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The American Founding and Global Justice: Hamiltonian and Jeffersonian Approaches

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I. INTRODUCTION

On one conventional account, a constitution is quintessentially a national affair. It constitutes the state for a particular polity, creating the various organs and branches of government, defining the powers that they exercise, and setting forth the procedural modalities through which they adopt policy, execute the laws, and adjudicate legal disputes. In most cases, it also declares a list of fundamental rights that constrain government officials in the exercise of their powers over citizens and, in federal constitutions, defines the role of subnational governmental units, the principles governing their interrelationships, and the immunities they may claim against central authorities. On this account, a constitution is made by the citizens of a particular polity for themselves as an expression of their popular sovereignty, and its purpose is to promote the flourishing of that polity and of its members, while insuring respect for their rights and for the rule of law.

Though inward looking, the constitution does not ignore the existence of the outside world. It provides the state with powers to conduct war, make treaties, conduct foreign affairs, and the like. To be sure, its institutional arrangements in this context are likely to differ substantially from those designed for the conduct of domestic affairs. The executive, for example, typically has broader powers and wider discretion. But the fundamental aim of the constitution remains the same: the organs of the state are empowered to conduct foreign relations in order to secure and promote the national interest and defend the rights of its citizens on the global stage.

Of course, the exercise of the state's foreign affairs powers will inevitably have an impact on other nations, and at least sometimes will generate disputes about whether the state has trampled on their legitimate claims or violated the rights of their citizens. However, these are matters that are of peripheral concern from a constitutional perspective. In a "dualistic" constitutional world, limits on the state's powers to disregard the rights of other nations and their citizens are properly the concern of international law, and, although the constitution may take up the problem of compliance with international law insofar as the national interest seems to require, it generally leaves these problems to the democratic political process relatively free of constitutional constraint. Whatever duties the state may have to the rest of the world, the constitution is not the place to look for their fulfillment.[1]

How far this stylized account reflects common understandings of what constitutions are for throughout the world is a core subject of this

1 I use the term "dualist" in a loose sense. In principal, so-called dualist constitutional systems can be as respectful of international law as so-called monist systems. In practice, however, the general assumption is that dualist systems will be more likely than monist systems to disregard or violate international duties and obligations. On the distinction between dualist and monist systems, see BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW–MONISM & DUALISM (Marko Novakovic ed., 2013).

Symposium. How far it actually reflects the role constitutions play in practice is equally worth considering. I suspect that it resonates strongly with constitutional intuitions at least in the United States today and possibly in other countries as well. Something like it certainly underlies the U.S. Supreme Court's enthusiastic embrace of Congress' "option of non-compliance" with treaty obligations, which can be exercised not only affirmatively by ousting international legal obligations but passively by simply doing nothing at all.[2]

From a normative perspective, this "nationalist" account of the purpose of the constitution seems unattractive. The constitution constitutes the organs of the state, but international law constitutes the state as a sovereign among sovereigns. For the legal institution of "sovereignty" to be justified in moral theory, there must be limits on the freedom of states to disregard the agreements into which they have entered and the kinds of harms that they can inflict on one another and their respective citizens. Arguably, states also have affirmative obligations to those who lose most from the choice of sovereignty as the central organizing principle of world ordering.[3] Given the overriding moral significance of these duties and obligations–and the role of the constitution in establishing the fundamental principles by which the state is to be governed–it seems persuasive, at least *prima facie*, that the constitution ought to be concerned not only with promoting national well-being but with guaranteeing the state's discharge of its international duties. The moral commitments of the constitution ought to be both inward and outward directed.

Be that as it may, the nationalist account of the constitution, at least in the case of the U.S. Constitution, is also ahistorical. In an article co-authored with Professor Daniel Hulsebosch, we argued that the drafting and adoption of the U.S. Constitution was emphatically an international affair.[4] Having won independence on the battlefield, Americans sought integration as an equal sovereign in the European state system, but they quickly discovered that this goal would be at least as difficult to achieve as breaking free of the British Empire had been. Experience under the Articles of Confederation demonstrated that their desire for recognition as a respectable, "civilized" nation could not be accomplished under the weak institutions of their Confederation, which were incapable of ensuring that treaty obligations and the law of nations were reliably enforced. In order to earn their claim to equal standing among the sovereigns of Europe, they needed a governmental

2 Medellin v. Texas, 552 U.S. 491, 511 (2008).

3 *See* JOHN RAWLS, THE LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED 105-19 (2001) (defending an affirmative duty of aid that, though modest, is more stringent than is reflected in the actual practices of states); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013).

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

structure that would enable the nation to conduct itself honorably on the global stage. It was this realization that impelled them to Philadelphia and to the adoption of a new Constitution, and it explains the pervasive entanglement between the Constitution and international law in the Founding text. Key aspects of the Framers' efforts were devoted to developing innovative institutional mechanisms, consistent with republican principles, which would enable and encourage the new nation to respect its international obligations.[5]

In the minds of leading Federalists, the difficulties were inextricably tied to the American experiment in republican government. If not properly channeled, the unprecedented degree of popular participation in democratic politics that characterized their governments, state and federal, would leave the nation's international relations–and, especially, its outward facing duties to uphold treaty and other international law obligations–vulnerable to the shifting winds of popular sentiment, manipulated by factional leaders and demagogues seeking to exploit delicate, and sometimes embarrassing, international questions for short term political gain.

The new Constitution, therefore, included a complex set of institutional arrangements that carefully modulated, depending on context, the extent to which international law compliance would be subject to the authority of the House of Representatives, the branch of the government that would be most directly subject to popular political influence and pressure. In the context of treaty-making, implementation, and compliance, for example, the Constitution virtually excluded the House from participation. Instead, it lodged the relevant powers in the President and the Senate (the latter of whose members were appointed by the state legislatures for six-year terms, instead of, as in the case of the House, directly elected by the people for two-year terms), and in the new federal courts. These branches, they believed, would be better placed to interpret and uphold the nation's obligations with integrity, consistency, and resolve. The Constitution's approach to the law of nations was similar. In contrast, in the context of war, the Framers reversed course, believing that Congress–and especially the House–had a vital role to play in restraining military conflict. The people, they imagined, were pacifistic and would resist wars and the human suffering and taxes that military ventures inevitably produced. As a result, in this context, the Constitution could harness the people's natural jealousy of war to discourage executive

5 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4. Much of this and the next several paragraphs are drawn from our earlier article, which sets out the argument in greater detail. For further discussion of these themes, *see* David M. Golove & Daniel H. Hulsebosch, *"The Known Opinion of the Impartial World": Foreign Relations and the Law of Nations in* The Federalist, *in* CAMBRIDGE COMPANION TO THE FEDERALIST (Jack N. Ravoke and Colleen Sheehan, eds., forthcoming 2018) [hereinafter Golove & Hulsebosch, *Known Opinion*]; David Golove & Daniel Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEORGETOWN L. J. (forthcoming 2018) [hereinafter Golove & Hulsebosch, *Law of Nations*].

adventurism and the unnecessary and unjust wars to which it gave rise. The interests of the people and the duties of international justice being aligned, the solution to the problem of "universal peace" lay at least in part in assigning the legislature the power to declare war.[6]

Of course, the outward commitments of the Constitution did not contemplate the kinds of global obligations that are of central concern to many moral philosophers and international human rights activists today. For the Founding generation of Americans, Montesquieu's famous *dictum*–that the foundational principle of the law of nations was "that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests"[7]–concisely expressed the essence of outward looking moral duty; whereas Vattel's affirmation "that every nation is obliged to perform the duty of self-preservation"[8]–and therefore that each nation "has a right to everything necessary for its preservation"[9]–expressed the core of the nation's inward looking duties. The Constitution was designed to facilitate the discharge of both.[10]

Nor did the Framers' design go unchallenged. In the state ratifying conventions, Anti-Federalists protested the Constitution's federal arrangements, but having lost important ground on the federal structure, they shifted some focus from the states to the House of Representatives, which they too anticipated would be the organ of the new government most closely tied to local popular politics. They skillfully pressed anxious Federalists on just how far the Framers' text had limited the role of the House. In the end, however, the text was ratified as it had come from Philadelphia, and all of the various amendments the Anti-Federalists proposed to modify the Framers' approach–many of which sought to enhance the House's powers–were ignored or defeated.[11]

Yet, the Federalist victory was surprisingly short-lived. As reconfigured political factions adjusted to the new institutional environment brought into life by the Constitution, the Anti-Federalist critique quickly reemerged, albeit

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6 James Madison, *For the National Gazette: Universal Peace, Jan. 31, 1792*, *in* 14 THE PAPERS OF JAMES MADISON 206 (Thomas A. Mason et al. eds., 1983) [hereinafter Madison, *Universal Peace*, *in* 14 MADISON PAPERS]. For discussion of the subject of this paragraph, see Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 980–1015.

7 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 6 (Thomas Nugent, trans. 1883).

8 EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS § 16, at 4–5 (Joseph Chitty ed., 1876) (1758).

9 *Id.* § 18 at 5-6.

10 For an especially articulate example of the affirmation of these fundamental principles, see, e.g., 1 THE WORKS OF JAMES WILSON 128–58 (James DeWitt Andrews ed., 1896) (affirming these principles in his Law Lectures in chapter "Of the Law of Nations").

11 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 997–98.

in muted form, in the evolving ideology of the incipient Republican faction. Notwithstanding the theory of the Constitution, and the arguments used to justify it in the ratification debates, Republicans remained sympathetic to the Anti-Federalist commitment to local popular style politics. By the mid-1790s, however, there was nothing muted about the Republicans' retreat from critical aspects of the Framers' Constitution of 1787. The French Revolution, the global wars its increasing radicalism triggered, and the conflicting, and impassioned, reactions these epochal events provoked in the United States were overriding causes for this shift. Was France, as Republicans believed, the vanguard of a world historic global republican revolution whose victory or defeat on the battlefield would either secure or doom republicanism everywhere, including in the United States? Or was it, as Federalists suspected, an anarchistic power that would ultimately undermine the prospects for respectable republican government for a generation or more–but only after its aggressive international posture had provoked a global conflagration threatening civilized nations everywhere?

Independent of events in France, there was a powerful and seemingly irreconcilable strand of post-Revolution antipathy towards Great Britain (associated with Republicans), which, in turn, confronted a countervailing strand of attachment to the culture, legal system, and constitution of the mother country, particularly prevalent among New England elites (who were generally Federalists), and which, yet again, was matched by a growing attachment to the new nation's Revolutionary War ally, and British antagonist, France (Republicans). These simmering differences burst into existential conflict with the execution of Louis XVI and the ensuing military campaign against the revolutionary regime initiated by a broad coalition of reactionary European monarchies.

