

BEING SEEN LIKE A STATE:
HOW AMERICANS (AND BRITONS) BUILT THE
CONSTITUTIONAL INFRASTRUCTURE OF A DEVELOPING
NATION

DANIEL J. HULSEBOSCH*

“One objection which heretofore existed to the entering into any com[mercia]l treaty with America, seems wearing away apace: In the late unsettled state of the Union when each exercised individual rights of sovereignty, and adopted or rejected at discretion all public measures, there could be no assurance of realizing compacts with foreign powers,—now my Lord, there is an appearance of a regular establishment of Govern[ment], and some prospect of efficiency....”

—British Consul Phineas Bond (Philadelphia) to the Duke of Leeds[†]

* Charles Seligson Professor of Law and Professor of History (courtesy) N.Y.U. School of Law. The author is grateful for comments received at the Stanford Law School Faculty Workshop; the Annual Conference of the Omohundro Institute for Early American History and Culture; the British Legal History Conference; the NYU Legal History Colloquium; the Yale Legal History Forum; the Annual Conference of the Society for Historians of the Early Republic; the Annual Conference of the American Society of Legal History; the Annual Symposium of the Eighteenth-Century Seminar, Princeton University; the Conference on the Washington Administration, Mt. Vernon; the UVA School of Law Legal History Workshop; and the Columbia University Seminar in Early American History and Culture. In particular he is thankful for comments from José Alvarez; Holly Brewer; Jud Campbell; John Dixon; Alec Dun; Max Edling; David Garland; Joshua Getzler; Joseph Grundfest; Paul Halliday; Oona Hathaway; Daniel Ho; Gordon Hylton; Richard John; Larry D. Kramer; Naomi Lamoreaux; Ned Landsman; John Langbein; Thomas Lee; Daryl Levinson; Ben Lyons; Mark Kelman; T.A. Milford; Cynthia Nicoletti; Nicholas Parrillo; Steve Pincus; Claire Priest; Jack Rakove; Deborah Rosen; Richard Schragger; Allen Weiner; G. Edward White; James Whitman; and many others. Special thanks are due David Golove, coauthor on the larger project this Article serves. He also acknowledges the support of the Filomen D’Agostino and Max E. Greenberg Faculty Research Fund.

[†] Letter from Phineas Bond, British Consul at Philadelphia, to the Duke of Leeds (Aug. 15, 1789), Foreign Office 4/7, British National Archives.

ABSTRACT

This Article develops the argument that the Federal Constitution of 1787 was conceptualized, drafted, and put into operation not only for American citizens but also for foreign audiences. In a world without supranational governing institutions, a constitution—at least, the Federal Constitution—might serve to promote peaceable international relations based on reciprocal trade and open credit. That at least was the Enlightenment-inflected hope.

Did it work? If early Americans engaged in constitution-making in large part to demonstrate their capacity for self-government, self-discipline, and commercial openness to foreign audiences, did anyone notice? Or was it all, regardless of diplomatic purposes and consistent with the conventional account of the American Founding, just an intramural affair? This Article argues that many foreigners did notice, not least because some of them had participated in the process of reform. Although no foreigners intervened directly in drafting or ratification, international demands, incentives, and reactions shaped the way that leading American Framers pursued constitution-making. After a “foreign ratification debate” that stretched into the first years of the Washington Administration, Britain normalized diplomatic relations with the United States and substantial capital investment followed. In 1791, the British Board of Trade approvingly analyzed the Constitution in a report designed to guide the Privy Council as it drafted instructions for its first official envoy to the United States. Within fifteen years, Britons were the largest holders of foreign investment in the United States, including state and federal “domestic debt,” or the restructured wartime certificates and loans that had floated the Revolution. In sum, Britons ultimately financed much of the project of American independence, and contemporaries believed that these credit relations would reduce, without eliminating, the prospect of renewed war.

