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ESSAY

The Status of the Law of Nations in Early American Law

*Stewart Jay**

A perennial issue is the relationship of international law to the domestic law of the United States. The question appears in various contexts, but in each the central problem is determining whether the body of customary international law is binding on the national and state governments. Discussions about this subject inevitably lead to consideration of separation of powers at the national level. If the United States may depart from international law, which branch of government has the power to do so? If one branch transgresses international law, is this action binding on the others?¹ For example, a recent case examined the

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1. A major difference exists between the question of whether customary international law is binding on the several branches of the United States government based on constitutional command and the question of whether the United States should suffer consequences in the international community for violations of customary international law. For example, under current constitutional interpretations, the President arguably has the authority to violate customary international law. These actions by the President, however, may expose the country to adverse consequences in the international arena, such as giving another country just cause to suspend treaty obligations or to use military force against the United States. See Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1567-69 (1984). This Essay deals for the most part with the first question. As will be discussed, however, assertions by persons in the eighteenth century that the law of nations was "the law of the United States" may have been made with regard to the second question.

executive's authority to detain aliens in violation of international law, and thus implicitly raised the issue of the judiciary's authority to order the executive to conform to international norms.²

Considering the importance of the basic issues involved, it is not surprising that a small industry of scholarship has grown around them, with each generation of scholars revisiting the territory.³ Most of these works make an excursion into the legal history of the eighteenth century, presumably with the idea that this background will help explain the place that international law was intended to occupy under the Constitution.⁴ Those who sympathize with imposing at least some customary international legal constraints on the United States have found this early history to be a particularly fruitful source of authority. A large number of declarations can be assembled from leading figures of that era to the effect that the law of nations was a part of American law and in important respects binding on our government. For others who are skeptical of placing limits on the domestic law of the United States through application of customary international law, the task has been to explain away the significance of this history.

Despite the forays into history that have been attempted on this subject, one is left nevertheless with the impression that there is lack of correlation between the historical studies and current concerns about American governmental actions. Although scholars continue to report new sources to demonstrate the importance of the law of nations to eighteenth-century American law, for the most part they merely sub-

2. *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 901-04 (N.D. Ga. 1985), *reviewed sub nom. Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir. 1986) (holding that the executive may disregard international law in service of domestic policy).

3. The most recent contribution appears in the *Vanderbilt Law Review*. See Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988). A sampling of the literature includes: 1 D. O'CONNELL, *INTERNATIONAL LAW* 37 n.1 (1965) (collecting older sources); Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913 (1986); D'Amato, *The President and International Law: A Missing Dimension*, 81 AM. J. INT'L L. 375 (1987); Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952) [hereinafter Dickinson, *Law of Nations*]; Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239 (1932) [hereinafter Dickinson, *Changing Concepts*]; Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321 (1986); Goldklang, *Back on Board The Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 1 (1984); Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Henkin, *supra* note 1; Kirgis, *Federal Statutes, Executive Orders and "Self-Executing" Custom*, 81 AM. J. INT'L L. 371 (1987); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970); Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932).

4. The best recent effort is Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985).

stantiate better what has long been known. Unfortunately, legal commentators have made little effort to consider eighteenth-century pronouncements on the law of nations in the historical context that produced the Constitution and formed the setting for American foreign policy decisions under the new government.

The purpose of this Essay is to demonstrate the way in which the law of nations was treated in the constitutional politics of the late eighteenth century. It is not meant to be an exhaustive rendition of events in relation to the law of nations. But even an overview of some of the major controversies establishes that many of the statements recorded from that period about international law must be interpreted in light of America's status in the world. America was, after all, a weak power with an unproven government, operating in a world in which warfare was a common form of dispute resolution and a principal element of the international aspirations motivating many nations. While the world still emphasizes violence as a foreign policy tool, America's role now is completely unlike the one that it consciously sought to assume in its infancy. As a part of this transformation, American Presidents have become accustomed to asserting vigorously the executive's prerogatives in foreign relations.

In addition to exploring the international events that confronted the early Republic, we need to account for the jurisprudential theories underlying the eighteenth-century Anglo-American view of the relevance of the law of nations to domestic law. Of course, this is not exactly fresh territory for scholarship. Much of the existing commentary, however, interprets key provisions of the Constitution without considering either historical purpose or legal context. With distressing regularity legal scholars assume that certain words meant the same in the eighteenth century as they do today, or that persons two hundred years ago would construe a constitution in the way we would. For example, the syntax and general structure of the Constitution may imply meanings to a modern reader that do not reflect the intentions of the document's authors. Most importantly, we should bear in mind that the language of the Constitution was intended to create a government to deal with the affairs of a particular eighteenth-century society, one that scarcely resembles our own.

I. THE LAW OF NATIONS AND DOMESTIC LAW IN EIGHTEENTH-CENTURY JURISPRUDENCE

Writers in the eighteenth century did not always use the term "law of nations" to describe the same subject matter, nor did certain writers use the expression consistently. In its broadest usage, the law of nations comprised the law merchant, maritime law, and the law of conflicts of

laws, as well as the law governing the relations between states.⁵ At times writers distinguished between the law of nations and the law merchant,⁶ but the law of nations always was understood to encompass what Justice James Iredell referred to as the law governing "controversies between nation and nation."⁷ These differences in terminology probably were not significant inasmuch as it was commonly recognized that there was a body of general law that "existed by common practice and consent among a number of sovereigns."⁸ This diverse collection of law encompassed commercial disputes between individuals, private disputes in admiralty, criminal offenses, and a host of issues that arose under what we now term public international law. In theory, or at least in aspiration, this general law was uniform throughout the civilized world.⁹ A court applying the law of nations was "in effect, a court of all the nations of the world."¹⁰

In the eighteenth century a consensus existed that the law of nations rested in large measure on natural law. As Emmerich de Vattel contended, and Americans repeated, "the *law of Nations* is originally no other than the *law of Nature applied* to Nations."¹¹ Jurists fre-

5. See Dickinson, *Law of Nations*, *supra* note 3, at 26-34. On the law of conflicts of laws as part of the law of nations, see Rheinstejn, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 805 (1955).

6. See, e.g., *Henfield's Case*, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6360) (Wilson, J.). Although Justice Wilson referred to the law merchant as if it were separate from the law of nations, he cited Blackstone describing it as "a branch of the law of nations." *Id.* (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769)[hereinafter 4 W. BLACKSTONE]). St. George Tucker's 1803 American edition of *Blackstone's Commentaries* also distinguished the "general law merchant" from the "general law of nations." 1 W. BLACKSTONE, COMMENTARIES 421 n.8 (S. Tucker ed. 1803) [hereinafter 1 W. BLACKSTONE].

7. See *Charge to the Grand Jury for the District of South Carolina* (May 12, 1794) [hereinafter *South Carolina Charge*], in GAZETTE OF THE UNITED STATES (Philadelphia 1794) [hereinafter U.S. GAZETTE].

8. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984); see Jay, *Origins of Federal Common Law* (pt. 2), 133 U. PA. L. REV. 1231, 1263-67 (1985).

9. This conclusion even applied to commercial issues. See J. SULLIVAN, THE HISTORY OF LAND TITLES IN MASSACHUSETTS 352 (Boston 1801).

10. *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 91 (1795) (Iredell, J.) The Court noted: "[Prize cases are] determined by the law of nations. A prize court is, in effect, a court of all the nations in the world, because all persons, in every part of the world, are concluded by its sentences." *Id.*; see *The Walsingham Packet* (1799), reprinted in 2 REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ADMIRALTY 78, 82 (G. Minot ed. 1853) [hereinafter ADMIRALTY CASES]; *The Maria* (1799), reprinted in 1 ADMIRALTY CASES, *supra*, at 340, 350; see also *Sprout*, *supra* note 3, at 293.

11. E. DE VATTEL, THE LAW OF NATIONS at lvi (J. Chitty ed. 1863) (emphasis in original) (the original edition was published in 1758). James Wilson followed Vattel closely in telling a grand jury: "The law of nations has its foundation in the principles of natural law, applied to states; and in voluntary institutions, arising from custom or convention." *Charge to the Grand Jury for the District of Virginia* 16 (May 23, 1791) (A. Davis ed. 1791) [hereinafter *Virginia Charge* 1791], in 2 THE WORKS OF JAMES WILSON 813 (R. McCloskey ed. 1967) [hereinafter WORKS OF JAMES WILSON].

quently claimed that the law of nations derived from divine law. Chief Justice John Jay instructed a grand jury in 1793: "It may be asked who made the laws of nations? The answer is *he* from whose *will* proceed all moral obligations, and which *will* is made known to us by reason or by revelation."¹² Others described the doctrines of the law of nations as deriving from human reason. Justice Iredell told a grand jury that "the only way to ascertain the duties which one nation owes to another, is to enquire what reason dictates, that attribute which the Almighty has bestowed upon all mankind for the ultimate guide and director of their conduct."¹³ These were fairly loose, albeit widely accepted expressions, and the reliance on higher law leaves many modern observers with the impression that there was great uncertainty in all law during the Revolutionary era.¹⁴ But the vagueness we may find inherent in these inexact formulations did not prevent writers from describing the law of nations as a system of rules capable of rational explication.