In response to these momentous events, the previous fault lines opened into giant chasms, and political passions exploded on both sides. In this turbulent situation, Republicans no doubt felt constrained to conclude that fidelity to constitutional structure had to take second seat to the overriding political question of how the nation would position itself in relation to the ongoing global conflict. That Republican leaders perceived public opinion to support their side undoubtedly also influenced their view that the House of Representatives, which was the only branch of the federal government they controlled, should assume a larger role. Nevertheless, it was the ideology of the French Revolution itself, especially its commitment to new, radical theories of popular sovereignty, which had the most critical influence on France's American partisans. The remarkable successes of the revolutionary forces on the ground gave these ideological commitments a tremendous additional boost, leading Republicans to see the complex, carefully constructed institutional arrangements of the U.S. Constitution in a new, and increasingly unfavorable, light.

In this essay, I explore the emergence during the period from the adoption of the Constitution to the War of 1812 of two theoretical models for the conduct of foreign affairs, which, in turn, were reflected in two corresponding approaches to interpreting the Constitution's foreign affairs provisions. The first, which was associated with the Federalist Party under the leadership of Alexander Hamilton, I shall refer to as the model of "Enlightened Statesmanship." The second, which was associated with the Republican Party under the leadership of Thomas Jefferson and James Madison, I dub the model of "Revolutionary Utopianism." To be sure, there remained many points of agreement between these ideological positions. Both were fully imbued in Enlightenment philosophy and ideals, and both embraced a commitment to pursuing a just foreign policy and upholding the nation's international legal duties, as well as to constitutional mechanisms that would promote those goals. Neither faction denied the existence of the nation's outward looking moral obligations, nor the role of the Constitution in ensuring their discharge.

Nevertheless, the choice between the two models inevitably had a powerful impact on how far the nation would in fact be able to carry out its outward duties and, ultimately, on whether its commitment to doing so would erode over time. Wittingly or not, Jefferson's and Madison's steady movement away from classical republicanism to more popular forms of democratic politics both reflected and drew them towards an increasingly partial perspective, which influenced not only the style and content of their political leadership, foreign policy positions, and diplomacy, but also their constitutional views. Ultimately, a growing nationalism, combined with an antipathy towards Great Britain, put them on a collision course with the core commitment of their Enlightenment philosophy to peace. On the constitutional front, it turned on its head their key assumption that the people and their representatives would be jealous of war and, therefore, that lodging the power over war and peace in Congress would guard against the initiation of imprudent and unjust wars. On the diplomatic front, it overthrew their commitment to Enlightenment impartiality and led them, seemingly ineluctably, towards more belligerent and peremptory forms of diplomacy and ultimately to the launching of an imprudent, unnecessary, and probably unjust war for national "dignity." In the end, the disappointed idealism that their utopian expectations inevitably produced engendered an increasingly skeptical, even cynical, attitude towards foreign nations and international law.

In the first section of this essay, I set the stage by describing two critical foreign policy and constitutional crises of the 1790s, which catalyzed the contending parties to develop their competing models of foreign relations and corresponding constitutional approaches. In the second section, I describe in more detail their competing visions on both fronts. I close with some brief observations about the long-term consequences of the Republican political

triumph after 1800 for the American commitment to international justice and international law in the nineteenth century.

II. THE NEUTRALITY CRISIS OF 1793 AND THE JAY TREATY DISPUTE OF 1795-76

Early American political and constitutional history was dominated by the foreign policy crises provoked by the French Revolution, which raised questions going to the foundation of national identity. Americans were intensely proud that the American Revolution had been the first republican revolution in modern history, but few doubted that the French Revolution was the crucial historical event, bringing republicanism to Europe's greatest power and setting off a chain of events that held the potential to revolutionize the political character of the world's "civilized" nations. Yet, as the events in France increasingly revealed, the nature of the republicanism to which the new nation was committed remained disturbingly unsettled. Even more immediately threatening, there was little agreement on how the nation should position itself in relation to the fast-moving European events. Should it ally with Revolutionary France and help defend republicanism against attack, perhaps even joining France's crusade to bring republicanism to the rest of Europe? Should it instead tilt towards Great Britain as the leading defender of European liberty, the model of effective and balanced government, and America's natural trading partner and ally? Or, finally, should it attempt a strictly neutral course between the contending forces and bide its time while the European conflagration slowly burned itself out? Partisans of all three approaches were not in short supply, and the complex set of controversial policy decisions that inevitably arose provoked a long series of heated disputes during the 1790s and the first decade and a half of the 19th Century. The two earliest and, for present purposes, most critical–the Neutrality Crisis of 1793 and the Jay Treaty debate of 1795–96–forced the underlying philosophical and constitutional disagreements to the fore, led to the creation of the nation's first two political parties, and prompted the leading antagonists to define with increasing clarity the theories underlying their respective positions.[12]

12 The historiography of this period is vast. Works from which I draw include STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993); GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 (2008); ROBERT W. TUCKER & DAVID C. HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON (1990); PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814 (1993); MARIE-JEANNE ROSSIGNOL, THE NATIONALIST FERMENT: THE ORIGINS OF U.S. FOREIGN POLICY, 1789–1812 (2004); CONOR CRUISE O'BRIEN, THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION, 1785–1800 (1996); JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC (3rd ed. 2007); JOHN LAMBERTON HARPER, AMERICAN MACHIAVELLI: ALEXANDER HAMILTON AND THE ORIGINS OF U.S. FOREIGN POLICY (2004); GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF

As early as the summer of 1793, it had already become clear that the emerging Republican and Federalist factions held conflicting interpretations of important parts of the constitutional text and conflicting philosophical approaches to the whole problem of "liquidating" the Constitution's meaning.[13] These differences reflected profound rifts in ideas about politics, economy, and culture.[14] Nevertheless, the full dimensions of the problem were as yet unknown. President George Washington's first term had been blessedly free of major foreign policy crises, in part because the French Revolution in its early phases had been uniformly welcomed in the United States. This consensus permitted the papering over of what would prove to be more pronounced philosophical differences between Federalists and Republicans than even they may have appreciated. With the beheading of Louis XVI in late 1792 and the radicalization of the Revolution that it portended, and with the ensuing outbreak of the Wars of the French Revolution, that papering over was no longer possible.[15] The hitherto latent divisions burst forth, and the new nation entered into an extended period of intense political and constitutional conflict that shook the foundations of the Framers' Constitution.

In the summer of 1793, despite the explosive controversy over whether the nation would ally with Revolutionary France or Great Britain, the leadership of both factions–in the calm before the storm–remained largely in agreement about the main contours of the Constitution of 1787. This status quo was reflected most dramatically in the arguments made by both Hamilton and Madison in their famous *Pacificus/Helvidius* debate, which was prompted by the arrival of Citizen Gênet in Charleston and the ensuing so-called Neutrality Crisis of 1793.[16] Despite their frequent citation as a marker of how

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REPUBLICAN GOVERNMENT (1970). BRADFORD PERKINS, PROLOGUE TO WAR: ENGLAND AND THE UNITED STATES, 1805–-1812 (1961). For a broad overview of the early reception of the French Revolution in the United States, and the Neutrality and Jay Treaty Crises, see, e.g., ELKINS & MCKITRICK at 303–-449.

13 Alexander Hamilton, James Madison, & John Jay, THE FEDERALIST NO. 37, 231, 236 (Jacob E. Cooke ed. 1961) (stating that meaning of the Constitution, like that of all laws, would be "liquidated and ascertained by a series of particular discussions and adjudications").

14 On the early constitutional wrangling over issues like the First Bank of the United States, assumption of the Revolutionary War debts, the siting of the capitol city, and so on, see, e.g., STANLEY M. ELKINS & ERIC L. MCKITRICK, THE AGE OF FEDERALISM (1993) at 133-93, 223-244, 257-302.

15 *See, e.g.,* HERRING, *supra* note 12, at 56–73.

16 In addition to the works already cited, there are many excellent accounts of the Neutrality Crisis of 1793. *See generally* HARRY AMMON, THE GENET MISSION (1973); ALEXANDER DECONDE, ENTANGLING ALLIANCE: POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON (1958). For accounts that focus on legal and constitutional aspects of the crisis, see generally WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (2006); STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 113–70 (1997); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1789–1835, at 105–18 (1922).

During the Crisis, Hamilton penned seven essays as *Pacificus* (and a number of others under different pseudonyms). S*ee* 15 THE PAPERS OF ALEXANDER HAMILTON 33–43, 55–63, 65–69, 82–86, 90–95, 100–06, 130–35 (Harold C. Syrett ed., 1969) [hereinafter 15 HAMILTON PAPERS] (reprinting

far the two authors of *The Federalist* had moved apart since their partnership at the Founding, the debate in fact revealed continuing agreement on a wide array of critical constitutional points.[17] That did not mean, however, that this consensus extended to the population at large. Republican rage at the reactionary coalition's campaign to overthrow France's revolutionary government, mixed with a lingering sense of gratitude to France for its critical assistance in the Revolutionary War, led to an outpouring of impassioned displays of support for the revolutionary regime, threatening to provoke war with Great Britain. When Washington proclaimed neutrality in late April, Republican activists responded by turning that passion against their own government. Articulating their grievances in a constitutional idiom infused with populist sentiment, they questioned the constitutional basis for virtually all of the administration's actions: what authority did the President have to determine that the United States was neutral in the ongoing conflict? Why had he declined to convene Congress to decide that question? What authority did the President have for seeking the advice of the Supreme Court about the meaning of the nation's treaties with France and the duties imposed upon neutral nations by the law of nations, when those were properly questions to be decided by the common sense of the people, not by the legal sense of elite judges? Why, after the Court refused the President's request, had he turned to his cabinet, rather than Congress, to provide the necessary interpretations of the treaties and the law of nations? And what constitutional basis was there for prosecution of American citizens for acts that were in violation of no statute adopted by their legislature but only of a supposed principle of the law of nations?[18]

If the points of agreement between Hamilton and Madison reflected the continuing force of the Founding constitutional arrangements, the same did not carry over to their underlying philosophical viewpoints about foreign affairs, as the Neutrality Crisis starkly revealed. Most obvious were their conflicting attitudes towards Great Britain and France. The antipathy of

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essays dated June 29, 1793; July 3, 1793; July 6, 1793; July 10, 1793; July 13–17, 1793; July 17, 1793; and July 27, 1793). Only the first of these addressed constitutional issues. *See* Alexander Hamilton, *Pacificus Number 1* (June 29, 1793), *in* 15 HAMILTON PAPERS, *supra*, at 33, 33–43 [hereinafter Pacificus Number I]. For Madison's five responding *Helvidius* essays, see 15 THE PAPERS OF JAMES MADISON 66–73, 80–87, 95–103, 106–10, 113–20)(Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985)[hereinafter15 MADISON PAPERS] (reprinting essays dated Aug. 24, 1793; Aug. 31, 1793; Sept. 7, 1793; Sept. 14, 1793; and Sept. 18, 1793). Madison limited his discussion almost entirely to the constitutional questions.

