



**THE EXTENDED FOUNDING:  
THE STRUGGLE BETWEEN ENLIGHTENED  
STATESMANSHIP AND ROMANTIC NATIONALISM  
IN THE EARLY AMERICAN  
CONSTITUTIONAL LAW OF FOREIGN AFFAIRS**

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## 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 addition, it declares a list of fundamental rights that constrain governmental 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, the constitution is made by the citizens of a particular polity for themselves, 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 foreign 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. On this understanding, 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 international law compliance 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.

I am uncertain how far this stylized account reflects common understandings of what constitutions are for throughout the world. I do think it resonates strongly with constitutional intuitions in the United States today and perhaps in other countries as well. Something like it certainly underlies the U.S. Supreme Court’s recent enthusiastic embrace of Congress’s “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.<sup>1</sup>

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 legal principles that limit 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 the citizens of each. Perhaps, as well, there need to be principles that mandate some affirmative obligations to those who lose most from the choice of sovereignty as the central organizing principle of world ordering. Given the overriding moral significance of these duties and obligations – and the role of the constitution in

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

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 legal 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 a recent article I co-authored with Professor Daniel Hulsebosch, we argue that the drafting and adoption of the U.S. Constitution was emphatically an international affair. 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 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. Much of the Framers’ efforts were devoted to developing innovative institutional mechanisms, consistent with republican principles, which would enable the new nation to respect its international obligations.

In the minds of leading Federalists, the dilemma was 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 capacity 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 altogether. Instead, it lodged the relevant powers in the President and the Senate (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 it was Congress – and especially the House – that would be best placed to play the restraining role. The people, they imagined, were pacifistic and would resist wars and the increased taxes that military ventures inevitably engendered. As a result, in this context, the Constitution could harness the people's natural jealousy of war and taxes to discourage executive 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” was to assign the legislature the power to declare war.

The Framers' design did not 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.

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 partially reemerged in the developing ideology of the Republican party. The sources that prompted this retreat from the Framers' Constitution of 1787 were many. In part it was the continuation of the Anti-Federalist commitment to the primacy of local popular style politics, but other factors seem to have played a larger role. Perhaps, most important was a powerful and seemingly irreconcilable strand of post-Revolution antipathy towards Great Britain, 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, and which, yet again, was matched by a growing attachment to the new nation's Revolutionary War ally, and British antagonist, France. These simmering differences burst into existential conflict when the course of the French Revolution turned more radical and provoked global wars lasting more than two decades. 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, considerations of constitutional structure had to be subordinated to some extent to the overriding political question of how the nation would position itself in relation to the ongoing global conflict. That the emerging Republicans perceived public opinion to support their side undoubtedly influenced their view that the House of Representatives, which was the only branch of the federal government they controlled, should assume a larger role, a consideration that must have seemed all the more justified as the theory of popular sovereignty received a tremendous boost from the successes of the French revolutionary forces.<sup>2</sup>

In this essay, I explore the emergence during the period from the adoption of the Constitution to the War of 1812 of two theoretical conceptions, or models, for the conduct of foreign affairs, which, in turn, were closely related to 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 Romantic Nationalism. To be sure, this nomenclature exaggerates the differences between them, but it does so for effect. It would certainly be wrong to deny that Jefferson and Madison were as deeply imbued in Enlightenment philosophy and ideals as Hamilton, and, yet, there was a difference. Whether wittingly or not, the slow but steady move in their thinking away from classical republicanism to more popular forms of democratic politics both reflected, and drew them towards, an early kind of proto-romantic nationalism, which influenced not only their

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<sup>2</sup> Republican leaders – including Jefferson and Madison – sometimes wrongly assessed the state of public opinion, and their confidence in the conformity of the peoples' views with their own probably reflected, among other things, a regional bias.

constitutional views but also the style and content of their critiques of Federalist foreign policy in the 1790s and later, after the Republican victory in 1801, the style and content of their own diplomacy. Ultimately, their growing nationalism, combined with their antipathy towards Great Britain – which they tirelessly encouraged in their political base – 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, to the launching of an imprudent – really, reckless – aggressive, unnecessary, and probably unjust war for national “dignity.” And, yet, though the nation barely survived the war intact – and did so in large measure due to events beyond its control – the conclusion of the war, almost miraculously, succeeded in inspiring a pervasive sense of national dignity, ushering in the Era of Good Feelings and an extended period of national unity.<sup>3</sup>

In Part I of this essay, I briefly summarize the critical aspects of what I call the “Framers’ Constitution,” which emerged from Philadelphia and won ratification without amendment in the

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3 The potential for dismemberment had both internal and external sources. Internally, the war provoked substantial secessionist sentiment in the New England states and in the Federalist party, leading to the Hartford Convention at the end of 1814. Only the quick conclusion of the war thereafter obstructed the dangerous path on which the Federalists seemed headed. Externally, Great Britain came perilously close to making major territorial gains, potentially cutting the nation in half and blocking further westward expansion. Serendipitously, events in the European military situation, a significant military defeat on the Great Lakes, and perhaps a lack of motivation, conspired to convince Britain, unexpectedly, to accept a *status quo ante* settlement, rather than persist in military conflict with America.



states. This victory ensured that the Framers' constitutional vision would start off on a strong political footing. Nevertheless, the unavoidable ambiguities in the Constitution's relatively terse text meant that, with time and sufficient motivation, the meaning of many of its key provisions could be contested.

In Part II, I turn to the first great foreign policy dispute of the new government, the Neutrality Crisis of 1793. Revolutionary fervor inspired by the French Revolution; a sense of gratitude towards France for its crucial aid during the American Revolution; smoldering resentment against Great Britain for its resistance to independence, its perceived brutality during the Revolutionary War, and its continuing unwillingness to liberalize trade with the new nation; and righteous outrage at the concerted efforts of the European monarchies to suppress the Revolution by military force, all combined to ensure that there would be widespread and passionate support for France when the Wars of the French Revolution broke out following the execution of Louis XVI. At the same time, continuing cultural and political affinities with Britain; disgust at the execution of America's crucial ally in the Revolutionary War and more largely at the radical turn that the execution reflected in French revolutionary politics; and a prudent recognition of the military weakness of the nation, its vulnerability to military attack, and dependence on continuing trade with Britain for the fiscal solvency of the federal government, equally ensured that pro-French fervor among emerging Republicans would be matched by a similar pro-British, or at least pro-neutrality, fervor among Federalists. All of this occurred, moreover, just as relations between the Hamiltonians and Jeffersonians were reaching a new low, devolving into a state of simmering hostility and outright distrust. Yet, what made matters still more combustible was the old 1778 Treaty of Alliance with France, concluded in the early days of the Revolutionary War, which, as the price of French military aid to the Americans,

extracted a corresponding promise on the American side to defend (or “guaranty”) French possessions in the West Indies. With Britain now part of the reactionary coalition arrayed against France, there could be no question that French possessions would come under naval attack. In this perilous state of affairs, how would the country navigate these world historical events?

After some rancorous cabinet debates, President Washington opted for neutrality. His famous Proclamation shocked partisans of France and provoked heated political controversy, including unprecedented criticism of Washington. At the same time, it revealed the implications of the Framers’ Constitution to Republican activists, perhaps in many cases, for the first time. Out-of-doors, Republicans protested fiercely, calling into question the authority of the President to issue the Proclamation and objecting to the Administration’s assertion of power to define and enforce neutrality and its decision to seek judicial involvement in resolving crucial legal questions under the law of nations. Why, they demanded, had the President declined to call Congress back into session and thereby afforded the people’s representatives the opportunity to decide these critical questions? In an effort to calm the flames, Hamilton penned his famous *Pacificus* essays defending the constitutionality of the Proclamation and pressing the view that the United States was not bound by the treaty to come to France’s defense. The *Pacificus* essays, in turn, sparked an extended reply by Madison (at Jefferson’s insistence) writing as *Helvidius*. The debate thus produced remains one of the most celebrated, though least understood, constitutional exchanges in American history.

Contrary to conventional accounts, what is most striking about the exchange is not the many points about which Hamilton and Madison disagreed, but, rather, the extent to which they agreed. Careful analysis of their essays shows that, at this still early date, both continued to

adhere to the major features of the Framers' original constitutional vision. Indeed, despite his political interests, Madison soberly rejected virtually all of the revisionist constitutional claims being made by Republican writers in the press. The exchange thus provides powerful evidence confirming that the Federalist Constitution was well understood by leading officials and that its essential contours were less open-ended and more settled than is often supposed.

At the same time, the points on which they disagreed, and the vitriolic character of Madison's rhetoric, pointed out, at least in hindsight, the direction that future developments would take and, even more subtly, revealed the deep tension, if not contradiction, at the heart of the Republican constitutional vision. For the most part, Madison pitched his criticisms of Hamilton's constitutional arguments at a high level of abstraction and was content to leave unclear what the actual concrete implications of their different views might be. Indeed, the single point directly in controversy – how far the President could rightly announce his interpretation that the Treaty of Alliance did not require the United States to defend France under the circumstances of the ongoing European conflict – involved metaphysical subtleties that neither Madison nor Hamilton attempted to resolve. Nevertheless, two clear animating ideas drove Madison's positions. First, on each point of difference, however abstract and limited in scope, Madison was defending a greater role for Congress – meaning the House – in the making of foreign policy. Second, offering eloquent passages extolling the Enlightenment commitment to peace, Madison displayed a keen sensitivity to any respect in which Hamilton's arguments might somehow accord the President influence over questions of war and peace, and he openly accused Hamilton of being a wolf in sheep's clothing. Yet, there was something perverse in Madison's elegant rhetoric. Not only had Hamilton unequivocally acknowledged that the power to initiate war was in Congress – and that under no circumstances could the President launch a

war without a declaration from Congress – but the entire purpose of his essays was to convince the American public to support peace (neutrality) rather than war. At that very moment, in contrast, Jefferson and Madison, albeit behind closed doors, were encouraging Republican activists to whip up pro-French sentiment throughout the country. Their brinkmanship was bringing the nation up to the precipice of war. Although perhaps not appreciated by Madison's audience at the time, nor by Madison or Jefferson themselves, this contradiction – between their commitments to peace, congressional power, and a nationalistic style of popular politics – would continue to play out for the next two decades, until it finally yielded war.

In Part III, I turn to the most complete articulation in the early American republic of the model of Enlightened Statesmanship. It is found in the writings of Alexander Hamilton, especially in his remarkable series of essays, *The Defence*, which sought to overcome Republican opposition to the Jay Treaty and which are arguably entitled to equal, or even greater, regard than his more well known Publius essays in *The Federalist*.

Although the Washington Administration had managed successfully to steer a neutral course through the initial crisis provoked by Britain's entry into the war against France and the arrival of Citizen Gênet in Charleston, it barely had time to pause before a new crisis emerged. Not only were their continuing diplomatic disputes with the British of major significance, but new British measures, including the capture of a large number of American merchant vessels as prize and, at least in the eyes of Americans, British incitement of Indian attacks on frontier settlements, pushed the nations to the brink of war in early 1794.

Led by Madison in the House, Republicans pushed for the adoption of strong measures of economic retaliation, which, in the context of the ongoing conflict in Europe, would almost certainly have been perceived in England as highly provocative, if not as blatant violations of

neutrality. In fact, economic discrimination against Britain had been a favored strategy of Jefferson and Madison for some years, and they would return to it repeatedly in the future, ultimately with disastrous consequences. Federalists largely opposed the idea, instead supporting the Administration's decision, as a last ditch effort, to send Chief Justice John Jay to London to attempt a negotiated settlement of outstanding issues. Federalists viewed the adoption of economic retaliation in advance of negotiations as unduly provocative, but argued strongly for undertaking preparations for war, given the new government's almost complete lack of any military establishment and the real possibility that negotiations would fail. Oddly, though consistent with Republican anti-war ideology, Madison led the House to resist all such proposals, and, in a further auguring of the direction in which his constitutional thinking was headed, he even offered expansive, though dubious, constitutional objections to Federalist proposals that moved well beyond the more limited positions he had developed as *Helvidius*.

When Jay sent home the famous treaty that bears his name, its unsatisfactory features were readily apparent. On the basis of an all things considered judgment, the Federalist dominated Senate nevertheless gave its consent by the requisite two-thirds majority. Before Washington had time to ratify the treaty, however, the text was leaked to the press. The reaction was incendiary. Provoking a year long dispute of most extreme kind, it brought the country to the brink of a constitutional crisis of the first order 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 the employment of economic retaliation in the future, thus

cutting to the heart of the Republican's foreign policy program and, moreover, given the inevitable French reaction, effectively tilting the nation towards Britain in the ongoing European conflict.

Republicans quickly organized anti-treaty political action on a nationwide basis. Jay – and even Washington when, defying the Republican reaction, he decided to ratify the treaty – were burned in effigy in political protests across the nation. Hamilton was allegedly stoned when he tried to defend the treaty at a New York City rally. In a remarkable burst of political energy, and with the aim of forestalling Washington's ratification, Republican writers produced scathing tracts criticizing the treaty in all of its aspects. Their strategy included the launching of an all out assault on its constitutionality, articulating – to the evident satisfaction of Jefferson in his "retirement" in Monticello – a long list of constitutional objections that, though nearly if not entirely frivolous, would have virtually extracted the treaty power from the Constitution. A more sober Madison refused to join the chorus. Instead, anticipating that the treaty would have to come before the House for a small appropriation of funds to carry out its provisions for the arbitration of outstanding legal disputes, he carefully prepared for an epochal effort to block the implementation of the treaty in the House. 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. Though not so frivolous as

those of the Republican polemicists, it was a position, which if sustained, might well have ignited a civil war.<sup>4</sup>

Into this breach stepped Alexander Hamilton who, with characteristic energy and brilliance, assumed the task of justifying the treaty in its entirety to the public and defeating the constitutional arguments that Republicans had so cavalierly pressed. His *The Defence* essays served multiple purposes. Like *The Federalist*, they had a clear political agenda and corresponding polemical elements, and large portions of the essays are devoted 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 going back to his *Phocion Letters* of 1783 and continuing through *The Federalist* and most recently his *Pacificus* essays. (The argument of *The Defence* also prefigured Washington's celebrated *Farewell Address*, which in relevant respects, Hamilton wrote only a few months later). Rooted in an account of individual and collective political psychology; the dynamics of factionalism in republican governmental structures; the

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4 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." 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." 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 any thing more in the same line, or add any qualifying expression to soften what he had said. But he did neither."

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 and profound 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 principles and institutions. It concludes with an extended treatment of constitutional issues. When taken in connection with positions he argued for elsewhere, including in the *Pacificus* essays, Hamilton's aim was to offer a comprehensive defense of the Framers' Constitution. At the same time, the tight interrelationship between his constitutional views and his larger theory of the conduct of foreign affairs was not accidental. 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.

In Part IV, I turn to the model of Romantic Nationalism associated with Jefferson, Madison, and the Republican political movement they led. 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, and, though Madison wrote a number of essays and even a full length book on the law of nations, he more often focused narrowly on specific policy questions or engaged in lawyerly types of constitutional and legal argumentation, than on more expansive theoretical ideas or speculations. 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.



The difficulty is compounded by two other considerations. First, Jefferson and Madison were as imbued in Enlightenment ideas, and in the writings of the great publicists of the Law of Nations, as Hamilton was, and, in their writings, they invoked many of the same concepts and principles as he did. Indeed, they may well have been influenced, albeit unconsciously or at least without public acknowledgment, by Hamilton's framework of analysis. Given these similarities, it can be difficult to find crisp distinctions between their theoretical views and his. Second, political considerations always played a significant role in the writings of men who were, after all, leaders of a political party, at first in opposition, and later, in control of the government. The same was true of Hamilton and the Federalists, only in reverse. To make matters worse, the initial Republican stridency against reconciliation with the British during the Jay Treaty crisis quickly morphed into a dovish attitude towards relations with France, when French policy turned hostile to the United States and led the countries only two years later to the brink of war and then somewhat beyond. Correspondingly, the Federalist's pacifism in the crisis with Great Britain morphed equally quickly into hostility towards France, leading ultimately to a limited naval engagement with France in the so-called Quasi-War of 1798-99. These shifting policy positions – and the inevitable polemical elements in the writings of political leaders – further complicate the task of distilling their deeper commitments. Perhaps the best evidence of these commitments, in the Republican case, can be found in the period after they assumed office when their earlier infatuation with the French Revolution slowly gave way, especially in the wake of Napoleon's assumption of power, to a somewhat more balanced assessment of the international situation.

At the core of the Republican approach was a deep opposition to war, which, as articulated by Jefferson and Madison, 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 a utopian faith that it could be eliminated as legitimate method of resolving international disputes. At the same time, Republicans focused on the internal consequences to which war gave rise: standing armies, expanded executive power, higher taxes, growing public debt, and a consequent diminishment of liberty and increased threat of executive tyranny. 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. Indeed, on 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.

Perversely, the ostensibly pacifistic Republicans proved, in practice, to be at least as prone to war as their ostensibly more militaristic Federalist antagonists. Despite their official ideology, there was a sometimes latent, sometimes open, belligerent character to Republican foreign policy that derived ultimately from contradictory philosophical and political commitments. An Enlightenment right brain struggled with a romantic nationalist left brain for dominance, and sometimes lost. Substantively, Republicans were as deeply committed to the principle of free trade as they were to the ideal of pacificism. Yet, in the mercantilist world of the late 18<sup>th</sup> and early 19<sup>th</sup> Centuries, the likelihood that the new nation could free international trade from national restrictions was even more fanciful than that it could remain aloof from European military conflicts. In any case, a willingness and capacity to use force was certainly requisite to any plausible strategy for prying open European and colonial markets. Yet,

Republicans fiercely denied the obvious tension between their two core commitments and, instead, held fast to the dubious belief that “peaceful” economic coercion alone could accomplish their commercial goals while avoiding any need for war or even for preparations for such an eventuality.

Procedurally, notwithstanding Jefferson’s enthusiasm for Smithian “Impartial Spectator” Enlightenment epistemology, his foreign policy thinking was characterized by a striking intellectual and moral partiality, which was subtly but distinctly evident in the foreign policy speeches and writings that he and Madison produced. They eschewed any obligation to acknowledge, let alone seriously to consider, the potential legitimacy of the claims and interests of their foreign adversaries, especially of their arch rival Great Britain. Instead, they simply assumed that United States was unequivocally in the right; painted the motives of British officials as obviously cynical and crassly self-interested; and, emphasizing national honor and dignity, insisted as a first principle on an expansive conception of the idea of sovereign equality, which they were especially quick to find offended – and shocked at the discovery – by the policies of the world’s leading empire. When they were out of power, this stance encouraged them to press provocative policies toward – as well as to oppose efforts at conciliation with – Britain, notwithstanding the risk of war and the overriding economic and strategic interests at stake. After they assumed power in 1801, it encouraged them to bind their rhetoric of national dignity to demands for British and French respect for legal principles that were thinly veiled assertions of national economic self-interest, and which they sought to justify, alternatively, by strident appeals to supposed natural law principles and then, just as stridently, by aggressively pressing highly legalistic defenses of sometimes normatively weak positions. Notwithstanding the immense stakes of the global conflict between Britain and France, moreover, they showed

little interest in acknowledging the overriding existential interests of the belligerents that gave powerful impetus to their conduct, nor in taking into account the portentous strategic implications for the United States of a successful French invasion of the British isles, a seemingly critical point in view of the unavoidable dependence of the new nation on the British navy for the protection of its territorial integrity and international trade. Even the immense economic advantages that were accruing to U.S. trade as a result of the war did not alter their thinking, or mitigate, in their minds, the severity of the insults and injuries under which they imagined the nation to be laboring.