To an eighteenth-century lawyer, a major part of the law of nations consisted of "[c]ertain maxims and *customs*, consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law."¹⁵ In ascertaining principles of the law of nations, lawyers and judges of that era relied heavily on continental treatise writers, Vattel being the most often consulted by Americans. An essential part of a sound legal education consisted of reading Vattel, Grotius, Pufendorf, and Burlamaqui, among others.¹⁶ Quotations from these sources appeared not only in briefs and opinions, but also in discussions of critical foreign policy matters by the President's Cabinet and in the popular press. Implicit in this widespread usage was acceptance of the validity of the law of nations as knowable doctrine. But some even went further in their praise. Justice Iredell spoke in this manner to a grand jury in 1794:

The Law of Nations, by which alone all controversies between nation and nation

12. *Charge to the Grand Jury for the District of Virginia* (May 22, 1793) [hereinafter *Virginia Charge 1793*], in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 480 (H. Johnston ed. 1891) [hereinafter PAPERS OF JOHN JAY] (emphasis in original). Justice Wilson wrote that "the law of nations, as well as the law of nature, is of origin divine." 1 WORKS OF JAMES WILSON, *supra* note 11, at 149.

13. *South Carolina Charge*, *supra* note 7, in U.S. GAZETTE, *supra* note 7.

14. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 291-305 (1969).

15. E. DE VATTEL, *supra* note 11, at lxxv (emphasis in original). On the various approaches to the law of nations, see Dickinson, *Changing Concepts*, *supra* note 3; and Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT'L L. 547 (1909).

16. See Dickinson, *Law of Nations*, *supra* note 3, at 35. Lord Mansfield said in the oft cited case of *Triquet v. Bath*, 3 Burr. 1478, 1481, 97 Eng. Rep. 936, 937 (K.B. 1764), that "the law of nations was to be collected from the practice of different nations and [also from] the authority of Grotius, Barheyrac, Bynkershoek, Wiquefort [and others,] there being no English writer of eminence, upon the subject." *Id.* at 1481, 97 Eng. Rep. at 938.

can be determined, has been cultivated with extraordinary success. In its main principles, as stated by many able writers all civilized nations concur. . . . Within these few years this law has not only been stated with peculiar accuracy and conciseness, but all its principles have been traced to their sources with a power of reasoning which has commanded universal assent¹⁷

Viewed from a modern vantage point, the reliance on treatise writers may be explained partially by the unavailability of other authority, such as published case reports or diplomatic records.¹⁸ Nevertheless, in this prepositivist era the treatise writers were respected for their use of natural reasoning to discover the true principles of the law of nations. These were the same sources who had an established place in the intellectual foundation of the Revolution's ideology of natural rights. As revolutionaries, Americans quoted these authorities in the course of demanding respect for natural rights that were perceived as grounded in a body of law existing independently of positive enactment.¹⁹ The law of nations, described as a system of rights based on natural reasoning, fit well with Enlightenment rationalism. In the same grand jury charge just noted, Iredell remarked that "[w]e have the happiness to live in an age when human knowledge in all its branches has been carried to a great perfection."²⁰ With regard to the law of nations, it had been expounded and accepted "with a spirit of freedom and enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning."²¹

Educated Americans of this period were familiar with Blackstone's position that "the law of nations . . . is here adopted in it's full extent by the common law, and is held to be a part of the law of the land."²² American revolutionaries held as a fundamental article of faith that the colonists were entitled to the protection of the common law.²³ Notwith-

17. *South Carolina Charge*, *supra* note 7, in U.S. GAZETTE, *supra* note 7.

18. See Dickinson, *Changing Concepts*, *supra* note 3, at 241-42, 259.

19. See B. BAILY, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26-27 (1967); G. WOOD, *supra* note 14, at 9, 291-305; Lobel, *supra* note 4, at 1079-80; Sherry, *The Intellectual Origins of the Constitution: A Lawyer's Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENTARY 323, 327 (1988).

20. *South Carolina Charge*, *supra* note 7, in U.S. GAZETTE, *supra* note 7.

21. *Id.*

22. 4 W. BLACKSTONE, *supra* note 6, at 67 (eighteenth-century grammatical conventions are not corrected in text); see *Triquet v. Bath*, 3 Burr. 1478, 1481, 97 Eng. Rep. 936, 938 (K.B. 1764) (Mansfield, J.) (stating that "[t]he law of nations, in its full extent was part of the law of England"). Judge Mansfield purported to be quoting from *Barbuit's Case*, 25 Eng. Rep. 777, 778 (Ch. 1737) (Talbot, L.C.). On these cases, see Sprout, *supra* note 3, at 282-84.

23. See J. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITICS OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788*, at 24-28 (1986); see, e.g., *Declaration of Rights of the Continental Congress* (1774), in *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* 309 (R. Pound & T. Plucknett 3d ed. 1927) (stating that "the respective colonies are entitled to the common law of England").

standing the controversy that would erupt in the 1790s over the extent to which the common law formed the basis for the law of the national government, writers generally asserted that the law of nations was part of the law of the new American states and their national government.

The Continental Congress resolved that it was the organ for exercising the powers of war for the United States, and that accordingly it was charged with "executing" the relevant law of nations. In particular this meant that American courts would decide prize cases during the Revolution according to the law of nations.²⁴ During the Confederation period there was acute awareness among national leaders of the obligations imposed by the law of nations. One of the main reasons for convening the Philadelphia Convention in 1787 was the transgression of that law by various states.²⁵ The failure of states to enforce debts owed to foreigners (British creditors in particular) was a special concern because the law of nations at that time could be interpreted to allow a creditor nation to resort to war for satisfaction.²⁶

In the early years of the American Republic, federal judges, leading political figures, and commentators commonly stated that the law of nations was part of the law of the United States. Chief Justice Jay informed a grand jury on circuit in 1790 that "[w]e had become a nation—as such, we were responsible to others for the observance of the *Laws of Nations*."²⁷ Jay specifically instructed that the law of nations was "part of the laws of this, and of every other civilized nation."²⁸ During a charge in 1794, Justice Iredell explained to another grand jury:

The Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it. . . . In whatever manner

24. In 1779 the Continental Congress resolved to insist on strict compliance with the law of nations when determining the legality of captures on the high seas. See 14 *JOURNALS OF THE CONTINENTAL CONGRESS* 635 (W. Ford ed. 1909); see also Reeves, *supra* note 15, at 556-57.

25. See, e.g., 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 19, 24-25 (M. Farrand ed. 1911) [hereinafter M. Farrand]. Governor Edmund Randolph argued that national authority was needed to prevent states from infringing the law of nations, which could produce war. He cited as examples the failure to honor treaties and the general absence of laws to protect the rights of foreign ambassadors. *Id.*

26. See F. MARKS, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 45 (1973).

27. *Charge to the Grand Jury for the District of New York* (Apr. 4, 1790) [hereinafter *New York Charge*], in *NEW HAMPSHIRE GAZETTE* (Portsmouth 1790) [hereinafter *N.H. GAZETTE*] (emphasis in original). Jay made a similar statement in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

28. *New York Charge*, *supra* note 27, in *N.H. GAZETTE*, *supra* note 27; see also *Virginia Charge* 1793, *supra* note 12 (Jay, Cir. J.), in 3 *PAPERS OF JOHN JAY*, *supra* note 12, at 479 (stating that "[t]he Constitution, the statutes of Congress, the laws of nations, and treaties constitutionally made compose the laws of the United States").

the Law of Nations is violated, it is a subject of national, not personal complaint.²⁹

Justice Wilson declared in a 1796 case that “[w]hen the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”³⁰ Earlier, Wilson had informed a grand jury that neutrality violations by American citizens constituted an indictable offense against the law of nations, despite the lack of a federal statute making such conduct a crime.³¹ The neutrality cases of the 1790s, which we will return to later, reflect in a series of opinions and grand jury charges the accepted view among leading Supreme Court and lower federal court judges that the laws of the United States encompassed the law of nations.³²

Alexander Hamilton wrote in his *Pacificus* papers of 1793 that the law of nations was included within “the laws of the land.”³³ As *Camillus* he contended two years later that the United States was bound to comply with the “customary law of Nations as established in Europe.”³⁴ Writing in reply to Hamilton under the pseudonym *Helvidius*, James Madison conceded that his adversary’s point about the law of nations was “a truth.”³⁵ Both Attorneys General Edmund Randolph and Charles Lee declared in opinions to secretaries of state in the 1790s that the law of nations was part of the law of the land. Randolph specifically noted that this conclusion was unaffected by the fact that the law of nations was “not specially adopted by the Constitution or any municipal act.”³⁶ William Rawle, who was one of the leading lawyers of the

29. *South Carolina Charge*, *supra* note 7, in U.S. GAZETTE, *supra* note 7. Justice Iredell made a similar statement in *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795).

30. *Ware v. Hylten*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) (emphasis in original).

31. See *Henfield’s Case*, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6360) (Grand Jury Charge of Wilson, Cir. J.).

32. See Jay, *Origins of Federal Common Law* (pt. 1), 133 U. PA. L. REV. 1003, 1040-53 (1985).

33. A. HAMILTON, *Pacificus No. I* (June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 34 (H. Syrett ed. 1969) [hereinafter PAPERS OF A. HAMILTON].