17 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1035–39. I develop this point, which goes against the grain of scholarly consensus, in depth in David Golove, *Constitutional Law and Development in the Extended Founding: The Constitutional Law of Foreign Affairs Reconsidered* (2017) (unpublished manuscript) (arguing that the constitutional disputes between Hamilton and Madison were largely confined to narrow points but that the range of agreement on fundamental questions was broad).

18 For description of the outraged reaction, with citations, see, e.g., Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1020–21 n.347, 1027 n.360, 1034–35 n.372.

Jefferson and Madison towards the British government undoubtedly had deep psychological and personal sources, but it also reflected their rejection of what they saw as the corrupt nature of the British constitutional system, their worry that the new nation's economic dependence on British trade rendered it strategically vulnerable, and their conviction that British commercial policy was intolerably unjust and prejudicial to American rights. After Britain joined the continental coalition bent on restoring the Bourbon monarchy, their antipathy only intensified. In contrast, France offered the new nation an opportunity to wean itself from economic dependence on Britain and to position itself successfully to confront the latter's unjust policies with measures of economic retaliation.[19] After the triumph of the French Revolution–especially when the survival of the Revolution seemed immediately threatened by the combined forces of Europe's monarchies–Republican sympathy for France transformed into identification with its cause. Jefferson and Madison came to believe that the survival of republicanism not only in France, but in the United States (and anywhere else it might emerge), depended on the success of French arms.[20]

Federalists took a sharply contrasting view. Rather than seeing the British government as morally repugnant, they tended to accept the view that the mother country's mixed constitution was, if not the best, at least among the best, constitutions in the world and that its system of government was in significant respects worthy of emulation. More importantly, they viewed trade relations with Britain as crucially important to the well-being and long-term development of the new nation's economy. Although they too hoped to push British commercial policy in a more liberal direction, they were content to leave that aspiration to the indefinite future, or at least to avoid measures in the meantime that would provoke a trade war in a dubious attempt at successfully coercing the world's most economically, and politically, powerful nation. Republican hopes that American trade could be redirected towards France, moreover, savored of wishful thinking, rather than of a well-digested plan for promoting the nation's economic interests. The ability of the new government to fund the public debt depended almost entirely on customs receipts. Insofar as their favored policies sought to block British exports to the United States, Republicans risked sinking Hamilton's entire fiscal program and, with it, the nation's best hope for economic development.[21] With respect

19 On these points, see, e.g., TUCKER & HENDRICKSON, *supra* note 12, at 25–83; ELKINS & MCKITRICK, *supra* note 12, at 79–92, 209–11, 308–64; DORAN S. BEN-ATAR, THE ORIGINS OF JEFFERSONIAN COMMERCIAL POLICY AND DIPLOMACY (1993); Merrill D. Peterson, *Thomas Jefferson and Commercial Policy, 1783–1793*, 22 WM. & MARY Q. 584 (1965).

20 For an in-depth assessment of Jefferson's attitude toward the French Revolution, see, e.g., O'BRIEN, *supra* note 16, at 69–190.

21 TUCKER & HENDRICKSON, *supra* note 12, at 33-73; ELKINS & MCKITRICK, *supra* note 12, at 113–31, 336–41, 360–62; HARPER, *supra* note 12, at 22–25, 88–125; STOURZH, *supra* note 12; Peterson, *supra* note 19, at 586–87, 602–04.

to France, Federalists initially welcomed the Revolution, as did virtually all Americans, but the execution of Louis XVI marked the beginning of a rapid change in perspective. Rather than seeing the hopes for republicanism as resting on the revolutionary French experiment, Hamilton worried that its radicalization would discredit the republican project altogether and confirm what so many respectable European authorities already believed, that republicanism led to anarchy, disrupting law and social order and encouraging dangerous forms of populist demagoguery. In the foreign policy realm, moreover, the revolutionary regime had self-consciously, and outrageously, violated the most fundamental principles of the law of nations, thus further calling into doubt the *bona fides* of its claim to lead the global republican movement.[22]

Although the Washington Administration somehow adroitly steered a neutral course through the initial crisis provoked by Britain's entry into the war against France and the raucous events following Citizen Gênet's arrival, it barely had time to pause before a new, and even fiercer, crisis broke out. Continuing diplomatic disputes with the British over the American states' pervasive violations of the Treaty of Peace of 1783 and the retaliatory refusal of Britain to withdraw from forts on U.S. territory encircling the country on its western and northern borders only intensified. When combined with new British measures, including the capture of a large number of American merchant vessels and, at least in the eyes of Americans, British incitement of Indian attacks on frontier settlements, the situation became combustible, pushing the nations to the brink of war in early 1794.[23]

As a last-ditch effort, Washington opted to send Chief Justice John Jay to London to attempt a negotiated settlement, and the Federalist dominated Senate quickly gave its consent to the resulting agreement–the Jay Treaty–which famously bears his name.[24] After some hesitation because of the tough bargaining position the British had taken, Washington ratified the treaty in the summer of 1795. The public reaction was incendiary. Provoking a year-long

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22 TUCKER & HENDRICKSON, *supra* note 12, at 45–47; ELKINS & MCKITRICK, *supra* note 12, at 308–41. The defense of these views is at the heart of Hamilton's writings on the Neutrality Crisis. *See, e.g.*, Hamilton, *Pacificus No. 2*, *supra* note 20, at 59–63; Hamilton, *Pacificus No. 5*, *supra* note 20, at 93–5; Hamilton, *Pacificus No. 6*, *supra* note 20, at 100–06.

23 TODD ESTES, THE JAY TREATY DEBATE, PUBLIC OPINION, AND THE EVOLUTION OF EARLY AMERICAN POLITICAL CULTURE 15-70 (2006); ELKINS & MCKITRICK, *supra* note 12, at 375–406; HERRING, *supra* note 12, at 73–77.

24 For leading historical works on the Jay Treaty crisis, see, e.g., SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES (5th ed. 1965); JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS (1970); ALEXANDER DECONDE, ENTANGLING ALLIANCE: POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON 101-40 (1958); ESTES, *supra* note 23; ELKINS & MCKITRICK, *supra* note 12, at 406–49. For discussion of the Jay Treaty crisis and the various constitutional controversies to which it gave rise, see Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1039–61; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1154–88 (2000).

dispute, it brought the country to the brink of a constitutional crisis and ultimately resulted in the consolidation of the Republican and Federalist factions into the nation's first political parties. Throughout the country, Republicans reacted with dismay, viewing the treaty as a national calamity, so unequal in its terms that, if ratified, it would dishonor the nation and destroy its dignity. Perhaps, most disturbingly from the Republican perspective, with only two-thirds of the "aristocratic" Senate onboard, the treaty would rule out economic retaliation against Britain in the future, thus cutting to the heart of the Republicans' foreign policy program. Moreover, given the inevitable French reaction, the treaty would effectively tilt the nation towards Britain in the ongoing European conflict.[25]

Republicans quickly organized anti-treaty political action on a nationwide basis. Jay, and even Washington, were burned in effigy in political protests across the nation. Hamilton was allegedly stoned when he tried to defend the treaty at a public meeting in New York City. In a remarkable burst of political energy, Republican writers produced scathing tracts criticizing the treaty in all of its aspects. Their strategy included mounting an all-out assault on its constitutionality, articulating a long list of constitutional objections that would have virtually extracted the treaty power from the Constitution.[26] A more sober, and strategic, Madison refused to join the chorus. Instead, anticipating that the treaty would have to come before the House for a small appropriation of funds, he carefully prepared to block the implementation of the treaty in the lower house.[27] Technically, that meant rejecting the self-executing treaty doctrine at the heart of the Supremacy Clause–and of the Framers' Constitution, as Madison himself had repeatedly recognized in the past–and insisting instead that the House, like the Senate, had legitimate authority to block treaties after all.[28] Though not so extreme as those of the Republican

25 *See, e.g.*, ELKINS & MCKITRICK, *supra* note 12, at 406–49; ESTES, *supra* note 23, at 71–149.

26 On the Republican constitutional objections, see Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1040–41, 1044–46; Golove, *Treaty-Making, supra* note 24, at 1163–69. Many of the leading essays on both the Republican and Federalist sides are helpfully collected in 1-3 THE AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C., RELATIVE, OR HAVING AN AFFINITY, TO THE TREATY WITH GREAT BRITAIN (Mathew Carey ed., Philadelphia, Henry Tuckniss 1795-1796).

27 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1040–41, 1047–57; Golove, *Treaty-Making, supra* note 24, at 1174–88.

28 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1040–41, 1047–57. On Madison's earlier position, compare, e.g., Madison, *Helvidius No. 1*, *supra* note 16, at 71 (noting that, "treaties when formed according to the constitutional mode, are confessedly to have the force and operation of *laws*, and are to be a rule for the courts in controversies between man and man, as much as any *other laws*. They are even emphatically declared by the constitution to be 'the supreme law of the land'")(*quoting* U.S. Const., Art. VI, § 2) (emphasis in original), with James Madison, *Jay's Treaty* (Mar. 10, 1796) *in* 16 THE PAPERS OF JAMES MADISON 255, 261 (J.C.A. Stagg, Thomas A. Mason & Jeanne K. Sisson eds., 1989)(arguing that notwithstanding the Supremacy Clause, treaties "required…Legislative sanction & co-operation, in those cases where the Constitution had given express & specific powers to the Legislature"). To be even more technical about the issue, the narrow question before the House was

polemicists, it was a position, which if sustained, might well have ignited a civil war.[29]

Into this breach stepped Alexander Hamilton, who assumed the task of justifying the treaty in its entirety to the public and defeating the constitutional arguments that Republicans had so causally pressed. His *The Defence* essays–his most profound and systematic work–served multiple purposes.[30] Like the *Publius* essays in *The Federalist*,[31] they had a clear political agenda and corresponding polemical elements, and he devoted large portions to addressing the specific issues raised by the treaty, article by article. At the same time, Hamilton used the occasion as an opportunity to deepen, refine, and extend ideas about the conduct of foreign relations that he had developed in earlier essays. Rooted in an account of individual and collective political psychology; the dynamics of factionalism in republican governmental structures; the nature of, and possibilities for, competition and cooperation within the international system; and the roles of power, patriotism, honor, morality, and law in international relations, *The Defence* is Hamilton's most sustained effort to offer the new nation a comprehensive set of principles for the conduct of foreign policy. It includes not only abstract theorizing about government, politics, and international relations, but also an account of the role and methodology of the law of nations, as well as an elucidation of some of its critical maxims, principles and institutions.[32] It concludes with an

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actually whether to appropriate money to carry the treaty into execution, not whether the treaty was otherwise self-executing. Nevertheless, the debate focused principally on the issue of self-execution.