This uneasy alliance between pacifism and national pride, which was reflected in Republican diplomacy, was accompanied by a growing commitment, even in the context of foreign affairs, to the primacy of popular politics over classical republicanism. This shift in thinking about political principles was due, in part, to the overriding importance of the hotly contested foreign policy issues that emerged in 1793 with the outbreak of the Wars of the French Revolution. The military advances of the reactionary coalition, and the grave threat thus posed to the Revolution and to the prospects of republicanism in Europe, inspired impassioned support for France among many Americans, complemented by escalating resentment and outrage at Great Britain for its entry into a war on behalf of monarchy. Republicans perceived the immense political advantage that could be gained by making popular appeals on these issues, and began to develop the tools of mass political organization on a nationwide scale, forcing reluctant Federalists, in defensive posture, to follow suit and ultimately prompting the emergence of political parties. The result was to bring foreign policy and diplomacy to the center of democratic politics. However unanticipated, this move was consistent with larger trends in Republican ideology, but it also had the perhaps unintended effect of promoting a budding

nationalism. To some extent nationalist strains were likely already present in the thinking of Republican leaders, but the democratization of diplomacy created a mutually reinforcing dynamic in which appeals to national interest and pride had magnifying popular resonance and payoffs in the political realm.

As for Hamilton, constitutional principles for Jefferson and Madison were derived from, and meant to complement, their wider ideas about the conduct of foreign affairs. Only for Republicans, this 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 – at least before they assumed power in 1801 – was to the augmentation of congressional (and, hence, the House's) power, which, not entirely coincidentally, was the only branch of the federal government which they controlled politically. 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. With respect to treaties, the Republicans had a more difficult task, because the Framers' Constitution had, in explicit terms, gone far in removing any role for the House. It was here that the Republican's commitment to popular politics – and their sense of the enormous stakes at issue – necessitated the most radical constitutional measures. To claim a role for the House, Republicans nearly provoked a constitutional crisis and, perhaps, avoided it only because the Federalists had out-maneuvered them in populist appeals, forcing a bare Republican majority in the House to uphold the Jay Treaty despite an intense year-long effort to kill it.

At the same time, as a matter of constitutional principle, Republicans were generally as strongly committed to compliance with treaties and the law of nations as Federalists. 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, consistent with respect for international law and the need to govern the executive by law, 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 acknowledged, part of the law of the United States. This position was also consistent with Republican perceptions that the United States was a righteous power only seeking respect for its law of nations recognized 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 the enforcement of that law. At the same time, the left flank of the Republican movement, bitter at the failure of mainstream law of nations arguments to achieve respect for perceived American rights, began to develop radical natural law schemes to replace the existing “monarchical” law of nations, especially, unsurprisingly, in the area of neutrality. Although resisted by Madison, their resort to pure abstract natural law reasoning made it all the more possible to assert the validity of rules that advantaged U.S. economic interests dressed in the language of deep moral principle.

Still, the Republican ascension to power in 1801, accompanied by the eclipse and ultimate demise of the Federalist party, placed constitutional issues in a somewhat new light. Once strident Republican constitutional positions began to soften, and the logic of the Framers’ Constitution at least partly reasserted itself. Republicans dropped some of their more extreme

arguments, adopted Federalist views on some key points, and found ways to agree on compromise positions that set the course for constitutional developments into the 19<sup>th</sup> Century. This shift was reflected in a number of the most salient policy measures of the Jefferson Administration, including the Louisiana Purchase (which involved a broad interpretation of the Treaty Clause), the Embargo Act of 1807 (which involved broad interpretations of both executive power and the federal commerce power), and national security policy in the Mediterranean (which, in the context of the Barbary States, involved a broad, and by previous standards anti-Jeffersonian, interpretation of the President's unilateral war powers). Another telling example pertained to the previously explosive issue of the role of the House in treaty-making and implementation. The great confrontation over this issue, which seemed to raise an uncompromisable issue of first principle, now appeared as mostly an intermural legislative competition between the House and Senate over prerogatives that could be settled by a reasonable accommodation of conflicting institutional interests. When, in the coda to the War of 1812, the issue arose in connection with a new commercial convention concluded with Great Britain to accompany the Treaty of Ghent, a long congressional discussion of the issue ensued. In the end, the two houses reached common ground: The House – this time genuinely – disclaimed a power to veto treaties, but the Senate, in turn, agreed that the House would have some role to play in implementing at least certain kinds of treaty provisions. The only matter that remained was to work out the details of which provision was which.

Finally, in Part V, I turn to the dénouement of the story in the nearly disastrous War of 1812. I trace the course of Republican diplomacy, and the disreputable position into which it backed the nation, and its new President, James Madison, leading seemingly inevitably, albeit senselessly, into an unwinnable war led by committed pacifists. I then puzzle over the twist that

a reckless policy implemented incompetently, nearly leading to the dismemberment of the nation from secessionist sentiment internally and military defeat externally, nevertheless unified a fractious polity, destroyed the party that had opposed the policy from the beginning, and provided the foundation for a widespread sense of national dignity. However strange the journey, Republicans had begun a nation building exercise that would, through many twists and turns to come, set the country on a path to national greatness.

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## **II. The Neutrality Crisis of 1793: Pacificus v. Helvidius**

### **A. Republican v. Federalist Theories of the Conduct of Foreign Affairs**

In the Summer of 1793, the Framers' Constitution stood at a crossroads. It had already become clear that the emerging Republican and Federalist factions held conflicting interpretations of important parts of the text and, perhaps more importantly, conflicting philosophical approaches to the whole problem of "liquidating" the Constitution's meaning. These differences, in turn, reflected even more profound cleavages about politics, economy, and culture. Nevertheless, the full dimensions of the problem were as yet unknown. The Washington Administration's first term had been blessedly free of major foreign policy crises. In retrospect, that fortuity had permitted the papering over of what would prove to be even more pronounced philosophical differences between Federalists and Republicans in the realm of foreign affairs. A close observer of early machinations within the cabinet – and of some congressional maneuvering – might have picked up on the problem even earlier, but the latent divisions between the factions could remain mostly submerged because both greeted the French Revolution, the signal event of the era, with enthusiasm. 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, the hitherto latent divisions quickly became patent, and the new nation entered into an extended period of intense political and constitutional conflict that shook the foundations of the Framers' Constitution.

But that is to get somewhat ahead of ourselves. What is most striking about the Summer of 1793 is that, 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 Framers’ Constitution. This agreement is of critical importance in contemporary debates over the “foreign affairs Constitution,” because it suggests a baseline of consensus about what an unavoidably open-ended text was supposed to accomplish. In this respect, it pushes strongly against the grain of contemporary scholarship, which tends to argue – or, sometimes, simply to illustrate in spite of the intentions of its authors – that these aspects of the Constitution were hopelessly ambiguous and contested. It also conflicts with the nearly uniform tendency to see in the celebrated *Pacificus v. Helvidius* debate – which amounted to a considered expression of constitutional views by the leadership of both factions – only the relatively limited points over which they disagreed, rather than the wide field of constitutional doctrine about which they were fully agreed. In the contemporary constitutional imagination, *Pacificus*/Hamilton stands for the modern, unitary, imperial President, and *Helvidius*/Madison for an all powerful Congress. In historical perspective, this interpretation of the debate is tendentious at best, if not outright misleading. More importantly, however, scholars have failed to notice the substance of their agreement, which, ranging over major questions in contemporary constitutional law, demonstrates how thoroughly contemporary constitutional practice has departed – indeed, rejected – Founding principles. In no respect is this more evident than in their common embrace of the constitutional status of the law of nations and of its deep entanglement with constitutional principles and institutions.

That Hamilton and Madison agreed on many points does not imply that this consensus extended to the population at large. Out of doors, rage at the reactionary coalition’s campaign to overthrow France’s republican 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 and, if it decided upon neutrality, to determine as well the principles of neutrality that would govern the conduct of U.S. citizens and their government? 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 to provide the necessary interpretations of the treaties and the law of nations and then let them draw up the rules that would be enforced by the executive? And what constitutional basis was there for his institution of prosecutions against 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?

These questions placed Jefferson and Madison in a delicate position. They welcomed the widespread outpouring of enthusiasm for France among Republicans and strongly encouraged intensifying Republican popular organizing to put pressure on the Administration to tilt towards France. Indeed, Jefferson could hardly contain his exuberance in response to the tremendous pro-French demonstrations that began with Citizen Gênet's arrival in Charleston in April and continued well into the summer. Describing how a large crowd of urban "yeomanry" had "burst

into peals of exultation” while observing a French naval victory off the coast of Delaware, he excitedly informed Monroe that “[a]ll the old spirit of 1776[] is rekindling.” Yet, Jefferson and Madison were playing a dangerous game of brinkmanship, exploiting the political advantage to be gained by encouraging identification with the cause of French republicanism while relying on Washington and the Federalists to avoid allowing the country to be drawn into war. Indeed, in the cabinet, Jefferson had supported all of the measures that had provoked outrage among his followers, recognizing, as he explained to Madison, that they would "prove a disagreeable pill to our friends, tho' necessary to keep us out of the calamities of a war." He was fully aware of the constitutional justifications for the Administration’s measures, which he accepted and implemented, even as he must have felt satisfaction at the growing constitutional populism of his supporters.

If the points of agreement between Hamilton and Madison reflected the continuing force of the Founding constitutional arrangements, the consensus among the Federalist and Republican leadership did not extend 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, which had existed from the beginning and also reflected, to some extent, regional biases. The antipathy of Jefferson and Madison towards the British government undoubtedly had deep emotional sources, but it reflected as well 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 (with its Navigation Acts in times of peace and belligerent rights pretensions in time of war) was intolerably unjust and prejudicial to American rights. After Britain joined the continental coalition bent on restoring the Bourbon monarchy, their antipathy

only became more unrelenting. In contrast, France offered the new nation an opportunity to wean itself from economic dependence on Britain and to put itself in a position successfully to confront the latter's putatively unjust policies with measures of economic retaliation. In fact, Jefferson, as a diplomat during the Confederation, and then again as Secretary of State, had worked tirelessly, though largely unsuccessfully, to divert American trade away from Britain and direct it towards France. After the triumph of the French Revolution, and 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.

Under Hamilton's leadership, 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 of crucial importance 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. Rather, they believed that British trade would inevitably remain dominant for a range of compelling, and difficult to alter, reasons, including the two nations' common language, their common legal and business cultures, and a century plus

of coordinated economic development under the Empire that made existing trade relations efficient and mutually beneficial. Republican hopes that American trade could be redirected towards France (and, to a lesser extent, toward other European nations) savored of wishful thinking, rather than of a well-digested plan for promoting the nation's economic interests. Moreover, the ability of the new government to fund the public debt depended heavily on customs receipts, which were the only form of tax that Americans seemed willing to pay. 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 best hope for economic development that would, in a few decades, enable the United States to assume the kind of aggressive posture that Republicans preferred. With respect 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 soberly worried that revolutionary developments 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.

The immediacy, combined with the overriding importance, of these conflicting positions was probably enough on its own to wreak havoc on the delicate and mostly still unproved political institutions of the new government. In fact, however, it was becoming increasingly clear that the differences brought to the fore by the Wars of the French Revolution were rooted in

even deeper divergences in Federalist and Republican thinking. Conventional accounts try to capture these differences by invoking the dichotomy between the “realist” and “idealist” traditions in American foreign relations, with Jefferson/Madison fathering the idealist line and Hamilton fathering the realist line.<sup>5</sup> However, these categories are only moderately helpful and positively inapt in describing many of the salient points of difference.

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<sup>5</sup> That is the central thesis of Felix Gilbert’s magisterial *Towards the Farewell Address*, though Gilbert located the origins of the dichotomy in the first settlements in the new world. In the pre-Constitution period, he pointed, among others, to the writings of Thomas Paine and to John Adams’ Model Treaty.

Consider, for example, the realist/idealist dichotomy 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.” 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. 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 . . .” The unequivocal embrace of the law of nations on both sides reflected a common aspiration for the new nation to be seen as an honorable and respectable state with a claim to equal standing in the community of civilized European nations. If there was a difference between the Federalist and Republican approaches, it was not in their commitment to the law of nations, but, rather, in the greater willingness of Federalists to acknowledge that America had sometimes been in the wrong, that it was not only a victim of international injustice but sometimes a victimizer. 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, as in Jefferson’s celebrated diplomatic note of May 29, 1792 to the British Minister, George Hammond, in which he brilliantly, albeit unconvincingly, 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. Ironically, it was their very certitudes about violations of American natural rights – and frustration at their inability to oppose them effectively – that provoked Jefferson and Madison to their few, oft-quoted, but only momentary, outbursts of genuinely isolationist sentiment.

Rather than retaining the idealist/realist dichotomy, it would be closer to the truth to re-characterize the putative international idealism of Jefferson and Madison as a form of dogmatic utopianism and Hamilton’s putative realism as a kind of sober idealism that was keenly sensitive to human psychology, institutional and political dynamics, and structural constraints.

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, may have been influenced by the writings of the French philosophes with whom Jefferson had interacted during his diplomatic tenure in France. The anti-war sentiments of Jefferson and Madison, in turn, had an especially powerful influence over their constitutional views. They regularly decried the injustice and wastefulness of war, which they associated with the corrupt ambitions of monarchical forms of government. On the domestic front, moreover, war was the source of bloated executive power, the corruption of republican virtue, and the overthrow of republican liberty. 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.

These concerns led them to oppose 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, despite the limited capacity of the latter for the task. At the same time, Jefferson and Madison were as staunchly committed to the principle of free trade as they were to peace. 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. 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. That peace and free trade were in America's interests was a commonplace of the era.<sup>6</sup> Indeed, the notion that the interest of America lay in being a free port is coterminous with American nationality, tracing back at

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<sup>6</sup> Perversely America's economic interest would soon prove to be for general war among other nations and peace (*i.e.*, neutrality) for America, so long as the natural rights of neutrals, as Jefferson and Madison understood them, were recognized and respected. Hence, for example, the magnitude of American commerce skyrocketed during the Napoleonic Wars, even as Jefferson and Madison were engaged in a bitter battle with the belligerents over neutral rights.

least as far as Thomas Paine's argument in *Common Sense*. 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. Britain was not apt to reevaluate its long favored policies and established legal views, for example, unless the Americans could plausibly threaten it with unwelcome military consequences. This tension was exacerbated by the approach that Jefferson and Madison took to the conduct of diplomacy. Consistent with the depth and clarity (in their minds, at least) of their natural law views, they were drawn to a diplomatic style that eschewed compromise and accommodation in favor of unyielding insistence on principle. Moreover, in an early version of Wilson's "[o]pen covenants of peace, openly arrived at," they practiced novel forms of diplomatic transparency, including the public revelation of diplomatic exchanges, which tended to harden positions and make compromise more elusive. 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. To escape the horns of the dilemma created by the imperative both to avoid war and to liberalize international trade arrangements, moreover, they sought 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 seeking to promote trade by actually abandoning it, while, at the same time, still running an evident risk of provoking war.

A final component of Republican foreign policy thinking was its emphasis on enhancing the degree of popular influence over the conduct of foreign affairs. The growing preference of Jefferson and Madison for more popular institutional arrangements was rooted in at least three 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 – and likely under Jefferson's influence and perhaps that of the French Revolution – 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 as well more immediate strategic considerations were 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.

Second, developing Republican ideology, perhaps 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 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.

The third element in their thinking grew out of the second and was aided by some tenets of Republican 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 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 uncontroled by it; whilst war is to be declared by those who are to spend the public money, not by those who are to pay it; by those who are to direct the public forces, not by those who are to support them; by those whose power is to be raised, not by those whose chains may be riveted, the disease must continue to be hereditary like the government of which it is the offspring.

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, Madison acknowledged that the people could sometimes be misled into supporting unjust wars. 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.” 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.” 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.” 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.” 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.”

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 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 (and that he had personally so energetically sought to combat). 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.

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 one's own (and one's nations') moral objectivity, 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. To be sure, natural law properly played a role in the methodology of the law of nations. That role, however, was quite 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. 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.

Perhaps most importantly, Hamilton fundamentally rejected the Republican view of the causes of war. Although far from a modern structural realist, he believed that military conflict, though wasteful and irrational, was an unavoidable feature of international relations. 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. 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. 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 acquisitions, 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 tainted by the passions and views of those individuals?

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, “important interests to the little, vindictive, selfish, mean passions of a few.” 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.

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 warmaking. 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 supermajoritarian 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. 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.<sup>7</sup> That the legislature ought to have the power to declare war was one 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 most representative branch. 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 more subtle approach to constitutional design was essential.

Given the depth of the differences in Federalist and Republican thinking about foreign affairs – and the agitated political situation after the arrival of Citizen Gênet – it is perhaps surprising that *Pacificus* and *Helvidius* still agreed about so many aspects of the Framers’ Constitution. The most plausible explanation, supported by much other evidence, is that from the outset there was a reasonably settled understanding of the basic contours of the Framers’ Constitution that at least Hamilton and Madison shared and that it was simply too soon, with the ink barely dry on the Constitution’s parchment, for either to deny the obvious. It may have helped that Hamilton’s approach had mostly carried the day in 1787 and that the profound shift

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<sup>7</sup> In this regard, consider, for example, the Mexican-American War of 1846, World War I, World War II, the Vietnam War, the First Gulf War, and the Iraq War. By the time the question came before Congress in each of these cases, the course of diplomacy, military maneuvering, and domestic politics had all but answered the crucial question. Most directly pertinent here is the War of 1812, which was the ultimate result of years of Republican diplomacy and hostile, uncompromising domestic propagandizing, not congressional initiative. By the time Congress declared war, any other decision would have been a national humiliation of colossal proportions.

in Madison's thinking about foreign affairs – which back in Philadelphia had been more compatible with Hamilton's – was still in a process of development. As impassioned as the debates of the Summer of 1793 were, moreover, events on the ground had not yet reached the crisis proportions that they soon would. In any event, this agreement would not hold.

To say that they agreed on many important points is not to suggest that they agreed about everything. The vitriolic character of their rhetoric – actually Madison's, since Hamilton had already completed his seven *Pacificus* essays before Madison began publishing his own – suggests that at least Jefferson and Madison thought there were important constitutional principles at stake, and, of course, *Pacificus* and *Helvidius* did indeed disagree about some important points. What is most notable about those disagreements is how closely they tracked the larger foreign affairs frameworks to which each adhered. At least when viewed in retrospect, the debate opened a window through which one could observe the direction, if not the full intensity, of their constitutional disputes to come.

After briefly introducing the context of the debate, I turn, first, to considering the issues about which they expressed the same or similar understandings and, then, to considering their points of disagreement. I conclude this section with an assessment of the legal and political significance of their respective positions and of what those positions portended for future developments in their constitutional thinking.

**B. “For god’s sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to peices in the face of the public.”<sup>8</sup>**

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<sup>8</sup> Letter from Thomas Jefferson to James Madison, July 7, 1793.

Most scholars who are lightly familiar with the *Pacificus-Helvidius* debate imagine that the debate was over the constitutionality of Washington's famous April 22, 1793 Proclamation of Neutrality. That is untrue and also misleading. In fact, both Hamilton and Madison agreed that the Proclamation was within the scope of the President's powers. What, then, were they arguing about? To answer that question, we need to recur to the events that immediately preceded the debate.

The origin of the debate lay in the intense wrangling in the Cabinet between Hamilton and Jefferson that began with the receipt of official information that Britain and Holland had entered the war against Revolutionary France and with the coincidentally timed arrival of Citizen Gênet in Charleston. Hamilton had immediately recognized the tremendous implications of these events and, in particular, the delicate questions that would be posed because of the existing Revolutionary War treaties between the United States and France. Of most pressing significance was Article 11 of the 1778 Treaty of Alliance, which had been the legal foundation for French military aid in the revolutionary struggle, but which also included a mutual guaranty of territory mandating, in the case of the United States, the defense of French colonial possessions in the West Indies. With Britain in the war, there could be no doubt that French West Indian possessions would come under naval attack. Was the United States bound to enter the war as an ally of France, notwithstanding the calamitous consequences that would ensue?

