the law of nations when their jurisdiction was invoked and the law of nations was applicable. Indeed, in the *Commentaries*, Blackstone was emphatic about the higher law status of the law of nations, in part based on its natural law foundations but more generally as the law applicable to all sovereign states. *See* 4 BLACKSTONE, *supra* note 75, at \*66–67. The frequent repetition of Blackstone’s dictum in the United States, however, associated the law of nations with the common law in the minds of American lawyers and later created the potential for confusion when the dispute over the federal common law became salient.

opinion, and national prejudice.<sup>81</sup> To some, the English judge's robe was just a cover to hide the Englishman beneath.<sup>82</sup> In contrast, the American judiciary offered the promise of a new era in which the law of nations could be administered fairly, even by national courts.

The most innovative feature of the founders' plan and another American contribution to the evolving law of nations was the doctrine that treaties were self-executing and did not require legislative implementation. Self-execution arose out of the experience with treaty noncompliance during the Confederation and was designed to facilitate treaties' implementation by assigning the task to the courts through the equally innovative institution of judicial review.<sup>83</sup> Under the Articles of Confederation, Congress had the power to make treaties.<sup>84</sup> However, Congress lacked the power to enforce treaties or to force the states to do so.<sup>85</sup> Many of the states assumed that they could, for example, pass retaliatory measures against Britain for what they perceived as violations of the Treaty of Peace. In short, many state legislatures claimed the sovereign power to interpret treaties and retaliate for perceived infractions.<sup>86</sup> Britain, of course, rejected the states' claims, lodged its own complaints about American noncompliance, and most importantly, determined that because Congress lacked the power to address these issues, there was no point in dealing with American diplomats who were incapable of representing thirteen different sovereigns.<sup>87</sup> The Confederation's fragmentation thus obstructed negotiations to resolve these differences.

Similar problems marred treaties with Native American nations. The simultaneous attempts by New York State and the Confederation Congress to negotiate with the Iroquois at Fort Stanwix in 1784 was perhaps the most catastrophic example.<sup>88</sup> It was not only a problem of the authority to make treaties with Native Americans (which was at least textually ambiguous under the Articles),<sup>89</sup> it was also a problem of enforcing them, as the federal government had to rely on the restraint of the state governments claiming

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81. See Golove & Hulsebosch, *supra* note 2, at 949–70.

82. See, e.g., *The Venus*, 12 U.S. (8 Cranch) 253, 299 (1814) (Marshall, J., dissenting) (declaring that “I respect sir *William Scott*, as I do every truly great man; . . . but it is impossible to consider them attentively, without perceiving that his mind leans strongly in favor of the captors”); see also WILLIAM BARTON, *A DISSERTATION ON THE FREEDOM OF NAVIGATION AND MARITIME COMMERCE* 246 n.\* (Philadelphia, John Conrad & Co. 1802) (asserting that “the judges of [the English courts of admiralty] have been commanded by the crown to conform their . . . cases, to the royal instructions, issued from time to time to the commanders of British armed ships of war”).

83. See Golove & Hulsebosch, *supra* note 2, at 994–1000.

84. See ARTICLES OF CONFEDERATION of 1781, arts. VI, IX.

85. We analyze these problems in Golove & Hulsebosch, *supra* note 2, at 957–59.

86. See *id.* at 949–70.

87. See *id.*

88. Jack Campisi, *From Stanwix to Canandaigua: National Policy, States' Rights and Indian Land*, in *IROQUOIS LAND CLAIMS* 49–52 (Christopher Vescey & William A. Starna eds., 1988).

89. See ARTICLES OF CONFEDERATION of 1781, art. IX (granting the “united states in congress assembled” the “sole and exclusive right and power of . . . managing all affairs with the indians”).

local jurisdiction over the relevant territory. In land-hungry New York and Georgia, that restraint was absent.<sup>90</sup>

Faced with the deteriorating international reputation of the United States, many incipient Federalists sought to emphasize the principle *pacta sunt servanda*—treaties must be observed—to urge constitutional reform.<sup>91</sup> This was an uncontroversial principle of the law of nations. But the Federalists added that treaties were also the law of the land, operating throughout the American states and overriding state laws to the contrary.<sup>92</sup> In contrast to the practice in Britain, the Federalists insisted that the Confederation's treaties became the law of the land immediately upon ratification by Congress, without the need for any confirmatory legislation.<sup>93</sup> To preserve the sanctity of international treaty commitments, the doctrine of self-execution was born. The doctrine emerged in a handful of judicial cases in the 1780s, and Secretary for Foreign Affairs John Jay stated it clearly in 1786 in his report on state violations of the Treaty of Peace.<sup>94</sup> The drafters of the new Constitution then institutionalized it in the Supremacy Clause.<sup>95</sup>

In justifying this central aspect of the Constitution's institutional arrangements, Federalists invoked the law of nations and the practices of other civilized nations. This move was problematic because self-execution was so innovative. However, it was necessary in a republic, whose representative legislatures were prone to be led astray by demagogues who, to promote their own interests, would appeal to national partialities to whip up hostility to foreign powers and their claims on the United States. In contrast, the anti-Federalists, correctly perceiving that self-execution eliminated any popular legislative brake on treaty making by excluding not only the state legislatures but also the House of Representatives, made self-execution a prime target for their opposition.<sup>96</sup>

The Federalists replied by attempting to demonstrate that their innovation was rooted in the principles of the law of nations. When anti-Federalists protested that, in republics, legislation was the supreme law, Jay responded that the principle of *pacta sunt servanda* simply could not survive such thinking, stating:

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.<sup>97</sup>

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90. See J. David Lehman, *The End of the Iroquois Mystique: The Oneida Land Cession Treaties of the 1780s*, 47 WM. & MARY Q. 523, 527–29 (1990). See generally LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836* (2010); Campisi, *supra* note 88.