29 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1025; Golove, *Treaty-Making*, *supra* note 24, at 1156–57 & n. 242. When the issue of whether the House has a constitutional duty to fund treaties consented to by the Senate and ratified by the President had arisen as early as 1792 in the context of a relatively minor matter, Jefferson advised Washington that "it certainly would, and that it would be the duty of the representatives to raise the money." Thomas Jefferson, *Memoranda of Consultations with the President*, *Mar. 11–April 9, 1792*, *in* 23 THE PAPERS OF THOMAS JEFFERSON 258, 263 (Charles T. Cullen ed., 1990). However, he also cautioned that prudence counseled that the President consider the possibility that the House might nevertheless default on its duty. In response, Washington became exercised, expressing dissatisfaction at the need to bring the House into the matter at all and then portentously warning "that if [the House] would not do what the constitution called on them to do, the government would be at an end, and *must then assume another form*." *Id.* at 263. Somewhat taken aback, Jefferson then noted in his description of the incident: "[Washington] stopped here, and I kept silence to see whether he would say anything more in the same line, or add any qualifying expression to soften what he had said. But he did neither." *Id.*

30 Hamilton's *The Defence* comprised thirty-eight essays, of which he authored twenty-eight and contributed to the rest and which were published between July 22, 1795 and January 9, 1796. *See Introductory Note: The Defence No. I*, Alexander Hamilton, *in* 18 THE PAPERS OF ALEXANDER HAMILTON 475–79 (Harold C. Syrett, ed., 1973) [hereinafter 18 HAMILTON PAPERS]. The essays are reprinted in three volumes of the Hamilton Papers. *See* 18 HAMILTON PAPERS; 19 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett, ed., 1972) [hereinafter 19 HAMILTON PAPERS]; 20 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett, ed., 1974) [hereinafter 20 HAMILTON PAPERS].

31 For Hamilton's *Federalist* essays, see THE FEDERALIST (Jacob E. Cooke ed., 1961). For discussion of *The Federalist*, including Hamilton's various foreign policy essays, see Golove & Hulsebosch, *Known Opinion*, *supra* note 5.

32 In *The Defence*, Hamilton develops his theoretical ideas about foreign affairs through the discussion of the various issues raised by the Jay Treaty. His ideas, therefore, can only be fully grasped

extended treatment of constitutional issues.[33] When taken in connection with positions he argued for elsewhere, Hamilton's aim was to offer a comprehensive defense of the Framers' Constitution rooted in a larger theory of the conduct of foreign affairs. As we shall see, for Hamilton the role of constitutional doctrine, properly understood, was to facilitate the conduct of foreign affairs in accordance with the principles of Enlightened Statesmanship.

III. THE MODELS OF REVOLUTIONARY UTOPIANISM AND ENLIGHTENED STATESMANSHIP AND THEIR CONSTITUTIONAL IMPLICATIONS

Hamilton's ideas about foreign affairs were strikingly consistent over the course of his life, and he wrote about them extensively, beginning with his early *Phocion* essays in 1783 and continuing through his essays in *The Federalist* in 1788, as *Pacificus* in 1793, and then in 1795–96 in *The Defence*, in which he undertook a monumental effort to defend the Jay Treaty against the vigorous Republican attack on it from both policy and constitutional perspectives.[34] Unlike Hamilton, neither Jefferson nor Madison left a deeply theorized and comprehensive statement of the republican theory of foreign affairs. Jefferson rarely wrote for the public, prudently relying on the more disciplined Madison to be his ideological mouthpiece, but the latter's writings, rather than offering expansive theoretical ideas or speculations, tend to focus narrowly on specific policy questions and engage in lawyerly modes of constitutional and legal argumentation. As a result, there is no canonical statement of Republican thinking. Their views have to be gathered–and to some extent inferred–from a greater diversity of sources.

Their differing approaches were rooted in deep divergences in their developing ideological commitments. Conventional accounts try to capture these differences by invoking a dichotomy between the "realist" and "idealist" traditions in American foreign relations, with Jefferson and Madison together

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after careful consideration of the essays as a whole, rather than by consulting a canonical statement of his approach in any particular essay.

33 *See* Alexander Hamilton, *The Defence Number XXXVI* (Jan. 2, 1796) [hereinafter *Defence Number XXXVI*], *in* 20 HAMILTON PAPERS, *supra* note 30, at 3; Alexander Hamilton, *The Defence Number XXXVII* (Jan. 6, 1796) [hereinafter *Defence Number XXXVI*], *in* 20 HAMILTON PAPERS, *supra* note 30, at 13; and Alexander Hamilton, *The Defence Number XXXVIII* (Jan. 9, 1796) [hereinafter *Defence Number XXXVI*], *in* 20 HAMILTON PAPERS, *supra* note 30, at 22.

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

fathering the idealist line and Hamilton fathering the realist line.[35] These categories, however, are only moderately helpful and positively inapt in describing many of the salient points of difference. Consider, for example, the dichotomy between realist and idealist in relation to their professed commitments to justice in the international sphere and to respect for the law of nations. Hamilton, Jefferson, and Madison were all Enlightenment cosmopolitans who considered the demands of justice among nations as no less binding than the demands of justice within the state and who embraced the law of nations as the public law of civilized nations and as an important component of the Enlightenment project. Throughout his voluminous foreign policy writings, including his *Pacificus* essays, Hamilton was consistent in insisting that, "Faith and Justice between nations are virtues of a nature sacred and unequivocal. They cannot be too strongly inculcated nor too highly respected."[36] Indeed, this point provided a central theme in virtually all of his most important foreign policy essays, which were filled with expressions of Enlightenment optimism about the congruence between moral duty, the law of nations, and enlightened self-interest.[37] On this subject, Jefferson was equally emphatic. As he put it in his Second Inaugural, "we have done [foreign nations] justice on all occasions, favored where favor was lawful, and cherished mutual interests and intercourse on fair and equal terms. We are firmly convinced, and we act on that conviction, that with nations, as with individuals, our interests soundly calculated, will ever be found inseparable from our moral duties…"[38]

The unequivocal embrace of the law of nations on both sides reflected a common aspiration for the new nation to be an honorable and respectable state with a claim to equal standing in the community of civilized European nations.[39] This agreement, however, masked deeper disagreements.[40] If Federalists wished, by performing "honorably" and exhibiting "national character," to earn recognition of the nation's respectability by the civilized states of Europe, Republicans were already confident of its respectability and preferred to demand it from, rather than demonstrate it to, a supposedly

35 That is a central thesis of Felix Gilbert's magisterial monograph, though Gilbert located the origins of the dichotomy in the first settlements in the new world. *See* FELIX GILBERT, TOWARDS THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 66–75, 111–14 (1961) [hereinafter GILBERT]. *See id.* at 3–18. In the pre-Constitution period, he pointed, among others, to the writings of Thomas Paine and to John Adams' Model Treaty. *Id.* at 33–66.

36 Hamilton, *Pacificus No. 4*, *in* 15 HAMILTON PAPERS, *supra* note 16, at 84.

37 *See, e.g.*, Alexander Hamilton, *The Defence No. XXII*, Nov. 5–11, 1795, *in* 19 HAMILTON PAPERS, *supra* note 30, at 380, 388 (declaring, "[l]et me add as a truth which perhaps has no exception that in the wise order of Providence Nations in a temporal sense may safely trust the maxim that the observance of Justice carries with it its own and a full reward.").

38 10 Thomas Jefferson, *Second Inaugural Address*, *in* THE WORKS OF THOMAS JEFFERSON 128, 129 (Paul Leicester Ford, ed., 1905).

39 This is the central theme of Golove & Hulsebosch, *Civilized Nation*, *supra* note 4.

40 *See id.* at 1015-60.

impartial jury of monarchs.[41] Similarly, Federalists displayed a greater willingness to acknowledge that the nation had sometimes been in the wrong, that it was not only a victim of international injustice but sometimes a victimizer.[42] In contrast, Jefferson and Madison were rarely willing or able to see the nation's conduct in that less favorable light, and, indeed, would go to extreme–and often dubious–lengths to prove the contrary. In his celebrated diplomatic note of May 29, 1792, to the British Minister, George Hammond, for example, Jefferson brilliantly, albeit unconvincingly if not outright hypocritically, defended against the British charge, widely conceded even in America, that the states had violated the Treaty of Peace with Britain by interfering with the collection of pre-Revolutionary War debts.[43]

Rather than retaining the idealist/realist dichotomy, it would be more accurate to re-characterize the views of Jefferson and Madison as a form of revolutionary utopianism and Hamilton's as a kind of sober Enlightenment idealism that was keenly sensitive to human psychology, institutional and political dynamics, and structural constraints. Their competing visions, moreover, had direct implications both for their constitutional theory and for their understandings of key constitutional doctrines governing the relationship between the nation and the larger community of states.

A. Republican Ideals and Constitutional Vision

Throughout their lives, Jefferson and Madison remained fiercely committed to the ideals of peace and free international commerce. These ideals undoubtedly played a major role in their foreign policy thinking, which, in this respect, was influenced by the writings of the French philosophes with whom Jefferson had interacted during his diplomatic tenure in France.[44] Their deep opposition to war had both outward and inward looking elements. In part, their approach reflected an Enlightenment belief in the immorality of war and a revulsion against its brutality and wastefulness, as well as an idealistic faith that it could be eliminated as a legitimate method of resolving international disputes. They regularly decried the injustice of war, which they associated with the corrupt ambitions of monarchical forms of government.[45]

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41 This point is effectively demonstrated, and a core point, in TUCKER & HENDRICKSON, *supra* note 12.

42 Large portions of *The Defence* are dedicated to placing the conduct of the American states in a less biased perspective than Republicans would countenance. *See, e.g.*, Alexander Hamilton, *The Defence Nos. II, III, IV, V, VI, and VII*, July 25, July 29, Aug. 1, Aug. 5, Aug. 8, Aug. 12, 1795, *in* 18 HAMILTON PAPERS, *supra* note 30, at 493, 513; 19 HAMILTON PAPERS, *supra* note 34, at 77, 89, 105, 115.

43 *See Letter of Thomas Jefferson to George Hammond*, May 29, 1792, *in* 23 THE PAPERS OF THOMAS JEFFERSON 551-602 (Charles T. Cullen, ed., 1990).

44 On the influence of the philosophes over early American foreign policy thinking, see GILBERT, *supra* note 35, at 56–75. For a more skeptical assessment of Jefferson's relationship to the philosophes, see O'BRIEN, *supra* note 12, at 9–13, 34–6.

45 *See, e.g.*, Madison, *Universal Peace*, *in* 14 MADISON PAPERS, *supra* note 6, at 206–08.