34. A. HAMILTON, *To Defence No. XX* (Oct. 23-24, 1795), in 19 PAPERS OF A. HAMILTON, *supra* note 33, at 341-42 (H. Syrett ed. 1973). Hamilton explained:

The common law of England which was & is in force in each of these states adopts the law of Nations, the positive equally with the natural, as a part of itself. . . . Ever since we have been an Independent nation we have appealed to and acted upon the modern law of Nations as understood in Europe. Various resolutions of Congress during our Revolution—the correspondence of executive officers—the decisions of our Courts of Admiralty, all recognised this standard. . . . Executive and legislative acts and the proceedings of our Courts under the present government speak a similar language. The President’s Proclamation of Neutrality refers expressly to the *modern* law of Nations. . . . ‘Tis indubitable that the customary law of European Nations is a part of the common law and by adoption that of the U[nited] States.

Id. (footnotes omitted).

35. Madison, *Helvidius No. II*, in THE LETTERS OF PACIFICUS AND HELVIDIUS 73 (J. Gideon ed. 1845) [hereinafter LETTERS].

36. 1 Op. Att’y Gen. 26, 27 (1792) (Attorney General Randolph); *id.* at 68 (1797) (Attorney General Lee); *cf. id.* at 57 (1795) (Attorney General William Bradford).

period as well as the United States Attorney in Philadelphia during most of the 1790s, summarized the attitude when he wrote that “[t]he law of nations forms a part of the common law of every civilized country.”³⁷

Jurists of this era also typically recited that as to its obligatory elements the law of nations could not be violated by positive enactments. “Whence, as this law is immutable,” wrote Vattel, “and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.”³⁸ George Nicholas claimed at the Virginia ratifying convention in 1788 that “the law of nations was permanent and general. It was superior to any act or law of any nation; it implied the consent of all, and was mutually binding on all.”³⁹ Justice Iredell instructed a grand jury in 1794 that “[e]ven the Legislature cannot rightfully controul [the law of nations], but if it passes any law on such subjects is bound by the dictates of moral duty to the rest of the world in no instance to transgress them.”⁴⁰ Consistent with the English tradition, American legislation in an area subject to the law of nations was said to be “declaratory of the law of nations,”⁴¹ or to have “provided a particular manner of enforcing it.”⁴²

These statements encompassed not only unilateral actions by gov-

37. W. RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 108 (Philadelphia 2d ed. 1829).

38. E. DE VATTEL, *supra* note 11, at lviii.

39. 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 502 (J. Elliot ed. 1836) [hereinafter *STATE CONVENTION DEBATES*].

40. *South Carolina Charge*, *supra* note 7, in *U.S. GAZETTE*, *supra* note 7. Before a grand jury in 1791, Justice Wilson maintained:

True it is, that, so far as the law of nations is *voluntary* or *positive*, it may be altered by the municipal legislature of any state, in cases affecting *only* its own citizens. True it also is, that, by a treaty, the voluntary or positive law of nations may be altered so far as the alteration shall affect *only* the contracting parties. But equally true it is, that no state or states can, by treaties or municipal laws, alter or abrogate the law of nations any further.

Virginia Charge 1791, *supra* note 11, at 16, in 2 *WORKS OF JAMES WILSON*, *supra* note 11, at 813-14 (emphasis in original).

41. *Grand Jury Charge*, in W. PATERSON, *PATERSON PAPERS* (n.p. circa 1795) (original in Rutgers University Library).

42. *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.). For the similar English tradition, see Dickinson, *Changing Concepts*, *supra* note 3, at 254-55. Statutes incorporated the law of nations by reference, meaning that their provisions were understandable only in light of pre-existing law. See, e.g., Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (stating that the jurisdiction of the Supreme Court in cases involving ambassadors and foreign ministers is to be exercised “consistently with the law of nations”); *id.* § 9, 1 Stat. at 77 (authorizing an alien to sue “for a tort only in violation of the law of nations or a treaty of the United States”); An Act for the Punishment of Certain Crimes Against the United States, § 28, 1 Stat. 112, 118 (1790) (making it a crime to “assault, strike, wound, imprison, or in any manner infract the law of nations, by offering violence to the person of an ambassador or other public minister”).

ernments, but also the inability of nations to alter by treaty what Vattel termed the "necessary" laws of nations.⁴³ Justice Wilson explained that "[t]his they can no more do, than a citizen can, by his single determination, or two citizens can, by a private contract between them, alter or abrogate the laws of the community, in which they reside."⁴⁴ During the Virginia ratifying convention, Madison, Randolph, and others attempted to deflate the Anti-Federalist argument that the federal government could attempt to relinquish by treaty navigation rights on the Mississippi or otherwise to impair the country's territorial integrity; they did so by contending that such actions would be void under the law of nations.⁴⁵ Writing in *The Federalist No. 64*, John Jay countered a similar Anti-Federalist objection that the President and Senate might conspire to form "corrupt" treaties, such as one in which "they and their families and estates will not be equally bound and affected with the rest of the community."⁴⁶ While doubting that this would be politically possible given the two-thirds approval requirement, he added that "if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations."⁴⁷

The law of nations also fixed a natural right of states to insist on respect for treaty obligations. As Vattel stated, treaties "conferred . . . a real right to require the thing promised . . . Nations, therefore, and their conductors, ought inviolably to observe their promises and their treaties."⁴⁸ Jay explained in *The Federalist* that the new national government would be powerless to alter treaties by legislation: "[A]s the consent of both [nations making a treaty] was essential to their formation at first, so must it ever afterwards be to alter or cancel them."⁴⁹ Justice Iredell wrote in a 1796 opinion that "a treaty, when executed pursuant to full power, is valid and obligatory, in point of *moral obligation*, on all, as well on the Legislative, Executive, and Judicial Departments . . . as on every individual of the nation . . . because it is a promise in effect by the whole nation to another nation."⁵⁰

43. See E. DE VATTEL, *supra* note 11, at lvii-lviii.

44. *Virginia Charge* 1791, *supra* note 11, at 16, in 2 WORKS OF JAMES WILSON, *supra* note 11, at 814.

45. See Lobel, *supra* note 4, at 1094-95.

46. THE FEDERALIST No. 64, at 438 (J. Jay) (J. Cooke ed. 1961).

47. *Id.*

48. E. DE VATTEL, *supra* note 11, at 195-96.

49. THE FEDERALIST No. 64, *supra* note 46, at 437.

50. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796) (Iredell, J.) (emphasis in original).

II. THE LAW OF NATIONS AND THE FRAMING OF THE CONSTITUTION

Given the importance of the law of nations to national affairs, the Framers assumed as a matter of course that the federal government should have the ability to dominate most of the decisionmaking related to that law. Principally this result was accomplished by giving the federal government control over foreign relations, divided mainly between the executive and the Congress, but with a prominent role for the federal courts. Nothing in this allocation implies that the political branches had power to act contrary to the law of nations. Instead, the persistent idea was to provide a national monopoly of authority in order to assure respect for international obligations.⁵¹

Notwithstanding this interest in the law of nations, there are no recorded discussions among the Framers that are as candid as later judicial statements would be in describing the law of nations as part of the "law of the United States" or the "law of the land." It was not from sheer reluctance to employ the law of nations as a term in the Constitution, since article I expressly authorized Congress "[t]o define and punish . . . Offenses against the Law of Nations."⁵² Furthermore, the specific grant of authority to Congress over "piracy" was intended to give Congress the power to define a crime that otherwise the law of nations would demarcate;⁵³ specifically, Congress could augment provisions in the general law of nations regarding piracy that were "too vague and deficient to be a rule."⁵⁴

Despite these gaps in the historical record, a significant portion of the Framers' rationale with respect to constitutional authority and the law of nations may be inferred. This section describes the relationship that the Framers saw between the Constitution and the law of nations. As will become apparent in the concluding section of this Essay, however, the various statements about the law of nations already quoted from figures in the 1790s were meant to address matters quite different from the issues that concerned the Framers.

51. See F. MARKS, *supra* note 26, at 142-43; W. REVELEY, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 59-60 (1981).

52. U.S. CONST. art. I, § 8, cl. 10.

53. THE FEDERALIST No. 42, *supra* note 46, at 281 (J. Madison) (asserting that "[t]he definition of piracies might perhaps without inconveniency, be left to the law of nations; though a legislative definition of them, is found in most municipal codes"); see Sprout, *supra* note 3, at 282.

54. 2 M. FARRAND, *supra* note 25, at 615 (quoting Gouverneur Morris). Morris was responding to James Wilson's argument that "[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance. [sic] that would make us ridiculous." *Id.* (Mr. Wilson) (emphasis in original); see Lohel, *supra* note 4, at 1093.