91. See Golove & Hulsebosch, *supra* note 49, at 1609–10.

92. See, e.g., Golove & Hulsebosch, *supra* note 2, at 995–99.

93. See *id.* at 995.

94. See *id.* at 964, 967–69, 995–96.

95. See generally *id.* at 995–99.

96. See *id.* at 997.

97. THE FEDERALIST NO. 64, *supra* note 37, at 436–37 (John Jay).

The Constitution's solution to ensuring treaty compliance was thus necessary to enable the United States to fulfill its obligations as a civilized nation and, in this respect, perfectly in accord with international expectations and practice: "[t]he proposed Constitution therefore has not in the least extended the obligation of treaties," Jay noted.<sup>98</sup> "They are just as binding, and just as far beyond the lawful reach of the legislative acts now, as they will be at any future period, or under any form of government."<sup>99</sup>

With the adoption of the Constitution, the understanding that treaties were the law of the land automatically upon ratification achieved widespread acceptance in George Washington's cabinet, Congress, and the courts.<sup>100</sup> By the mid-1790s, however, that consensus began to unravel. The outbreak of the French revolutionary wars in 1792; the spread to America of increasingly radical French republican ideology, reflected in the passage of the French Constitution of 1793, which lodged the power to ratify treaties in the national legislature;<sup>101</sup> and the simple fact that while the Federalists controlled the Senate, Republicans controlled the House<sup>102</sup>—all of these developments catalyzed a radical change in the way that Thomas Jefferson, James Madison, and their followers in Congress and the states began to view the treaty power.<sup>103</sup>

The Jay Treaty crisis of 1795–96 brought the issue to a head. Under Jefferson's leadership, Republicans launched an all-out constitutional assault on the treaty power, insisting alternately that the power be eviscerated or that the House of Representatives be accorded a seat at the table. Their most far-reaching constitutional argument was that treaties could touch on no subject that fell within Congress's Article I, Section 8 powers, an argument that plainly gutted the treaty power of any force.<sup>104</sup> Jefferson captured the spirit of the Republican position, observing wryly that some "denied [this position] on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others."<sup>105</sup>

Republicans found themselves caught on the horns of a constitutional dilemma. Their position that the House had a right to participate in the treaty-

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98. *Id.* at 437.

99. *Id.*

100. On the role of the courts in adjudicating law-of-nations and treaty cases, see generally Ariel N. Lavinbuck, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 *YALE L.J.* 855 (2005); see also Arlyck, *supra* note 47.

101. 1793 CONST. 55 (Fr.). Though it never went into effect, the Girondin constitution circulated throughout early America. See, e.g., *The Whole of the New Constitution of France*, DUNLAP'S AM. DAILY ADVERTISER, Sept. 9, 1793 (Supp.) (printing the text of the French Constitution of 1793 the day after it was received from Paris).

102. See David Golove, *The American Founding and Global Justice: Hamiltonian and Jeffersonian Approaches*, 57 *V.A. J. INT'L L.* 621, 642 (2018).

103. For discussion, see *id.* at 646–48.

104. On the Republican constitutional arguments, see Golove, *supra* note 55, at 1164–68; see also Golove & Hulsebosch, *supra* note 2, at 1044–46.

105. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES 170 (Washington D.C., Joseph Milligan & William Cooper 2d. ed 1812) (1801).

making process lacked credibility because the Constitution's text granted the treaty power to the president by and with the advice and consent of two-thirds of the Senate.<sup>106</sup> This led them to concede that the House could not participate in the treaty-making process but to assert instead a role for the House in implementing treaties that the president and Senate had already made if they touched on subjects within Congress's Article I powers. This position rejected the self-executing treaty doctrine, but it left them vulnerable to the counterargument that they were, in essence, asserting a right of the House to violate the principle of *pacta sunt servanda*.<sup>107</sup> What else would the House be doing if it refused to implement a treaty the president and Senate had validly concluded? But that was a position that Republicans were unwilling to avow. No one believed that treaties could be treated so cavalierly.<sup>108</sup>

Although they were unable to find a way out of this dilemma, Republicans nevertheless persisted in insisting that treaties that touched on a subject within Congress's Article I powers were not self-executing and required the consent of the House before they became valid treaties and the supreme law of the land. The exclusion of the House, and therefore the people's representatives, was simply unacceptable, as the Jay Treaty—which they charged was an abandonment of the nation's republican commitments on a global scale and a national humiliation—tragically illustrated.<sup>109</sup>

Republicans did not only rely on these principles as a matter of abstract political theory but harnessed them to their own version of republican-infused law-of-nations reasoning. Rejecting Publius's contention that the House's composition and structure made it unfit to review and ratify treaties,<sup>110</sup> Jefferson claimed that “subjecting [treaties] to the ratification of the Representatives” would be “no more inconvenient than to the Senate”<sup>111</sup> and further emphasized the recent post-French Revolution practice of European nations, asserting that, “[i]n all countries, I believe, except England, treaties are made by the legislative power.”<sup>112</sup> Moreover, even in England, if treaties “touch the laws of the land, they must be approved by Parliament.”<sup>113</sup>

Republicans strenuously pressed this comparative point, emphasizing how self-execution would make the Constitution even less republican than the English Constitution and the House of Representatives inferior to the House of Commons.<sup>114</sup> In response, the Federalists pressed their own version of law-of-nations reasoning, countering the Republicans' efforts at comparative

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106. See U.S. CONST. art. II, § 2, cl. 2.

107. See Golove & Hulsebosch, *supra* note 2, at 1050–52.

108. For further discussion, see *id.* at 1047–52.

109. See *id.* at 1044–52.

110. See THE FEDERALIST NO. 64, *supra* note 37, at 435–38 (John Jay); see also THE FEDERALIST NO. 75, *supra* note 37, at 506–07 (Alexander Hamilton).

111. JEFFERSON, *supra* note 105, at 170.

112. *Id.* at 168.

113. *Id.* at 168–69.