At the same time, Republicans focused on the internal consequences to which war gave rise: standing armies, bloated executive power, the corruption of republican virtue, higher taxes, growing public debt, and a diminishment of liberty and increased threat of executive tyranny. As Madison wrote in a characteristic passage:

> Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people. The same malignant aspect in republicanism may be traced in the inequality of fortunes, and the opportunities of fraud, growing out of a state of war, and in the degeneracy of manners and of morals, engendered by both.[46]

For these reasons, war was strictly to be avoided unless no other option remained. Moreover, the gravest threat of war, they believed, emanated from the executive.[47] Indeed, in their view, the republican character of the state could be measured by the extent to which the decision over war and peace was removed from executive control and lodged in the legislature. It was in the legislature that the influence of the people's natural reluctance to squander their lives and treasure would be most directly felt and would most effectively restrain the impulse to war.[48] They also therefore vigorously opposed standing armies and, strikingly, even measures of military preparedness in times of portentous diplomatic conflict and looming war. Instead, they insisted that reliance be placed on the state militias, notwithstanding the limited capacity of the latter for the task.[49]

At the same time, Jefferson and Madison were as staunchly committed to the principle of free trade as they were to the ideal of peace. Here, too, they attributed the dominant mercantilist policy of the European powers in the late eighteenth and early nineteenth centuries to their monarchical forms of government and held that the people naturally opposed trade restrictions of

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46 James Madison, *Political Observations*, April 20, 1795, *in* 15 MADISON PAPERS 511, 518.

47 *See Helvidius No. 4*, *in* 15 MADISON PAPERS, *supra* note 16, at 108 (declaring that,"[i]n no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department…. War is in fact the true nurse of executive aggrandizement").

48 *See id.* at 109 (observing that, "[h]ence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.").

49 *See, e.g.*, ELKINS & MCKITRICK, *supra* note 12, at 375–96.

all kinds. One of their most urgent foreign policy goals was thus to free international trade from national restrictions. They vehemently condemned the restrictive trade practices of the British government, symbolized by the Navigation Acts, as well as the latter's decision, after the conclusion of the Revolutionary War, to restrict American trade with British colonies in the West Indies.[50] Once the Wars of the French Revolution commenced, they even more vehemently opposed British conceptions of belligerent rights, which imposed new restraints on American commerce not with Britain but with its arch rival and America's erstwhile ally, France, and they positioned themselves as the champions of a new era of neutral rights.[51] That peace and free trade were in America's interests was a commonplace of the era. Indeed, the notion that the interest of America lay in being a free port is coterminous with American nationality, tracing back at least as far as Thomas Paine's argument in *Common Sense*.[52] For Jefferson and Madison, however, these ideas were also, if not primarily, rooted in natural right.

From a practical perspective, there was an evident tension between their twin commitments to avoiding war and upholding free trade. Great Britain, for example, was not apt to reevaluate its long-favored policies and established legal views because of American natural law urgings. Yet, the likelihood that the new nation could peacefully pry open Britain's, or, indeed, the European and colonial markets of any other European power, was largely wishful thinking—perhaps more utopian than their belief that U.S. trade could proceed undisturbed by war among the leading European powers. In these circumstances, there was an unavoidable tension between their twin aspirations to peace and free trade, which they sought to resolve by finding alternative methods of coercion, ultimately settling on a strategy of trade sanctions and embargoes as the principal means of achieving respect for American rights. This policy of "peaceful coercion" was drastic in its potential economic consequences not only for their rivals (*i.e.*, Britain, which was, in fact, dependent on American trade), but for Americans (who were at least equally dependent on foreign trade), and it had the unfortunate feature of

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50 On the views of Jefferson and Madison about commercial policy, *see, e.g.*, Peterson, *supra* note 19, at 585–607; TUCKER & HENDRICKSON, *supra* note 12, at 25–47; ONUF & ONUF, *supra* note 12, at 103–08; GILBERT, *supra* note 35, at 33–66; BEN-ATAR, *supra* note 19. As Secretary of State, Jefferson prepared a lengthy report on foreign commerce, which sets forth his views on the subject. *See Final State of the Report on Commerce*, Dec. 16, 1793, *in* 27 PAPERS OF THOMAS JEFFERSON 567, 573–75 (John Catanzariti, ed., 1997).

51 TUCKER & HENDRICKSON, *supra* note 12, at 175–97, 214–21; ONUF & ONUF, *supra* note 12, at 190–220; PERKINS, *supra* note 12, at 38–41.

52 THOMAS PAINE, COMMON SENSE 25 (1776) (declaring that, "[o]ur plan is commerce, and that well attended to, will secure us the peace and Friendship of all Europe because, it is in the interest of all Europe to have America a *free port*."). For discussion, see GILBERT, *supra* note 35, at 36–50.

seeking to promote trade by actually abandoning it, while, at the same time, still running an evident risk of provoking war.[53]

The difficulty was exacerbated, moreover, by the paradoxically provocative approach that Jefferson and Madison took to the conduct of diplomacy and to political leadership at home. Consistent with the depth of their confidence in their natural law views, they were drawn to a diplomatic style that eschewed compromise and accommodation in favor of unyielding insistence on principle. There was a sometimes latent, sometimes patent, belligerent character to their foreign policy that derived ultimately from contradictory philosophical and political commitments. Following the French lead–and natural law theory–Jefferson and Madison appeared to believe that the law of nations favored republicanism and, therefore, the interests of republican nations. The result was a striking intellectual and moral partiality in their assessments of the international legal conflicts in which the United States was almost constantly engaged. Eschewing any obligation to take the claims of their adversaries seriously, especially of their arch rival Great Britain, they seemed simply to assume that United States was unequivocally in the right and painted the motives of their opponents as obviously cynical and crassly self-interested.[54] At home, they emphasized national honor and dignity, a rhetorical stance they tied to demands for British and, later, French respect for legal principles that were thinly veiled assertions of national economic self-interest, and which they sought to justify, alternatively, by one-sided appeals to natural law principles and then, just as one-sidedly, by pressing highly legalistic defenses of sometimes normatively weak positions.[55] Their approach was a recipe for intensifying diplomatic conflict, a consequence that they seemed willing to embrace, even though it magnified the risks of war and placed the nation's reputation for good faith under a cloud of doubt.[56]

This uneasy alliance between pacifism and national partiality was accompanied as well by a growing commitment to the primacy of popular

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53 *See, e.g.*, TUCKER & HENDRICKSON, *supra* note 12, at 19–21, 35–6, 46–47, 63–67, 209–13, 326–28 n. 55; PERKINS, *supra* note 12, at 101–83. The long-held commitment of Jefferson and Madison to the use of commercial coercion, rather than war, to achieve their goals ultimately yielded the Embargo and Non-Intercourse Acts, and finally the War of 1812.

54 *See, e.g.*, TUCKER & HENDRICKSON, *supra* note 12, at 137–71, 180–228; PERKINS, *supra* note 12, at 39–42.

55 Madison's book length pamphlet on the neutrality dispute with Great Britain, written in 1805 when he was serving as Secretary of State, affords a striking illustration. *See* JAMES MADISON, AN EXAMINATION OF THE BRITISH DOCTRINE WHICH SUBJECTS TO CAPTURE A NEUTRAL TRADE NOT OPEN IN TIME OF PEACE (1805). On the one hand, Madison treated what amounted to maritime war-profiteering under the neutral flag as a natural right; on the other, he premised his argument throughout on legal technicalities that eschewed any recognition of the normative content of the principles of the law of nations, insisting instead that the positive law principle of consent trumped any argument from normative coherence.

56 *See, e.g.*, TUCKER & HENDRICKSON, *supra* note 12, at 231–56.

politics over classical republicanism. Although this shift was due in part to the overriding importance of the hotly contested foreign policy issues that emerged with the outbreak of the Wars of the French Revolution, it also reflected larger trends in Republican thinking, which were greatly accelerated and extended by the influence of French revolutionary ideology. The result was to bring foreign policy and diplomacy to the center of democratic politics and to introduce a mutually reinforcing dynamic in which appeals to national interest and pride had magnifying popular resonance and payoffs in the political realm—precisely what the Framers had so assiduously sought to avoid in Philadelphia through careful constitutional design.[57]

The growing preference of Jefferson and Madison for more popular institutional arrangements was rooted in several elements of their theoretical views. First, it was of a piece with the movement in their thinking more generally, which, especially in Madison's case, had shifted dramatically in a populist direction in comparison with the views he expressed during the Confederation and the struggle over the Constitution. No doubt the French Revolution provided a critical influence but more immediate strategic considerations were also in play, since Federalists controlled the Executive, the Senate, and the Courts, while Republicans controlled the House, the branch most directly tied to popular politics. As the stakes of the foreign policy disputes grew to crisis proportions–and the sympathies of the majority of Americans leaned, at least in the assessment of Jefferson and Madison, towards France–so too did the urgency of asserting a role for the House in checking the other branches.[58]

Furthermore, developing Republican ideology, borrowed from the foreign policy writings of the French philosophes, among others, held a generally optimistic view about the people's instincts for justice. Jefferson and Madison focused especially on what they took to be the natural reticence of the people to support war. They were similarly sanguine that the people opposed monopolistic practices of all kinds and preferred the elimination of restraints on free trade. Left to their own devices, the peoples of the world, they optimistically believed, would put an end to war and would engage in fair and mutually beneficial trade in the goods of their own production. Indeed, war and restrictive trade policies were the offspring of monarchical forms of government, in which the interests of the sovereign and the people sharply diverged and in which the glory and conquests of the state inured to the personal benefit of the crown. Moreover, even on slightly less optimistic assumptions, the people would be hesitant to countenance unjust and

57 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1017–21, 1039–46. *See also* ESTES, *supra* note 23, at 35–53; CASTO, *supra* note 16, at 139–43; ELKINS & MCKITRICK. *supra* note 12, at 355–65.

58 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1047–52; ESTES, *supra* note 23, at 35–53. For one interpretation of Madison's developing views, see RAKOVE, *supra* note 12, at 109–57

unnecessary wars if they were made aware of the actual financial costs to be incurred and made to bear those costs in increased taxes in the near term. Long-term public debt was thus anathema to Republican ideology.[59]

The constitutional vision of Jefferson and Madison was derived from, and meant to complement, their wider ideas about the conduct of foreign affairs. For Republicans, however, their theory of foreign affairs entailed developing a body of doctrine that, in important respects, moved sharply away from the principles that had informed the Framers' Constitution. The two central questions were war and treaty-making, and with respect to both, their central commitment was to the augmentation of congressional (and, hence, the House's) power. With respect to war, they sought to strengthen the Framers' decision to lodge the power to declare war in Congress by developing supporting doctrines that limited the ability of the executive to interfere in Congress' decision-making processes and that forced all policy judgments that might indirectly affect the ultimate question of war or peace to be made by the legislature.[60] With respect to treaties, Republicans had a more difficult task, because the Framers' Constitution had, in explicit terms, gone far in removing any role for the House.[61] It was here that their commitment to popular politics – and their sense of the enormous stakes at issue–necessitated the most radical constitutional revisions.