A. *The Federal Courts and the Law of Nations*

Most of the specific discussions in Philadelphia about the law of nations dealt with judicial competence. George Mason wrote to a correspondent at the beginning of the Convention that with regard to the courts "[t]he most prevalent idea [was] to establish . . . a judiciary system with cognizance of all such matters as depend upon the law of nations, and such other objects as the local courts of justice may be inadequate to."⁵⁵ In *The Federalist No. 3*, Jay defended federal court jurisdiction over the law of nations and treaties:

[U]nder the national Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner—whereas adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent⁵⁶

An early draft of article III from the Committee on Detail (in James Wilson's handwriting) expressly extended jurisdiction to cases "which may arise . . . on the Law of Nations."⁵⁷ For reasons that are not articulated in the debates, the final version of that section did not include a specific reference to the law of nations, but rather parceled matters dealing with the law of nations into the separate categories of jurisdiction now appearing in article III. Hamilton explained in *The Federalist No. 80* that the clauses concerning the law of nations were the various diversity grants, the one dealing with foreign ambassadors and ministers, the provision for cases arising under treaties, and the grant for admiralty and maritime cases.⁵⁸ Although Hamilton's arrangement covered every aspect of the law of nations that the Framers had designated as critical to national affairs, he never explicitly stated that article III encompassed the law of nations in its entirety. Moreover, Hamilton did not assert that the law of nations fell under article III's jurisdiction over cases arising under the "laws of the United States."

Professor Arthur Weisburd has argued that the Framers' failure to list the law of nations as a separate category, combined with Hamilton's apparently excluding it from the "laws of the United States" in article III, indicates that the law of nations was not understood as part of the "laws of the United States."⁵⁹ This line of analysis is bolstered with a point appearing some years later in *American Insurance Co. v. Canter*,

55. Letter from George Mason to Arthur Lee (May 21, 1787), reprinted in 3 M. Farrand, *supra* note 25, at 24.

56. THE FEDERALIST No. 3, *supra* note 46, at 15 (J. Jay).

57. 2 M. Farrand, *supra* note 25, at 157 (emphasis in original).

58. THE FEDERALIST No. 80, *supra* note 46, at 534-41 (A. Hamilton). A similar categorization was made by James Wilson. See 1 WORKS OF JAMES WILSON, *supra* note 11, at 281-82.

59. See Weisburd, *supra* note 3, at 1222-23.

in which Chief Justice Marshall wrote that article III's categories of jurisdiction were "distinct," so that a case within the subject matter contained in the grant of jurisdiction under one category could not be brought into federal court via another.⁶⁰

While this argument may seem plausible at first glance, there is another construction of article III that better reflects the Framers' expressed concerns and the jurisprudential perspective of their time. Initially, it bears stressing that the configuration of article III gave the federal courts potential jurisdiction over every type of judicially cognizable case involving the law of nations that the Framers thought needed treatment by the federal judiciary. Both Hamilton and Jay in their respective *Federalist* papers advanced this viewpoint, and it is consistent with the Framers' underlying concern for national dominance over key aspects of the law of nations.⁶¹ Consequently, for the purpose of article III it was irrelevant to those who wrote the Constitution whether the "laws of the United States" included the law of nations.

Marshall's argument, made forty years after the Philadelphia Convention in a quite different context, is itself unpersuasive. The jurisdictional classifications in article III overlap substantially. "Issue" jurisdiction and "citizenship" jurisdiction are not logically distinct. That is, many admiralty cases, most disputes involving foreign ambassadors and ministers, as well as numerous cases placed in the several "arising under" categories would also be covered by alienage or diversity jurisdiction. Federal criminal cases both arise under the laws of the United States and involve the United States as a party. Admiralty itself included a criminal jurisdiction in which the United States would be a party.

Several considerations offer a likely explanation for why the Framers decided not to include a specific reference to the law of nations in article III. Hamilton's account in *The Federalist No. 80* provides part of the answer. When discussing cases relating "to the intercourse between the United States and foreign nations," Hamilton noted that mistreatment of foreign powers or their citizens by a state was "classed among the just causes of war."⁶² Foreigners were just as likely to be affronted by state abuses of local laws as they would from violations of the law of nations. Hence "it [was] by far most safe and most expedient

60. 26 U.S. (1 Pet.) 511, 545 (1828); see Weisburd, *supra* note 3, at 1215.

61. See Sprout, *supra* note 3, at 281-82.

62. THE FEDERALIST No. 80, *supra* note 46, at 536 (A. Hamilton). Those who attach much significance to the Framers' excision of "law of nations" from the draft article III also must explain the significance of the Framers' substitution of "laws of the United States" for "laws passed by the legislature," which arguably was intended to incorporate common-law decisions. See Jay, *supra* note 8, at 1255.

to refer all those [cases] in which they [were] concerned to the national tribunals."⁶³ Merely creating an article III category for the law of nations would not have reached all the cases involving foreigners that might present difficulties for the country if handled by state courts.⁶⁴

Apart from Hamilton's interpretation, a specific inclusion of the law of nations in article III would have gone beyond the Framers' purpose of extending federal judicial competence to every case involving national interests. For example, the law of nations included the law merchant; issues under that body of commercial law would appear not only in diversity cases, but also in purely intrastate disputes. It would have been highly controversial for the Framers to recommend that ordinary contract cases involving citizens of the same state be sent to federal courts. Paralleling this problem was the imprecision known to exist in some areas of the law of nations, which may have caused the Framers to distrust using it as a basis of jurisdiction.⁶⁵

Even though article III did not mention the law of nations, the jurisprudential assumptions and choice of law rules of the day would direct federal courts to decide cases under that law whenever it provided the relevant rule of decision. The law of nations was classified as "general law" in the sense that *Swift v. Tyson*⁶⁶ later employed the term. Questions under the law of nations would be resolved by turning to a source of law that in theory was recognized throughout the Western world. For these purposes it usually would not have been appropriate to employ either the term "United States" or "federal" in conjunction with a reference to the law of nations. Courts and others seeking to apply the law of nations assumed without hesitation that they were referring to an objectively identifiable body of law, and they made use of the standard treatises and other authorities for explicating the doctrine. Section 34 of the 1789 Judiciary Act⁶⁷ is consistent with this interpretation, because state law would not apply in a case covered by the law of nations.⁶⁸

The status of the law of nations as general law also explains the omission of it and any other type of common law from the supremacy clause, which provides that laws "made in Pursuance" of the Constitution "shall be the supreme law of the land."⁶⁹ Some commentators have

63. THE FEDERALIST No. 80, *supra* note 46, at 536 (A. Hamilton).

64. Either removal from state courts or exclusive federal jurisdiction would avoid state judicial interference with any case Congress wished to place under federal control.

65. See *supra* text accompanying note 52.

66. 41 U.S. (16 Pet.) 1 (1842).

67. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1982)).

68. See Fletcher, *supra* note 8; Jay, *supra* note 8, at 1263-67.

69. U.S. CONST. art. VI.

contended that the law of nations was “made” by the national government and hence it is covered by the supremacy clause,⁷⁰ but this conclusion contradicts the prepositivist understanding that judges merely discovered law (a point of view especially important with regard to the law of nations in that it was formed from international sources).⁷¹ It is similarly inaccurate from an eighteenth-century perspective to depict the binding effect of the law of nations as springing from its “federal” character.⁷² Instead, the force of the law of nations stemmed from the conception that it was rooted in natural law. To the extent that uniformity in interpretation of the law of nations was needed, article III’s jurisdictional grants assured that a federal court (and ultimately the Supreme Court) would have cognizance over any question of a judicial nature that the Framers believed needed consistent exposition.

If the reasoning offered here is accurate, what sense should we make of the previously noted allusions to the law of nations as “the law of the land”? One explanation is that these expressions were reflections of the prepositivist understanding that, in appropriate situations, the “general” law (of which the law of nations was a part) prevailed, and thus the country was bound by it. Another answer is that these references were made in a special context, namely to explain that the international community considered the United States bound by the law of nations, and that violations on the part of this country could give just cause for war by an offended foreign state. Further, as a later section of this Essay develops, the concern for foreign policy ramifications in matters involving the law of nations had consequences for separation of powers questions. Often the assertion that the law of nations was part of the law of the United States was interjected into situations in which either the executive or the courts were attempting to justify their assertions of authority.

B. Separation of Powers and the Law of Nations

The Framers must have been aware, as was any knowledgeable person of their day, that violations of the law of nations were common throughout the world. Consequently, some commentators argue that the Framers contemplated the possibility that some branch of the national government would take action in conflict with the prevailing law of nations.⁷³ While this may seem reasonable to a modern observer, it is hard

70. See, e.g., Glennon, *supra* note 3, at 343 (noting that “judges also ‘make’ law, a power implied in jurisdictional grants”).

71. See Jay, *supra* note 8, at 1275.

72. See Lohel, *supra* note 4, at 1093.

73. Professor Louis Henkin, for example, writes:

For every State has the power—I do not say the legal right—to denounce or breach its trea-

to imagine how or why the Framers might have resolved a putative question of who in the government could violate the law of nations since the dogma was that no one could. Yet, even under a theory that afforded obligatory force to the law of nations, there remained the question of which branch of government would be responsible for interpreting the country's international obligations. In addition, the possibility that the political branches might transgress international law left the issue of whether the Constitution established judicial review for such violations.

There is no reason to suppose that only one branch of the federal government was responsible for interpreting the law of nations. As is true with the separation of powers generally, a given topic might be assigned exclusively to a branch, or responsibility for it could be shared with the others. Unfortunately, no provision of the Constitution conclusively resolves any question about the extent of powers given by the Constitution to Congress or the executive over matters touching on the law of nations. Certainly nothing in our previous discussion of article III's heads of federal judicial jurisdiction is helpful for this purpose. The Constitution fails to delineate which cases involving alleged violations of the law of nations by the United States would be subject to judicial review. Indeed, the Constitution does not expressly provide that the federal courts have a role in constraining the other branches from violations of international law.