Perhaps surprisingly, this was not the question that provoked acrimony in the Cabinet. Indeed, the Cabinet was agreed that Article 11 would not, in fact, require the United States to enter the war. They were also agreed on the issuance of a Proclamation notifying American citizens of the existence of a state of war among the belligerent powers, of the nation's status as friendly to all of those powers, of the duties thus imposed on American citizens by the law of

nations, and of the intention of the Administration to refuse diplomatic protection to, and to institute prosecutions against, any person who “violate[s] the law of nations, with respect to the Powers at war, or any of them.” Over the course of next few months, the Cabinet further agreed that it was the duty of the executive to enforce the law of nations (in this context, the law of neutrality) more generally; that, in pursuit of that duty, the executive should indeed institute non-statutory criminal prosecutions against citizens who had violated the law of nations by accepting privateering commissions from Gênet (Gideon Henfield was only the first of these), as well as prosecute a host of other legal measures to carry out the nation’s duty under the law of nations to prevent belligerent parties from using its territory for hostile purposes; that it should not convene Congress but instead should seek the advice of the Supreme Court on a long list of difficult interpretive questions concerning the law of nations and the 1778 Treaties of Alliance and of Amity and Commerce with France; and, when the Court famously declined Washington’s request for an advisory opinion, that the Cabinet should promulgate a code of regulations resolving outstanding interpretive questions about the scope of the nation’s neutral duties and, on executive authority alone or in the courts, as the context demanded, enforce them against citizens and belligerents who refused to comply.

So, given Jefferson’s support for all these decisions – despite the hostile reception they provoked in many of his followers – what was the acrimony all about? There were three main lines of dispute. First, seeking to avoid the need to face the question of whether the United States was obligated to defend France under Article 11 – and the near inevitability, even if that question was answered in the negative, that it would still be required to accord certain important wartime privileges to France under Articles 17 and 22 of the Treaty of Amity – Hamilton, invoking the President’s power to “receive” ambassadors, proposed that Washington receive

Gênet “with qualifications.” The qualification he had in mind went directly to the status of the two Treaties of 1778. According to Hamilton, given the unsettled state of French affairs, especially the uncertain outcome of the ongoing war in which the very question was whether the revolutionary regime or a reinstated monarchy would control the French state, it was proper for the United States to consider the treaties in a state of suspension, at least until the situation clarified itself. (Which side was the ally? Would it change depending on the ups and downs of the volatile military situation?) Additionally, deeming the treaties suspended was justified because, depending on the character of the regime that ultimately assumed power, it was possible that the United States would be within its rights under the law of nations – and on this point, the proper interpretation of Vattel became critical – to terminate the agreements altogether. (The United States had allied with a stable regime, not a missionary state bent on reforming the civilized world with its army). It was these arguments that most deeply disturbed Jefferson. In his mind, it was one thing for the United States to remain neutral in the current conflict, but what Hamilton was suggesting might, depending on events, amount to a complete renunciation of the French alliance, to which Jefferson remained deeply committed. He responded in kind with an elaborate essay on the law of nations and the meaning and validity of ‘an ill-understood scrap in Vattel.’ On these points, Jefferson prevailed, and the Cabinet agreed to receive Gênet without Hamilton’s qualification.

The second line of dispute was of greater constitutional significance. If the 1778 Treaties were still in effect, as the Cabinet had just decided, then the question of the application of Article 11 to the current conflict reemerged. Hamilton outlined several powerful arguments in favor of the view that the treaty did not require the United States to enter the war. Here, again, he rehearsed elaborate arguments under the law of nations. Only in this case, Jefferson agreed, at

least with Hamilton's conclusion, if not with all of the arguments he pressed. Nevertheless, there was still an important matter in dispute, and it had both practical and constitutional dimensions. On the practical side, Jefferson preferred to delay announcing any particular interpretation of Article 11 on the twin grounds that it was a delicate matter diplomatically with France and that it might prove unnecessary to face the issue, since Gênet might well refrain from invoking the mutual guaranty (as, in fact, turned out to be the case). After all, by invoking the guaranty, France only stood to lose the benefit of U.S. neutrality without gaining any valuable military aid from a weak ally, which was without even a navy.<sup>9</sup> On the constitutional side, Jefferson argued that in view of Congress' power to declare war, it was for the legislature to decide what the treaty meant and that the executive should, therefore, stay its hand. On this point, too, Jefferson believed he had prevailed in the Cabinet, although the actual text of the Proclamation was ambiguous and could be read, *contra* Jefferson, implicitly to interpret the Guaranty Clause as not requiring war.

The third line of dispute was closely related to the second. Jefferson objected to the suggestion that the President's proclamation should purport to be a proclamation of neutrality. He assumed that a proclamation of neutrality would effectively resolve the issue of whether or not the United States would go to war on France's behalf (including the interpretive question

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<sup>9</sup> Angling for advantage against Britain as well, Jefferson also hoped to use U.S. neutrality as a bargaining chip. In an example of his penchant for wishful thinking, he imagined that Britain might finally be made to agree to a favorable commercial treaty as well as to deep concessions on the scope of belligerent rights in return for a promise of American neutrality. The latter, he noted, would provide an important compensating benefit to France, since it would enhance the ability of the United States to provide economic sustenance to French during the European military conflict.

with respect to Article 11), and, again, he invoked Congress' power to declare war as at least implicitly denying the President the power to make that determination. It is easy to make Jefferson look silly on this point, because he was quickly satisfied by a compromise proposal simply to avoid using the word "neutrality" anywhere in the Proclamation, without in any other way changing the substance of the matter. Not surprisingly, the "Proclamation" was immediately called a Proclamation of Neutrality, was universally understood to be precisely that at the time, and has ever since been referred to by the name. Still, Jefferson was making a genuine point. A proclamation warning American citizens that the nation was at peace until such time as Congress declared war, that the requirements of the law of neutrality, therefore, had to be observed in the meantime, and that violations thereof would be condignly punished, was perfectly compatible with even a modest conception of executive authority. Indeed, the authority to issue such a proclamation, if not the duty to do so, seemed to follow directly from Congress' power to declare war, which necessarily implied a duty in the President to preserve peace until Congress decided otherwise. To preserve peace, the President had to enforce the laws of neutrality, and a proclamation of the kind Washington issued was an essential step in that direction. The real question about Jefferson's actions is not why he insisted on removing the word neutrality from the Proclamation, but, rather, why, in view of the constitutional position he advocated and the dangerous posture of the nation at that moment, he voted against the proposal to convene Congress.<sup>10</sup>

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<sup>10</sup> Significantly, Jefferson opposed convening Congress when the political situation in the country might have led it to adopt provocative anti-British/pro-French measures, or even declare war. Later in the summer, after G net's grotesque errors in judgment had, with Federalist encouragement, turned the tide of public opinion, Jefferson shifted ground and voted (unsuccessfully) to convene Congress. It is difficult to avoid the conclusion that he did



Here matters would have rested had Hamilton not gone public with his first *Pacificus* essay. Hamilton began the essay by characterizing the Proclamation not only as a warning to citizens to comply with the duties of neutrality but also as a determination by the President that the existing treaties with France did not require the nation to defend French West Indian possessions.<sup>11</sup> Jefferson immediately smelled a rat, reacting in outrage at Hamilton's temerity in misleading the public on this crucial point. Hadn't Jefferson prevailed in the Cabinet on precisely this issue? To make matters worse, moreover, Hamilton was not only mischaracterizing what the President had done, but was also defending the constitutional authority of the President to do exactly what Jefferson had argued was beyond the powers of the

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not fully trust his own allies in Congress to manage the delicate dance he was pursuing behind closed doors in the Cabinet. More to the point, however, is the question of the consistency between his principled worries about protecting the legislature's prerogative over war, and his pragmatic judgment that Congress could not be trusted with the decision and thus should conveniently be left on the sidelines until political passions settled.

11 Hamilton began his essay with a direct statement of what the Proclamation of Neutrality, as he called it, had been intended to accomplish:

The true nature & design of such an act is – to make known to the powers at War and to the Citizens of the Country, whose Government does the Act that such country is in the condition of a Nation at Peace with the belligerent parties, and under no obligations of Treaty, to become an associate in the war with either of them; that this being its situation its intention is to observe a conduct conformable with it and to perform towards each the duties of neutrality; and as a consequence of this state of things, to give warning to all within its jurisdiction to abstain from acts that shall contravene those duties, under the penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention. . . . It follows that the Proclamation is virtually a manifestation of the sense of the Government that the UStates are, under the circumstances of the case, not bound to execute the clause of Guarantee.

executive. Jefferson instantly wrote Madison, enclosing the essay, and within the week, was pressing him in urgent terms to write a full response. A reluctant Madison bravely resisted but finally caved in to the pressure, agreeing to write the essays while complaining bitterly throughout that the task was “the most grating one I ever experienced.” In fact, he only completed one third of the essays he set out to write, responding in his five *Helvidius* essays principally to *Pacificus No. 1* and secondarily to *Pacificus No. 7*.

The *Pacificus-Helvidius* debate, then, was about whether the President has power to interpret a guaranty clause of a treaty, like Article 11 of the French Treaty of Alliance, and, in particular, whether he has the power, as an official act, publicly to announce his conclusion that such a guaranty clause does NOT require the United States to go to war in any particular instance. Hamilton asserted that the President had done precisely that and, in doing so, was acting within his constitutional authority. In contrast, Madison denied that Washington had purported to interpret Article 11 but that, had he in fact purported to do so, he would have been intruding unconstitutionally into the sphere of exclusive congressional power. That’s it.

It must be a common, though perhaps deflating, realization among thoughtful people that some of the most heated intellectual and political exchanges turn out, on careful analysis, to be fought over relatively minor points. Even worse, what is actually in dispute is often ill-defined, and the significance of the arguments on both sides depend on a more precise specification than the antagonists will ever supply. What did Hamilton mean when he contended that the President has the power to make an official interpretation of a guaranty clause? He was unwilling to say – what could not possibly have been the case – that his interpretation would bind Congress when it came to consider whether it should affirm neutrality or declare war. What weight, then, was it supposed to have? Contrariwise, what could Madison have meant when he denied the power of

the President to interpret the Guaranty Clause? What if the British Minister had demanded an immediate statement of views, on pain of war? Could the President not have offered his opinion in the course of his conduct of diplomatic discussions? Alternatively, wouldn't his interpretation be relevant to whether or not to convene Congress and let it decide on the ultimate question? Would he have been out of bounds if he had included his views on the meaning of the treaty in a war message to Congress, or, alternatively, in a message urging restraint? Did Madison even mean to deny the President freedom of speech and opinion? Neither Hamilton nor Madison attempted to provide any clear answers to these and other questions, which only would have revealed the impossibility of drawing clear lines and the folly of taking dogmatic positions.

We will return to this issue later in considering the wider implications of the debate for the coming turn in Republican constitutional views. For the moment, whether or not the issue in controversy was important in its own right, and whether or not the positions of *Pacificus* or *Helvidius* were well or poorly specified, the critical point is that, in arguing their respective cases, they both chose to range widely over critical constitutional matters. That is why the debate was important then, and why it remains important today to achieving an understanding the development of constitutional law in the Early Republic.

Before entering more closely into the debate, it is worth underscoring a few additional background points. First, as already noted, Hamilton went first and, indeed, completed his seven essays even before Madison had begun publishing his own. Moreover, Hamilton devoted only his first essay to constitutional issues. The other essays took up a comprehensive defense of the his position – which he claimed the Proclamation had affirmed – that the Guaranty Clause did not require the United States to enter the war and that going to war voluntarily was neither in the interest of the nation, nor morally requisite under the circumstances. The last essay defended the

Administration's handling of the issue. In contrast, although Madison initially intended to respond to all of *Pacificus*' arguments, he became exhausted with the task, and ran out of time, before he could go beyond responding to *Pacificus No. 1* and (glancingly) *No. 7*. That meant that Madison devoted considerably more thought – and nearly four times as many words (even excluding his last essay, which focused more on *Pacificus No. 7*) – to the constitutional issues. The difference showed. Despite its fame, *Pacificus No. 1* was an uncharacteristically sloppy effort. However compelling Hamilton's views might be, he made a number of logical leaps – even errors – and Madison's rhetorical strategy was to exploit each one in loving detail. Indeed, Madison's essays virtually quoted the entirety of *Pacificus No. 1* and made an often brilliant line by line dissection and refutation of Hamilton's arguments. It was a lawyer's delight – at least if the lawyer in question was suffering from OCD. It was no wonder that Madison ran out time and patience with the task. It was this aspect of his approach, moreover, that explains why, at least in one important sense, he “lost” – as scholars of the debate seem irrepressibly drawn to judging – the debate: Hamilton's essay was a model of rhetorical clarity and force; Madison's were long, obscure, turgid affairs that were and remain, in parts, almost unreadable.

Finally, Madison's methodology, however much it may have undermined his polemical goals, is a gift to the historian. In part, that's because he said so much. More importantly, though subtly, however, it is because his indefatigable determination to respond to every point Hamilton made, often with multiple objections, allows us to infer a great deal about when he actually agreed with Hamilton, even while preferring to let his agreement go unspoken. If Hamilton made a claim, and Madison declined to oppose it, or opposed it only on one ground offered by Hamilton in its defense but not another, it is reasonably safe to infer, albeit with

caution, that he implicitly agreed with whatever he left unopposed. This conclusion is all the more justified when other evidence of Madison's earlier views provides confirmation.

### **C. The Framers' Constitution Reaffirmed**

There are many points on which Hamilton and Madison agreed that are jarring to modern constitutional sensibilities or are plainly inconsistent with established practices. Perhaps the most obvious example is the power to declare war. Of course, to anyone familiar with the Founding era it can come as no surprise that Hamilton and Madison were fully agreed that the power to declare war gave Congress the exclusive power to decide whether the United States would go to war. Given the centrality of the point to Madison's whole argument, it is needless to pursue his views here. On the other hand, in view of the canonical status of *Pacificus No. 1* for modern proponents of the unitary executive, it is worth underscoring that Hamilton explicitly acknowledged Congress' exclusive power over the question of war and peace and premised his larger argument on that understanding as an unassailable background constitutional principle. Indeed, the chief obstacle to his defense of the Proclamation was precisely his recognition that Congress' power to declare war gave it the ultimate decision over war and peace. As a result, the burden of his argument was to show how notwithstanding that power, the executive had other powers that it could exercise concurrently (*e.g.*, proclaiming neutrality) that might legitimately impact upon Congress' deliberations, at least by encouraging it to opt for peace. Thus, according to Hamilton, "[i]f the Legislature have a right to make war on the one hand – it is on the other the duty of the Executive to preserve Peace till war is declared." Furthermore, "the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War" and "[i]n this distribution of powers the wisdom of our constitution is manifested. It is the

province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War.”

Perhaps more surprising, both Hamilton and Madison agreed that a treaty provision like the Guaranty Clause – or more modern Mutual Defense Treaties, which mandate the defense of another nation when attacked – are constitutionally incapable of being “self-executing.” I come back to the issue of self-execution shortly, but it should be underscored here that this doctrine is one important manifestation of the profound pacific bias of the Constitution: Although treaties in general were self-executing, the opposite was the case when a treaty might require the United States to go to war; under no circumstances could the President “execute” or “enforce” such a provision without first obtaining the imprimatur of Congress. Madison was quite explicit on this point. Referring to the Guaranty Clause, he noted, for example, that “the article . . . cannot . . . from the very nature of it, be in operation as a law, without a previous declaration of the legislature.”<sup>12</sup> Hamilton fully concurred. Although he wished to emphasize how the President’s decision to receive an ambassador from a nation with which the United States had a treaty of alliance, and which was then at war, would oblige the United States to come to its defense, he conceded that the right of the President to execute that obligation would still depend on

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12 He repeated this point for emphasis:

The existence of eventual engagements [*i.e.*, the Guaranty Clause] which can only take effect on the declaration of the legislature, cannot, without that declaration, change the actual state of the country, any more in the eye of the executive than in the eye of the judiciary department. The laws to be the guide of both, remain the same to each, and the same to both.

Congress' adoption of a declaration of war. Although the President's action should affect the legislature's exercise of its power

to declare war[, t]he Executive indeed cannot control the exercise of that power – further than by the exercise of its general right of objecting to all acts of the Legislature; liable to being overruled by two thirds of both houses of Congress. The Legislature is free to perform its own duties according to its own sense of them . . .

Indeed, in this passage, Hamilton not only acknowledges that mutual defense obligations cannot constitutionally be self-executing, he further insists that the President's ordinary veto power applies to declarations of war. In fact, however, while intuitively compelling, this point has long been in controversy. Consider, for example, the constitutional arguments that were raised against President's Cleveland's threat to veto a congressional declaration of war against Spain in the lead-up to the Spanish-American War. Or, more directly pertinent, consider Hamilton's evident worry about what Congress, if convened, might have done in the heated political environment of the early Summer of 1793. As these examples suggest, a presidential power to veto declarations of war was another manifestation of the pacific bias of the Framers' Constitution.

Hamilton and Madison also agreed that the President had no, or at most a very limited, power to terminate or suspend treaties. Especially in view of the now almost complete abandonment by proponents of congressional power of this not-so-long-ago fiercely contested issue, their agreement is particularly striking. Responding to Hamilton's argument that the President's refusal to receive an ambassador from a country undergoing a change in government could bring about a suspension of some treaty obligations (*i.e.*, public rights provision), Madison replied:

As a change of government then makes no change in the obligations or rights of the party to a treaty, it is clear that the executive can have no more right to suspend or prevent the

operation of a treaty, on account of the change, than to suspend or prevent the operation, where no such change has happened. Nor can it have any more right to suspend the operation of a treaty in force as a law, than to suspend the operation of any other law.

As already noted, Hamilton did argue for a limited power in the President to suspend, but the very narrowness of his argument suggests strongly, if not conclusively, that he assumed that the President had no general power to terminate. Indeed, the core of his argument, as we have seen, was to establish a limited concurrent power in the President that was not entirely swallowed by Congress' power to declare war. To make this case, he sought to provide other examples of concurrent executive and legislative powers, and his principal example was a very limited executive power to suspend public rights obligations of treaties as a consequence of a presidential refusal to receive an ambassador from a nation that was underling a revolution in government. The idea was that the President, in relation to the suspension of those obligations, was exercising a power concurrent with that of the President and Senate over the making (and, necessarily, implicitly, the suspension and termination) of treaties. If Hamilton had believed that the President had a general power of termination, it would have been absurd for him to spin out such an elaborate argument for a marginal power of suspension in the highly specialized circumstances of revolutions or changes in governments.

While contemporary liberals may find these points of agreement pleasing, there was at least one key issue on which Hamilton and Madison agreed that will provide some compensating comfort to conservatives: Hamilton's famous "Executive Vesting Clause" argument. In seeking to justify a presidential power to interpret the Guaranty Clause not to require war, Hamilton faced the problem of a missing Article II grant of power that clearly covered the case. He therefore sought to fortify his position by pointing to the so-called Vesting Clause of Article II, which provides that the "executive Power shall be vested in a President of the United States of



America.” Rather implausibly from any textual point of view, Hamilton argued that this clause was a grant in bulk to the President of all powers that are in their nature executive in character. The specific enumerations of presidential powers that followed in Article II were either limitations on specific powers that would otherwise have been granted unconditionally by the Vesting Clause or were “intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power.” Notably, however, he limited the potential scope of the argument by acknowledging that these unenumerated powers were to be “interpreted in conformity to other parts of the constitution and to the principles of free government.”