TABLE OF CONTENTS

INTRODUCTION: THE FEDERAL CONSTITUTION AND THE ATLANTIC WORLD	1242
I. CREDIT AND THE INTERNATIONAL DIMENSIONS OF CONSTITUTION-MAKING	1247
<i>A. The Enlightenment and Constitutional Reform</i>	1247
<i>B. European Audiences for the Constitution: Friends, Enemies, and Debt.</i>	1249
II. BRITISH GRIEVANCES AND AMERICAN CONSTITUTIONAL REFORM	1255
<i>A. The Anglo-American Origins of the "Critical Period"</i> ...	1255
<i>B. The Constitutional Infrastructure of International Commerce</i>	1271
III. THE FOREIGN RATIFICATION DEBATE	1285
<i>A. Persuading the British</i>	1285
<i>B. The Board of Trade Reviews the Constitution.</i>	1303
IV. THE FIRST DEVELOPING NATION?	1314
CONCLUSION	1318

INTRODUCTION: THE FEDERAL CONSTITUTION AND THE ATLANTIC WORLD

In a series of recent articles, David Golove and I have argued that American constitution-making began as an international process: the revolutionary generation conceptualized, drafted, and institutionalized their new constitutions not only for domestic constituencies but also for foreign audiences.¹ To appeal to those audiences, and to persuade them to trade and invest in post-revolutionary America, the Framers incorporated several guarantees of international commitments under treaties and the law of nations into the Federal Constitution.² Many Founders conceived of the Federal Constitution in particular as a promise to foreign nations, conveyed in a legible script for action, that the United States would fulfill its international obligations as a member of what they saw as “the civilized world.”³ The so-called “critical period,” a diagnosis to which foreign critics contributed, demonstrated to many Americans the necessity of structural reform to give the federal government not only the powers to tax and spend, but also to regulate international commerce, manage foreign policy, and enforce obligations under treaties and the law of nations.⁴ The resulting Constitution

1. See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010) [hereinafter Golove & Hulsebosch, *Civilized Nation*]; David M. Golove & Daniel J. Hulsebosch, “*The Known Opinion of the Impartial World*”: *Foreign Relations and the Law of Nations in The Federalist*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST (Jack N. Rakove & Colleen Sheehan eds.) (forthcoming) [hereinafter Golove & Hulsebosch, *Known Opinion*]; see also Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759 (2014) [hereinafter Hulsebosch, *Revolutionary Portfolio*]; Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825 (2006) [hereinafter Hulsebosch, *Discrete and Cosmopolitan*]. Throughout, the term “constitution-making” is preferred to the conventional “Founding” to mitigate the exceptionalism frequently associated with the latter term.

2. Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 991-94.

3. See *id.* at 938.

4. See *id.* at 947-48, 991-94. For work on federal constitution-making that concentrates on the powers to tax and spend, see generally ROGER H. BROWN, *REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION* (1993); MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); and E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790* (1961).

centralized the foreign affairs powers up from the states and then distributed those powers across the federal government to foster expertise and to insulate some aspects of foreign relations from the relatively democratic House of Representatives.⁵ In addition, and most relevant to this Article, it entrenched within the American constitutional order institutional commitments to fulfill international obligations, particularly public and private financial obligations. Under the Supremacy Clause in Article VI, existing as well as future treaties became the law of the land, enforceable in state and federal courts.⁶ That Article also recognized the validity of all debts “entered into, before the [a]doption of th[e] Constitution.”⁷ These two guarantees in Article VI were the Constitution’s only retroactive provisions. In addition, state governments were forbidden to issue paper money, impair the obligations of contracts, and conduct war or diplomacy with foreign nations, including Native American nations within the nation’s borders.⁸ Finally, a powerful and independent Executive would play a leading role in developing foreign policy and enforcing it within the states.⁹

Did it work? If federal constitution makers sought to demonstrate their capacity for self-government to foreign audiences, did anyone notice? If they noticed, what exactly did they notice? Or was it all, regardless of diplomatic purposes and consistent with the conventional account of the Founding, just an intramural affair?

This Article argues that federal constitution-making did play an important role in persuading Europeans to recognize the United States along a number of dimensions. Before and after the Philadelphia Convention, European diplomats, Enlightenment thinkers, displaced British loyalists, transatlantic merchants, and overseas investors paid close attention to constitutional developments in the United States. Together they formed important foreign audiences for American political development in the generation after the

5. Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, 996-98.