A reasonable assumption is that the Framers expected the President to execute the law of nations in any area within executive competence. This authority would not encompass all questions concerning the law of nations. Congress would consider those law of nations issues within its ambit, such as the definition of offenses against the law of nations⁷⁴ and the determination of when the law of nations justified war (although the latter was not a result free of controversy). The judiciary would be responsible for a number of other issues under the law of nations, such as admiralty disputes or questions governed by the law

ties, or to violate obligations of customary international law. The Constitution does not allude to such power, but it is inconceivable that the Constitution was intended to make it impossible or impermissible—unconstitutional—for the United States to violate a treaty or other international obligation.

Henkin, *supra* note 1, at 1568.

74. U.S. CONST. art. I, § 8, cl. 10. Professor Michael Glennon has argued that this clause precludes the President from violating customary international law without congressional direction (presumably because that would be an "offense"). Glennon, *supra* note 3, at 68. But the term "offense" in the setting of the law of nations had a limited meaning to lawyers of the eighteenth century. Blackstone listed the principal offenses against the law of nations as violations of safe-conducts, infringement of the rights of ambassadors, and piracy. See 4 W. BLACKSTONE, *supra* note 6, at 68.

merchant. Given the overall theory that the law of nations had binding effect on the nation, it would follow that the President could not disregard the law of nations, but instead had a duty to ensure that the country complied with it on matters within the executive's province.⁷⁵ Not only does this view make sense, but as the next section develops, it was stated on a number of occasions in the 1790s. However, this does not necessarily mean that the Constitution gave federal courts authority to order compliance with international law by the executive.

It cannot be concluded that the Framers intended the federal courts to have competence over an issue merely because it potentially fit under one of the categories of article III. For one thing, the judicial enforcement of rights was confined to claims fitting under common-law categories dealing with property and contract.⁷⁶ Based on English experience, the Framers expected that matters such as prize cases and diplomatic privileges would be treated by courts,⁷⁷ even though these often had sensitive foreign policy implications. Questions concerning the formulation and execution of treaties were not ordinarily heard by British courts, and there is a fair amount of evidence that early Americans would have regarded many issues relating to treaties as nonjusticiable political questions.⁷⁸ As Blackstone wrote, offenses against the law of nations were

principally incident to whole states or nations: in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice.⁷⁹

Blackstone did add that countries had an obligation to restrain

75. Professor Arthur Weisburd has argued that the President is not bound by the domestic law of the United States to obey customary international law. He maintains that the Framers did not intend the law of nations to be a "law of the United States" for article III purposes, and therefore international law should not be included among the laws the President "shall take Care [to] faithfully execute[]." U.S. CONST. art. II, § 3; see Weisburd, *supra* note 3, at 1209; see also text accompanying notes 59-60. Weisburd points out that "laws" cannot mean all laws because many are certainly outside of the President's responsibility, and he suggests that the qualifier "of the United States" should be read into the take care clause. The Framers, however, rejected such a recommendation; earlier drafts of the clause specifically incorporated this phrase. See Glennon, *supra* note 3, at 334. In any event, Weisburd asserts without proof that the Framers intended to limit the President's duty to the execution of those laws enumerated in article III.

76. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 505-13 (1965).

77. See Dickinson, *Law of Nations*, *supra* note 3, at 32.

78. See *id.*; Lobel, *supra* note 4, at 1122 n.263, 1127 n.283. Undoubtedly it was expected that treaties could affect private rights, and thus be the subject of judicial interpretation. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), was an example of this.

79. 4 W. BLACKSTONE, *supra* note 6, at 68. This same point was made by Justice Iredell in a previously noted grand jury charge, in which he remarked that "in whatever manner the Law of Nations is violated, it is a subject of national, not personal complaint." *South Carolina Charge*, *supra* note 7, in U.S. GAZETTE, *supra* note 7.

their citizens from violating the law of nations and hence giving cause for war. This theory would be used by federal authorities in the 1790s to justify prosecutions of Americans who acted contrary to the country's position of neutrality in the ongoing French-American conflict.⁸⁰ It might be argued that this theory could require executive officers or members of Congress to act or refrain from acting in accordance with international law, but that is at best speculative. In any event, the remedies available in federal courts for official violations of law had specific requirements, and it would have been at least controversial to propose that something such as a mandamus action be used to compel the President to obey the law of nations. Some commentators have maintained recently that *Marbury v. Madison*⁸¹ is authority for the courts to act against the executive in this way.⁸² Perhaps so, but it is one thing to demand that the Secretary of State perform a ministerial duty by delivering a judicial commission (which *Marbury* defined as a clear property right), and quite another to order the President to abide by some aspect of the law of nations. Moreover, the modern acceptance of *Marbury's* command that no one is above the laws (an ambivalent acceptance given the political question doctrine) overlooks the strong outcry at the time over the mere issuance of process against the executive, much less the purported authority to issue a writ of mandamus.⁸³ Marshall's assertion of the mandamus power was more adroit than definitive considering the Court's determination that it had no jurisdiction to enforce the remedy.

Notwithstanding ambiguity about the role of judicial review over questions concerning the law of nations, modern commentators argue over whether the Framers intended the federal courts to "have the last word" on international law issues.⁸⁴ These observations import a positivist notion of judicial review and interpretive hegemony that does not square well with concepts of law and the judicial function in the late eighteenth century. For many of the issues dealing with the law of nations, the federal courts had final authority for the simple reason that no other governmental body was competent to interfere. By the same token, the judiciary did not interfere with decisions respecting the law of nations that fell within the executive's exclusive domain. But no na-

80. 4 W. BLACKSTONE, *supra* note 6, at 68; see *Henfield's Case*, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6360) (Wilson, J.) (Charge to the Grand Jury) (stating that if the nation refuses to oblige its citizen to make reparation or punish for the offense against the law of nations, "it renders itself in some measure an accomplice in the guilt, and becomes responsible for the injury").

81. 5 U.S. (1 Cranch) 137 (1803).

82. See Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 927 (1986).

83. See Bloch & Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 319 n.70; Jay, *supra* note 32, at 1107-10.

84. Weisburd, *supra* note 3, at 1241.

tional agency had "the last word" on these issues: it lay under the ultimate control of the international community. Having said this, the question is still unresolved whether the Constitution provided any instances of overlapping authority, in which the courts would have been able to disagree with another branch of government or to order that branch to comply with the law of nations.

III. THE LAW OF NATIONS IN THE CONTEXT OF THE INTERNATIONAL POLITICS OF THE LATE EIGHTEENTH CENTURY

American public affairs in the late eighteenth century were closely linked with international affairs in numerous respects. The continuing hostilities between Great Britain and France, which intensified with the events of the French Revolution, dominated the issues of foreign policy. From the standpoint of the Washington and Adams Administrations, the problem was maintaining neutrality in the face of both strong public feelings favoring the French and transgressions by each of these foreign powers on American shipping. Adding to the stress was the fact that the United States was hemmed in on the North American continent by the Spanish and the British, with the latter still maintaining military outposts on American territory. The United States was in no position to conduct any serious military or naval operations, it had a sizeable debt from the Revolutionary War to repay, and there was no assurance that the citizenry would unite if the Administration committed forces. At the same time, many Americans refused to pay private pre-war debts to British merchants, further exacerbating British ire. A considerable number of American citizens covertly or overtly intrigued with the Spanish or the British. It was impossible to avoid the problems in Europe because American commerce depended on access to overseas markets. Moreover, any conflict between the British and the Spanish likely would include hostilities along the ill-defined borders of the western territories and might pull the United States into the contest.⁸⁵ The United States also had obligations to France under the treaties of 1778, including a pledge to guarantee its ally's possessions in the West Indies.⁸⁶

85. Numerous sources discuss these events. See, e.g., J. BOYD, NUMBER 7: ALEXANDER HAMILTON'S SECRET ATTEMPTS TO CONTROL AMERICAN FOREIGN POLICY (1964); A. DeCONDE, ENTANGLING ALLIANCE (1958); A. DeCONDE, THE QUASI-WAR (1966); J. FLEXNER, GEORGE WASHINGTON AND THE NEW NATION (1970); J. FLEXNER, GEORGE WASHINGTON: ANGUISH AND FAREWELL (1969); F. GILBERT, THE BEGINNINGS OF AMERICAN FOREIGN POLICY: TO THE FAREWELL ADDRESS (1965); D. LANG, FOREIGN POLICY IN THE EARLY REPUBLIC (1985); G. LYCAN, ALEXANDER HAMILTON & AMERICAN FOREIGN POLICY (1970); D. MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY (1962); F. McDONALD, THE PRESIDENCY OF GEORGE WASHINGTON (1975); C. THOMAS, AMERICAN NEUTRALITY IN 1793 (1967).