Surprisingly, perhaps, Madison appears to have agreed – though he did not say so explicitly. Rather, he passed over this elephant-in-the-room in silence. Despite the wishes of modern day opponents of expansive executive power, however, it is simply implausible to suggest that this decision did not constitute an implicit acceptance of Hamilton’s position. Indeed, this inference is confirmed when we consider how Madison did deal with Hamilton’s position. Hamilton’s point was actually designed to support a complex argument. War and treaty-making, he argued, were in their nature executive powers, but the Constitution had derogated from the ordinary division of authority between the executive and legislative powers by assigning them to Congress (in the case of war) and to the Senate (in the case of treaties). It followed, he next argued, that these powers should be construed strictly so as to retain in the executive, under the Vesting Clause, all of those allied powers that would otherwise follow in the train of the declare war and treaty powers. This argument was one of the major points in contention, and Madison could easily – and persuasively – have responded by denying that the executive had any powers that were not included in the enumerations of Article II. Instead,

however, he passed over that argument and instead combatted, at great length, Hamilton's claim that war and treaty-making were executive powers. On the contrary, he maintained, they were quintessentially legislative powers, and, therefore, Hamilton's argument was turned on its head: all of the allied powers necessarily belonged to Congress, whose war and treaty powers should be construed broadly.<sup>13</sup>

For present purposes, however, more important than all of these areas of agreement, were their respective positions on a range of issues defining the relationship between treaties and the law of nations, on the one hand, and domestic (or municipal) law, on the other, or, to put it differently, defining the constitutional status of international law. These are among the most controversial issues in American constitutional law today, and it is striking how far afield current debates are from core Founding understandings. The positions of Hamilton and Madison reflect the cosmopolitan character of the Founding and the imperative felt on both sides to ensure that the new nation would comply with its international commitments.

Begin with the law of nations. How the Constitution relates to the law of nations is a modern day puzzle. It is barely referred to in terms in the text. Most significantly, the absence of any explicit reference to it in Article II's injunction that the executive faithfully execute the laws, in Article III's "arising under jurisdiction" in the federal courts, or in Article VI's

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<sup>13</sup> It only confirms this interpretation that Madison had made the same, or at least a similar Vesting Clause argument, in the course of the earlier Removal Power debate. As *Helvidius*, he undoubtedly wished to avoid making any arguments that were directly inconsistent with his earlier positions. That would have been especially important in the *Pacificus-Helvidius* debate, because Madison repeatedly included lengthy quotes from Hamilton's contributions to *The Federalist*, which seemed to be inconsistent with what *Pacificus* was now arguing, to suggest that Hamilton's current positions were not being offered in good faith. Setting himself up for a similar *riposte* would have been highly imprudent.

Supremacy Clause has been the source of considerable, and growing, doubts about its constitutional status. There are a range of possibilities. Is the law of nations (or the modern day analog, customary international law) part of the law of the United States at all, or does it become so only upon legislative incorporation into a statute? If it is part of the law of the United States, what kind of law is it, federal or state (or yet some other category of) law? If federal law, what is its status in the hierarchy of federal law? For instance, does the President have a duty to observe it, or may he utilize it for his own purposes while disregarding any limitations it imposes on the range of his discretion? Are there any respects in which Congress itself may be constitutionally bound to observe its requirements? At the moment, a majority of the Supreme Court seems poised, with much impassioned scholarly encouragement, to answer the first question in the negative: the law of nations is simply not part of the law of the United States, except, that is, when incorporated into a statute. If so, all of the other questions easily answer themselves. Even if the Court declines to so rule, however, it is accepted today even by customary international law advocates that the law of nations has, at best, the lowest available status under federal law.

This is all a remarkable shift from Founding principles, and from the consensus between Hamilton and Madison on most, if not all, of these questions. Consider first whether the law of nations was part of the law of the United States without the need for legislative incorporation. Both Hamilton and Madison unequivocally confirmed that it was (and a good thing, too, since the Washington Administration's whole program for enforcing neutrality depended on the same supposition and Supreme Court Justices were regularly so instructing grand and petit juries). Hamilton repeatedly made this point, without feeling the need even to argue its merits. Thus, federal prosecutions for non-statutory violations of the law of neutrality were unproblematic,

because citizens must “abstain from acts that shall contravene those duties, under the penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention.” The Proclamation, in warning citizens that they would be prosecuted, was merely “proclaim[ing] a fact with regard to the existing state of the Nation, inform[ing] the citizens of what the laws previously established [*i.e.*, the law of nations] require of them in that state, & warn[ing] them that these laws will be put in execution against the Infractors of them.” “Our Treaties and the laws of Nations,” moreover, “form a part of the law of the land.” The reason? The Constitution had “recognise[d] and adopt[ed] those laws.” Madison was fully on board. Indeed, as we shall see, the premise that the law of nations was part of the law of the United States was foundational to many of his most fully developed arguments. Thus, the “obvious and legal” purpose of the Proclamation was to carry out “the duty of the Executive to preserve peace by enforcing [the laws of neutrality], whilst those laws continued in force,” a necessity created by “the danger that indiscreet citizens might be tempted or surprised by the crisis, into unlawful proceedings, tending to involve the United States in a war.” Madison even stooped so low as explicitly to agree with Hamilton – on this one point – that “the Municipal Law . . . recognizes and adopts” the law of nations.

In this respect, Hamilton and Madison were simply reflecting the nearly universal understanding that the Constitution – like the earlier Declaration of Independence and the Articles of Confederation – had incorporated the law of nations into the law of the United States. Perhaps even more interestingly, both agreed that the necessary consequence was that the President was bound to observe the requirements of the law of nations as part of his duty faithfully to execute the laws. This consensus flies in the face of the now longstanding understanding that the President can disregard the law of nations at will, at least by adopting

what is obscurely dubbed “a controlling executive act.” Ironically, from a Founding era perspective, the incorporation of the law of nations into the law of the United States had the consequence of vastly extending the scope of executive power. It meant that the executive had a whole body of non-statutory law, which impacted both citizens and foreigners, that he could execute in the course of conducting the nation’s foreign affairs. Indeed, for the Founders, the conduct of war and foreign affairs were not realms of uncontrolled executive discretion (as they are so often thought to be today). Although the executive did, of course, have a wide range of discretion – wider than in the realm of domestic affairs – his conduct was always subject to law. The critical point was that the law he executed was not generally – and certainly not only – the municipal law of the United States, but the law of nations. The incorporation of the law of nations into the law of the United States, thus, both empowered the executive enormously, but also imposed important limits on the scope of his discretion, limits which, to a considerable degree, were designed to render the conduct of war and foreign affairs consistent with the principles of Enlightenment humanism.

That the President, in conducting the nation’s foreign affairs, was bound to observe the law of nations was a central theme in both *Pacificus* and *Helvidius*. Hamilton repeatedly made precisely this point:

The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws. It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war to foreign Powers.

Indeed, Hamilton concluded *Pacificus No. 1* by arguing that the Proclamation could be defended on the sole basis of “[t]hat clause of the constitution which makes it [the President’s] duty to ‘take care that the laws be faithfully executed.’” Why? Because “[t]he President is the

constitutional Executor of the laws,” and “our Treaties and the laws of Nations form a part of the law of the land.” The President was thus charged with “the observance of that conduct, which the laws of nations combined with our treaties prescribed to this country, in reference to the present War in Europe.” On the affirmative side, he noted that this doctrine also meant that “it belongs to the ‘Executive Power,’ to do whatever else [beyond transferring the country from a state of peace to a state of war] the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the UStates with foreign Powers.”

Madison not only agreed with this understanding of the President’s powers, he made it a foundational premise underlying many of the most important twists and turns in his complex set of arguments. Thus, for example, quibbling with Hamilton’s linking of the President’s duty faithfully to execute the laws of neutrality in times of peace to his duty to avoid giving cause of war to foreign nations, Madison more rigorously insisted:

That the executive is bound faithfully to execute the laws of neutrality, whilst those laws continue unaltered by the competent authority [*i.e.*, until Congress has declared war], is true; but not for the reason here given, to wit, to avoid giving cause of war to foreign powers. It is bound to the faithful execution of these as of all other laws internal and external, by the nature of its trust and the sanction of its oath . . .

If the President was bound to execute the laws of neutrality during time of peace, moreover, he was likewise bound to execute the laws of war during time of war. War, Madison explained, “has the effect of repealing all the laws operating in a state of peace, so far as they are inconsistent with a state of war; and of enacting, as a rule for the executive, a new code adapted to the relation between the society and its foreign enemy.” That code was, of course, the laws of war, and Madison here suggests, in a brief passage, what would indeed be one of the foundational premises of the constitutional framework for war throughout most of U.S. history: In time of war, the laws of war displace the municipal laws of peace. The executive’s belligerent

measures are thus governed – and their validity determined – by the laws of war, not by statutes enacted for peacetime circumstances or even by the individual rights protecting provisions of the Constitution and Bill of Rights. By the same token, however, peace terminates the application of the laws of war and reinstates the ordinary municipal laws as well as, in the event that other nations remain at war, the laws of neutrality. “In like manner,” as Madison put it, “a conclusion of peace annuls all the laws peculiar to a state of war, and revives the general laws incident to a state of peace.”

Moreover, it was not simply that the law of nations was incorporated into the laws of the United States as part of the laws that the executive was bound to enforce. In some contexts at least, the law of nations had constitutional status. Madison’s extended discussion of the President’s power to receive ambassadors provides a suggestive example. As already noted, one of Hamilton’s key arguments purporting to demonstrate the acceptability of concurrent executive and legislative powers focused on the example of the President’s power to receive ambassadors. Hamilton argued that when the President refused to receive an ambassador from a new government, he effectively suspended any existing treaties between that nation and the United States, “[f]or until the new Government is acknowledged, the treaties between the nations, as far at least as regards public rights, are of course suspended.” On Hamilton’s account, this showed that the President shared at least some power over treaties – the power to suspend – that was simultaneously lodged in the President and Senate acting together. Madison objected to this argument on a number of grounds, but three of his core points nicely illustrated the entanglement of the President’s substantive constitutional powers with the law of nations.

First, Madison rejected Hamilton’s assumption that the President had any authority at all to refuse to recognize an existing foreign government, whether new or old. Relying on

background principles of the law of nations, which, he maintained, mandated the recognition of any (*de facto*) regime in stable control of the organs of the state, Madison noted:

When a foreign minister presents himself, two questions immediately arise: Are his credentials from the existing and acting government of his country? Are they properly authenticated? These questions belong of necessity to the executive; but they involve no cognizance of the question, whether those exercising the government have the right along with the possession. This belongs to the nation, and to the nation alone, on whom the government operates.

Consequently, the refusal of the President to recognize a new, but existing, government would simply be “without right or authority.” Madison thus assumed that the scope of the President’s reception power was itself defined by the law of nations. At most, the President could refuse to receive an ambassador under those circumstances, and only those circumstances, that would justify the nation in doing so under the law of nations.

Madison next rejected any suggestion that a change in government in itself – as in the case of France after the execution of Louis XVI – could somehow relieve either party to that nation’s existing treaties of their obligations and thus justify a presidential suspension of treaties. (Here, he was responding not to *Pacificus* but to Cabinet Minister Hamilton, who had made a similar argument, to Jefferson’s horror, in the crisis days before Gênet’s arrival in Philadelphia). Under the law of nations, treaties entered into by the competent organ of the state are treaties of the nation, and they remain binding on the state and its treaty partners when the organ of the state changes hands and even when it is transformed into a new form government. “A nation, by exercising the right of changing the organ of its will,” Madison declared, supported by lengthy quotes from Vattel and Burlamaqui, “can neither disengage itself from the obligations, nor forfeit the benefits of its treaties.” Consequently, the President had no power to suspend the treaties on this ground. “As a change of government then makes no change in the obligations or rights of



the party to a treaty, it is clear that the executive can have no more right to suspend or prevent the operation of a treaty, on account of the change, than to suspend or prevent the operation, where no such change has happened.” Here, again, the scope of the President’s constitutional powers were defined by the law of nations.

Finally, even assuming that the President did have the power to refuse to recognize a new government – or that the President had found in a particular case that there was, in fact, no existing government – Hamilton erred yet again in arguing that the consequence would be to suspend existing treaties. Once again Madison’s argument sounded in the law of nations. To be sure, Hamilton had suggested that the suspension might be limited to the treaty’s public rights provisions, leaving its private rights provisions intact. Even accepting this concession, however, Hamilton was simply wrong in suggesting that non-recognition of a government suspended all public rights obligations of existing treaties. On the contrary, according to Madison, it suspended only those public rights obligations that could not be carried into effect without the agency of the non-recognized government.

It is not true, that all public rights are of course suspended by a refusal to acknowledge the government, or even by a suspension of the government. . . . Public rights are of two sorts: those which require the agency of government; those which may be carried into effect without that agency. As public rights are the rights of the nation, not of the government, it is clear, that wherever they can be made good to the nation, without the office of government, they are not suspended by the want of an acknowledged government, or even by the want of an existing government.

Thus, not only was the scope of the President’s power to receive ambassadors defined by the law of nations, but so too were the consequences of any exercise he might make of that power. Moreover, it happened, as Madison’s effort to illustrate this claim pointedly suggested, that the duty to defend under a guaranty clause was precisely the kind of public rights obligation that would survive a refusal of recognition!

Carrying the point one step further, Madison also made it clear that the judiciary would enforce these law of nations limits on the President's powers. Noting Hamilton's equivocal concession that the suspension would apply only to public, not private, rights, he pointed out that any presidential failure to recognize this distinction would subject him to embarrassment at the hands of the judiciary:

This qualification of the suspending power, though reluctantly and inexplicitly made, was prudent, for two reasons: first, because it is pretty evident that private rights, whether of judiciary or executive cognizance, may be carried into effect without the agency of the foreign government: and therefore would not be suspended, of course, by a rejection of that agency: secondly, because the judiciary, being an independent department, and acting under an oath to pursue the law of treaties [which was a part of the law of nations] as the supreme law of the land, might not readily follow the executive example; and a right in one expositor of treaties, to consider them as not in force, whilst it would be the duty of another expositor to consider them as in force, would be a phenomenon not so easy to be explained.

In other words, despite an announcement by the President that a treaty had been suspended in consequence of the executive's refusal to recognize a foreign Minister from a particular nation, and despite the President's further decision to consider not only the public rights but also the private rights obligations of the treaty as falling within the terms of the suspension, the judiciary, following the law of nations not the President, would continue to uphold private rights under the treaty in litigated cases. No hint of a principle, here, of judicial deference to executive discretion, nor of the need for a congressional statute – beyond, of course, a grant of jurisdiction over treaty cases – to empower the judiciary to review executive action for compliance with the law of nations.

If the views of Hamilton and Madison about the constitutional status of the law of nations are jarring from a contemporary perspective, so too are their views about the constitutional status of treaties. Ironically, to the modern constitutional mind, the position of treaties in the

constitutional order is far more secure than that of the law of nations. The Treaty Clause specifies precisely how they are to be made, and both Article III arising under jurisdiction and the Supremacy Clause refer to them explicitly. For most, it is therefore safe to assume as well that the President's duty faithfully to execute the "laws" must have been intended to include not only the statutes of Congress, but the Constitution and treaties of the United States, since they too are made "supreme law of the land." Nevertheless, the same impulse that has sought to exile the law of nations from the American constitutional order has likewise sought to reduce treaties to a similar non-status. Leading scholars now argue that, like the law of nations (on their view), treaties, or at least most of them, are not part of the domestic law of the United States, except insofar as incorporated into a statute adopted by Congress. In other words, treaties are not "self-executing." As a consequence, the executive is not bound to implement them, and the judiciary is not permitted to apply them. This position has received a large boost from the most recent Supreme Court pronouncement on the subject, which many interpret, albeit loosely, as creating an all but irrebuttable presumption against deeming treaties self-executing. It goes without saying that the so-called "last-in-time" rule – under which (self-executing) treaties and statutes are equal in the hierarchy of federal laws, implying that Congress is constitutionally free to violate treaties at will – is of unassailable authority.

Neither *Pacificus* nor *Helvidius* would have agreed. Consider what Hamilton had to say about self-execution. Strikingly, his concern was not with establishing that they were self-executing – which he assumed was a point of consensus and which, as we will see, he defended elsewhere – but with establishing some outer limits on the scope of judicial power over treaty disputes between nations. "The province of th[e Judiciary] Department is to decide litigations in particular cases," he explained. Thus, although it is "indeed charged with the interpretation of

treaties,” it “exercises this function only in the litigated cases; that is where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of Treaties between Government and Government.” Rather, it was the executive that would be “the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government.” Notice that Hamilton was not arguing that treaties were not self-executing. His point was that there were justiciability type limits on the scope of judicial jurisdiction – in this case derived from the law of nations’ doctrine of sovereign immunity – that excluded judicial resolution of certain treaty disputes. Decades later, this relatively modest doctrine would morph into a more extensive political question doctrine. The point, however, is that Hamilton believed that even if judicial enforcement was not available, the executive was charged with faithfully implementing treaties, which were the law of the land. Indeed, he understood the law of nations and treaties to be interchangeable in this sense. Thus, after quoting the President’s duty to execute the laws, he declared: “Our Treaties and the laws of Nations form a part of the law of the land.”

Consequently, the executive would have “to interpret[] those articles of our treaties which give to France particular privileges, in order to the enforcement of those privileges.” Indeed, he would also have to determine “what rights are given to other nations by our treaties with them – what rights the law of Nature and Nations gives and our treaties permit, in respect to those Nations with whom we have no treaties; in fine what are the reciprocal rights and obligations of the United States & of all & each of the powers at War.”

Once, again, Madison agreed. As he had maintained elsewhere,

treaties, when formed according to the constitutional mode, are confessedly to have 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.”

Indeed, as Madison was keenly aware from the states’ rights controversies over treaties that he had dealt with as a member of Congress during the Confederation, treaties were the supreme law of the land even though they frequently overrode – as was dramatically the case with the Treaty of Peace of 1783 – sensitive domestic regulations:

These remarks will be strengthened by adding, that treaties, particularly treaties of peace, have sometimes the effect of changing not only the external laws of the society, but operate also on the internal code, which is purely municipal, and to which the legislative authority of the country is of itself competent and complete.

Moreover, the President was bound to implement treaties, just as he was bound to enforce the law of nations more generally. Treaties, he noted, have “the force of a law, and [are] to be carried into execution, like all other laws, by the executive magistrate.” Applying this doctrine to Articles 17 and 21 of the 1778 Treaty of Amity, Madison concluded that the President was obligated to enforce the privileges that these articles granted France and withheld from its enemies because they were, even without congressional implementation, “a law in operation.”

The agreement of Hamilton and Madison on the principle of self-execution is important in its own right, though, for present purposes, it is particularly significant for what it suggests about Madison’s stark about-face a few years later during the Jay Treaty crisis. In any case, Hamilton and Madison agreed not only on the principle of self-execution, but also, as we have seen, on two other related points. First, both held the view – reflective of the pacific bias of the Constitution – that there was a special constitutionally mandated exception for treaties of alliance. The treaty obligation to defend an ally was always non-self-executing – hence was not “a law in operation” – and could only be enforced upon the adoption of a congressional declaration of war. Second, they both roughly agreed with the view that the President had no –

or only very limited – unilateral authority to suspend or terminate treaties. Indeed, as Madison rightly pointed out, Hamilton’s argument that the President, by not receiving an ambassador, could suspend certain treaty obligations, even if literally true, was a misleading way of characterizing the President’s power. The President did not himself “suspend” the treaty. Rather, the treaty was suspended by operation of the law of nations – yet another example of the constitutional status of the law of nations – and was thus really a side consequence of the exercise of another power explicitly granted to the President. As Madison put it, the suspension followed only “from a consequential operation” of the right to receive ambassadors, not from a power in the President to suspend.