6. U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”). To enforce this provision, Article III provided federal court jurisdiction over existing and future treaties. *Id.* art. III, § 2, cl. 1 (extending federal court jurisdiction to cases arising under “Treaties made, or which shall be made” under the authority of the Constitution or laws of the United States).

7. *Id.* art. VI, cl. 1.

8. *Id.* art. I, § 10.

9. *Id.* art. II, §§ 2-3.

Revolution. Even the term “audience,” suggesting passive observation, is too weak. Instead, foreign actors participated in a number of ways. Although foreigners did not intervene directly in the Constitution’s drafting or formal ratification, international demands, incentives, and reactions shaped the way that Americans undertook constitution-making in the 1780s and beyond.

Ultimately, the influence flowed both ways across the Atlantic. Foreign demands clarified American perceptions of what they wished to achieve by constitutional government. In turn Americans helped redesign the legal infrastructure of the international system they sought to enter, particularly respecting the protection of foreign capital, setting precedents defining liberal governance that remain powerful today as neoliberal ideals. Those notions of good governance have, however, been abstracted from their specific, and forgotten, origins. After the Revolution, Americans and their foreign audiences began to map out what it meant for a postcolonial polity to enter the European community of “civilized nations,” not just formally with treaties of peace and commerce, but also as a full participant in the Atlantic economy of trade and finance. Converting imperial connections into international relations, the Framers sought to create not a fiscal-military state of the sort familiar to European experience but instead a fiscal-commercial state approximating Enlightenment ideals.¹⁰ There was no conventional blueprint.¹¹ There were instead legacy relations of the British Empire mixed with new ideas about how the United States could profit from European connections without being drawn into Europe’s wars, a

10. See EDLING, *supra* note 4, at 47-51, 219-29. Max Edling’s discussion is modeled on John Brewer’s analysis of eighteenth-century Britain. See JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783* (1988). See generally *THE MILITARY REVOLUTION AND THE STATE, 1500-1800* (Michael Duffy ed., 1980). For skepticism about whether the eighteenth-century British state is best characterized as a fiscal-military state, see Steve Pincus & James Robertson, *Challenging the Fiscal-Military Hegemony: The British Case*, in *THE BRITISH FISCAL-MILITARY STATES, 1660-C.1783*, at 229, 229-62 (Aaron Graham & Patrick Walsh eds., 2016).

11. The gradual independence in the Netherlands from the sixteenth to the seventeenth century is distinguishable on the long-term scale (recovery of formal local political control rather than initial independence), location, and especially relative economic development: by 1600, the Netherlands was already the premier carrying power in Europe and a net international creditor. See generally JAMES C. RILEY, *INTERNATIONAL GOVERNMENT FINANCE AND THE AMSTERDAM CAPITAL MARKET, 1740-1815* (1980); Richard Sylla, Book Review, 51 *ECON. HIST. REV.* 625, 625-26 (1998).

combination that also appealed to some in France and Britain as a political ideal and a strategic convenience.¹²

The document carried some of the burden of proof but did not suffice. Single-text constitutions were portable and legible but not comprehensive.¹³ Given the Federal Constitution's ambiguities and gaps, construction mattered. By the early 1790s, after a period of inquiry and assessment that can be called *the foreign ratification debate*, influential European audiences became persuaded that the new federal government was capable of adhering to the law of nations, conducting diplomacy, and regulating commerce.¹⁴ The connection between constitution-making and commercial integration was not simply sequential. Foreign governments and their subjects causally linked their behavior to the Constitution and the federal institutions built on it. Proof was diplomatic normalization, particularly with Britain, and an unprecedented amount of capital investment, first from Dutch investors and eventually also from the

12. The classic study of early American commitment to commercial integration and political neutrality toward Europe is FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* (1961).