86. See M. SMELSER, THE WINNING OF INDEPENDENCE 226-28 (1972).

Foreign affairs had critical ramifications for domestic policies. A major rationale for Hamilton's controversial economic plans was to encourage the growth of a substantial manufacturing sector in order to avoid dependence on foreign countries and to make it less likely that the United States would be drawn into conflicts. Domestic manufacturing would also provide a stable source of armaments. Hamilton's insistence on increased military appropriations, which required additional revenues, was inspired by the need to place the country in a position to act more freely in the international arena.⁸⁷ Often these measures prompted vehement criticism from the emerging opposition party, and eventually led the Adams Administration to pursue extraordinary measures, including sedition prosecutions. All these events were connected to the evolution of the Republican party and the political fortunes of Thomas Jefferson.⁸⁸

As Washington and Adams found themselves required to react to foreign events and to shape a coherent policy toward Europe, the need arose to delineate the respective powers of the President and the Congress. Although the Framers arguably intended the President to be "more than an agent of Congress"⁸⁹ in external relations, the Constitution was not generous in its depiction of the executive's role. If anything, the commitment to Congress of the war powers, the regulation of foreign commerce, and the definition of offenses against the law of nations, taken together with the treaty ratification power in the Senate, supported a strong role for the legislative branch in foreign relations. In contrast, the Constitution specifically commands the President to "execute" the laws (as opposed to make them), which reasonably supports the assumption of a relatively modest spot for the executive.⁹⁰ Americans of the late eighteenth century would have approached this issue with a deep-seated ideological distrust of the types of prerogative powers in foreign affairs that were associated with European monarchs and a solid fear of a standing army.⁹¹

87. See D. LANG, *supra* note 85, at 21.

88. See L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 246-47 (1978).

89. W. REVELEY, *supra* note 51, at 99.

90. Writing as *Helvidius*, Madison said that "[t]he natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of laws to be executed." Madison, *Helvidius No. I*, in *LETTERS*, *supra* note 35, at 57. The Constitution used the word "make" to describe the President's role with respect to treaties. U.S. CONST. art. II, § 2, cl. 2.

91. See F. MARKS, *supra* note 26, at 144. In the *Helvidius* papers, Madison wrote: "The power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government*, and accordingly treated as *executive prerogatives* by *British commentators*." Madison, *Helvidius No. I*, in *LETTERS*, *supra* note 35, at 62 (emphasis in original). The fourth *Helvidius* essay contains a passionate warning that "[w]ar is in fact the true nurse of executive

A recurring topic at Cabinet meetings in this period was whether Congress should be involved in a particular matter. Cabinet meetings and memoranda to the President from the Cabinet officers also involved detailed discussions of issues concerning the law of nations. These communications were replete with citations to the leading treatises of the day on this subject. Disagreements over interpretation of these sources were common among Cabinet members and an advocate's viewpoint about a passage from Vattel or another luminary bore a relationship to that officer's policy position. We can hardly imagine this type of exchange occurring among the protagonists in a modern American Cabinet meeting. Perhaps this portrayal gives the impression that political figures of the eighteenth century were more serious in their commitment to follow international norms. To whatever extent that is true, it is overshadowed entirely by the context in which these discussions about foreign relations were held.

A. *American Weakness and the Law of Nations*

The primary consideration that forced the United States to pay respect to the law of nations was the country's weakness in relation to the European powers. As Edwin Dickinson has written about the eighteenth century, "It was an age of the basest diplomatic intrigue, of hostilities too rarely assuaged in periods of peace, and of the utmost ruthlessness in the conduct of hostilities."⁹² Throughout the eighteenth century, wars fought on American territory were tied directly to the balance of power in Europe. Even the Revolution owed its successful outcome in large measure to the interplay of powers in Europe; the French had aided the war effort principally to further their own ambitions.⁹³ Those forming the national government sought to avoid the European power struggle and the permanent military establishment that went along with playing politics by warfare.⁹⁴ Entangling military alliances were to be shunned. The Framers, in fact, expected only occasional need for diplomacy and treaties, and these would be mostly commercial in nature.⁹⁵

American determination to evolve as a commercial power unaffected by the ills of continental affairs was squarely supported by Vattel's theory of sovereign equality. Vattel maintained that nations were equal in their rights and obligations under the law of nations because

aggrandizement." *Id.* at 89.

92. Dickinson, *Changing Concepts*, *supra* note 3, at 241.

93. See D. LANG, *supra* note 85, at 68-71; M. SMELSER, *supra* note 86, at 222-24.

94. See Lint, *The American Revolution and the Law of Nations*, 1 *DIPL. HIST.* 20, 21 (1977).

95. See F. MARKS, *supra* note 26, at 155; W. REVELEY, *supra* note 51, at 61.

they were comprised of people who were naturally equal themselves: "A dwarf is as much a man as a giant; a small Republic is no less a sovereign state than the most powerful kingdom."⁹⁶ During the Continental Congress in 1775, Benjamin Franklin wrote to thank the American agent in The Hague for copies of Vattel's treatise, which he said the delegates had been using continually—"the circumstances of a rising State make it necessary frequently to consult the law of nations."⁹⁷

At the practical level, the need to avoid a violation that would give a more powerful country cause for war explained the insistence on following the law of nations. During the period of the Articles of Confederation, a desire to avoid war inspired concern about states' disregard of the law of nations.⁹⁸ An early instance of this occurred at the beginning of the Washington Administration in 1790, when Great Britain came close to war with Spain (then France's ally) following a clash on Nootka Sound in the Pacific Northwest. Before the affair defused, Washington alerted his Cabinet to the probability of war, which likely would have produced a request from the British to move forces from Canada across American territory to attack New Orleans. The President asked his Cabinet and Chief Justice Jay to advise him on the proper response. Each responded in writing (Jay included), and their memoranda contain abundant references to the law of nations, along with elaborate interpretive arguments about various treatise writers' views on the subjects.⁹⁹

In the Nootka Sound opinions, the contentions about the law of nations (writers differed on the obligations under it) were interspersed with assessments of the strategic consequences of various courses of conduct. These legal commentaries, in short, were designed to show whether particular options would give another power a basis to declare war. The writers held no illusions that the British would behave in accordance with the law of nations, or that moral considerations alone should motivate American conduct. Moreover, the opinions reflected each writer's position about the British. Hamilton, for example, contended strongly that our interests were on the side of cooperation with them, a view that was consistent with his basic Anglophilia. Jefferson, by contrast, feared danger to the United States if Britain gained Florida and Louisiana; he wanted to remain neutral, but not in a way that would seem partial to the British.¹⁰⁰

96. E. DE VATTEL, *supra* note 11, at lxii.

97. Letter from Benjamin Franklin to Charles Dumas (Dec. 1775), *reprinted in* 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (F. Wharton ed. 1889).

98. *See supra* text accompanying notes 25-26.

99. The opinions are collected in J. BOYD, *supra* note 85, at 107-39.

100. *See* D. LANG, *supra* note 85, at 94-96, 130-31.

Complicating America's general desire to stay neutral in the 1790s were the earlier treaties with France, because they arguably obligated the United States to render assistance to that country in its conflict with Great Britain. Aiding the French would have comported well with the high favor that many Americans held for the French on account of their contributions to the Revolution. But such open assistance would have meant war with the British. Consequently, within the Administration even those most favorable to France were averse to taking steps that might result in hostilities.

Hamilton, who saw his country's interests best served by a close relationship with Britain, sought to minimize America's responsibilities under the French treaties. Yet as he confided to Jay, it was doubtful whether the United States "could *bona fide* dispute the ultimate obligations of the treaty."¹⁰¹ Nonetheless, Hamilton did dispute them, both in the Cabinet and in public writing as *Pacificus* and *Camillus*. He argued that the treaties should be considered suspended because of the overthrow of Louis XVI or at least narrowly interpreted to exclude assistance, since the treaties were defensive in nature and the French were engaged in an offensive war.¹⁰² Just as Hamilton defended his position with references to the law of nations, so too did Jefferson in reply. Jefferson maintained that the United States was obliged under the law of nations, which he said was the applicable law, to honor its treaty commitments with France. He also argued at length that acting in accordance with the treaty commitments did not endanger American interests, a position which agreed with his overall sympathies toward with the French.¹⁰³ Besides, Jefferson concluded, repudiating the treaties would be "giving just cause of war to France."¹⁰⁴

Despite Washington's decision not to repudiate the treaty formally and instead to proclaim American neutrality, the French were not satisfied. America was most valuable to the French as a neutral and thus as a source of supplies, yet they also desired access to bases in the United States for the purpose of outfitting privateers to cruise against British

101. Letter from Alexander Hamilton to John Jay (Apr. 9, 1793), in 14 PAPERS OF A. HAMILTON, *supra* note 33, at 297-98.

102. See Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 PAPERS OF A. HAMILTON, *supra* note 33, at 367-96; Letter from Alexander Hamilton to George Washington (May 2, 1793), in 14 PAPERS OF A. HAMILTON, *supra* note 33, at 398-408; A. HAMILTON, *Pacificus No. II*, in 15 PAPERS OF A. HAMILTON, *supra* note 33, at 55-63.

103. See T. JEFFERSON, *Opinion on French Treaties* (Apr. 28, 1793), in 7 THE WORKS OF THOMAS JEFFERSON 283-301 (P. Ford ed. 1904) [hereinafter WORKS OF T. JEFFERSON]. Jefferson complained to Madison that Hamilton's argument was based on "an ill understood scrap in Vattel." Letter from Thomas Jefferson to James Madison (Apr. 28, 1793), in *id.* at 301. See generally D. MALONE, *supra* note 85, at 73-79.