Finally, Hamilton and Madison appeared to agree – although the evidence here is more speculative – that even Congress was bound to comply with the nation’s international law obligations. As we have seen, Hamilton conceded that, in exercising its discretion under its power to declare war, Congress was “free to perform its own duties according to its own sense of them.” But the discretion he had in mind related to presidential-congressional relations. His point was that Congress did not have to accept the judgment of the President as to the nature of U.S. treaty obligations, but could interpret them “according to its own sense.” That did not mean, however, that Congress was free to disregard those obligations in deciding whether to declare war, only that it had independent judgment about what the treaty actually required. To make this point clear, Hamilton hypothesized that the 1778 Treaty with France was an Alliance both Offensive and Defensive, and that the President had recognized the new French government by receiving its ambassador. In this context, he noted, Congress would be “under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war.” In other words, assuming that the Guaranty Clause actually required war (which Hamilton denied

in part on the ground that the war was offensive on France's part and the alliance only defensive), and that other recognized excuses under the law of nations (like lack of capacity) did not apply (which Hamilton believed actually did apply), then Congress was constitutionally obligated to carry out the treaty obligation by declaring war.

Unfortunately, Madison never directly responded to Hamilton's argument in this respect. Instead, he ridiculed Hamilton for, among other things, drawing the absurd inference that it was the President's exercise of his power to receive ambassadors that had "laid the Legislature" under an obligation to declare war in his hypothesized case. The fact that Madison did not forthrightly deny Hamilton's bold constitutional claim, however, is telling. It would have been easy for Madison simply to deny that Congress was ever under a constitutional obligation to comply with, or carry out, treaty commitments, let alone bound to do so in the special case of war. If he had thought Hamilton was wrong, it is highly likely that he would have done so. That is all the more likely because, as we have seen, he was keen to answer every "erroneous" argument that Hamilton had pressed.

#### **D. What Exactly Are You Two Gentleman Fighting About?**

[This section is not yet written. In brief, there were essentially three constitutional questions on which Hamilton and Madison clearly disagreed. First, as we have seen, they disagreed about the scope of the President's power to receive ambassadors (a clause, incidentally, which is now before the Supreme Court for interpretation). Hamilton interpreted the President's discretionary powers broadly, or, at least, broadly enough to permit the President – as, ironically, Jefferson would later do in regard to the revolutionary Black regime in Haiti – to refuse to receive a foreign Minister and thereby the government he represented. It is actually unclear just how much room Hamilton thought the President would have in this regard. In

contrast, Madison denied that the power to reject an ambassador ever entailed a power to refuse recognition to his government. It was a purely ministerial task (or, rather, fact-based inquiry), as Hamilton earlier had suggested in a passage, quoted by Madison, in *The Federalist*. To the extent that the law of nations permitted a refusal of recognition in rare cases “in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism,” that power resided in Congress, not in “so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors.” Here, again, is the background assumption that the scope of the constitutional powers over foreign affairs are defined by the law of nations.

Second, they starkly disagreed about the admittedly somewhat abstract question whether the war and treaty powers were properly conceived of as executive or legislative powers. The issue played a role in various parts of the argument – some of which have already been suggested – but principally it went to an interpretive presumption. If Hamilton was right, and they were executive in nature, then the Constitution had derogated from the natural division of powers, implying, as in the case of the Appointments Clause, that the scope of Congress’ (and the Senate’s) powers should be strictly construed. If, on the contrary, Madison was right, then the opposite presumption should prevail. Being legislative powers granted by the Constitution to Congress and the Senate, they were to be broadly construed, and the executive broadly excluded from exercising authorities that interfered with their free exercise. Notwithstanding modern skepticism about interpretive presumptions, in fact, the point proved to be of enormous importance, at least on the Republican side, not only in justifying Madison’s ultimate claim in the debate, but, more importantly, in the development of Republican constitutional views going



forward. For example, in the following period, it underwrote some, by any standards, radically narrow interpretations of executive power and an insistence on application of a breathtakingly strict non-delegation doctrine in the context of war and the military establishment.

Finally, there was the ultimate issue in the debate – the power of the President to announce an official executive interpretation of the Guaranty Clause as not requiring the United States to go to war. The great problem with Hamilton’s argument was the lack of any enumerated power in Article II that seemed to cover the case. Of course, Hamilton pointed to the President’s treaty-making power, his diplomatic powers, his control over the public force, and his duty to execute the laws, but none of these were really convincing as grounds for the President’s powers. The President was not making a treaty. Nor had a foreign nation (*e.g.*, Britain) demanded, or even requested, a statement of presidential views, which, in turn, were not delivered via diplomatic note but in a municipal proclamation. Still less was the President’s interpretation necessary to inform his use of the public forces or, as we shall see, his execution of the laws, since everyone agreed that the laws of neutrality applied in any case. Consequently, Hamilton constructed two additional powers for the President that he hoped would do the trick, a kind of general free-standing power to interpret treaties as well as a power “to determine the condition of the Nation” in respect to other nations (by which he meant to determine its legal condition, *e.g.*, its neutral status). But these claims were hardly more compelling precisely because they seemed rather freely constructive, not text based. His last resort was to the Vesting Clause, and this argument moved him closer to the mark. Moreover, he sought to bolster it by introducing the strict construction interpretive presumption in application to the essentially “executive” powers of war and treaty. But, here, too, the argument failed, as Madison so lovingly exposed and Hamilton seemed all too aware: If, applying the interpretive presumption,

construing the Guaranty Clause was an executive power, then Hamilton would be claiming that Congress's power to declare war did not include the power to judge whether the nation was under a treaty obligation to go to war. That however, as Madison put it, was the very "essence" of the power in question, and Hamilton could not, and did not, disagree. Hence, Hamilton was forced midstream to shift ground and enter into the morass of concurrent powers, his ultimate argument being "that the Executive is in any case [not] excluded from a similar right of Judgment, in the execution of its own functions."

Unfortunately for Hamilton, this argument did not fare any better. As Madison argued, if the President shared Congress' power to judge whether a treaty obligation required war, which was a core aspect of the power to declare war, then why did it not follow that he also shared the power to declare war? What was the limiting principle? Why was the power to declare war partly exclusive and partly concurrent? Of course, Hamilton never replied, so we do not know whether he might have found such a limiting principle, but certainly the answer to Madison's query is far from obvious. Moreover, even waiving that point, just exactly how was the President, in announcing his interpretation of the Guaranty Clause, acting "in the execution of [his] own functions"? As Madison astutely pointed out, if the President interpreted the treaty, as he did, not to require war, then, in the exercise of his functions, he was bound to apply the law of neutrality. Yet, if he interpreted the treaty to require war, would he, in the exercise of his functions, act any differently? Not, presumably, unless Hamilton was willing to avow what he repeatedly denied, that the President did have a power to go to war on the basis of a treaty obligation without first obtaining a declaration of war.

Hamilton's last move, perhaps his most interesting, was to emphasize "the duty of the Executive to preserve Peace." This notion was consistent with several of his other arguments,

which sought to enhance the Constitution's pacific bias. His point seemed to be that the President's powers were not entirely symmetrical. Although the President might not have had authority to announce an interpretation of the Guaranty Clause as requiring war, he could, in view of his duty to preserve peace, announce an interpretation that gave it the opposite sense, as permitting peace. The argument apparently held no appeal for Madison. It was another free-standing executive power without textual grounding. To be sure, the President had a duty to preserve peace, but, in Madison's mind, that duty entailed only the strict fulfillment of his duty faithfully to execute the laws. Indeed, Madison was strikingly harsh on this point:

That the executive is bound faithfully to execute the laws of neutrality, whilst those laws continue unaltered by the competent authority, is true; but not for the reason here given, to wit, to avoid giving cause of war to foreign powers. It is bound to the faithful execution of these as of all other laws internal and external, by the nature of its trust and the sanction of its oath, even if turbulent citizens [*e.g.*, angry and impassioned Republican activists!] should consider its so doing as a cause of war at home, or unfriendly nations [France!] should consider its so doing as a cause of war abroad. The duty of the executive to preserve external peace, can no more suspend the force of external laws, than its duty to preserve internal peace can suspend the force of municipal laws.

It is certain that a faithful execution of the laws of neutrality may tend as much in some cases, to incur war from one quarter, as in others to avoid war from other quarters. The executive must nevertheless execute the laws of neutrality whilst in force, and leave it to the legislature to decide, whether they ought to be altered or not.

According to Madison, the President would have properly discharged all of his obligations – and exercised all the authority he had – by convening Congress and giving them the information they needed to make their own independent judgment:

The executive has no other discretion than to convene and give information to the legislature on occasions that may demand it; and whilst this discretion is duly exercised, the trust of the executive is satisfied, and that department is not responsible for the consequences. It could not be made responsible for them without vesting it with the legislative as well as with the executive trust.]

### **E. Assessing the Debate and Its Portents for the Future of the Framers' Constitution**

As I suggested at the outset, the most significant aspect of the debate may well be the breadth of the overlap in the constitutional views of Hamilton and Madison at this critical political juncture. Their agreement on so many central constitutional issues suggests that there were well settled understandings, at least among leading Framers, and that the sharp differences on some of these same issues that quickly emerged in the period following the debate should be understood as the result of a full-fledged rethinking by Republicans. Global events, political developments on the home front, experience with the operations of the government, and a fuller development of their conceptual and normative thinking about foreign affairs, all contributed to what would amount to a sharp turnabout on a number of crucial constitutional issues. These considerations also influenced the positions they would develop on issues that were less clearly resolved by the original settlement. For those who embrace originalist, and perhaps other historically-inflected, modes of constitutional interpretation, this reconstruction of the history of the Early Republic is obviously important. Still, one might be forgiven for harboring doubts about how far present-minded scholars and judges, whatever their methodological commitments, will prove open to the conclusions that the evidence seems to require.

In historical perspective, the broad scope of their agreement suggests the continuing consensus on a cosmopolitan understanding of the Constitution that sought to facilitate the conduct of an honorable and respectable foreign policy and avoid the errors of the Confederation period. The interest of Federalist and Republican leaders in being recognized as full and equal members of the European community of “civilized” states remained alive, and this common outlook, and the foreign policy thinking that supported it, helps account for the fact that when it

came to the status of international law – and the institutional arrangements the Constitution constructed to ensure its enforcement – there was as yet little visible space between the positions of Hamilton and Madison.

At the same time, however, the fault lines in other respects were already visible, and however technical, and arguably modest, the actual points of constitutional disagreement were, they portended, at least in retrospect, the direction in which events would travel. What is critical is that virtually all of the differences reflected the underlying differences in their developing normative and conceptual visions of the conduct of foreign affairs. Consider, for example, their central dispute about the power of the President to announce officially his view that the Guaranty Clause did not require the United States to join France in the burgeoning European conflict. As I suggested earlier, there was an ambiguity in their constitutional argumentation about what exactly Madison thought the President could not do and about what Hamilton thought the President had, or at least could have, done. Ironically, in their respective final essays, which were, nominally at least, directed at non-constitutional aspects of the controversy, they were both more explicit about their positions and about the nature of their underlying concerns.

Hamilton's explanation closely tracked his core theoretical views about the sources of war, and the role of the executive in preserving peace, both in the conduct of diplomacy and in the management of political events at home. The purpose of the Proclamation was to announce "that *in the opinion of the Executive* it was consistent with the duty and interest of the Nation to observe a neutrality in the War and that it was intended to pursue a conduct corresponding with that opinion." The "opinion" of the executive, of course, was something different from the opinion of an ordinary citizen, because as "[t]he constitutional organ of intercourse between the UStates & foreign Nations – whenever he speaks to them, it is in that capacity; it is in the name

and on behalf of the UStates.” In such cases the President’s announcement is thus “an official expression of the *political* disposition of the Nation *inferred* from its political relations obligations and interests.” To some extent, this account only further muddied the waters at least for a lawyer seeking a clear understanding of the weight that the President’s official announcement was supposed to have, either with Congress or with foreign nations, who were presumably aware of Congress’ constitutional powers. Still, Hamilton’s broader purpose was reasonably clear. Even if Congress had power to overrule the President’s judgment, he had spoken for the nation, and his views should be deemed conclusive at least until a real expectation that Congress would reverse his judgment emerged.

Matters would have been easier for Hamilton had there been any form of diplomatic demand, or even an inquiry, about the President’s understanding of the applicability of the treaty obligation. Instead, Hamilton had to offer other less obvious explanations for why issuing the Proclamation – with a resolution of the treaty question – was necessary. He immediately rose to the task. First, it was essential to consider the overall political situation that the President faced. Not only were the states at war with France understandably concerned about whether the United States would join the French side, their concerns and jealousies were heightened by the fact that American citizens were volunteering in their enemy’s navy to attack their shipping interests. Their hostility was likely to be aggravated further by the tremendous demonstrations in favor of France that were occurring throughout much of the country. To avoid a dynamic of this kind from turning into a war that few believed was in American interests, it was essential for the President to act:

It was to be expected, that their attention would be immediately drawn towards the UStates with sensibility, and even with jealousy. It was to be feared that some of our citizens might be tempted by the prospect of gain to go into measures which would injure

them, and commit the peace of the Country. Attacks by some of these Powers upon the possessions of France in America were to be looked for as a matter of course. While the views of the UStates as to that particular, were problematical, they would naturally consider us as a power that might become their enemy. This they would have been the more apt to do, on account of those public demonstrations of attachment to the cause of France; of which there has been so great a display. Jealousy, every body knows, especially if sharpened by resentment; is apt to lead to ill treatment, ill treatment to hostility.

In view of these developments, “the policy on the part of the Government of removing all doubt as to its own disposition, and of deciding the condition of the UStates in the view of the parties concerned became obvious and urgent.” Moreover, it was quixotic to imagine that there was any other public official or branch of government that could achieve this goal. Certainly, amid the political turmoil of the moment, Congress was in no position to assume the responsibility, even had it been in session.

Nor was it an objection that there was no diplomatic demand that prompted the President to act. Diplomacy was more complicated than that and required the President to take a more sensitive approach to anticipating foreign opinion. “It is of much importance to the end of preserving peace,” he observed, “that the Belligerent Powers should be thoroughly convinced of the sincerity of our intentions to observe the neutrality we profess; and it cannot fail to have weight in producing this conviction that the Declaration of it was a spontaneous Act – not stimulated by any requisition on the part of either of them – proceeding purely from our own view of our duty and interest.” A grudging diplomacy that responded only when foreign demands could no longer be resisted was thus self-defeating, if not also dishonorable and mean-spirited. Hence, again, if the executive was to preserve peace and advance the national interest, he needed room to exercise discretion. Moreover, there were some more basic pragmatic concerns as well. For example, if the foreign governments anticipated that the United States

would enter the war, they would be tempted to prepare for the capture of American merchant ships as prizes, and the merchants, anticipating this possibility, would be reluctant to send their ships out on the high seas until matters were clarified. Trade would thus be shut down. It was therefore a matter of

great importance that our own citizens should understand, as soon as possible, the opinion which the Government entertained of the nature of our relations to the warring parties and of the propriety or expediency of our taking a side or remaining neuter. The arrangements of our merchants could not but be very differently affected by the one hypothesis, or the other; and it would necessarily have been very detrimental and perplexing to them to have been left in uncertainty. It is not requisite to say how much our agriculture and other interests would have been likely to have suffered by embarrassments to our Merchants.

Perhaps most importantly, however, the President could preserve peace only if was in a position to manage domestic political crises in a way that could held mitigate political passions and discourage the highly provocative acts in which citizens might otherwise be engaged. Accomplishing that goal was not simply a matter of threatening or even instituting prosecutions. Indeed, although Hamilton may not have been fully anticipated this result, those prosecutions faced dim prospects of success for the very reason that the public temperature had already risen so high. What was critical was achieving some political acquiescence, if not political consensus, on what the national position would be. By announcing the understanding of the President with respect to the critical issue of whether the treaty required war, the Proclamation was an instrument, perhaps more effective than other available, to calm passions, mitigate political conflict, and restore public order.

If, in addition to the rest, the early manifestation of the views of the Government has had any effect in fixing the public opinion on the subject and in counteracting the success of the efforts which it was to be foreseen would be made to disunite it, this alone would be a great recommendation of the policy of having suffered no delay to intervene.



Delay would only “give opportunity to contentious discussions – to intriguing machinations – to the clamors of a faction won to a foreign interest.”

Like Hamilton, Madison’s explanation for why a presidential power to interpret the Guaranty Clause would be harmful closely tracked the emerging Republican foreign affairs ideology and reflected its growing distrust of executive power and faith in the People’s Representatives. Sounding positively like the old Madison, he began with what might, given recent developments, seem like a Hamiltonian point:

If the legislature and executive have both a right to judge of the obligations to make war or not, it must sometimes happen, though not at present, that they will judge differently. The executive may proceed to consider the question to-day; may determine that the United States are not bound to take part in a war, and, in the execution of its functions, proclaim that determination to all the world. Tomorrow, the legislature may follow in the consideration of the same subject; may determine that the obligations impose war on the United States, and, in the execution of its functions enter into a constitutional declaration, expressly contradicting the constitutional proclamation.

In what light does this present the constitution to the people who established it? In what light would it present to the world a nation, thus speaking, through two different organs, equally constitutional and authentic, two opposite languages, on the same subject, and under the same existing circumstances?

But this was not really where Madison was heading. Rather, his more fundamental objection was simply that “the Legislature ought to be as free to decide, according to its own sense of the public good,” and that it ought therefore to be protected from the influence of the executive, which, if Hamilton was right, would inevitably, as Hamilton hoped, burden its deliberations: The legislature would

be thrown under the dilemma, of either sacrificing its judgment to that of the Executive; or by opposing the Executive judgment, of producing a relation between the two departments, extremely delicate among ourselves, and of the worst influence on the national character and interests abroad; a variance of this nature, it will readily be perceived, would be very different from a want of conformity to the mere recommendations of the Executive, in the measures adopted by the Legislature.

The larger point, however, was a matter of “some of the most obvious and essential truths in political science.” The executive could not be trusted to promote peace. Here, Madison offered some of the most eloquent – if dogmatic – passages in all of his writings:

Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war . . .

In 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. Beside the objection to such a mixture to heterogeneous powers, the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.

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

The issue was thus joined over whether the Federalist or Republican theory of the causes of war would be reflected in constitutional doctrine going forward.

At the same time, there something perverse in Madison’s position, which reflected a deep tension at the heart of Republican foreign affairs theory. Hamilton had advocated a set of doctrines that were designed, at least according to his own lights, to tilt the Constitution in favor of peace. Indeed, considered in context, that seemed to be the direction in which most, if not all, of his positions were heading: for example, the President’s power to veto declarations of war and

his duty to preserve peace, along with the non-self-executing character of treaties of alliance. Even Hamilton's insistence on the President's power to refuse recognition was motivated by a desire to enable the executive to escape from a situation in which the nation might be forced into war, as, very probably, was his insistence on avoiding judicial jurisdiction over government to government treaty disputes, which would leave the executive with more room to wiggle out of potential treaty commitments requiring war. Yet, Madison either rejected or ignored each of these positions to the extent they increased the scope of executive power, embracing only those, like the non-self-executing character of alliances, which expanded legislative power. In the case of his rejection of Hamilton's duty to preserve peace, he was even quite explicit, as we have seen, in arguing that the executive could act to preserve peace only in strict accord with existing law, letting events otherwise take their course, even in a context that Madison acknowledged could be highly volatile. The same was true of his rejection of the President's power to interpret the Guaranty Clause to permit peace. He fully acknowledged that he wished to ensure that the legislature would be "free to decide, according to its own sense of the public good, *on one side as on the other side.*"

Madison repeatedly charged Hamilton with bad faith and with being a sheep in wolf's clothing. He even concluded his eloquent defense of congressional war powers with a warning that "[i]f a free people be a wise people also, they will not forget that the danger of surprise can never be so great, as when the advocates for the prerogative of war can sheathe it in a symbol of peace." According to Madison, Hamilton's constitutional positions were a surreptitious scheme to wean the war power away from Congress and lodge it in the executive. Of course, Hamilton had from beginning to end disavowed any such notion, but Madison, in a monumental slippery slope argument, played out the chain of arguments that would, he claimed, eventually reach that

result: If the President can interpret the treaty to permit peace, can he not also interpret it to require war? If the President has a concurrent power to interpret a Guaranty Clause, does he not also have a power to execute it as well, even without a declaration of war? If a declared war has been concluded by a peace treaty, what, on Hamilton's reasoning, will prevent him from declaring that the treaty has been violated by the other side and using that as an excuse for reinstating war? Or, if the circumstances permit, and there happens to be a change of government in the other party, what will prevent him from refusing to receive a new Minister, declaring the peace treaty suspended, and, again, reinstating war?