114. This point was stressed by Representative Albert Gallatin during the House debates on the Jay Treaty. See 5 ANNALS OF CONG. 469–72 (1796).

constitutional law by pointing to the disanalogies between the British and American systems. The president was an elected official, unlike the king of Great Britain; under the English parliamentary system, as opposed to the American separation of powers system, the same party necessarily controlled both the ministries and the Commons; and, in contrast to the unilateral royal power to make treaties, the Senate not only participated with the president in the treaty-making approval process but did so under a supermajoritarian voting rule.<sup>115</sup> In designing the treaty power, the founders, the Federalists observed, had not been inattentive to republican principles or to the principles and practices of the law of nations.<sup>116</sup> In contrast, the British system was arrived at not through a deliberative and reasoned process of decision but as the contingent outcome of the long historical struggle of the Commons to diminish the Crown's prerogative powers.<sup>117</sup>

Ultimately, the Republicans failed to remodel the Constitution. Just as the House was wrapping up its debate over the Jay Treaty, the U.S. Supreme Court rendered its decision in *Ware v. Hylton*.<sup>118</sup> The decision made clear that the Justices unanimously viewed the self-executing treaty doctrine as constitutionally mandated.<sup>119</sup> Nevertheless, the Jay Treaty debate cast a long shadow, and presidents and Senates were sometimes forced to acquiesce in the House's participation in the treaty-making process when core congressional powers were engaged. The Republican critique was absorbed into the constitutional system, if not as constitutional doctrine, then as a working political consensus.

### *c. Congressional Power over War and Peace*

Few provisions in the Constitution reflect the comparative public law dimension of the law of nations more fully than the power to declare war.<sup>120</sup> Warmaking was a defining power of legitimate nations, the ultimate means by which a state could enforce its legal rights. The aspirational commitments of the law of nations, however, were pacific. They were based on the ideal of a cooperative international order in which diverse nations, with different political orders, could coexist in harmony and flourish individually. Thus, while recognizing the necessity of war, the law of nations sought to discourage it and limit its scope and destructive potential. As Vattel put it: "Those things which have a tendency to promote peace are favourable; those that lead to war are odious."<sup>121</sup>

Nor was the law of nations silent on how states should structure their internal arrangements for deciding questions of war and peace. For example, it enjoined states to vest the decision to engage in military conflict

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115. *See id.* at 684, 698–700 (statement of Rep. William Vans Murray).

116. *See id.*

117. *See id.*

118. 3 U.S. (3 Dall.) 199 (1796).

119. *See id.* at 277.

120. *See* U.S. CONST. art. I, § 8, cl. 11.

121. *See* VATTEL, *supra* note 22, at 435.

exclusively in the sovereign power and to prohibit citizens from engaging in hostilities without authorization, punishing those who might violate this principle.<sup>122</sup> Nevertheless, as a general matter, the law of nations left nations' internal arrangements dealing with the warmaking power to the determination of municipal law.

In vesting the power to declare war in Congress, the founders were engaging with these fundamental premises of the law of nations.<sup>123</sup> Madison's early essay, "Universal Peace," made this point explicit.<sup>124</sup> Trumpeting the American constitutional solution to the scourge of war, Madison considered the problem in dialogue with the utopian writings of the European universal peace tradition, the Scottish realists Adam Smith and David Hume, and the republican theorist Jean-Jacques Rousseau. The Americans, Madison maintained, had discovered the most realistic and efficacious mechanism ever proposed for promoting universal peace, which was also a fundamental tenet of republicanism: removing the power of war and peace from the executive and placing it in the hands of the people's representatives in Congress.<sup>125</sup> They had thereby provided a model, which "[h]ad Rousseau lived to see the rapid progress of reason and reformation, which the present day exhibits, the philanthropy which dictated his project would find a rich enjoyment in the scene before him;"<sup>126</sup> which revolutionary France had wisely adopted;<sup>127</sup> and which, "[w]ere all nations to follow . . . the temple of Janus might be shut, never to be opened more."<sup>128</sup>

## 2. The Law of Nations and the Construction of Federalism

The usefulness of the law of nations to the project of constructing a federal state was pervasive—and peculiarly so—as the founding generation struggled to conceive of, and construct, its federal system. The Articles of Confederation were widely conceived to be a treaty arrangement creating a confederation, a recognized form of the law of nations.<sup>129</sup> The confederal form consisted of a central authority with given powers—usually, in that era, focusing on security and defense—but left intact the sovereignty, and the power of internal governance, of the member states.<sup>130</sup> Except as modified by the treaty, moreover, the member states continued to regulate their relations by the principles of the law of nations.<sup>131</sup>

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122. *See id.* at 298–301.

123. *See* Golove & Hulsebosch, *supra* note 2, at 1012–14.

124. *See generally* James Madison, *Universal Peace*, NAT'L GAZETTE, Jan. 31, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON, *supra* note 14, at 206, 206–09.

125. *See id.*

126. *Id.* at 208.

127. Indeed, "[h]ad Rousseau lived to see the constitution of the United States and of France," he too would have recognized the error in his own thinking on the subject. *Id.* at 207.

128. *Id.* at 208.

129. *See* David Golove, *The New Confederation: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1706–07 (2003).

130. *Id.* at 1707.

131. *See id.* at 1703–10.

To a surprising extent, the confederal model also informed the more novel “Union” created by the Constitution.<sup>132</sup> This made the law of nations highly relevant in shaping the Constitution, including even in the structuring of the ratification process (by conventions rather than by submission to state legislatures).<sup>133</sup> It also meant that any modification of the default rules of the law of nations applying to relations among the states had to be—and in some cases, like the Interstate Extradition and the Fugitive Slave Clauses, were—included in the text. It also meant that the law of nations would be of critical importance in defining the relationships among the states going forward.