Republican constitutional views were aided by some tenets of their political science. If the people naturally opposed war and favored free trade, and if the executive branch (as the successor to the Crown) was the principal source of war and discriminatory trade practices, then it followed that a constitution could promote peace and free trade by lodging power over these subjects in the legislative branch, especially the branch most directly accountable to the people, and by removing authority over them from the prerogatives of the executive. Executive adventurism would thereby be checked by the constitutional veto granted the people's representatives. As

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59 *See, e.g.*, Madison, *Universal Peace*, *in* 14 MADISON PAPERS, *supra* note 6, at 206–08. In so arguing, Madison was drawing not only from European Enlightenment thought but also directly from Jefferson. *See* 15 THOMAS JEFFERSON, *Letter from Thomas Jefferson to James Madison*, Sep't 6, 1789, *in* THE PAPERS OF THOMAS JEFFERSON 392, 395 (Julian P. Boyd, ed., 1958). *See also* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1013–15.

60 The Constitution granted Congress not only the power "To declare War," and thus to decide upon war and peace, U.S. CONST., art. I, § 8, cl. 11, but also to "provide for the common Defence," *id.*, art. I, § 8, cl. 1, "To raise and support Armies," *id.*, art. I, § 8, cl. 12, to "maintain a Navy," *id.*, art. I, § 8, cl. 13, "to make Rules for the Government and Regulation" of the military forces, *id.*, art. I, § 8, cl. 14, and "To provide for calling forth the Militia" and for "organizing, arming, and disciplining." it. *id.*, Art. I, § 8, cls. 15, 16.

61 Excluding the House from any participatory role, the Treaty Clause provided the President with the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.*, art. II, § 2, cl. 2. In addition, the Supremacy Clause declared that, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," thereby eliminating any necessary role for the House in the implementation of many treaty commitments. *Id.*., art. VI, cl. 2.

Madison argued in an important essay written in early 1792, the solution to the scourge of war would never be found so long as the executive retained the power over war:

> [W]hilst war is to depend on those whose ambition, whose revenge, whose avidity, or whose caprice may contradict the sentiment of the community, and yet be uncontrouled by it; whilst war is to be declared by those who are to spend the public money, not by those who are to pay it; by those who are to direct the public forces, not by those who are to support them; by those whose power is to be raised, not by those whose chains may be riveted the disease must continue to be *hereditary* like the government of which it is the offspring.[62]

The solution was as simple as it was imperative: the legislature must be assigned the power to declare war, raise armies, and fund the military.

At the same time, at least at this early stage, Madison was willing to acknowledge–as he and Hamilton had argued strenuously in *The Federalist*–that the people themselves could sometimes be misled into supporting unjust wars.[63] This possibility posed a more difficult problem, but it could be solved "by subjecting the will of the society to the reason of the society; by establishing permanent and constitutional maxims of conduct, which may prevail over occasional impressions, and inconsiderate pursuits."[64] What was essential, he argued in an elaboration of one of Jefferson's most treasured ideas, was "that each generation should be made to bear the burden of its own wars, instead of carrying them on, at the expence of other generations."[65] To make this approach more effective, he added, "the taxes composing them, should include a due proportion of such as by their direct operation keep the people awake, along with those, which being wrapped up in other payments, may leave them asleep, to misapplications of their money."[66] In a nation that observed these practices, "avarice would be sure to calculate the expences of ambition; in the equipoise of these passions, reason would be free to decide for the public good; and an ample reward would accrue to the state, first, from the avoidance of all its wars of folly, secondly, from the vigor of its unwasted resources for wars of necessity and defence."[67] It was in the interest of each nation to follow this advice, but were all nations to adopt this course, "the temple of Janus might be shut, never to be opened more."[68]

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62 Madison, *Universal Peace*, *in* 14 MADISON PAPERS, *supra* note 6, at 207.
63 *See* THE FEDERALIST NO. 6 (Alexander Hamilton) 31–32.
64 Madison, *Universal Peace*, *in* 14 MADISON PAPERS, *supra* note 6, at 207.
65 Madison, *Universal Peace*, *in* 14 MADISON PAPERS, *supra* note 6, at 208.
66 *Id.* at 208.
67 *Id.* at 209.
68 *Id.*

If in this essay Madison sounded closer to his earlier self from the struggle over constitutional reform in the 1780s, in the wake of Neutrality Crisis of 1793, he became more strident in his constitutional reasoning. The gravamen of his *Helvidius* essays, for example, was his constitutional objection to any power in the President, even while maintaining a neutral course, to offer a view about whether existing treaty commitments did or did not require the United States to join in a war in defense of an ally.[69] Washington had famously proclaimed neutrality in the ongoing European conflict, and Hamilton, in his *Pacificus* essays, had asserted that the proclamation was implicitly based on the view that the "Guarantee Clause" of the 1778 Treaty of Alliance with France did not require the nation to aid in France's defense and, hence, was not inconsistent with Washington's Proclamation of Neutrality.[70] Although Hamilton had never suggested that the President's interpretation of the Guarantee Clause bound Congress, nor denied that the ultimate resolution of the question belonged to Congress exercising (or not) its power to declare war–and even though Washington had proclaimed for peace not war and Hamilton was tirelessly seeking to justify that policy–Madison insisted that the President could take no steps that might in any way interfere with or even influence Congress in carrying out its assigned constitutional role.[71] Questions of war and peace were, he insisted, inherently legislative in character, and no executive authority could be construed to enable the President to have any influence over the matter, even if it were only to discourage the nation from going to war. Thus, even if the President were acting solely to prevent "turbulent citizens" at home from provoking war or "unfriendly nations" from finding an excuse to make war from abroad, he was constitutionally required to remain mute.[72] Otherwise, the legislature would not be "free to decide, according to its own sense of the public good, *on one side as on the other side*."[73]

Shortly thereafter, Madison carried this protective approach a step further. With intensifying conflicts with Britain and a rapidly increasing prospect of war, Congress in 1794 considered a bill to enable the President, in the recess of Congress, to raise a modest military force should he determine that an invasion was likely. Despite Republican hostility to the British and their advocacy of highly provocative acts of retaliation, including confiscation

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69 As Madison summarized the point in issue: "The last papers compleated the view proposed to be taken of the arguments in support of the new and aspiring doctrine, which ascribes to the executive the prerogative of judging and deciding whether there be causes of war or not, in the obligations of treaties; notwithstanding the express provision in the constitution, by which the legislature is made the organ of the national will, on questions whether there be or be not a cause for declaring war." Madison, *Helvidius No. 4*, *in* 15 MADISON PAPERS, *supra* note 16, at 106.

70 *See* Hamilton, *Pacificus No. 1*, *in* 15 HAMILTON PAPERS, *supra* note 16, at 35.

71 *See id.* at 37–43.

72 *Helvidius No. 2*, *in* 15 MADISON PAPERS, *supra* note 16, at 86.

73 *Helvidius No. 5*, *in* 15 MADISON PAPERS, *supra* note 16, at 116 (emphasis added).

of the debts of U.S. citizens owed to British subjects and the imposition of a total trade embargo–and this at a moment of supreme emergency in Britain's war with France–Republicans opposed the bill and the making of any preparations for war, even during the period when Congress would not be in session.[74] Strikingly, however, Madison was not content with opposing the bill as unnecessary and unwise, but insisted as well that granting the President discretion to raise troops in these circumstances violated a kind of super-non-delegation principle he found implicit in the powers to declare war and to raise armies. Madison "did not see," he informed the House, any emergency that should "induce the house to violate the Constitution." He then added:

> that it was a wise principle in the Constitution to make one branch of the government raise an army, and another conduct it. If the legislature had the power to conduct an army, they might imbody it for that end. On the other hand, if the President was empowered to raise an army, as he is to direct its motions when raised, he might wish to assemble it for the sake of the influence to be acquired by the command.[75]

Thus, even the considerable risks presented by the prospect of having to meet a foreign invasion without adequate preparation, when the legislature was out of session, did not outweigh the dangers posed by executive ambition and adventurism.

If these examples illustrate the lengths to which Republicans were willing to go in their effort to quarantine the President from involvement in questions of war and peace, their approach to the treaty power was, in fact, far bolder, requiring an all-out assault on core institutional arrangements of the Constitution of 1787. Here, the problem was the text's explicit exclusion of the House of Representatives from participation in the treaty power. The Treaty Clause granted the President the power to make treaties "by and with the Advice and Consent of the Senate…provided two thirds of the Senators present concur."[76] The Supremacy Clause, in turn, declared that, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[77] The manifest point of these arrangements was to remove the House from any role in either the making of treaties or in their implementation, functions that were to fall instead to the Senate, the executive, and the courts, without the need for any congressional involvement.[78] If in retrospect this constitutional settlement seemed

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74 For debate in the House over the bill, see 4 ANNALS OF CONGRESS OF THE UNITED STATES 735-38 (1849). For discussion, see ELKINS & MCKITRICK, *supra* note 12, at 388–96.

75 Madison, *Military Establishment*, *in* 15 MADISON PAPERS, *supra* note 16, at 339.

76 U.S. CONST., art. II, § 2, cl. 2.

77 *Id.*, art. VI, cl. 2.

78 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 995–99.

mortifying to Republicans as a matter of principle, the Jay Treaty had demonstrated that the dangers were even greater in practice, as a monarchical President and aristocratic Senate had used the treaty power to undermine the most cherished ideals and aspirations of the people, bartering away their natural rights to free trade and the protections of neutrality and even their capacity to defend their most cherished interests against foreign deceit and violence.[79]

In the explosion of outrage that greeted the treaty, Republicans opened the floodgates, propounding a seemingly endless array of theories aimed at taming the treaty power. In the face of the text, for example, they boldly asserted that the House did in fact have a right to participate in the making of treaties, at least on any subject that fell within the scope of Congress' broad legislative powers. Republicanism, they argued, was at the foundation of the Constitution and provided an interpretive principle adequate to justify disregarding the apparent implications of the text. As if disbelieving their own argument, moreover, they simultaneously sought to kill off the treaty power, asserting a host of barely plausible constitutional limits on its scope that would virtually have written it out of the text. Treaties, they insisted, could not be concluded on any subject over which the Constitution grants Congress the power to legislate–a theory that would simply have ruled out most treaties. Nor, they asserted, could treaties cede territory claimed by the United States, even if only in resolution of a legitimate boundary dispute. Arbitration panels, moreover, could not be resorted to for the resolution of international disputes, such as over alleged breaches of treaties or of neutral rights under the law of nations, because the Constitution mandates that all such international disputes be adjudicated only by U.S. judges and in accordance with evidentiary rules and standards applied in U.S. courts. The list continued.[80] As Jefferson almost flippantly explained, so long as it resided in the President and Senate, he saw "not much harm in annihilating the whole treaty-making power, except as to making peace."[81]

It fell to Madison to discipline the troops and call a halt to their exuberant nihilism. Instead of continuing to waste their energies in scattershot attacks, Madison insisted on a more focused strategy that was less ostentatiously provocative but still held promise both to defeat the treaty and to establish the core Republican point of principle, that treaty commitments could not be enforced except with the cooperation of the House.[82] What ensued was a several month effort in the House, with Madison in the lead, to block the

79 *See id.* at 1039-43.