Madison made these arguments despite the fact that he was fully aware that he, Jefferson, and other Republican leaders were fully caught up in the pro-French fervor sweeping the nation and had acted at the height of the controversy, if not to encourage, then certainly not to discourage, huge public displays of pro-French sympathies, that undoubtedly encouraged citizens to violate neutral duties, were immensely provocative, and could well have led, intentionally or otherwise, to war. He was also aware that Hamilton was utterly opposed to going to war and that the whole purpose of his seven *Pacificus* essays was to justify a policy of peace. As his constitutional doctrines implied, Madison's fundamental purpose – despite his rhetoric – was not to safeguard peace against the scourge of war, but to preserve the possibility that the legislature would be in as unfettered a position as possible to vote for war should circumstances, on the Republican view, so warrant. Thus, what appeared to be fundamentally an anti-war constitutional position, turns out to be, on reflection, its opposite. Remarkably, this same tension – between anti-war ideology, and assertive, if not aggressive, foreign policy instincts exacerbated by populist style politics – remained at the heart of Republican foreign affairs thinking throughout the following two decades, until it finally yielded disaster and war.

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#### **IV. ALEXANDER HAMILTON AND THE THEORY OF ENLIGHTENED STATESMANSHIP**

##### **A. The Jay Treaty Controversy**

The explosive controversy over the Jay Treaty in 1795-96 provided the context, and motivation, for Hamilton's *The Defence* essays. The origins of the Jay Treaty go back to the beginnings of U.S. national history. In the 1783 Treaty of Peace ending the American Revolution, Great Britain recognized the new nation's independence and agreed to a surprisingly generous territorial settlement. The boundaries extended all the way to the Mississippi River in the west and along a somewhat uncertain line of demarcation in the north. Almost immediately, however, disputes erupted over whether the terms of the treaty were being complied with on both sides. The crucial obligations on the United States were in Articles IV and VI. Article IV required the United States to remove any impediments to the recovery by British creditors of substantial pre-War debts owed by Americans debtors. This provision sought to undo the acts of a number of states, which, during the War, had adopted laws confiscating or sequestering the debts. Article VI required the United States to refrain from taking any further reprisals against Loyalists. For its part, the British agreed to remove all British troops from U.S. territory, and, in the process, to refrain, as specified in Article VII, from "carrying away any Negroes (*i.e.*, slaves)" belonging to Americans. Nevertheless, as it withdrew its forces from New York and other areas, the British military evacuated a large number of former slaves. The British government argued that Article VII did not apply to "Negroes" who had been emancipated by

the British military during the course of the War, but only to those that were still slaves when the Treaty of Peace was concluded. On the American side, the state governments broadly resisted compliance with Articles IV and VI, leading the British to refuse – or at least giving them an excuse to refuse – to withdraw from a string of forts stretching across New York and the Great Lakes region. The failure to pay the debts quickly emerged as a major diplomatic issue. The inability of the Confederate Congress to force the states to comply with the Treaty seriously undermined the diplomatic credibility of the Confederation not only in Britain but across Europe. It was among the chief considerations that prompted the Philadelphia Convention and powerfully influenced the shape that the Constitution would ultimately take. To add to the difficulties, as the geography of the northern territory became better known, it emerged that the treaty line of demarcation was ambiguous and based, in part, on erroneous topographical assumptions. This added an important boundary dispute to the outstanding diplomatic issues.

These diplomatic disputes generated considerable acrimony, not only between the two nations but among Americans dissatisfied with the behavior of the states and the weakness of the Confederation. For the British, the payment of the debts was a critical issue. In part, the refusal to comply created significant domestic political complications for the British government. Perhaps even more importantly, in view of the magnitude of British financial capital invested around the globe, to acquiesce in the American treaty violations risked setting a dangerous precedent that the British government could not afford to ignore. On the American side, the continued British occupation of the forts had both economic and security consequences. Control of the forts meant control of the valuable fur trade. More importantly, it enabled the British to exercise influence over still powerful Indian tribes in the region, which it could take advantage of in ways that posed serious threats to frontier settlements and further westward expansion. The

British unwillingness to pay for the liberated slaves was a source of additional irritation. The acrimony engendered by these issues was compounded by an early decision of the British government following independence to adopt an unfavorable commercial policy towards the new nation, extending the Navigation Act to American trade with Britain's West Indian colonies. This unlooked for consequence of independence inflicted a serious blow to U.S. economic interests and helped to sustain, and inflame, already existing resentments towards the nation's erstwhile enemy.

Matters grew dramatically worse in late 1793 and early 1794 in response to two British actions. First, as part of its war effort against France, the British government issued a series of Orders in Council that adopted expansive interpretations of belligerent rights to interfere with neutral shipping and proceeded to direct the British Navy to enforce those rights even on American merchant vessels who had not received notice of the change in British policy. More than two hundred vessels were quickly seized. Second, at around the same time, Americans received reports of a provocative speech allegedly delivered by Lord Dorchester, Governor-General of British North America, to local Indian tribes, that seemed to suggest that war was imminent and to encourage Indian hostilities.

News of these developments arrived just as it finally seemed that the Washington Administration had successfully navigated the nation through the crisis provoked by the outbreak of the European wars and the arrival of Citizen Gênet in the United States. The American reaction was uniformly one of shock and outrage. Many people on both sides of the political spectrum seemed to believe that the British actions made war likely, if not inevitable. Led by Madison in the House, Republicans pressed for the immediate adoption of measures of economic retaliation. In fact, Jefferson and Madison had long been pressing proposals for commercial

discrimination against Britain as a means of coercing changes in its commercial policy. The most recent example of their advocacy of a policy of “peaceful coercion” had been Jefferson’s report to Congress on the state of American foreign trade – his last act as Secretary of State – in which he strongly advocated the adoption of commercial sanctions. Madison now seized the moment to renew those proposals, only this time in an even stronger form. Moreover, notwithstanding the still simmering controversy over the British debts, Republicans proposed to up the ante further by again sequestering private British debts in the United States, in this case ostensibly to create a fund for the payment of reparations to American victims of the British maritime “spoliations.” Whether Madison was right in thinking that these economic measures would bring Britain to heel is dubious, but it was clear that they were provocative in the extreme. Not only would they inflict real economic injury on Britain – which was their point after all – but they would take effect while Britain was engaged in a major European war, thus favoring the interests of her enemy. Rightly or wrongly, Britain was likely to view them as serious violations of American neutral duties and, consequently, as a just cause of war. Perhaps surprisingly, Republicans emphatically denied that the measures would provoke war and, even as they pressed for reprisals, resisted Federalist efforts to begin undertaking military preparations. In contrast, Federalists – preparing for the worst while hoping for the best – argued in favor of military preparations but also for a further effort at negotiations. Moreover, they opposed the adoption of reprisals in advance of the negotiations as imprudent and unduly provocative. Washington agreed, and appointed Chief Justice John Jay as envoy in a last effort to find a negotiated settlement of outstanding issues. While the country awaited the results of his mission, there was a kind of stasis in the ongoing disputes, which would quickly prove to have been just the eye of the storm.



When the treaty arrived in the Spring of 1795, it was undoubtedly a disappointment to just about everyone. Britain had used its leverage to exact a hard bargain, and many aspects of the treaty were, in some sense, unequal, although in retrospect, given the vast inequality in bargaining power, not so unequal as to occasion much surprise. Broadly speaking, the treaty dealt with five different sets of issues. First, in its most crucial provisions, it resolved most of the outstanding issues arising out of the Treaty of Peace and the recent neutrality imbroglio. Essentially, it sent the debts issue, the disputed captures under the Orders in Council, and the boundary issues to a series of international arbitrations, to be resolved by mixed commissioners from both countries with a tie-breaking commissioner to be chosen by lot. The British also agreed to withdraw from the forts. However, in one of the aspects criticized as most obviously unequal, the treaty failed to provide any resolution of the Article VII issue about the British evacuation of emancipated slaves at the end of the Revolutionary War.

Second, the treaty contained a number of provisions that dealt with disputed neutral rights questions under the law of nations. On these points, the treaty arguably gave up some modest ground from the American pro-neutral rights perspective, although how far it actually did so, especially in light of earlier diplomatic concessions, was disputable. Third, the treaty contained a number of commercial provisions that facilitated trade between the two nations, placing it upon a most favored nation footing. Putting aside whether these provisions benefitted Britain more than the United States – they undoubtedly benefitted both – the treaty did little or nothing to open up the West Indian trade to American merchant vessels, a crucial U.S. aim. Fourth – and perhaps most irritating to Republicans – the treaty ruled out any measures of commercial discrimination or retaliation, specifically prohibiting as well the sequestration of debts as a war measure or reprisal. In one fell stroke, these provisions obviated a core, and highly treasured,

feature of the Republican strategy for dealing with Great Britain, which Jefferson and Madison had made among their highest priorities. It did so, moreover, on the authority of the President and two-thirds of the Senate, overriding the views of the Republicans in the House. It thereby revealed in the starkest terms the political implications of the Constitution's exclusion of the House from the treaty-making process. Lastly, the entire treaty, and some of its specific provisions, were likely to be offensive to France, which would be inclined to see in them, whether rightly or wrongly, violations of the existing Franco-American treaties dating back to the Revolutionary War and a tilting of the United States toward Britain in the ongoing conflict. It would have been hard to deny that ratification of the treaty would auger poorly for U.S.-French relations, and this aspect of the treaty was also played an important role in inflaming Republican sentiment.

Despite the weaknesses of the treaty from the U.S. perspective, the Federalist dominated Senate quickly gave its consent and returned the treaty to Washington, who delayed ratification as he pondered his next step. In the meantime, when the treaty text was leaked to the Republican press, it set off a firestorm of protest. On the substance, dozens of Republican writers – among whom were a number of leading Republican figures – wrote essays attacking the treaty, picking apart its provisions piece by piece and finding virtually every provision not only objectionable but unconstitutional. The core of the Republican critique was the perceived inequality in the treaty provisions, which, Republicans asserted, rendered it an insult to the nation and ratification dishonorable to the national character. Impassioned essays found indignities throughout the text, and they leveled especially harsh criticisms of Jay. He had kowtowed at the foot of Royalty, conceding everything, while gaining nothing worthwhile in return. Moreover, he should have insisted on U.S. positions on the many outstanding legal disputes, rather than waiving some and

sending others to uncertain arbitration. Some even argued that Jay should have demanded reparations as a condition of further negotiation. At all events, he should not have conceded the one effective weapon in the U.S. arsenal, commercial discrimination and sequestration of British debts.

On the constitutional front, Republican writers offered a whole series of arguments that would have – and were undoubtedly meant to – eviscerate the treaty power and that were essentially frivolous. Among the arguments pressed vigorously, the most radical was the claim that the treaty power does not extend to the making of stipulations on any subject falling within the scope of Congress' Article I, § 8 powers. It was of no moment that, on this account, the treaty power would be rendered all but nugatory. Commercial treaties would be unconstitutional because they interfered with Congress' power over foreign commerce. Both peace treaties and treaties of alliance would unconstitutionally interfere with Congress' war powers, and treaties dealing with the naturalization of aliens or alien rights would unconstitutionally interfere with the naturalization power. Even treaties requiring the payment of monies would unconstitutionally interfere with Congress' appropriations power. Despite their acknowledgment that this interpretation would virtually nullify the treaty power – and render unconstitutional almost every provision of the Jay Treaty, as well as of every other treaty concluded since the French Treaties of 1778 – Republicans enthusiastically embraced it. At the same time, they offered a host of other constitutional arguments that sought to narrow the scope of the treaty power even further. Thus, it was not only treaty stipulations on subjects falling within the scope of Congress' Article I powers that were unconstitutional. So, too, were treaty stipulations on subjects reserved to the legislative authority of the states, such as, for example, those dealing with the rights of aliens to own real property, a typical subject of treaties in this era and one

which had been included in a number of the treaties concluded during the Confederation (as well as in Article 9 of the Jay Treaty). Moreover, treaty stipulations that could result in the cession of national territory (like the Jay Treaty articles referring the boundary issues to arbitration) were also unconstitutional, at least if not justified by circumstances of extreme necessity and even then only with the consent of the states whose territory would be affected. Furthermore, treaty stipulations for the arbitration of international legal controversies (like those at the core of the Jay Treaty) were unconstitutional because they interfered with the appointments power (in that the other nation's commissioners would not be nominated by the President and confirmed by the Senate), the exclusive jurisdiction of the federal judiciary, and the 7<sup>th</sup> Amendment right to a jury trial, and because they violated due process in not requiring the arbitration commissions to apply the common law rules of evidence. There was a flippant – or perhaps a revolutionary – quality to the Republican's arguments that was captured in Jefferson's frank acknowledgment that he saw “not much harm in annihilating the whole treaty making power.”

This extreme Republican reaction was prompted in part by a growing conviction – much confirmed by the Jay Treaty itself – that the Presidency was a “monarchical,” and the Senate an “aristocratical,” institution, and that the survival of republicanism depended urgently on ousting them of the power to determine the nation's fate, as the treaty power now appeared to empower them to do. Even more immediate was the goal of convincing a wavering Washington to decline ratification. Although wrong-headed as an interpretation of Washington's psychology, Republicans seemed to believe that throwing up a lot of dust might help push him in their direction. When that proved mistaken – and when Madison assumed more direct control over Republican political strategy in opposition to the treaty – they moved away from these radical critiques and planned instead for a more disciplined effort to assert a role for the House in the

treaty-implementation process that would enable them to veto the treaty in the branch over which they had majority influence. The wisdom of this shift became all the more evident after Hamilton entered into the debate with a crushing reply to their earlier constitutional positions.

## **B. Hamilton's Theory of Enlightened Statesmanship**

The initial Republican attack on the treaty provided the context for Hamilton's *The Defence* essays and for the theory of foreign relations that is at its foundation, which I call his theory of Enlightened Statesmanship. The essays were a prodigious effort (longer even than his efforts in *The Federalist Papers*) and were certainly among his most brilliant writings. Of course, their immediate purpose was not to offer a theory at all, but to defend the Jay Treaty against the scathing Republican attacks that had momentarily put Washington and the Federalists on the defensive, leaving the treaty politically vulnerable in case the House of Representatives chose to assert constitutional authority over treaties. The essays are a comprehensive – at times even laborious – effort to address every article of the treaty and every even remotely plausible criticism to which they had been subjected. Hamilton's aims were also polemical, seeking both to place the treaty in a positive light and to undermine the credibility of the Republican writers and thereby their influence on public opinion.

At the same, building on ideas that he had developed in earlier foreign policy essays, Hamilton took the opportunity to offer the public a fully developed account of the principles that ought to guide the conduct of foreign affairs. Presumably, he imagined that casting his more casuistic arguments as applications of a sophisticated theoretical framework would enhance their persuasiveness, but it seems clear as well that he hoped to offer the nation a lasting framework for carrying out the most delicate, and potentially most consequential, duty of its new

government. This must have seemed all the more necessary to him in view of the Republican reaction to the treaty and the highly politicized, and undisciplined, manner in which they had promoted opposition to it. Hamilton must have had a disturbing sense of *déjà vu*. From his perspective, the Republican attacks seemed to reveal that little progress in the understanding of the proper principles of foreign relations had been made since the days of the Confederation when the states that had resisted compliance with the Treaty of Peace justified their action with arguments that were eerily similar to those now being offered against the Jay Treaty.

Given the goals of the essays, Hamilton nowhere offered a systematic exposition of his theoretical ideas, but instead interlaced them throughout the course of his more particular arguments. Consequently, his views must be reconstructed to bring out their overall shape and coherence. What follows is an effort at such a reconstruction.

Hamilton posits a set of Enlightenment-inspired values that inform his account: Among these are the pursuit of peace, commerce, national self-interest, national honor (on a rational interpretation), and justice. These are intrinsic goods that Hamilton assumes throughout are the proper ends at which the conduct of foreign relations should aim.

In presenting his framework, Hamilton starts by examining the internal political dynamics within a state – especially a republican state like the United States – that threaten to undermine the proper and rational conduct of its foreign affairs. Here, he offers an account of faction and of individual and collective political psychology that focuses on the unique features of the foreign affairs context and especially of the problem of national passions. He then shows how the obstacles to rational action that arise from these internal dynamics are compounded in the context of the interactions between two states, both of which are affected by similar internal dynamics, in addition to the systemic dynamics that arise from their state to state interactions.

Yet a further complicating factor results from the potential involvement or interference of third party states. These complications make the rational conduct of foreign relations especially difficult to manage, and they account for the peculiar delicacy of international relations, with its constant potential for downward spirals into irrational violence, mutual self-destruction, injustice, and ultimately national calamity.

To avoid these self-destructive cycles, Hamilton offers a series of principles, or maxims, designed to guide the conduct of foreign affairs. In part, these are principles of prudence; in part, principles of justice and international law. Their proper application depends on a capacity for sober assessment of the long-term rational interests of the state and of its real economic and military capacities; a commitment to candidness and impartiality in evaluating the claims and pretensions of one's own nation; an ability to overcome national passions, vanity and pride, and to acknowledge error; a willingness to compromise; and a recognition of the need to understand, and the flexibility to accommodate, the important interests even of an adversary. These principles, in turn, give rise to conceptions of patriotism and national honor as rational ideals, which affirm the value of standing up for truth and impartiality even in the face of popular criticism and untoward political consequences and which resist the seductions of false pride and resentment. Even national humiliation, on Hamilton's account, occurs not just when the state acquiesces in the insults of a foreign power, but equally when the state violates its duties of justice and the law of nations. The law of nations defines the state's duties of justice, and natural law methodology for Hamilton is appropriately used not to insist on the state's perspective in the face of contrary conventional and customary practices but to restrain the state from engaging in unjust practices even when the customary or conventional law of states is more permissive. At the same time, however, none of this implies that war is always unjustifiable or that the state

should acquiesce in violations of its rights or injuries and insults. In Hamilton's view, war is an unavoidable necessity in the international state system, and states accordingly have to prepare for its eventuality or ultimately suffer dishonor. Still, war should only be resorted to as a last measure in response to insults or violations of fundamental interests of the state, which cannot be satisfactorily resolved through negotiations. Even when war is necessary, it should be conducted in accordance with liberal principles of humanity and the law of nations. Both the interests of the state and its honor coincide in rendering justice and compliance with law essential principles for the conduct of war and foreign affairs.