*a. Vertical Federalism: The Legacy of Confederal Thought*

The very term “federal” (like “nation”) is derived from the law of nations.<sup>134</sup> When drafting both the Articles of Confederation and the Constitution, moreover, the founders drew from Montesquieu’s ideas about the confederal form and existing examples of confederations, as in the Netherlands and Switzerland. In *The Spirit of Laws*, Montesquieu promoted the idea of small republics joining together in a league for mutual defense and security while still retaining their internal liberty,<sup>135</sup> an idea also embraced by Vattel and Samuel von Pufendorf.<sup>136</sup> This became the fundamental premise of the American federal order.<sup>137</sup>

If the imperative of mutual defense prompted the founders to create the Confederation, it was the foreign policy frustrations of the Confederation that led to the Philadelphia Convention. Most critically, the impetus was the Confederation’s inability to rein in the states, which repeatedly violated the Confederation’s treaties and the law of nations. As Hamilton decried in his first bill of particulars against the Confederation: “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.”<sup>138</sup> The result was a nation that had “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.”<sup>139</sup> The need to ensure that the United States would uphold its international commitments and act the part of a civilized nation was the motivating force behind

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132. U.S. CONST. pmbi.

133. *See id.* art. VII.

134. *See* Golove, *supra* note 129, at 1704.

135. *See* 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 185–87 (Thomas Nugent trans., New York, The Colonial Press rev. ed. 1899) (1752).

136. *See* VATTEL, *supra* note 22, at 84; *see also* 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 1046–52 (C. H. Oldfather & W. A. Oldfather trans., 1934) (1688).

137. *See* DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* 28–29 (2003).

138. THE FEDERALIST NO. 15, *supra* note 37, at 91 (Alexander Hamilton).

139. *Id.*



constitutional reform and the newly enhanced powers of the federal government.<sup>140</sup>

The Constitution's effort to form "a more perfect Union"<sup>141</sup> was less a rejection of the fundamental Montesquieuian idea of a complex polity than an attempt to improve it in light of experience with the states' foreign policy failures. And to defend the Constitution's strengthening of the confederal model, Federalists again had recourse to literature of the law of nations. Hamilton, for example, drew from the writings of the Abbé de Mably, who was among the most insightful writers in the law of nations tradition, to argue that a more integrated union was necessary to avoid conflict and even war among the states.<sup>142</sup> When warning of the disastrous consequences of disunion, Federalists did not claim that Americans were obliged to follow Montesquieu's models or Mably's insights. They selected among and modified the received learning. The point, however, is that the law of nations provided them with useful resources for state making, and its leading exponents were esteemed authorities whose wisdom was taken seriously, if not followed by rote. Moreover, they imagined that their innovations would in turn provide a model for other nations to follow, as Benjamin Franklin explained to a European correspondent after the conclusion of the Philadelphia Convention: "I do not see why you might not in Europe carry the project of good Henry the Fourth into execution, by forming a federal union and one grand republic of all the different states and kingdoms, by means of a like convention, for we had many interests to reconcile."<sup>143</sup>

Nor did the importance of the confederal model disappear after ratification. James Madison and Thomas Jefferson again drew on international jurisprudence a dozen years later when advocating the "compact" theory of the Constitution in the Virginia and Kentucky Resolutions,<sup>144</sup> which John C. Calhoun and other Southerners later elaborated during the antebellum era.<sup>145</sup> Traces of the theory still influence constitutional thought today.<sup>146</sup>

*b. Horizontal Federalism: The Law of Nations and Default Relations  
Among the States*

That the law of nations provided models and concepts for building and understanding the federal government should, on reflection, be easily understandable. The law of nations was, after all, concerned with the

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140. See Golove & Hulsebosch, *supra* note 2, at 945–48.

141. U.S. CONST. pmbl.

142. See, e.g., THE FEDERALIST NO. 6, *supra* note 37, at 35–36 (Alexander Hamilton).

143. Letter from Benjamin Franklin to Rodolphe-Ferdinand Grand (Oct. 22, 1787), in 32 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 16, at 180.

144. See, e.g., JAMES MADISON, The Report of 1800 (Jan. 7, 1800), reprinted in 17 THE PAPERS OF JAMES MADISON, *supra* note 14, at 303, 308–12.

145. See generally Stephen C. Neff, *Secession and Breach of Compact: The Law of Nature Meets the United States Constitution*, 45 AKRON L. REV. 405 (2012).

146. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846–50 (1995) (Thomas, J., dissenting) (relying in part on the compact theory to state that the power to restrict congressional eligibility lies only with the people of each independent state).

meaning of political nationhood. More surprising is the role it played in defining the relations among the states in the federal system—what is today called horizontal federalism.

Consistent with the practice of treaty-based confederations, Article II of the Articles of Confederation declared that, except as “expressly” agreed otherwise, “[e]ach state retains its sovereignty, freedom and independence, and every power, jurisdiction and right.”<sup>147</sup> One implication of this reservation was that, notwithstanding their treaty of confederation, the states continued to relate to one another as independent sovereigns. A further implication was that the default rule for determining their rights and obligations toward one another, except as modified by the Articles, was the law of nations.

The Constitution as originally drafted did not include a similar provision, but the Tenth Amendment reintroduced a similar notion in more ambiguous language.<sup>148</sup> The deep question of how far the Constitution went in creating a nation, as opposed to merely strengthening a more limited union among the states, has been the source of endless controversy among historians, constitutional lawyers, and political leaders throughout U.S. history.<sup>149</sup> Yet, the implication that the relations among the states would be governed by the law of nations was never especially controversial.

The quasi-international relationship between the individual states was to be implemented, at least in part, through Article III of the Constitution’s grant of original jurisdiction to the Supreme Court in “controversies between two or more States.”<sup>150</sup> The states could, like nations, negotiate settlements or compacts with each other, although they needed federal approval.<sup>151</sup> However, Article III encouraged them to submit bilateral disputes to courts.<sup>152</sup> Here was yet another innovation on the law of nations: nations were not required to submit their controversies to a court but were limited to negotiation or war as the only means of resolving their disputes. That made international relations a perilous realm in which might, not right, threatened to decide controversies. Among the American states, however, a different method, based on law and impartial adjudication, would prevail, and it later provided a model for reforming international law.