104. T. JEFFERSON, *Opinion on French Treaties*, *supra* note 103, in 7 WORKS OF T. JEFFERSON, *supra* note 103, at 301.

ships. In addition, France wished to recruit Americans for service in its military and naval operations. While France insisted that the 1778 treaties gave them these rights, American leaders understood that this course of conduct would risk confrontation with the British. The Washington Administration not only refused the French requests, but announced that Americans serving on French privateers or otherwise endangering neutrality would be prosecuted for violations of the law of nations.¹⁰⁵

The series of incidents over neutrality and the French treaties provided the context for several important discussions about the status of the law of nations under American law and the powers of the respective branches of the federal government in relation to international law. One was Jefferson's statement to the French ambassador, Edmond C. Genêt, who was protesting that the Washington Administration's neutrality posture violated the standing treaties with France. Genêt suggested that Congress should decide this matter; this prompted Jefferson to respond "that the President is to see that treaties are observed. . . . [T]he constitution ha[s] made the President the last appeal."¹⁰⁶

Of more significance was the Administration's threatened and actual prosecutions of Americans for neutrality violations. Every leading official in the Washington Administration, including Jefferson, asserted that it was unlawful for American citizens to act contrary to their country's obligations under the law of nations. This setting produced a considerable number of statements, many of which were noted earlier, that the law of nations was part of the law of the United States. A large portion of these pronouncements appeared in grand jury charges by federal judges who were urging vigilance in prosecuting neutrality violations. Without these judicial declarations the government would have been hard pressed to explain the basis of the prosecutions, given that no statute existed on neutrality offenses.¹⁰⁷ In the Administration's first prosecution, *Henfield's Case*,¹⁰⁸ Justice Wilson responded to the defense's objection that no law had been violated by holding that the offense was against "the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed."¹⁰⁹ The

105. See A. DeCONDE, *ENTANGLING ALLIANCE*, *supra* note 85, at 205-34.

106. This was recorded in notes made by Jefferson of the conversation on July 10, 1793. See 1 *WORKS OF T. JEFFERSON*, *supra* note 103, at 285.

107. See Jay, *supra* note 32, at 1042-53. All the grand jury charges noted earlier in the text were made in this context.

108. 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

109. *Id.* at 1120. This concern for the existence of a law defining the offense probably underlies Justice Iredell's remark to a grand jury a few months earlier that the law of nations had been stated by treatise writers "with peculiar accuracy and conciseness." *South Carolina Charge*, *supra* note 7, in *U.S. GAZETTE*, *supra* note 7; see also *supra* text accompanying note 17. Iredell was one of

jury acquitted Henfield, a result that Hamilton attributed to the jurors' French bias, but the Administration had achieved its goal of a firm judicial pronouncement that the neutrality violations were illegal.¹¹⁰

Henfield's Case did not recede into obscurity; it provided legal authority for other federal common-law criminal prosecutions in the 1790s. While some of these cases involved ordinary crimes such as bribery, the Adams Administration prosecuted Republican dissenters for the common-law offense of sedition. Virtually every member of the national judiciary in the 1790s supported the concept of federal common-law crimes. Republicans, however, proclaimed that the Federalist executive and judiciary were attempting to assert federal jurisdiction over the entire common law. Federalists actually were not making such a broad claim, yet it became an article of political faith to Thomas Jefferson and his followers that the claims for common-law jurisdiction were part of a plot to absorb all the powers of the states into one national government.¹¹¹ After Jefferson became President and had secured his own majority on the Supreme Court, the Court ruled in *United States v. Hudson*¹¹² that the federal courts had jurisdiction only over crimes created by statutes.

One commentator has maintained that *Hudson* "obviously weakened the authority of those Framers who contended . . . that the laws of the United States included the law of nations."¹¹³ But *Hudson* was a criminal defamation prosecution, and the Supreme Court majority wrote the opinion against the backdrop of the Republican claim that Federalist judges were attempting to absorb the mass of the British common law into the law of the United States. Thus, the Court's foremost concern was the perceived threat of federal common-law jurisdiction to the lawmaking authority of the states. Regardless of the merits of the Republican position on this issue, it was not focused at the time

the trial judges in *Henfield's Case*.

110. See Letter from Alexander Hamilton to George Washington (Aug. 5, 1793), in 15 PAPERS OF A. HAMILTON, *supra* note 33, at 194; Jay, *supra* note 32, at 1051.

111. See Jay, *supra* note 8, at 1231-41. Professor Arthur Weisburd has written that "[a]t least some of the Framers who asserted that the laws of the United States included the law of nations took that position as an element of their broader belief in the unlimited common-law jurisdiction of the federal courts." Weisburd, *supra* note 3, at 1222. Curiously, he relies on my article, Jay, *supra* note 32, at 1042-52, but that is not a conclusion which I stated. My point was that Republicans claimed the Federalists were advancing such a position, but that the accusation was politically motivated and largely unfounded. See *id.* at 1112. As John Marshall wrote in 1800, not "one man [could] be found" who maintained "that the common law of England has . . . been adopted as the common law of America by the constitution of the United States." Letter from John Marsball to St. George Tucker (Nov. 27, 1800), *reprinted in* Jay, *supra* note 8, at app. A.

112. 11 U.S. (7 Cranch) 32 (1812).

113. Weisburd, *supra* note 3, at 1222-23.

on the law of nations.¹¹⁴ Jefferson's party was not making a case for state domination over foreign relations.¹¹⁵ Furthermore, even Jefferson was fully behind the neutrality prosecutions.

The neutrality cases show that the use of the law of nations as the domestic law of the United States was related directly to the need for control over a critical foreign policy issue. This conclusion demonstrates, moreover, that a sizeable portion of early pronouncements about the application of the law of nations to American law must be understood as having been advanced to augment the executive's assertion of power over foreign affairs. To be sure, the law of nations was said to limit American actions, but this was in the context of constraints imposed by the threat of war, not by judicial review of executive actions. If anything, the evidence indicates close cooperation between the federal courts and the executive in maintaining the Administration's neutrality position.¹¹⁶ The various statements in the neutral-

114. In *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816), the Court held that a common-law indictment could not lie for an offense within the admiralty law. Justice Story had sat in the circuit court that convicted Coolidge for forcibly rescuing a vessel that had been seized lawfully as a prize by privateers. Story distinguished *Hudson* on the ground that the *Coolidge* prosecution was under the admiralty jurisdiction, see 25 F. Cas. 619, 621 (C.C.D. Mass. 1813) (No. 14,857), but the Supreme Court reversed the conviction on authority of *Hudson*. See *Coolidge*, 14 U.S. (1 Wheat.) at 415. Given that admiralty cases fell under the law of nations, *Coolidge* might seem to offer better support than *Hudson* for a denial of inherent judicial authority over the law of nations. However, the Supreme Court held no argument in *Coolidge* because neither side appeared. The Court acknowledged a continuing "difference of opinion" among the Justices on the question of common-law jurisdiction, but considering the absence of counsel it decided to follow *Hudson*. *Id.* No mention was made of the law of nations or Story's argument at trial that admiralty courts had long possessed a nonstatutory criminal jurisdiction. See Jay, *supra* note 8, at 1298-99.

115. In 1802 Jefferson's Attorney General, Levi Lincoln, wrote that there was no federal crime violated in a case in which the Spanish ambassador complained of a riotous assault against him. Citing Vattel, Lincoln wrote that the alleged actions constituted a violation of the law of nations, which was "part of the municipal body of each State." 5 Op. Att'y Gen. 691, 692 (1802). Thus the case should have been referred to state authorities. Lincoln stated: "I doubt the competency of the federal courts, there being no statute recognizing the offence." *Id.* Because this statement was made shortly after the heated debates in Congress over nonstatutory federal offenses, Lincoln's reserve is understandable, albeit completely in contradiction to earlier opinions by Federalist Attorneys General. See Jay, *supra* note 32, at 1073-1111. Lincoln did not deny, however, the possibility of Congress passing a statute on the subject.