Hamilton begins with an analysis of the internal dynamics within the state that threaten its capacity for pursuing a rational foreign policy. Referring to the division in America between partisans of Britain and France, he notes that there is a dangerous tendency among citizens to nurse resentments against particular foreign powers and to identify closely with others. This was a point on which he dwelled in his *Pacificus* essays and would again appear, at his urging, as a central theme in Washington's *Farewell Address*. These resentments and attachments powerfully influence the way people perceive the interests of the nation, and the passions thus inflamed undermine the capacity for rational reflection and analysis. According to Hamilton, this dynamic was strongly in place in the case of the Jay Treaty:

It was known, that the resentment produced by our revolution war with Great Britain had never been entirely extinguished, and that recent injuries had rekindled the flame with additional violence. It was a natural consequence of this, that many should be disinclined to any amicable arrangement with Great Britain, and that many other should be prepared to acquiesce only in a treaty which should present advantages of so striking and preponderant a kind as it was not reasonable to expect could be obtained.



In contrast, enthusiasm for France, because of its aid in the American Revolution and, even more importantly, because of widespread identification with the French Revolution, would have the opposite impact:

It was not to be mistaken, that an enthusiasm for France and her revolution, throughout all its wonderful vicissitudes, has continued to possess the minds of the great body of the people of this country; and it was to be inferred, that this sentiment would predispose to a jealousy of any agreement or treaty with her most persevering competitor.

The danger that these prejudices posed was amplified by the problem of faction and by the manipulations of demagogues seeking to advance their personal ambitions.

It is only to consult the history of nations, to perceive, that every country, at all times, is cursed by the existence of men who, actuated by an irregular ambition, scruple nothing which they imagine will contribute to their own advancement and importance: in monarchies, supple courtiers; in republics, fawning or turbulent demagogues, worshipping still the idol—power—wherever placed, whether in the hands of a prince or of the people, and trafficking in the weaknesses, vices, frailties, or prejudices of the one or the other.

Moreover, the problem was greatly aggravated because “party rivalships, of the most active kind,” were so directly in play. As a result, these foreign attachments and resentments gave “the fullest scope to insidious arts to perplex and mislead the public opinion.”

From the combined operations of these different causes, it would have been a vain expectation that the treaty would be generally contemplated with candor and moderation, or that reason would regulate the first impressions concerning it.

Moreover, in view of the interests of other foreign powers – in this case France – the difficulties are complicated yet further by the intermeddling of outside actors:

It was not to have been doubted, that there would be one or more foreign powers indisposed to a measure which accommodated our differences with Great Britain, and laid the foundation of future good understanding, merely because it had that effect. Nations are never content to confine their rivalships and enmities to themselves. It is their usual policy to disseminate them as widely as they can, regardless how far it may interfere with the tranquillity or happiness of the nations which they are able to influence.

The impassioned reaction to the treaty demonstrated the force of these dynamics:

Can the result be considered as any thing more than a sudden ebullition of popular passion, excited by the artifices of a party which had adroitly seized a favorable moment to furorize the public opinion?

Starting with these general observations, Hamilton dug deeper into the political psychology of foreign policy-making, focusing on the dysfunctionality of permitting foreign policy to be governed by national pride and passions. With some understatement, he noted that “[n]ational pride is generally a very untractable thing,” adding: “The truth unfortunately is, that the passions of men stifle calculation; that nations the most attentive to pecuniary considerations, easily surrender them to ambition, to jealousy, to anger, or to revenge.” Thus, for example, although there was consensus on the proposition that war was an evil generally to be avoided – a proposition that applied with special force to the United States – the ability of people to reason clearly in applying it was frequently undermined by confusions engendered by national passions:

“Peace, in the particular situation of this independent country, is an object of such great and primary magnitude, that it ought not to be relinquished, unless the relinquishment be clearly necessary to preserve our honor in some unequivocal point, or to avoid the sacrifice of some right or interest of material and permanent importance.” This is the touchstone of every question which can come before us respecting our foreign concerns. As a general proposition, scarcely any will dispute it; but in the application of the rule there is much confusion of ideas—much false feeling, and falser reasoning. The ravings of anger and pride are mistaken for the suggestions of honor.

Compounding these difficulties was a cognitive vulnerability to wishful thinking and self-delusion, typically manifested in an inability to acknowledge or comprehend the actual limits of the nation’s power:

But the misfortune is, that men will oppose imagination to fact. Though we see Great Britain predominant on the ocean; though we observe her pertinaciously resisting the idea of pacification with France, amidst the greatest discouragements; though we have employed a man whose sagacity and integrity have been hitherto undisputed, and of a character far from flexible, to ascertain what was practicable; though circumstances favored his exertions; though much time and pains were bestowed upon the subject; though there is not only his testimony, but the testimony of other men who were

immediately on the scene, and in whom there is every reason to confide, that all was attained which was attainable: yet we still permit ourselves to imagine, that more and better could have been done, and that by taking even now a high and menacing tone, Great Britain may be brought to our feet.

This dangerous mix of pride and bluster, fortified by over-estimations of national strength, portended disastrous consequences, or, more probably, when realities finally sunk in, humiliating retreats:

It is curious to observe the inconsistency of certain men. They 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.

The problem, at least in part, arose from a misconception of what national honor actually consists in. "True honor," Hamilton postulated, "is a rational thing. It is as distinguishable from Quixotism as true courage from the spirit of the bravo." It was emphatically not to be confused with an insistence on the making of unreasonable demands, on stubborn refusals to compromise and accommodate conflicting interests, on persistence in the defense of erroneous claims, or on a penchant for conflating expressions of moderation with weakness. This erroneous interpretation of national pride was well reflected, for example, in the common criticism leveled at Jay for being too deferential in the style of his diplomacy:

Even a style of politeness in our envoy has been construed to his disadvantage. Because he did not mistake strut for dignity, and rudeness for spirit; because he did not, by petulance and asperity, enlist the pride of the British court against the success of his mission, he is represented as having humiliated himself and his nation. It is forgotten that mildness in the manner and firmness in the thing are most compatible with true dignity, and almost always go further than harshness and stateliness.

Worse still were the claims that Jay had dishonored the nation by not insisting on immediate British withdrawal from the forts as a condition of further negotiations:

In a case of incontestable *mutual* infractions of a treaty, one of the parties is to demand, peremptorily of the other, an unconditional performance upon his part, by way of

preliminary, and without negotiation. An envoy sent to avert war, carrying with him the clearest indications of a general solicitude of his country that peace might be preserved, was, at the very first step of his progress, to render hostility inevitable, by exacting, not only what could not have been complied with, but what must have been rejected with indignation. The government of Great Britain must have been the most abject on earth, in a case so situated, to have listened for a moment to such a demand. And because our envoy did not pursue this frantic course—did not hold the language of an imperious Bashaw to his trembling slave, he is absurdly stigmatized as having prostrated the rights of freemen at the foot of royalty. . . . To have taken, therefore, the imperious ground which is recommended, in place of that which was taken, would have been not to follow the admonitions of honor, but to have submitted to the impulse of passion and phrensy.

Indeed, some writers had even insisted that Jay should have demanded payment of reparations for the disputed captures in the West Indies without allowing an opportunity for an impartial determination of the specific facts of each case and of the amount of actual damages suffered.

Could it be expected of Great Britain, that she would pay, till it was fairly ascertained what was to be paid . . . Would it have been justifiable on our part, to make her compliance with such a demand, the sine qua non of accommodation and peace? Whoever will believe that she would have complied with so humiliating a requisition, must be persuaded that we were in a condition to dictate, and she in a condition to be obliged to receive any terms that we might think fit to prescribe! The person who can believe this, must be, in my opinion, under the influence of a delirium, for which there is no cure in the resources of reason and argument.

The obstacles to rational foreign policy engendered by national passions were that much more treacherous, moreover, once one further recognized that the dynamics that tended to give rise to unreasonable demands and pretensions in one state were equally likely to work to a similar effect in the other party to a dispute. Worse still, when both parties were acting under these influences, the likelihood of war and destructive conflict increased immeasurably. It was to avoid this self-reinforcing dynamic that Hamilton offered a set of principles, or maxims, designed to govern the conduct of foreign affairs, with the aim of maximizing the possibilities for rational behavior and the mutually beneficial and peaceful resolution of international controversies.

A core principle that underlay many of Hamilton's more specific maxims was the necessity of acting in ways that are respectful of the dignity of the other nation and that eschew the making of demands that might be viewed as insulting or humiliating. Such gestures are likely to provoke the nation's pride and make compromise impossible.

Pride is roused; resentment kindled; and where there is even no previous disposition to those hostilities, the probability is that they follow. Nations, like individuals, ill brook the idea of receding from their pretensions under the rod, or of admitting the justice of an act of retaliation or reprisal by submitting to it.

Indeed, in some cases, it may well be rational for a state to take umbrage at such gestures in order to preserve its reputation and standing. Thus, for example:

In the councils of no country does [national pride] act with greater force than in those of Great Britain. Whatever it might have been in her power to yield to negotiation, she could have yielded nothing to compulsion, without self-degradation, and without the sacrifice of that political consequence which, at all times very important to a nation, was peculiarly so to her at the juncture in question.

For this reason, it would have been a mistake to adopt measures of reprisal, as Republicans had proposed, before seeking a negotiated solution to the outstanding disputes with Britain.

When one nation has cause of complaint against another, the course marked out by practice, the opinion of writers, and the principles of humanity, the object being to avoid war, is to precede reprisals of any kind by a demand of reparation. To begin with reprisals is to meet on the ground of war, and put the other party in a condition not to be able to recede without humiliation.

\* \* \* \* \*

But the true inference is, that we ought not lightly to seek or provoke a resort to arms; that, in the differences between us and other nations, we ought carefully to avoid measures which tend to widen the breach; and that we should scrupulously abstain from whatever may be construed into reprisals, till after the employment of all amicable means has reduced it to a certainty that there is no alternative.

Moreover, the failure to follow this practice will ultimately prove self-defeating, because the humiliating gesture will unify the opposing nation's people in support of its government and strengthen its national resolve, while, correspondingly, it will undermine the unity of the state's

own citizens when the privations of war lead them to reevaluate how they found themselves in such a position.

Had this course been pursued by us, it would not only have rendered war morally certain, but it would have united the British nation in a vigorous support of their government in the prosecution of it; while, on our part, we should have been quickly distracted and divided. The calamities of war would have brought the most ardent to their senses, and placed them among the first in reproaching the government with precipitation, rashness, and folly for not having taken every chance, by pacific means, to avoid so great an evil.

Nor does national honor require the adoption of reprisals before negotiations proceed. On the contrary, “it is consistent with honor to precede rupture by negotiation, and whenever it is, reason and humanity demand it. Honor cannot be wounded by consulting moderation.”

A second maxim proposed by Hamilton was that states should generally refrain from insisting on receiving explicit admissions that the other party was in the wrong. This too tended to provoke national pride and diminished the possibilities for peaceful resolution of disputes. In this context too, Hamilton was responding to repeated Republican claims that Jay should have insisted not only on an immediate British withdrawal from the forts, but also on an acknowledgment that Britain had been first to violate the Treaty of Peace.

[N]othing is more common, in disputes between nations, than each side to charge the other with being the aggressor or delinquent. . . . This mutual crimination, either from the nature of circumstances, or from the illusions of the passions, is sometimes sincere; at other times it is dictated by pride or policy. But in all such cases, where one party is not powerful enough to dictate to the other, and where there is a mutual disposition to avoid war, the natural retreat for both is in compromise, which waives the question of first aggression or delinquency. This is the salvo for national pride; the escape for mutual error; the bridge by which nations, arrayed against each other, are enabled to retire with honor, and without bloodshed, from the field of contest. . . . What is to be done when the pride of neither will yield to the arguments of the other? War, or a waiver of the point, is the alternative. What sensible man, what humane man, will deny that a compromise, which secures substantially the objects of interest, is almost always preferable to war on so punctilious and unmanageable a point?

Moreover, it was not only wrong in principle to insist on humiliating concessions of this kind, but it was a further error not to acknowledge that the righteous pretensions of one's own nation might well reflect national partiality more than a sober, impartial assessment of the real merits of the dispute. This possibility brought out even more clearly the provocative character of such demands. Good faith requires a willingness to be more self-critical and, where justified, to challenge politically expedient conventional wisdom, even if that means, as it did in the case of the Treaty of Peace, acknowledging the weaknesses in the official positions of one's government.

It would not follow, that, because the ground had been taken by the government, it ought to have been pertinaciously kept, if, upon fair examination, it had appeared to be not solid, or if an adherence to it would have obstructed a reasonable adjustment of differences.

Nations, no more than individuals, ought to persist in error, especially at the sacrifice of their peace and prosperity.

Indeed, to illustrate this point, Hamilton undertook an extended examination of the question of which party first violated the Treaty of Peace and effectively demonstrated – notwithstanding the repeated contrary assertions by the Washington Administration, including in important diplomatic exchanges with Britain – how weak the U.S. claim was and how equivocal and lacking in substance the arguments were that had been made to support it. Appealing “to the understandings and hearts of candid men – men who have force of mind sufficient to rescue themselves from the trammels of prejudice, and who dare to look even unpalatable truths in the face,” Hamilton observed:

[t]he discussion in the last two numbers has shown, if I mistake not, that this country by no means stands upon such good ground, with regard to the inexecution of the treaty of peace, as some of our official proceedings have advanced, and as many among us have too lightly credited.

He then offered an account of patriotism that valorized not the commitment to national partiality but the willingness, at critical moments, to contradict popular prejudices in favor of truth, as he had just displayed:

The task of displaying this truth has been an unwelcome one. . . . The true patriot, who never fears to sacrifice popularity to what he believes to be the cause of public good, cannot hesitate to endeavor to unmask the error, though with the certainty of incurring the displeasure and censure of the prejudiced and unthinking.

Pursuing the theme of impartiality further, Hamilton addressed the issue of Article VII of the Treaty of Peace and the carrying away of slaves in a similar vein. Although the U.S. government had consistently claimed that Britain had violated this provision, Hamilton sought to show that the matter was not actually so clear, that the British interpretation was at least plausible, if not persuasive, and, therefore, that Jay had properly waived the point. This was particularly the case because the American interpretation of Article VII rendered it odious, both in requiring the British government to dishonor its promises to the liberated slaves and in requiring the reenslavement of persons made free. Especially in cases of ambiguity, Hamilton argued, treaties were not to be given an odious construction. That was sufficient to justify Jay's decision, even though it contradicted the nation's longstanding interpretation of the provision and undermined the national interest in obtaining compensation for the substantial "property" losses involved.

In the interpretation of treaties, things odious or immoral are not to be presumed. The abandonment of negroes, who had been induced to quit their masters on the faith of official proclamation, promising them liberty, to fall again under the yoke of their masters, and into slavery, is as odious and immoral a thing as can be conceived. It is odious, not only as it imposes an act of perfidy on one of the contracting parties, but as it tends to bring back to servitude men once made free. The general interests of humanity conspire with the obligation which Great Britain had contracted towards the negroes, to repel this construction of the treaty, if another can be found. . . .

\* \* \* \* \*



Let me now ask this question of any candid man: Is our construction of the article respecting the negroes so much better supported than that of Great Britain, as to justify our pronouncing with positiveness, that the carrying them away was a breach of the treaty?

Hamilton's third maxim underscored the value of submitting intractable legal disputes to arbitration. Here, he was responding to various criticisms that had been made of the Jay Treaty's reference of the major outstanding legal disputes to commissioners for arbitration. Doing so, he argued, was the most effective and equitable method of resolving these kinds of disputes, since neither party could complain of unfair treatment at the hands of a tribunal of mixed commissioners, especially when the deciding commissioner was chosen by lot. It was not surprising that critics would point to the advantages of having legal disputes resolved in the nation's own courts, but, Hamilton noted, both sides would undoubtedly feel the same way, making it impossible for either to so insist.

If one party could not convince the other by argument, of the superior solidity of its pretensions, I know of no alternative but arbitration or war. Will any one pretend that honor required us in such a case to go to war, or that the object was of a nature to make it our interest to refer it to that solemn, calamitous, and precarious issue? No rational man will answer this question in the affirmative. It follows, that an arbitration was the proper course . . .

It is objected, that too much has been left to chance; but no substitute has been offered which would have been attended with less casualty. The fact is, that none such can be offered. . . . What is left to chance? . . . Is it that this reference to lot leaves it too uncertain of what character or disposition the third commissioner may be? If this be not rather a recommendation of the fairness of the plan, how was it to be remedied? Could it have been expected of either of the parties, to leave the nomination to the other? Certainly not. . . . Would the sword have been a more certain arbiter? Of all uncertain things, the issues of war are the most uncertain. . . .

In constructing a tribunal to liquidate the quantum of reparation, in the case of a breach of treaty, it was natural and just to devise one likely to be more certainly impartial than the established courts of either party. Without impeaching the integrity of those courts, it was morally impossible that they should not feel a bias towards the nation to which they belonged, and for that very reason they were unfit arbitrators. In the case of the spoliations of our property, we should undoubtedly have been unwilling to leave the

adjustment in the last resort to the British courts; and by parity of reason, they could not be expected to refer the liquidation of compensation in the case of the debts to our courts.  
...

Nations acknowledging no common judge on earth, when they are willing to submit the question between them to a judicial decision, must of necessity constitute a special tribunal for the purpose. The mode by commissioners, as being the most unexceptionable, has been repeatedly adopted.

Yet another of Hamilton's core principles emphasized the importance of respect for justice and the law of nations. This was a point on which he was especially emphatic. "True honor," he claimed, "can never be separated from justice." In a reflection of his classical Enlightenment optimism, he unabashedly declared:

Let me add as a truth—which, perhaps, has no exception, however uncongenial with the fashionable patriotic creed—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.

Throughout the essays, moreover, he harshly condemns the state violations of the Treaty of Peace and the law of nations and describes the humiliation that enlightened people feel at the unjust conduct of their government:

The disposition to infract the treaty, which, in several particulars, discovered itself among us, almost as soon as it was known to have been made, was, from its first appearance, a source of humiliation, regret, and apprehension to those who could dispassionately estimate the consequences, and who felt a proper concern for the honor and character of the country.

Hamilton was particularly motivated to show that the article of the Jay Treaty prohibiting the sequestration of private debts was not only wise and just policy but an affirmation of the law of nations. Given how deeply this article interfered with Republican policy for dealing with Great Britain, he was at pains to insist on its status under the law of nations, even without regard to the treaty, and, perhaps because of its uncertain status as a customary principle, he made elaborate natural law arguments to ground the principle. (His argument extended over four full

essays). He also offered an extended examination of the methodology of the law of nations to help support his larger claim. He concluded:

The virulence with which this article has been attacked cannot fail to excite very painful sensations in every mind duly impressed with the sanctity of public faith, and with the importance of national credit and character; at the same time that it furnishes the most cogent reasons to desire that the preservation of peace may obviate the pretext and the temptation to sully the honor and wound the interests of the country by a measure which the truly enlightened of every nation would condemn. . . .

Serious as the evil of war has appeared, at the present stage of our affairs, the manner in which it was to be apprehended it might be carried on, was still more formidable, in my eyes, than the thing itself. It was to be feared, that in the fermentation of certain wild opinions, those wise, just, and temperate maxims, which will for ever constitute the true security and felicity of a state, would be overruled; and that a war upon credit, eventually upon property, and upon the general principles of public order, might aggravate and embitter the ordinary calamities of foreign war. The confiscation of debts due to the enemy, might have been the first step of this destructive process. From one violation of justice to another, the passage is easy. Invasions of right, still more fatal to credit, might have followed; and this, by extinguishing the resources which that could have afforded, might have paved the way to more comprehensive and more enormous depredations for a substitute.