The Constitution did not only refer implicitly to the law of nations in structuring state-to-state disputes. That law also defined claims of state power and individual right against the backdrop of early modern understandings of the legislative competence of states. Leading examples are found in Article IV. The Interstate Extradition Clause, for example, mandates that fugitives from justice in one state found in another must be

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147. ARTICLES OF CONFEDERATION of 1781, art. II.

148. U.S. CONST. amend. X.

149. See generally HENDRICKSON, *supra* note 137.

150. U.S. CONST. art. III, § 2, cl. 1.

151. See *id.* art. I, § 10, cl. 3.

152. *Id.* art. III, § 2, cl. 1.

“delivered up” to the former.<sup>153</sup> That provision, written in the language of the law of nations,<sup>154</sup> was added because of the background rule that each nation’s jurisdiction was exclusive within its own territory and therefore no nation was obligated to extradite fugitives to another. Instead, early modern nations sometimes consented to extradition in bilateral treaties. In other words, the Interstate Extradition Clause reflects the founding assumption that the law of nations would govern the relationship between individual states in the absence of an explicit provision to the contrary in the Constitution.<sup>155</sup>

A similar explanation elucidates the Constitution’s treatment of slavery, especially the Fugitive Slave Clause.<sup>156</sup> Debate in Europe and the Americas over the legitimacy and morality of slavery gained momentum during the eighteenth century.<sup>157</sup> The deaccessioning of slavery from the law of nations, in particular, was energized by Lord Mansfield’s 1772 decision in *Somerset v. Stewart*<sup>158</sup> (*Somerset’s Case*), which proclaimed that slavery could not be reconciled with the law of nature but depended instead on the positive municipal law of a particular locality for its existence.<sup>159</sup> Mansfield, chief justice of the Court of King’s Bench, tied this conception of slavery to the law of nations’ principles of comity (now classified as private international law).<sup>160</sup> On what became a widely acknowledged understanding of the decision in the then British colonies in North America, the law of nations permitted one jurisdiction to refuse recognition of the effect of slavery in another. The customary recognition of comity for property rights did not apply in the case of slavery.<sup>161</sup>

One critical entailment of *Somerset’s Case* from the perspective of American constitution makers a decade later was that, under the law of nations, an enslaved person who entered free territory was no longer subject to the law of slavery of the state from which she came.<sup>162</sup> How far the law of that “foreign” state would be respected depended on the local law of the forum state. Southern slave owners at the Constitutional Convention

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153. *Id.* art. IV, § 2, cl. 2. The Articles of Confederation contained a nearly identical provision. See ARTICLES OF CONFEDERATION of 1781, art. IV.

154. See Treaty of Amity, Commerce, and Navigation, Gr. Brit.-U.S., art. 27, Nov. 19, 1794, 8 Stat. 116 [hereinafter The Jay Treaty] (providing the United States and Great Britain “will deliver up to Justice” fugitives found within the jurisdiction of each).

155. There were conflicting opinions on the issue of extradition, with some treatise writers maintaining that at least in some cases it was mandatory. The generally prevailing view—and the one adopted in the United States—denied that position. See 1 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 13–20 (Cambridge, John Wilson & Son 1891).

156. U.S. CONST. art. IV, § 2, cl. 3, *amended* by U.S. CONST. amend. XIII.

157. See generally DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 (1975); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1966).

158. (1772) 98 Eng. Rep. 499, Loft 1.

159. *Id.* at 502.

160. *Id.* at 510.

161. See generally Daniel J. Hulsebosch, Comment, *Nothing but Liberty: Somerset’s Case and the British Empire*, 24 LAW & HIST. REV. 647 (2006).

162. See PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 38–40 (1981).

apprehended that they could not compel Northern states, with their intensifying hostility to slavery in the 1780s, to return enslaved persons who had escaped into their territory.<sup>163</sup> With no explicit agreement, the default rule of the law of nations would control.

This legal background explains the perceived need for the injunction in the Fugitive Slave Clause that

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>164</sup>

Notably, however, that clause was limited to enslaved persons who escaped to a free state. It did not extend to a case like that of James Somerset, whose putative owner voluntarily transported him into a “free” jurisdiction. This was true, Mansfield held, even within the quasi-confederation of the British Empire.<sup>165</sup> As a consequence, it would remain in the discretion of each Northern state to decide whether to deem an enslaved person brought voluntarily into its territory to be free. Nor was this a matter of controversy. Indeed, for several decades Southern state judges uniformly ruled not only that the law of nations permitted the Northern states to deem an enslaved person taken voluntarily into their territory free but also that under the principles of comity expressed in that law, their status as free persons would be respected even when they returned to the state in which they had originally been enslaved.<sup>166</sup>

Southern courts shifted on the issue only in the late antebellum period, most notably in the litigation instituted by Dred Scott, which ultimately yielded the infamous Supreme Court decision. This change reflected the intensifying sectional conflict that culminated in the Civil War. Fittingly, the Supreme Court in *Scott v. Sandford*<sup>167</sup> refused to exercise jurisdiction over the Supreme Court of Missouri’s refusal to apply the law of nations.<sup>168</sup> But the deep engagement of the Constitution with the evolving law-of-nations approach to slavery belied Chief Justice Roger Taney’s unanalyzed dictum, coming as he vaulted the Fifth Amendment’s protection of property above the free soil principle of the law of nations, that “there is no law of nations standing between the people of United States and their Government.”<sup>169</sup> As

163. *See id.* at 40.

164. U.S. CONST. art. IV, § 2, cl. 3, amended by U.S. CONST. amend. XIII.

165. *Somerset’s Case*, 98 Eng. Rep. at 510.

166. *See generally* FINKELMAN, *supra* note 162; WILLIAM M. WIECEK, *THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* (1977).

167. 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

168. *See* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 330–34 (1978).