116. At the height of the crisis, Washington submitted questions to the Justices about the proper interpretation of the law of nations in regard to American neutrality. The Justices returned the questions unanswered on the ground that no "case" was involved, even though Chief Justice Jay gave such advice during the Nootka Sound affair. See *supra* text accompanying note 99. The incident of the returned letter may involve more than judicial restraint. For one thing, Justice Wilson addressed many of the questions in a grand jury charge that he delivered before the Chief Justice formally declined to answer. See Jay, *supra* note 32, at 1049. More importantly, Hamilton had written as *Pacificus* only weeks earlier that the interpretation of treaties is an executive function, "foreign to the Judiciary Department," which reviewed treaties "only in litigated cases." A. HAMILTON, *Pacificus No. 1*, in 15 PAPERS OF A. HAMILTON, *supra* note 33, at 38. Hamilton's argument was used to justify the Administration's claim of authority to judge American obligations under the French treaties.

ity period regarding the binding character of the law of nations should be seen as part of an effort by the American government to impose the law of nations on its subjects in order to achieve a national objective.¹¹⁷

B. The Law of Nations and the Balance of Power

When the United States was formed, American leaders sought to avoid the European political turmoil. By the 1790s, however, the country was thoroughly engaged in the international balance of power. Keeping an eye on the law of nations was part of the game. As one diplomatic historian has noted about the effect of the balance of power on international law: "National governments make international law and enforce it as far as they are able, which implies that strong nations make international law."¹¹⁸ In this vein, the Administration's neutrality posture acknowledged international reality, and "the law of nations pertaining to trade and neutral rights largely reflected British dominance of the seas."¹¹⁹ American reliance on the law of nations, then, was in deference to the very balance of power system that the Framers wished to avoid.¹²⁰

At the same time, many Americans realized that the United States could gain some advantage from European conflict, and an ability to insist on sovereign rights was important to that end. Examples of this attitude are Madison's plans to employ discriminatory trade practices against the British as a means of gaining bargaining strength, and Jefferson's advice in the Nootka Sound affair to exercise American rights so as to extract concessions from the Spanish. One of the reasons Vattel seemed a compelling authority was his emphasis on the necessity of obeying international law out of duty, rather than interest. Under this theory, a great power could not abuse American sovereign rights in pursuit of short-term gain.¹²¹

Despite the prominent references by eighteenth-century treatise writers and jurists to the natural law origins of the law of nations, Americans did not always depict it as a static body of rules. Neither did Americans feel compelled to follow slavishly the interpretation of the law of nations set down in the treatises. Hamilton, for example, contended that the ability to appeal to the law of nature allowed for disagreement with Vattel and other writers about even those aspects of the

117. See Rosen, *Alexander Hamilton and the Domestic Uses of International Law*, 5 *DIPLO. HIST.* 183 (1981).

118. *Id.* at 195.

119. D. LANG, *supra* note 85, at 128.

120. See Lint, *supra* note 94, at 33.

121. See D. LANG, *supra* note 85, at 45, 131.

law of nations that were considered obligatory on states.¹²² Diplomatic negotiations from the Revolutionary days onward found Americans consciously attempting to depart from the law of nations—with the intent to change international custom—on issues dealing with treaty formulations and the rights of neutrals trading in wartime.¹²³ It was in terms of newer attitudes about the rights of neutral traders that Jefferson said: “[T]he general principles of the law of nations, must give the rule. I mean the principles of that law as they have been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized Nation.”¹²⁴

The law of nations, then, served American interests even though the United States was a relatively impotent world player. Further, the United States endeavored to influence the development of the law of nations by asserting diplomatic positions that at times were in opposition to established international law. Often these positions had been taken in the context of diplomatic negotiations, without congressional participation. These themes bring us to the final subject of this Essay: The role of the law of nations in defining executive powers over foreign affairs.

C. *Executive Powers and the Law of Nations*

One aspect of the neutrality cases that should not be overlooked is that Washington's neutrality proclamation in effect created the crimes charged against Americans. The growing Republican opposition considered the power to declare neutrality a congressional prerogative, a view that Jefferson shared even though he supported issuing the proclamation.¹²⁵ The ability to utilize criminal prosecutions in aid of foreign policy objectives significantly augmented executive power, a fact that did not go unnoticed in the opposition party.¹²⁶ The executive claimed authority to interpret the law of nations as part of the process of gaining

122. See A. HAMILTON, *To Defence No. XX*, in 19 PAPERS OF A. HAMILTON, *supra* note 33, at 330 (H. Syrett ed. 1973).

123. See Lint, *supra* note 94, at 24-33; Reeves, *supra* note 15, at 557-61.

124. Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), in 7 WORKS OF T. JEFFERSON, *supra* note 103, at 314; see D. LANG, *supra* note 85, at 144-45.

125. See A. DECONDE, *ENTANGLING ALLIANCE*, *supra* note 85, at 254-56; D. MALONE, *supra* note 85, at 69-73; D. STEWART, *THE OPPOSITION PRESS OF THE FEDERALIST PERIOD* 145-48 (1969); C. THOMAS, *supra* note 85, at 36-37. James Madison, then a member of Congress, wrote Jefferson that the neutrality proclamation “seems to violate the forms & spirit of the Constitution, by making the executive Magistrate the organ of the disposition, the duty and the interest of the Nation in relation to War & peace, subjects appropriated to other department of the Government.” Letter from James Madison to Thomas Jefferson (June 10, 1793), *reprinted in* D. MALONE, *supra* note 85, at 82.

126. See D. STEWART, *supra* note 125, at 149-51; see also A. DECONDE, *ENTANGLING ALLIANCE*, *supra* note 85, at 215; Jay, *supra* note 32, at 1052.

ascendancy over American foreign policy.

Writing as *Pacificus*, Hamilton contended that "the law of nations form a part of the law of the land," and that the President was "charged with the execution of all laws," including the law of nations.¹²⁷ Similarly, in defending the Jay Treaty, Hamilton said as *Camillus* that the country had adopted the law of nations.¹²⁸ Viewed in isolation, these contentions seem to offer strong support for the modern view that the law of nations operates as a legal constraint on the executive.¹²⁹ In each instance, however, Hamilton actually was arguing for the right of the executive to interpret the law of nations exclusive of the other branches of government. Hamilton wrote *Pacificus No. 1* to defend the neutrality proclamation:

He who is to execute the laws must first judge for himself of their meaning. In order to the observance of that conduct, which the laws of nations combined with our treaties prescribed for this country . . . it was necessary for the President to judge for himself whether there was any thing in our treaties incompatible with an adherence to neutrality. Having judged that there was not, he had a right, and if in his opinion the interests of the Nation required it, it was his duty, as Executor of the laws, to proclaim the neutrality of the Nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non observance.¹³⁰

Hamilton continued by remarking that Congress's powers over foreign affairs were limited: "They are to be construed strictly—and ought to be extended no further than is essential to their execution."¹³¹ Along the same lines, Hamilton apparently intended his *Camillus* argument to prove that the law of nations compelled the Administration to take certain positions in the Jay Treaty negotiations. Hamilton was aware, of course, that the treaty was under heated attack as a surrender to the British.

The *Pacificus* papers, which were widely known to be Hamilton's work, provoked Jefferson to urge a response from Madison, which he did as *Helvidius*. Madison produced a brilliant series on the dangers of war and the perils of executive dominance over foreign affairs. Certainly, he allowed, it was a "truth" that the executive must execute the law of nations, but it was a legislative function to determine neutrality and questions related to treaty obligations.¹³² Madison even denied that the President had the authority to recognize a foreign government.¹³³

127. A. HAMILTON, *Pacificus No. I*, in 15 PAPERS OF A. HAMILTON, *supra* note 33, at 40, 43.

128. See *supra* text accompanying note 34.

129. See Lobel, *supra* note 4, at 1116.

130. A. HAMILTON, *Pacificus No. I*, in 15 PAPERS OF A. HAMILTON, *supra* note 33, at 43.

131. *Id.* at 42.

132. See Madison, *Helvidius Nos. II & III*, in LETTERS, *supra* note 35, at 64-85. For example, Madison wrote: "The executive must . . . execute the laws of neutrality whilst in force, and leave it to the legislature to decide, whether they ought to be altered or not." *Id.* at 73.

133. *Id.* at 78.

Madison's chief point, however, was to attack frontally any pretense that the executive determined when to declare war, for this power was "fully and exclusively vested in the legislature."¹³⁴

Other illustrations could be added, but this exchange highlights a central aspect of the law of nations issue in the 1790s. The period commenced under a Constitution containing an ill-defined separation of powers over international relations. Throughout the opening decade of the new nation, political actors competed in the struggle to influence America's foreign affairs. In contending for the necessity of following the law of nations, Hamilton and others were not advancing a theory of jurisprudence so much as they were attempting to take the lead in formulating United States foreign policy.¹³⁵

IV. CONCLUSION

At the Virginia ratifying convention, Patrick Henry listened to assurances that the law of nations offered binding protection against executive abuses of the treaty power. Unimpressed, Henry retorted: "When you yourselves have your necks so low that the President may dispose of your rights as he pleases, the law of nations cannot be applied to relieve you."¹³⁶ With a few words he struck at the heart of the problem of the law of nations in relation to American domestic law. The obligations of the United States to foreign states and their citizens are defined principally in the international arena; the extent to which American law acknowledges the law of nations is largely irrelevant. Domestically, in the context of either a United States citizen or a foreigner urging American law to follow international doctrines, the issue always revolves around an initial decision of whether to constrain our own institutions. This judgment turns on deciding which branch of government should have the power to interpret the law of nations, or to depart from it (perhaps in the expectation that the American position will eventually become the international custom).

American conceptions of the distribution of power over foreign affairs have evolved as the Nation has developed into a power with substantial ability to influence foreign events. As the executive acquires more discretion in foreign policy, concomitantly that same office grows in its ability to dominate interpretation of and adherence to the law of nations. From the very first years of the country, the law of nations often has served more as a source of executive power than as a limitation on it.

134. *Id.* at 89 (emphasis in original).

135. See Rosen, *supra* note 117, at 197.

136. 3 STATE CONVENTION DEBATES, *supra* note 39, at 503.

Notwithstanding the fascination we may feel for the events of the early Republic in regard to international relations, their contextual differences from world affairs today should lead us to view the various statements about the law of nations from that era as having no bearing on modern controversies. Certainly one can quote out of context, and scores have done so. And, some may be persuaded that declarations made by American leaders in a time of relative weakness ought to be honored when the United States has reached its place in the sun. But that is a moral judgment reflecting the speaker's commitment to the enterprise of customary international law.