He added portentously: “Terrible examples were before us . . .” Nor was it true, as Republicans argued, that sequestration debts was an essential weapon to enforce respect for U.S. rights:

But so degrading an idea will be rejected with disdain, by every man who feels a true and well-informed national pride; . . . by every man, in fine, who, though careful not to exaggerate, for rash and extravagant projects, can nevertheless fairly estimate the real resources of the country, for meeting dangers which prudence cannot avert. Such a man will never endure the base doctrine, that our security is to depend on the tricks of a swindler. He will look for it in the courage and constancy of a free, brave, and virtuous people—in the riches of a fertile soil—an extended and progressive industry—in the wisdom and energy of a well-constituted and well-administered government—in the resources of a solid, if well-supported, national credit—in the armies, which, if requisite could be raised—in the means of maritime annoyance, which if necessary, could be organized, and with which we could inflict deep wounds on the commerce of a hostile nation. He will indulge an animating consciousness, that while our situation is not such as to justify our courting imprudent enterprises neither is it such as to oblige us, in any event, to stoop to dishonorable means of security, or to substitute a crooked and piratical policy, for the manly energies of fair and open war.

Finally, as is already clear, Hamilton was no pacifist. He argued strenuously for preserving peace, but also insisted that there are circumstances in which war is the only choice consistent with national honor (in its rational construal). Had no accommodation with Britain proved possible, for example, war would have been justified:

It is not to be inferred from this, that we are to crouch to any power on earth, or tamely to suffer our rights to be violated. . . .

For my part, much as I deprecate war, I entertain no doubt that it would have been our duty to meet it with decision, had negotiation failed; that a due regard to our honor, our rights, and our interests would have enjoined it upon us. Nor would a pusillanimous passiveness have saved us from it. So unsettled a state of things would have led to fresh injuries and aggravations; and circumstances, too powerful to be resisted, would have dragged us into war. We should have lost our honor without preserving our peace.

Still, the circumstances that can justify or necessitate war must be understood to be narrow. It must be clear (on an impartial evaluation) that the nation is in the right and that the interests at stake are important and relate to core national concerns:

So likewise, when it is asserted that war is preferable to the sacrifice of our rights and interests, this, to be true, to be rational, must be understood of such rights and interests as are certain, as are important, such as regard the honor, security, or prosperity of our country. It is not a right disputable, or of small consequence, it is not an interest temporary, partial, and inconsiderable, which will justify, in our situation, an appeal to arms.

In this respect, Hamilton distinguished between injuries and insults. The former could justify war in certain circumstances, including when it proved impossible to obtain a monetary reparation. The latter, however, are more likely to leave the nation with little room to maneuver:

It is necessary to distinguish between injuries and insults, which we are too apt to confound. The seizures and spoliations of our property fall most truly under the former head. The acts which produce them, embraced all the neutral Powers, were not particularly levelled at us, bore no mark of an intention to humble us by any peculiar indignity or outrage. . . . It is clear that evils suffered under acts so circumstanced, are injuries rather than insults, and are so much the more manageable as to the species and measures of redress. It would be Quixotism to assert that we might not honorably accept in such a case, the pecuniary reparation which has been stipulated.

Furthermore, when the nation was forced to go to war, it was critical that it conducted the war in accordance with the principles of humanity, justice, and the laws of war. To depart from these principles was not only unjust, but risked dire consequences, as violence would grow even more brutal.

Every species of reprisal or annoyance which a power at war employs, contrary to liberality or justice, of doubtful propriety in the estimation of the law of nations, departing from that moderation which, in later times, serves to mitigate the severities of war, by furnishing a pretext or provocation to the other side to resort to extremities, serves to embitter the spirit of hostilities, and to extend its ravages. War is then apt to become more sanguinary, more wasting, and every way more destructive. This is a ground of serious reflection to every nation, both as it regards humanity and policy; to this country it presents itself, accompanied with considerations of peculiar force. A vastly extended sea-coast, overspread with defenceless towns, would offer an abundant prey to an incensed and malignant enemy, having the power to command the sea. The usages of modern war forbid hostilities of this kind; and though they are not always respected, yet, as they are never violated, unless by way of retaliation for a violation of them on the other side, without exciting the reprobation of the impartial part of mankind, sully the glory and blasting the reputation of the party which disregards them, this consideration has, in general, force sufficient to induce an observance of them.

In fact, complying with the principles of the laws of war is crucial in order to retain good relations with civilized countries, which has significant strategic implications:

Besides (as, if requisite, might be proved from the records of history), in national controversies, it is of real importance to conciliate the good opinion of mankind; and it is even useful to preserve or gain that of our enemy. The latter facilitates accommodation and peace; the former attracts good offices, friendly interventions, sometimes direct support, from others. . . . A contrary policy tends to contrary consequences. Though nations, in the main, are governed by what they suppose their interest, he must be imperfectly versed in human nature who thinks it indifferent whether the maxims of a State tend to excite kind or unkind dispositions in others, or who does not know that these dispositions may insensibly mould or bias the views of self-interest. This were to suppose that rulers only reason—do not feel; in other words, are not men.

This brief summary of Hamilton's theoretical framework does not, of course, capture the full complexity of the views he expressed in his *The Defence* essays. Moreover, it bears emphasis that *The Defence* is a representative expression, if also a further elaboration, of the

views Hamilton expressed throughout his career. Indeed, there is a striking consistency in his theoretical views across long stretches of time, which he articulated not only in his many essays on foreign affairs going back to the period of the Confederation and continuing to the end of his life, but also in his private letters, including to leading public officials whom he was hoping to influence, not least among them Washington. For these reasons, it seems fair to conclude that Hamilton was deeply committed to them. They were not just convenient positions he invoked from time to time for polemical purposes. Moreover, in view of his emphasis on classical Enlightenment values and rationalist thought, describing his approach as one of Enlightened Statesmanship seems apt.

### **C. Hamilton's Enlightened Statesmanship and the Constitution**

Hamilton's theory of the conduct of foreign affairs is important in its own right, but for present purposes, the crucial point is to appreciate the relationship between his theoretical views and his approach to constitutional law in area of foreign affairs. To be sure, his model of Enlightened Statesmanship does not neatly compel one set of constitutional doctrines. However, it does provide the normative underpinnings for his general approach, and the close fit between the two is evident on investigation.

**[Here follows a summary version of the argument of this subsection]:**

1. As previously noted, Hamilton devotes the bulk of his constitutional argument in the final three numbers of *The Defence* to defending a broad construction of the treaty power. This focus clearly reflects the central role of the treaty power in connection with the Jay Treaty debate and in the constitutional challenges that Republican writers launched in the early period after the text became public. Note, one weakness in Hamilton's constitutional discussion was his choice

to focus on the early arguments of Republican writers, rather than the more plausible and monumental argument that it was already clear, by the time Hamilton wrote his constitutional essays, would arise in the House of Representatives: Did the House have a constitutional duty to implement the treaty by appropriating the necessary funds to carry out its provisions for arbitration? That question, in turn, would involve examination, if not resolution, of the further questions of whether treaties could become domestic law unless first implemented by congressional legislation (the self-executing treaty doctrine) and, more generally, what power Congress had, if any, to disregard or violate treaty obligations (the last-in-time rule). These issues, in turn, were various doctrinal manifestations of the ultimate constitutional question: Did the Constitution contemplate that, like the Senate, the House would have a veto over treaties? Hamilton had already addressed these issues in earlier writings (including *Pacificus No. 1*), but, except briefly at the outset, and indirectly in the course of analyzing other issues, he chose not to address them in *The Defence*. I suspect the reason was that he perceived a political indelicacy in assuming that the House would assert a power that was – at least in his view – a clear and blatant violation of a fundamental structural feature of the Constitution. Were the House so to act, he warned,

adieu to all the securities which nations expect to derive from constitutions of government. They become mere bubbles, subject to be blown away by every breath of party. The precedent would be a fatal one; our government, from being fixed and limited, would become revolutionary and arbitrary . . .

Better to assume that no “man in either house of Congress, who values his reputation for discernment or sincerity, will publicly hazard it by a serious attempt to controvert the position.” Doing any more than briefly alluding to the issue, Hamilton must have believed, would tend to legitimate the argument. Not surprisingly, Hamilton did, in fact, simultaneously take these

issues up, but only in a lengthy private memorandum he sent to Washington, which became the basis for Federalist arguments in the House. On the other hand, Hamilton's failure to address these issues – and to controvert only the radical and implausible arguments of the Republican writers – led Fisher Ames, a leading Federalist ally, to mock him gently: Hamilton, he noted pointedly, “holds up the aegis against a wooden sword. Jove's eagle holds his bolts in his talons, and hurls them, not at the Titans, but at sparrows and mice.”

2. Hamilton framed his constitutional argument as a response to the central Republican claim that the treaty power does not extend to treaty stipulations that deal with subjects falling within the scope of Congress' Article I powers. In refuting this claim, Hamilton pressed on every front, from the text of the Treaty and Supremacy Clauses, to the structure of the federal government, to the past practice of the United States under the Confederation and the Constitution itself. His core normative point was to reject the imposition of artificial restraints on the treaty power derived from constitutional limitations on domestic legislation. In view of the principles prescribed by the model of Enlightened Statesmanship, any such restrictions on the scope of the treaty power ran the risk of complicating executive diplomacy and constraining its capacity to compromise in order to manage the peaceful resolution of international disputes and avoid conflict and war. Such limitations were, therefore, inconsistent with the fundamental aims of the conduct of foreign relations.

Hamilton thus insisted on the broad scope of the treaty power:

It was impossible for words more comprehensive to be used than those which grant the power to make treaties. They are such as would naturally be employed to confer a plenipotentiary authority. A power “to make treaties,” granted in these indefinite terms, extends to all kinds of treaties, and with all the latitude which such a power, under any form of government, can possess; the power “to make” implies a power to act authoritatively and conclusively, independent of the after-clause which expressly places treaties among the supreme laws of the land. The thing to be made is a treaty.



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.

This did not mean that there were no limitations on the treaty power. Treaties could not overturn the fundamental structural principles of the Constitution, as, for example, providing “that the judges, and not the President, shall command the national forces.” Beyond these kinds of limits, however, the only others that applied were to be found within the principles of the law of nations itself. Treaties that violated the law of nations – by, for example, making promises that were inconsistent with the nation’s right of self-preservation – would be void under the law of nations and, necessarily, under the Constitution as well:

[T]here is also a national exception to the power of making treaties, as there is to every other delegated power, which respects abuses of authority in palpable and extreme cases. On natural principles, a treaty, which should manifestly betray or sacrifice the private interests of the state, would be null. But this presents a question foreign from that of the modification or distribution of constitutional powers. It applies to the case of the pernicious exercise of a power, where there is legal competency. Thus the power of treaty, though extending to the right of making alliances offensive and defensive, might not be exercised in making an alliance so injurious to the state as to justify the non-observance of the contract.

Beyond these exceptions to the power, none occurs that can be supported.

Of course, avoiding the performance of treaty obligation that were made void by the law of nations itself could not give rise to legitimate complaint by the affected foreign power or be a just cause of war.

Hamilton also sought to make his larger point in more theoretical terms, responding to a common confusion about the relationship between treaty and legislative power. There was a tendency to analyze the constitutionality of exercises of treaty power by focusing only on those aspects of treaties that impose obligations on the state, particularly those that create rules or laws

governing domestic activities. This tendency, he argued, rested upon a serious conceptual error. Treaties were in the nature of contracts and were thus entirely different from legislation, which involved a unilateral determination of the rules that were to govern those subject to the jurisdiction of the state, but which could impose no duties or obligations on foreign countries as to their comparable domestic legislation. When thinking about the principles governing treaties, it was therefore essential to consider not only the domestic effect of treaty obligations but their effect on the law and activities of the other state to the agreement. The aim of treaties, after all, was not domestic regulation as such, but the obtaining of promises by another nation to exercise its legislative powers (or to refrain from exercising its legislative powers) in ways that promoted the national interest. From a legal and practical perspective, legislation simply could not accomplish what treaties could. It was therefore a grave error to hobble the power to enter treaties, as if, in managing its relations with foreign countries, it was possible, or desirable, to insist on inflexibly adhering to the ordinary rules and procedures applicable to domestic legislation. To illustrate this point, Hamilton addressed the difference between the legislative power to regulate foreign commerce, and the power by treaty to enter into binding international commercial treaties. Legislation could prescribe the rule of domestic law applicable to conduct in the national territory.

But it is clearly foreign to 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. It is 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, it is an absurdity to say, that the legislative power of regulating trade is an exception to the power of making treaties.

For this reason, the legislative powers of Congress were not a limitation on the treaty power.

Indeed, it was the other way around:

In considering the power of legislation in its relations to the power of treaty, instead of saying that the objects of the former are excepted out of the latter, it will be more correct, indeed it will be entirely correct, to invert the rule, and to say that the power of treaty is the power of making exceptions, in particular cases, to the power of legislation. The stipulations of treaty are, in good faith, restraints upon the exercise of the last-mentioned power. Where there is no treaty, it is completely free to act. Where there is a treaty, it is still free to act in all the cases not specially excepted by the treaty. Thus, Congress are free to regulate trade with a foreign nation, with whom we have no treaty of commerce, in such manner as they judge for the interest of the United States; and they are also free so to regulate it with a foreign nation with whom we have a treaty, in all the points which the treaty does not specially except.

3. Hamilton specifically addressed each of the arguments that Republicans had made in favor of various restrictions on the treaty power. The argument that limited the treaty power by the legislative powers of Congress, he noted, would have absurd consequences, in addition to the more subtle objections already noted above:

It follows, that if the objections which are taken to the treaty, on the point of constitutionality, are valid, the President, with the advice and consent of the Senate, can make neither a treaty of commerce nor alliance, and rarely, if at all, a treaty of peace. It is probable, that on a minute analysis, there is scarcely any species of treaty which would not clash, in some particular, with the principle of those objections; and thus, as was before observed, the power to make treaties, granted in such comprehensive and indefinite terms, and guarded with so much precaution, would become essentially nugatory. . . .

Moreover, if the power of the executive department be inadequate to the making of the several kinds of treaties which have been mentioned, there is, then, no power in the Government to make them; for there is not a syllable in the Constitution which authorizes either the legislative or judiciary departments to make a treaty with a foreign nation. And 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; since, in fact, our Constitution grants the power of making treaties, in the most explicit and ample terms, to the President, with the advice and consent of the Senate.

Hamilton then addressed more specific implications of this position:

Though Congress, by the Constitution, have power to lay taxes, yet a treaty may restrain the exercise of it in particular cases. For a nation, like an individual, may abridge its moral power of action by agreement; and the organ charged with the legislative power of a nation may be restrained in its operation by the agreements of the organ of its federative power, or power to contract. . . .

Though Congress are empowered to make regulations of trade, yet they are not exclusively so empowered; but regulations of trade may also be made by treaty, and, where other nations are to be bound by them, must be made by treaty.

Though Congress are authorized to establish a uniform rule of naturalization, yet this contemplates only the ordinary cases of internal administration. In particular and 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; thus the absolute cession and plenary dominion of a province or district possessed by our arms in war may be accepted by the treaty of peace on the condition that its inhabitants shall, in their persons and property, enjoy the privileges of citizens.

The same reasoning applies to all the other instances of supposed infraction of the legislative authority: with regard to piracies and offences against the laws of nations, with regard to expenditures of money, with regard to the appointment of officers, with regard to the judiciary tribunals, with regard to the disposal and regulation of the national territory and property. In all these cases, the power to make laws and the power to make treaties are concurrent and co-ordinate. The latter, and not the former, must act, where the co-operation of other nations is requisite.

5. Furthermore, Republican writers had proposed a number of other constitutional limitations on the treaty power, and Hamilton was again at pains to address each one. These arguments cut to the core of his model of Enlightened Statesmanship, effectively undermining the executive's ability to make necessary compromises and employ crucial mechanisms that were essential to empower the executive to resolve international disputes peacefully and avoid irritating irrational national passions and pride. Two examples were particularly salient. First, as noted above, Republicans had objected to the use of arbitration commissions on a number of different constitutional grounds, including the exclusivity of federal court jurisdiction under Article III and the appointments power of the President and Senate in Article II. In view of the vital role of arbitration in Hamilton's system, he sought to dismiss these argument as unacceptable. As to Article III, he observed:

To the objection of the Charleston committee, 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. Could either of them hold plea of a suit of Great Britain, plaintiff, against the United States, defendant? 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.

The same principle contradicts the position that there has been any transfer of jurisdiction from American courts and juries to commissioners. It is a question not between individual and individual, or between our Government and individuals, but between our Government and the British Government; of course, one in which our courts and juries have no jurisdiction. There was a necessity for an extraordinary tribunal to supply the defect of ordinary jurisdiction.

As to the objection rooted in the Appointments Clause, he further noted:

As to what respects the commissioners agreed to be appointed, they are not, in a strict sense, officers. They are arbitrators between the two countries. Though in the Constitutions, both of the United States and of most of the individual States, a particular mode of appointing officers is designated, yet, in practice, it has not been deemed a violation of the provision to appoint commissioners or special agents for special purposes in a different mode.

The second example was the problem of resolving boundary disputes. Republicans had asserted strong constitutional limits on the power to cede territory of the United States and correctly foresaw in the arbitration provisions a potential that, should U.S. pretensions not prevail, some territory claimed by the nation would be effectively transferred to Great Britain. The notion that negotiations to resolve boundary disputes would be hobbled by strong constitutional limitations struck Hamilton as preposterous and as embracing a principle of war at the heart of the Constitution itself:

The submission of this question to arbitration has been represented as an eventual dismemberment of empire, which, it has been said, cannot rightly 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, a surrender of its pretensions. . . .

The question is not, in this case, Shall we cede a part 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 the treaty, would demand from us an acquiescence in their claim. Not being able to agree in opinion on this point, it was most equitable and most agreeable to good faith to submit it to an impartial arbitration. . . .

Republicans also argued for federalism based limits on treaties leading to a cession of territory.

Even in cases meeting their standard of extreme necessity, the consent of individual states affected, they claimed, would be necessary. In response, Hamilton observed:

It has been asked, among other things, whether the United States were competent to the adjustment of the matter without the special consent of the State of Massachusetts. Reserving a more particular solution of this question to a separate discussion of the constitutionality of the treaty here, I shall content myself with remarking that our treaty of peace with Great Britain, by settling the boundaries of the United States without the specific consent or authority of any State, assumes the principle that the Government of the United States was of itself competent to the regulation of boundary with foreign powers—that the actual government of the Union has even more plenary authority with regard to treaties than was possessed under the confederation, and that acts, both of the former and of the present government, presuppose the competency of the national authority to decide the question in the very instance under consideration.

6. As noted above, Hamilton only briefly addressed the question of the House's role in treaty-making, despite the likelihood that this issue would emerge as central in the impending House proceedings to appropriate monies to implement the Jay Treaty. He did, however, make clear his position on the issue:

The treaty, having been ratified on both sides, the dilemma plainly is between a violation of the Constitution, by the treaty, and a violation of the Constitution by obstructing the execution of the treaty.

The VIth article of the Constitution of the United States declares, that “the Constitution and the laws of the United States, made in pursuance thereof, all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, any thing in the constitution or laws of any State to the contrary notwithstanding.” A law of the land, till revoked or annulled, by the competent authority, is binding, not less on each branch or department of the government than on each individual of the society. Each house of Congress collectively, as well as the members of it separately, are under a constitutional obligation to observe the injunctions of a pre-existing law, and to give it effect. If they act otherwise, they infringe the Constitution; the theory of which knows, in such case, no discretion on their part.

In several passages, moreover, he suggested, without pursuing, the claim that Congress itself is bound to uphold treaties and the law of nations, calling into question at least the modern understanding of the so-called last-in-time rule. These positions should be considered in combination with his earlier (and sometimes contemporaneous) arguments in favor of the self-executing treaty doctrine, the expansive powers of the executive over the conduct of foreign affairs, the incorporation of the law of nations into the law of the United States, the duty – and power – of the executive to faithfully execute treaties and the law of nations, and the important and far-reaching role of the judiciary in interpreting, applying, and enforcing compliance with treaties and the law of nations. From a normative perspective, all of these positions were underwritten by Hamilton’s concept of Enlightened Statesmanship.

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