169. *Scott*, 60 U.S. (19 How.) at 451. Justice Taney would add that

[t]he powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. . . . And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave,

it happened, there was. Indeed, six years later, President Abraham Lincoln invoked the laws of war to emancipate all enslaved people in the secessionist states.<sup>170</sup>

### 3. The Law of Nations and the Governance of Empire

The law of nations proved to be useful in yet another critical dimension of governance in the early republic. Reflecting the fact that many European nations were also colonizing empires, the law of nations contained essential resources for constructing the imperial features of the American constitutional project, especially the relationship between the federal government and the Native American polities and the institution of slavery.<sup>171</sup> European empire builders had long invoked the law of nations to conceptualize and justify the use of slave labor and to expropriate land from Indigenous populations. The founding generation was deeply familiar with both fields of legal rationalization, as well as with the fast and unpredictable evolution of the consensual principles bearing on the two subjects during the late eighteenth-century Enlightenment. As most white Americans ranked settlement and development of the continent's interior as a high governmental priority—a project that required obtaining that land and then finding labor to develop it—engagement with the law of nations in both areas intensified after the Revolution. In this sense, at least, the Constitution was imperial from the beginning.

#### *a. Native America and the Constitution*

Many complexities surrounded the original constitutional status of Native American nations (or, as the drafters pointedly referred to them, tribes). The degree of their sovereignty was hotly debated, often in juristic writings. Its practical meaning, however, was worked out in diplomatic interactions. Historians have mined those interactions between the federal government, the states, and the Native Americans.<sup>172</sup> These parties were never, however, the only participants in that struggle. The British and Spanish empires, which

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can enlarge the powers of the Government, or take from the citizens the rights they have reserved.

*Id.*

170. BURRUS N. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 117–23 (2007); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 1–9 (2012).

171. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004).

172. *See generally* COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION (2019); 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (abridged ed. 1984); LEONARD J. SADOSKY, REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA (2009); RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815 (1991). For “sovereignty” in imperial settings, *see generally* LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900 (2010).

surrounded the American “neighborhood,”<sup>173</sup> were also *inside* it. Both empires had extensive military and commercial relations with Native American nations within the western cession.<sup>174</sup> When the federal government began operations, commerce in land or goods with these western nations was largely imaginary.<sup>175</sup> What was imagined, however, was boundless wealth for the new nation and its citizens.<sup>176</sup>

Two textual hooks suggest the role that the law of nations played in structuring the relationship of the new government with the Native American polities. One is the Treaty Clause.<sup>177</sup> Treaty relations presumed that Native American polities were, legally, foreign. This was how Britain and most of the European empires had conducted relations with the Native Americans, and the Federalists were determined to appear as though they were respecting imperial ways.<sup>178</sup> Ironically, though, the primary audience for this international law claim was domestic: the states. Treating with the Native Americans was part of the project of centralizing key features of governance, especially foreign affairs and security, and it opened a new chapter in the long story of cooperation and competition between the federal and state governments for primacy in dealing with Native Americans. The other hook was the so-called Indian Commerce Clause, sitting alongside the international and interstate commerce clauses.<sup>179</sup> Although aimed at the states too, the Indian Commerce Clause signaled to foreign nations wishing to treat with Native Americans within the borders of the United States that the federal government claimed the power to regulate their trade.<sup>180</sup> Together, the two clauses traced the beginning of a complex strategy of federal governance over Native America: a monopoly not only in relation to the states but also claimed against the neighboring empires. The law of nations played a substantial role in both strategies, and Americans then added new elements to that law that other settler nations borrowed as they expropriated land and sovereignty from Indigenous people. Few areas of early federal governance better demonstrate the power-conferring potential of the law of nations than its deployment to obtain Native Americans’ land and dominate their trade.

Making the nations located in Native America *dependent* nations was one goal of Federalist governance under the new Constitution. It was ambitious,

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173. See generally JAMES E. LEWIS JR., *THE AMERICAN UNION AND THE PROBLEM OF NEIGHBORHOOD: THE UNITED STATES AND THE COLLAPSE OF THE SPANISH EMPIRE, 1783–1829* (1998).

174. See *id.* at 33–36.

175. See SADOSKY, *supra* note 172, at 79.

176. See ALAN TAYLOR, *THE DIVIDED GROUND: INDIANS, SETTLERS, AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION* 238 (2006).

177. U.S. CONST. art. II, § 2, cl. 2.

178. See generally DOROTHY V. JONES, *LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA* (1982); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

179. U.S. CONST. art. I, § 8, cl. 3; see also Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1059–74 (2015).

180. U.S. CONST. art. I, § 8, cl. 3.

requiring defter diplomacy and stronger force than the founders had originally imagined. It was at least a familiar project. Dependency was a known status in the law of nations. Vattel, for example, wrote of tributary states, feudal states, treaties of protection, and unequal alliances.<sup>181</sup> Small nations frequently made treaties with larger or more powerful nations that delegated some national powers, typically defensive powers, from the dependent to the principal. The “weak state” (as Vattel called the junior partner) might lose some freedom of action.<sup>182</sup> If it “reserve[d] to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state.”<sup>183</sup> In sum, a weak state in a covenant for protection did not “on this account, cease to rank among the sovereigns who acknowledge no other law than that of nations.”<sup>184</sup>

A dependent relationship, therefore, was something like a partial, issue-specific confederacy between two nations. The relationship and remedies were bilateral. Treaties of dependency did not bind third parties, although when publicized, they did suggest that consequences might follow outside interference. The European empires repeatedly used such treaties in Native America in the century before the Revolution. The example of Sir William Johnson, the British Superintendent of Indian Affairs for the Northern Department, and his decades-long relationship with (most of) the Six Nations was well known to revolutionaries who fought in the Northern states and then to federal state builders (often the same individuals).<sup>185</sup>

Persuading everyone across the Atlantic world that these dependent nations were also *domestic* nations was another thing altogether. That required turning a contractual relationship into a monopolistic property right, excluding all interference by all other nations. It also involved converting “borderlands” into “borders” and claiming that other nations could not reach across them to engage in trade and diplomacy with Native Americans, at least not without the consent of the United States as expressed in a treaty.<sup>186</sup> Early Americans tried to convert an international treaty relationship into a national one, closer along the spectrum to confederation, without the equal footing and shared decision-making that characterized confederations. It was a fantasy from the perspective of 1789. Yet Washington’s cabinet believed in it. Benefitting as they often did from European catastrophe from 1793 to 1815, successive federal administrations moved far toward reaching it—at the expense of Native American autonomy.<sup>187</sup>

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181. VATTEL, *supra* note 22, at 83–84.