80 *See id.* at 1044-46; Golove, *Treaty-Making, supra* note 24, at 1163–68.

81 *Letter from Thomas Jefferson to James Madison*, *Mar. 27, 1796, in* 16 Papers of James Madison 280 (J. C. A. Stagg, Thomas A. Mason, Jeanne K. Sisson, eds., 1989).

82 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1047–48; Golove, *Treaty-Making*, *supra* note 24, at 1174–78, 1180–84 & n.325.

treaty's implementation and to assert the position that treaties on subjects falling within Congress' legislative powers could not constitutionally be self-executing but were dependent for their execution on the House, which was as free as the President and Senate to consider them on their merits.[83] After a momentous constitutional debate lasting over a month, a Republican majority in the House asserted Madison's position,[84] but, in the end, outmaneuvered politically by the Federalists in the public debate, the House seemingly miraculously voted to approve the treaty, thereby avoiding in practice what might well have been a constitutional crisis leading to the destruction of the new constitutional order.[85]

None of this is to suggest that Republicans had abandoned their commitment to upholding the nation's international obligations. They sought entry for the House into the processes of treaty-making, but they never claimed a power to violate or disregard American duties under properly ratified treaties or the law of nations. Indeed, in their view, participation by the people's representatives would only have enhanced the prospects of peaceful, mutually beneficial, just, and law-abiding relations among republican nations.[86] Consistent with respect for international law and the need to govern the executive by law, moreover, Republican constitutionalism was especially keen to insist on the duty of the President faithfully to execute treaties and the law of nations, which were, they agreed, part of the law of the United States.[87] This position was also consistent with Republican perceptions that the United States was a law-abiding nation only seeking respect for its rights. As Republicans grew more darkly skeptical about the willingness of Britain to uphold the law of nations, and especially of the independence and impartiality of its Admiralty courts in applying the law of prize, it became a point of national pride to insist on the duty of the American President to observe the law of nations and of the independence of its courts in its enforcement.[88]

B. Federalist Foreign Affairs Theory and the Constitution

Federalist foreign policy thinking diverged from its Republican counterpart not in rejecting the importance of peace and free trade–which were consensus values–but in the main tenets of its political science. For Hamilton, Republican theory was naive. By emphasizing high principle and

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83 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1048–52; Golove, *Treaty-Making*, *supra* note 24, at 1175–78.

84 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1055–57.

85 *See* ESTES, *supra* note 23, at 150–88; ELKINS & MCKITRICK, *supra* note 12, at 431–49.

86 *See* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1060–61.

87 *See* Madison, *Helvidius No. 1*, *in* 15 MADISON PAPERS, *supra* note 16, at 69; Madison, *Helvidius No. 2*, *in* 15 MADISON PAPERS, *supra* note 16, at 86. *See also* Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 1036–37.

88 This point is the subject of a work-in-progress.

failing to take seriously the constraints imposed by human psychology, institutional dynamics, and structural imperatives, it reached false conclusions and offered misguided, and self-defeating, advice. The Republican approach, as he saw it, simply carried forward into the new government the same erroneous ideas about foreign affairs that had plagued the Confederation. If unchecked, it would yield similar results: a disreputable foreign policy that would undermine the honor and respectability of the new nation and ultimately render it too weak even to defend its fundamental interests.[89]

For Hamilton, the chief virtues in those charged with the conduct of foreign relations were prudence, a willingness to compromise and accommodate conflicts of interest, an attitude of self-doubt and skepticism about the moral objectivity of one's nation, and a commitment to the law of nations as an anchor to guide diplomacy and avoid unnecessary and costly errors. Stubborn insistence on compliance with the nation's unilateral demands, justified by its own moral pretensions, was emphatically misguided.[90] To be sure, natural law properly played a role in the methodology of the law of nations. That role, however, was different from the role that Jefferson and Madison imagined it to be, or, at least, different from the way they typically employed it. Rather than permitting the state to wrap its interests in the moral language of natural law principles that otherwise departed from conventional international understandings, natural law was most appropriately resorted to for the opposite purpose: to aid state officials in acknowledging politically unpopular and self-denying constraints on unjust measures that short term national interests and passions would otherwise lead them to adopt.[91] Ultimately, the insistence on high principle would make the nation look hypocritical, court diplomatic conflict, and either provoke calamitous war or humiliating retreats from self-defined uncompromisable principle.[92]

Perhaps most importantly, Hamilton fundamentally rejected the Republican view of the causes of war. Although far from a modern structural

89 Although present in all of his writings, these points are main themes in Hamilton's *The Defence*. For discussion, see *infra* notes 108–114, and accompanying text.

90 Characteristic treatments of these Hamiltonian themes are found in *The Defence Nos. II*, *III, IV*, *V*, *VI*, *and VII*. *See* 18 HAMILTON PAPERS, *supra* note 30, at 493, 513; 19 HAMILTON PAPERS, *supra* note 30 at 77, 89, 105, 115. *See also* Hamilton, *The Defence No. XX, Oct. 23 & 24, in* 19 HAMILTON PAPERS, *supra* note 30, at 329–47.

91 For example, Hamilton devoted four numbers to defending an article of the Jay Treaty that prohibited both nations from sequestering or confiscating private debts owed to their nationals, a principal, which, he argued, was consistent with the natural law and therefore with the requirements of the law of nations. *See* Hamilton, *The Defence Nos. XVIII, XIX, XX, XXI*, *Oct. 6, 14, 23 & 24, 30, in* 19 HAMILTON PAPERS, *supra* note 30, at 299–305, 318–24, 329–47, 365–74. The natural law argument appears principally in *The Defence No. XIX*.

92 *See* Hamilton, *The Defence No. V*, *in*, 19 HAMILTON PAPERS, *supra* note 30, at 95 (observing caustically that the critics "reprobate the treaty as incompatible with our honor, and yet they affect to believe an abortion of the negotiations would not have led to war. If they are sincere, they must think that national honor consists in perpetually railing, complaining, blustering, and submitting").

realist, he believed that military conflict, though wasteful and irrational, was an unavoidable feature of international relations.[93] That truth, however, only heightened the responsibility of state officials to act prudently to avoid unnecessary conflicts and, when war nevertheless occurred, to mitigate its brutality by observing the humane "maxims" of the laws of war.[94] Republicans erred when they insisted that war was the offspring of monarchy, and they erred even more consequentially in their conviction that the people–or, rather, their popularly elected representatives–would reliably oppose unnecessary and unjust wars. These claims denied the experience of history, and they failed to appreciate that the causes of war lay deeper, in the nature of the human personality and the dynamics of collective institutional behavior. It was not that the Republican explanation was internal. So too was Hamilton's, or at least it was in substantial part. To be sure, conflicts of interest and competing pretensions among nations, interacting in an environment in which there was no common judge to resolve their disputes, provided the setting in which wars occurred. But these external factors, although necessary, were only part of the story. It was the interaction between them and the internal political dynamics within potentially antagonist nations that provided the fuller explanation. Wars resulted from national passions and pride; human partiality, ambition, venality, and greed; and unchecked competitions for power within the governing institutions of the state.[95] Although these dynamics might operate somewhat differently in monarchies and republics, they existed within both. It was simply wishful thinking to believe that popular legislative assemblies would have any special immunity from these universal human failings:

> Have republics in practice been less addicted to war than monarchies? Are not the former administered by *men* as well as the latter? Are there not aversions, predilections, rivalships and desires of unjust acquisition that affect nations as well as kings? Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals in whom they place confidence, and are of course liable to be tinctured by the passions and views of those individuals?[96]

The same dynamics led popular assemblies in times of war to violate rights protected by the law of nations, thereby "sacrific[ing]," as in New York's unlawful reprisals against Loyalists in the wake of the British retreat,

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93 *See, e.g.*, Hamilton, *The Defence No. V*, *in*, 19 HAMILTON PAPERS, *supra* note 30, at 90–96.

94 *See, e.g.*, Hamilton, *The Defence Nos. XX and XXI*, *in* HAMILTON PAPERS 329–47, 365–74.

95 *See* THE FEDERALIST NO. 6, *supra* note 63, at 31–33. For discussion, see Golove & Hulsebosch, *Known Opinion*, *supra* note 5.

96 THE FEDERALIST NO. 6, *supra* note 63, at 32.

"important interests to the little vindictive selfish mean passions of a few."[97] Nor was it any more correct to believe that popular legislative assemblies would refrain from adopting trade restrictions or from showing commercial favoritism. This assumption too was belied by experience and was premised on utopian assumptions about the workings of legislative institutions. Petty jealousies, commercial rivalries, and partiality of perspective (that made it too easy to condemn the commercial practices of other nations while selectively overlooking the state's own provocations), combined with efforts by interested parties to whip up popular resentment, would inevitably put pressure on popularly elected assemblies to initiate or escalate self-defeating trade wars.[98]

If Hamilton was skeptical of Republican optimism about the people's pacific instincts, he was equally skeptical about Republican constitutional theory. In his view, Jefferson and Madison placed undue weight on the restraining force of a legislative veto over war making. It is not that Hamilton was opposed to lodging the power to declare war in the legislature, or, for that matter, to subjecting treaties to a requirement of super majoritarian senatorial advice and consent. On the contrary, he embraced these as necessary and valuable checks on the scope of executive discretion. No single individual should be accorded that much unchecked power over the lives of citizens and the fate of the nation.[99] The problem, however, was that the Republican approach also misunderstood the temporal dimension of the sources of war. From a causal perspective, war rarely resulted, in a substantial sense, from a last minute up or down vote of the legislature, but had a history. To understand the causes of war, it was necessary to examine the entire course of diplomacy that preceded it. Equally important was the manner in which responsible public officials in both nations managed the internal political dynamics generated by the international controversy. If diplomacy was not conducted adroitly and in a spirit of compromise and mutual accommodation, and if public officials permitted or even encouraged public opinion to view the dispute in exaggerated and one-sided terms that placed national dignity at stake, the decision to go to war might well, as a practical matter, have been made long before the legislative assembly ever convened to decide the matter.[100] That the legislature ought to have the power to declare war was one

97 Hamilton, *Letter from Phocion*, *in* 3 HAMILTON PAPERS, *supra* note 34, at 492.

98 *See* THE FEDERALIST NO. 6, *supra* note 63, at 31–33. For discussion, see Golove & Hulsebosch, *Known Opinion*, *supra* note 5.

99 *See* Hamilton, *Pacificus No. 1*, *in* 15 HAMILTON PAPERS, *supra* note 16, at 42 (noting that, "the wisdom of our constitution is manifested" in making it "the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War").

100 For discussion, see Golove & Hulsebosch, *Known Opinion*, *supra* note 5. Hamilton brilliantly expresses this perspective in *Pacificus No. 7*. *See* Hamilton, *Pacificus No. 7*, *in* 15 HAMILTON PAPERS, *supra* note 16, at 131–35.

thing, but a pacific constitutional structure depended to a greater degree on its capacity to encourage and facilitate the exercise of statesmanship by leading public officials. That would require embracing the vital role played by the executive, the courts, and the upper house of the legislature, rather than insisting on maximizing the authority of the House. Indeed, the same point applied to the conduct of foreign affairs more generally, especially in matters pertaining to compliance with international law and the demands of justice. If the nation was to conduct a rational, honorable, and effective foreign policy that could garner the respect of the civilized nations of Europe, a subtler approach to constitutional design was essential.[101]

Hamilton's views of the treaty power followed a similar logic. Popular legislative assemblies–particularly those composed of a large number of members, serving short terms of office–were unsuited to the task of identifying the long-term interests of the nation, making agreements to compromise competing national interests and resolve international controversies, and ensuring the steady maintenance and enforcement of national commitments and duties. Here, again, it was the sensitivity of popular assemblies like the House to the influence of popular passions and national pride, and their liability to the arts of demagogues, that rendered them incapable of managing these delicate tasks in a way that would promote the national interest and further mutually beneficial international cooperation. Hence the need to exclude the House from participation in the treaty process,[102] as well as the critical importance of not burdening the treaty power with constitutional limits and constraints that would complicate executive diplomacy and hamper its ability to make the necessary compromises and employ the most effective mechanisms to resolve international disputes peacefully rather than through conflict and war. The grant of the treaty power, Hamilton thus maintained, was plenary:

> A power "to make treaties," granted in []indefinite terms, extends to all kinds of treaties, and with all the latitude which such a power, under any form of government, can possess…With regard to the objects of the treaty, there being no specification, there is, of course, a carte blanche. The general proposition must, therefore, be, that whatever is a proper subject of compact, between nation and nation, may be embraced by a treaty between the President of the United States, with the advice and consent of the Senate, and the correspondent organ of a foreign state.[103]

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101 Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 985–1015; Golove & Hulsebosch, *Known Opinion*, *supra* note 5.

102 For discussion, see Golove & Hulsebosch, *Civilized Nation*, *supra* note 4, at 995–99, 1009–11; Golove & Hulsebosch, *Known Opinion*, *supra* note 5.

103 Hamilton, *The Defence No. XXXVI*, *in* 20 HAMILTON PAPERS, *supra* note 30, at 6.

It was not only that the scope of the treaty power had to be broad, but that constitutional restrictions like those Republicans had insisted upon were wrong-headed and counter-productive. If the Republicans' constitutional claims were valid, "there is scarcely any species of treaty which would not clash, in some particular, with the principle of those objections; and thus…the power to make treaties, granted in such comprehensive and indefinite terms and guarded with so much precaution would become essentially nugatory."[104] The result would be that "our Constitution would then exhibit the ridiculous spectacle of a government without a power to make treaties with foreign nations: a result as inadmissible as it is absurd."[105] The Republican claim that treaties could not touch on legislative subjects was especially misguided, fundamentally misunderstanding the relationship between treaty and legislation. Legislation could, for example, prescribe the rule of domestic law applicable to trade with foreign countries, but it could not effect:

> that mutual regulation of Trade between the United States and other nations which from the necessity of mutual consent can only be performed by Treaty. Tis indeed an absurdity to say, that the power of regulating trade by law is incompatible with the power of regulating it by treaty; since the former can by no means do what the latter alone can accomplish. Consequently, tis an absurdity to say that the *legislative* power of regulating trade is an exception to the power of making treaties.[106]

The Republican approach, moreover, would interfere with the executive's ability to maintain and restore peace. Thus:

> [t]hough Congress are authorised to establish a uniform rule of naturalization, yet this contemplates only the ordinary cases of internal administration. In particular & extraordinary cases, those in which the pretensions of a foreign Government are to be managed—a Treaty may also confer the rights and privileges of Citizens…
>
> The same reasoning applies to all the other instances of supposed infraction of the legislative authority…In all these cases the power to make laws and the power to make treaties are concurrent and coordinate. The latter and not the former must act, where the co-operation of other nations is requisite.[107]

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[104] Hamilton, *The Defence No. XXXVII*, *in* 20 HAMILTON PAPERS, *supra* note 30, at 18.
[105] Hamilton, *The Defence No. XXXVII*, *in* 20 HAMILTON PAPERS, *supra* note 30, at 19.
[106] Hamilton, *The Defence No. XXXVI*, *in* 20 HAMILTON PAPERS, *supra* note 30, at 10.
[107] Hamilton, *The Defence No. XXXVII*, *in* 20 HAMILTON PAPERS, *supra* note 30, at 20.

Equally pernicious were constitutional prohibitions on the use of arbitration tribunals to resolve international controversies peacefully and upon the basis of law.

> To the objection…that the article erects a tribunal unknown to our Constitution, and transfers to commissioners the cognizance of matters appertaining to American courts and juries, the answer is simple and conclusive. The tribunals established by the Constitution do not contemplate a case between nation and nation arising upon a breach of treaty, and are inadequate to the cognizance of it…The case therefore required the erection or constitution of a new tribunal, and it was most likely to promote equity to pass by the courts of both the parties.[108]

Republicans had even combined their constitutional objection to arbitration with the claim that a cession of territory in resolution of a boundary dispute (including, as the treaty contemplated, in accordance with the judgment of an arbitration commission) was constitutionally impermissible. The notion that negotiations to resolve boundary disputes would be hobbled by constitutional limitations was preposterous and effectively embedded a principle of war at the heart of the Constitution:

> The submission of this question to arbitration has been represented as an eventual dismemberment of empire, which it has been said cannot rightfully be agreed to but in a case of extreme necessity. This rule of extreme necessity is manifestly only applicable to a cession or relinquishment of a part of a Country held by a clear and acknowledged title – not to a case of disputed boundary. It would be a horrid and destructive principle that nations could not terminate a dispute about the title to a particular parcel of territory, by amicable agreement or by submission to arbitration as its substitute; but would be under an indispensable obligation to prosecute the dispute by arms till real danger to the existence of one of the parties should justify by the plea of extreme necessity surrender of its pretensions…
>
> The question is not in this case, shall we cede a tract of our country to another power? It is this—to whom does this tract of country truly belong? Should the weight of evidence be on the British side, our faith pledged by Treaty demands an acquiescence in their claim. If the parties are not able to agree in opinion concerning the point it is most

108 Hamilton, *The Defence No. XIV*, Sep't 9, 1795, *in* 19 HAMILTON PAPERS, *supra* note 30, 245, 253.

> equitable & most consistent with good faith to submit it to the decision of impartial judges…[109]

IV. CONCLUSION: THE DENOUEMENT

By the end of the 1790s, the differing approaches, and constitutional visions, of the two parties were well entrenched. Perhaps, though, it will come as no great surprise that after their ascension to power in the election of 1800, accompanied by the eclipse and ultimate demise of the Federalist party, Republicans began to soften on once stridently held constitutional positions, seeming to rediscover the merit in the Constitution's original design. They dropped some of their more extreme arguments, adopted Federalist views on a few key points, and found ways to agree on compromise positions that set the course for constitutional developments into the nineteenth century.[110]

The same cannot be said for their approach to foreign affairs, which more faithfully followed the path they had staked out when in opposition, although their attachment to the French Revolution withered after Napoleon declared himself Emperor. Despite the tremendous economic benefits that inured to the nation from American neutrality in the Napoleonic Wars, Jefferson relentlessly encouraged Americans to believe that the British–and to a lesser extent the French–were violating the nation's most important rights under the law of nations, and he insisted that long-standing British positions on neutral rights were affronts to the nation's dignity, a point that resonated powerfully with ordinary Americans who could not assess the controversies from an informed and impartial perspective. In response to British refusals to accept American positions, moreover, Jefferson and Madison adopted increasingly aggressive measures–culminating in a complete embargo on trade as a measure of "peaceful economic coercion"–that sought to take advantage of British economic and military vulnerabilities resulting from the loss of its allies to France's spectacular military successes and from the growing prospect of a French invasion of the British Isles. Meanwhile, Jeffersonian diplomacy was consistently provocative and uncompromising, repeatedly eschewing opportunities for favorable settlements of the great disputes over neutral rights because of British refusal altogether to capitulate on its core principles,

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109 Hamilton, *The Defence No. XIV*, Sep't 9, 1795, *in* 19 HAMILTON PAPERS, *supra* note 30, 237, 242–43.

110 Among the more dramatic, and early, examples was the Republican turnabout on the treaty power, a shift that was necessitated by the Louisiana Purchase Treaty, the signal accomplishment of the Jefferson Administration. For discussion of the constitutional issues, see EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812 (1920); Golove, *Treaty-Making*, *supra* note 24, at 1189–93. For a brilliant rendering of the history and the striking constitutional hypocrisy that so marked the affair, see 2 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 74–134 (1889).

and adopting positions–for example, in relation to coveted Spanish territories in East and West Florida–that were boldly aggressive, resting on extreme interpretations of treaty language and the law of nations that made the nation appear strikingly hypocritical in the eyes of other powers.

When these measures failed to achieve capitulation from their adversaries, Republicans in their frustration turned to increasingly strident efforts to justify U.S. positions on the disputed international law questions. Veering from careful positive law argumentation to radical natural law tracts sweepingly rejecting the traditional law of nations as the law of monarchs and then to highly legalistic defenses, Republicans grew increasingly cynical about the law of nations, doubting the willingness of other nations to act in good faith and uphold their legal duties. Whereas the law of nations had earlier been viewed as a critical part of the Enlightenment project and worthy of high veneration and respect, it now began to lose its luster. Ultimately, reliance on legal argumentation appeared misguided, and the dynamic which years of Republican politics and diplomacy had set in motion ultimately boxed Madison into a corner from which he could not extricate himself. Although he recognized the imprudence, if not the sheer recklessness, of launching a war against Britain, he ultimately concluded that he had no other choice, facing a Congress, with its so-called War Hawks, bent on war. The resulting War of 1812 left the nation's capital smoldering and nearly (but for contingent timing of Napoleon's repeated rises and falls) the country a mere rump republic hemmed in on all sides by a hostile power.[111] It starkly revealed that the assumption that the people were pacifistic and Congress the constitutional bulwark against unnecessary and unjust wars was at a minimum oversimplified, as Hamilton had argued, and at least sometimes dangerously wrong. And it encouraged a shift in attitudes towards international law that was to have important long-term implications for U.S. diplomacy even after the nation miraculously escaped the war with its territory and Constitution still intact.

111 These themes are the subject of TUCKER & HENDRICKSON, *supra* note 12.