182. *Id.* at 83.

183. *Id.*

184. *Id.*

185. See TAYLOR, *supra* note 176, at 235–65.

186. See, e.g., The Jay Treaty, *supra* note 154, art. 12 (permitting British traders in Canada to trade with Native Americans in the United States without paying international tariffs and vice versa). On the shift from borderlands to borders, see generally Jeremy Adelman & Stephen Aron, *From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History*, 104 AM. HIST. REV. 814 (1999).

187. For early federal policy regarding Native American land and trade, see generally REGINALD HORSMAN, *EXPANSION AND AMERICAN INDIAN POLICY, 1783–1812* (1967).

*b. Slavery and the Constitution*

The place of slavery within the eighteenth-century law of nations might be as complicated as its place within the Constitution. The latter relationship remains deeply contested among historians.<sup>188</sup> Famously, although the drafters avoided the term, slavery shaped congressional representation, the Electoral College, the taxing power, the relationship between individual states, and the federal power to regulate the international trade in human beings.<sup>189</sup> That cumulative effect was substantial, as Northern anti-Federalists were quick to observe during the ratification debates.<sup>190</sup> Daring not to speak the word, though, said something. And the oblique way that the drafters did write about slavery reflected their understanding of its legal standing within the contemporary law of nations. One reason they could say so little was because the legal premises were so well understood.

That understanding was transatlantic. Again, at about the same time as the American Revolution, the European nations and empires began to deaccession slavery from the law of nations.<sup>191</sup> Americans who supported the elimination of slavery grabbed hold of these developments and then helped accelerate them.<sup>192</sup> The loss of this bulwark of legitimation, reflected most famously in *Somerset's Case*, sent supporters of slavery searching for new justifications within municipal law.

The clause forbidding Congress to prohibit the trade in human lives before 1808,<sup>193</sup> for example, should be read against the background of developments in the law of nations. The legality of the slave trade had long rested on the justification that the laws of war permitted conquerors to enslave their enemies as a lesser form of punishment than death. But as early modern Europeans began to reject the ancient Roman law rule in wars among themselves, the legal justification for the slave trade too came under pressure. In the ensuing decades, some, like Chief Justice John Marshall, argued that the laws of war among African nations still legitimized the practice.<sup>194</sup> Others rejected the argument that the slave trade could be conducted under legal auspices at all. Justice Joseph Story, for example, later credited the United States with “having set the first example of prohibiting the further

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188. Compare SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING (2018), with SLAVERY AND THE LAW (Paul Finkelman ed., 1997), GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (2010), and DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009); see also *We Respond to the Historians Who Critiqued the 1619 Project*, N.Y. TIMES MAG. (Jan. 19, 2021), <https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html> [<https://perma.cc/QG47-C2ZK>].

189. See, e.g., WIECEK, *supra* note 166, at 62–63.

190. See *id.* at 80–83.

191. See *supra* notes 150–55 and accompanying text.

192. See *id.*

193. U.S. CONST. art. I, § 9, cl. 1.

194. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825).



progress of this inhuman traffic.”<sup>195</sup> As enslavement was jettisoned from the laws of war, engaging in the transatlantic trade became a source of transnational censure, while prohibiting it became one of emulation and coordination. One example of the latter was the transatlantic correspondence between the British Abolition Society and American manumission societies and state governments during the drafting and ratification of the Constitution.<sup>196</sup>

Prohibiting the trade was a mechanism by which the new nation could contribute to reforming the law of nations. When delegates from Northern states at the Constitutional Convention proposed prohibiting the trade, however, representatives from the Deep South wrested a compromise: Congress would have no power to prohibit the trade for twenty years. The expectation was that, then, it would do so.<sup>197</sup> The result was indirectly coordinated and nearly simultaneous prohibitions on the international slave trade in the British Empire and the United States.

As the legal justification for initial enslavement and the slave trade eroded, slavery itself came under pressure.<sup>198</sup> The legal default was, increasingly, free soil. Slavery required protection in the positive municipal law, which, again, is why Southerners demanded the Fugitive Slave Clause.<sup>199</sup> More generally, proslavery advocates developed the municipal law of property as the primary bulwark against legal challenges to slavery itself, putting constitutional protections of property on a collision course with the law of nations premises of the Constitution’s federal structure.<sup>200</sup>

### C. *The General Law of Nations: Maritime and Commercial Law*

Yet another field in which the founding generation employed the law of nations to govern their federal state was the regulation of private transactions in a range of disparate but important areas. Early American lawyers classified an assortment of fields as part of the law of nations. Trading with the enemy was one and it was widely applied by the courts without the need

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195. Joseph Story, A Charge Delivered to the Grand Jury of the Circuit Court of the United States, at its First Session in Portland, for the Judicial District of Maine (May 8, 1820), *reprinted in* 1 THE AFRICAN SLAVE TRADE AND AMERICAN COURTS 9, 22 (Paul Finkelman ed., ser. 5, 2007).

196. *See, e.g.*, Letter from Granville Sharp to President, Vice President, and Treasurer of The Soc’y Established in New York for the Manumission of Slaves (May 1, 1788), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 329 (Henry P. Johnston ed., New York, G. P. Putnam’s Sons 1891).

197. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS 133–62 (3d ed. 2014).

198. Forced servitude for prisoners of war lasted into the early modern period, but it rested on the municipal law of poor relief rather than the law of nations. *See generally* Sonia Tycko, *The Legality of Prisoner of War Labour in England, 1648–1655*, PAST & PRESENT, Feb. 2020, at 35.

199. *See supra* Part III.B.2.b.

200. *See* U.S. CONST. amend. V; *see also* Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

for legislation. Conflict of laws, foreign judgments, and foreign evidence were part of what one commentator called “The minor Law of Nations.”<sup>201</sup>

The largest remaining field, however, was not minor at all: commercial law. Modern lawyers might classify the subject as the epitome of private law. Early American lawyers were more likely to call it public law.<sup>202</sup> It had two branches: the law of merchants and maritime law.<sup>203</sup> These were not actually two separate subjects. Rather, both were species of commercial law, with one covering transactions on land and the other those made on or concerning oceanic trade. The premise was the same: because the underlying activity tended to transcend national borders, so should the law governing it.

This notion that commercial law was a transnational subject was common across eighteenth-century Europe. The proximate doctrinal source of this faith in the United States was again Lord Mansfield. “When Lord Mansfield mentioned the law of merchants as being a branch of public law,” Kent observed in his *Commentaries on American Law*,

it was because that law did not rest essentially for its character and authority on the positive institutions and local customs of any particular country, but consisted of certain principles and usages of trade, which general convenience, and a common sense of justice had established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.<sup>204</sup>

Here “public law” was a rhetorical highlighter, referring to the law of nations and designed to place such transactions beyond the jurisdiction of municipal law. It was a hybrid: intrinsically international but concerning individuals. Two local merchants creating a negotiable instrument or insuring a vessel’s cargo were, whether they knew it or not, supporting actors in the epic drama of civilization. And so their deal ought to be governed by the law of civilized states.

Some American judges took the universal conceit further and argued that even legislatures could not alter these rules. “From the nature of commerce,” wrote New Hampshire Chief Justice Jeremiah Smith in 1806,

it is not capable of being regulated by the municipal laws of individual states, but it must be governed by a code, which is respected by all civilized nations, and denominated the *Law Merchant*. In respect of the universality of this system, it may be considered as a portion of the law of nations; not indeed regulating the intercourse of independent states, but obligatory on

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201. Peter Stephen Du Ponceau, *The Minor Law of Nations* (unpublished manuscript) (on file with the American Philosophical Society).

202. 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 1–3 (New York, O. Halsted 2d ed. 1832).

203. *See id.*

204. *Id.* at 2.

the individuals of each state among themselves, and with the citizens of other states, in the multifarious transactions of trade and commerce.<sup>205</sup>

Although this belief in an insulated and apolitical transnational commercial law, supreme over municipal law, persisted throughout the nineteenth century, it was never the dominant view.<sup>206</sup> More subtly, many lawyers assumed that legislatures should not change the substance of commercial rules, though they had freer rein with altering remedies. Justice Story endorsed this view in his opinion in *Swift v. Tyson*,<sup>207</sup> in which he claimed that the federal courts, sitting in diversity jurisdiction, had the power to determine the applicable rules governing commercial law disputes, at least in the absence of governing state statutes.<sup>208</sup> The transnational premise of this doctrine has been lost by finding that the court upheld “federal general common law,”<sup>209</sup> whereas in that much-misunderstood decision, Story did not refer to the common law. The relevant rule was found elsewhere, in the cosmopolitan body of commercial jurisprudence. “The general principles of commercial law” were distinct and universal.<sup>210</sup> Therefore, in the absence of clear municipal law to the contrary, that transnational law operated in and among the states.<sup>211</sup>

It is therefore ironic that today some legal academics and judges believe just the opposite about the law of nations. They argue that all of the law of nations—all international law outside the similarly constricting zone of treaty law—is effectively just state common law and even then only insofar as the state courts choose so to recognize it and the state legislatures refrain, in their free discretion, from overruling or revising it.<sup>212</sup>

#### CONCLUSION

The law of nations was a pervasive language of governance in early America. The Federalists found in it a multidimensional resource for nation

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205. Book Review, 3 MONTHLY ANTHOLOGY & BOS. REV. 308, 312 (1806) (reviewing 1 GEORGE CAINES, AN ENQUIRY INTO THE LAW MERCHANT OF THE UNITED STATES; OR LEX MERCATORIA AMERICANA (New York, Isaac Collins & Son 1802)) (citing *Luke v. Lyde* (1759) 97 Eng. Rep. 614, 617–618, 2 Burr. 882)). Although the book review was unsigned, the authors believe Chief Justice Smith likely wrote it. See also 1 SAMUEL MARSHALL, A TREATISE ON THE LAW OF INSURANCE 18–19 (Boston, Manning & Loring 1805) (referring to Lord Mansfield and to marine insurance law as public law).

206. The Supreme Court usually followed state statutes that were contrary to the transnational commercial law as rules of decision, though sometimes it did not. See TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 90–94 (1979).

207. 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

208. See *id.* at 18–19.

209. *Erie*, 304 U.S. at 78 (overturning *Swift*).

210. *Swift*, 41 U.S. (16 Pet.) at 22.

211. Even the best doctrinal scholarship on this branch of law does not locate it within the law of nations. See generally William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

212. See generally Bradley & Goldsmith, *supra* note 8.

building that was not narrowly concerned with international relations. Instead, it was a capacious body of principles, maxims, and case histories for governing, both at home and abroad. The law of nations also imported a reflexive mode of reasoning, in which policy decisions were supposed to be considered from the perspective not just of local interest but also of an imagined impartial spectator.

Three dimensions of the law of nations were particularly useful in the early republic. First, it was an indispensable resource for claiming independence and then performing nationhood on the international stage. Second, the comparative public law dimension proved useful to structuring the federal state, in its vertical and horizontal dimensions, and for according it power to act like a civilized nation and, for better or worse, an empire. Finally, the transnational dimension of the law of nations provided a body of legal principles to facilitate American citizens' engagements in commercial and other unofficial transactions with individuals from other nations.