13. "[M]uch of early modern European statecraft," James C. Scott argues, "seemed ... devoted to rationalizing and standardizing what was a social hieroglyph into a legible and administratively more convenient format." JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 3 (1998). It was how states made internal sense of their land, people, and resources. *See id.* at 2-3. This Article borrows the suggestive notion of legibility and explores the degree to which it applies historically to the communication of information internationally between states through constitution-making.

14. *See infra* Part III. The terms "nation" and "state" had multiple meanings during the eighteenth century. Here they carry the connotation current in the early modern literature and practice of the law of nations: a nation or state (the terms were convertible) was an independent, self-governing polity entitled to the rights and subject to the duties of the law of nations. "Nations or states," wrote Emer de Vattel in the first section of his treatise on the law of nations, first published in 1758, "are bodies politic, societies of men united together to procure their mutual safety and advantage by means of their union." 1 EMER DE VATTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 1 (1760). Such a state was a "moral person [possessing] an understanding and a will peculiar to itself, and is susceptible of obligations and laws." *Id.* "The law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." *Id.* This external connotation of nation originally revealed little about the internal constitution of a polity, which might be a kingdom, republic, or empire. *Cf.* JANE BURBANK & FREDERICK COOPER, *EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE* (2010) (observing the predominance of empires, not nation-states, throughout most history).

British.¹⁵ Diplomatic and commercial normalization with Britain had cascading effects on other relationships. It quickly brought nominal friends, like the Spanish,¹⁶ and ongoing enemies, like many of the Northwest Native American nations, to the negotiating table.¹⁷ Paradoxically, the recognition process with France, the United States' first military ally, passed through a long period in which the royal and then revolutionary governments treated the United States as a quasi-state, a phase that ended with the termination of the alliance during the Quasi-War.¹⁸

This Article, however, focuses on the relationship that was most critical to the commercial development of the early United States: the Anglo-American connection. It begins in Part I by providing a brief account of the Federalist vision of international relations and identifies debt as a common denominator among the foreign audiences. Part II traces the British critique of American government during the 1780s, as well as the partial incorporation of that foreign perspective among constitutional reformers. Part III analyzes the British assessment of the Federal Constitution and the government built on it. Part IV begins to sketch out connections between the British assessment and financial integration of the United States into European markets, connections that will be mapped more precisely in future work.

15. See MIRA WILKINS, *THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914*, at 34-39 (1989).

16. The Spanish ceased plans to colonize the American Southwest and began to permit American navigation on the Mississippi River. See SAMUEL FLAGG BEMIS, *PINCKNEY'S TREATY: A STUDY OF AMERICA'S ADVANTAGE FROM EUROPE'S DISTRESS, 1783-1800*, at 265-67 (1926); JAMES E. LEWIS, JR., *THE AMERICAN UNION AND THE PROBLEM OF NEIGHBORHOOD: THE UNITED STATES AND THE COLLAPSE OF THE SPANISH EMPIRE, 1783-1829*, at 21-23 (1998).

17. The Northwest Native American Nations ceased fighting along the Ohio River, thereby opening swaths of the Northwest Territory for white settlement and intra-American state-building. See ERIC HINDERAKER, *ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY, 1673-1800*, at 244-45 (1997); RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815*, at 472-75 (1991).

18. See, e.g., HARRY AMMON, *THE GENET MISSION* (1973).

I. CREDIT AND THE INTERNATIONAL DIMENSIONS OF
CONSTITUTION-MAKING

A. *The Enlightenment and Constitutional Reform*

Integrating the United States into the Atlantic world of commerce and culture had been a central, and in the 1780s, still unfulfilled, goal of the Revolution. Nations, like individuals, were presumed to be sociable and had the duty as well as right to work together with others. To that end, American constitution makers sought to construct a government that, consistent with a dominant strand of the Enlightenment, would encourage sociability—particularly, commerce—within and beyond national borders. The way to do so, they believed, was to modulate impassioned, localist, and short-term politics, while promoting decision-making along a broader temporal and spatial horizon.¹⁹

Although the nature of the connections between nations, and even the definition of which polities counted as “nations,” was contested, few Americans doubted that there was in fact an international community of states that should, at least, govern their relations by common legal principles in war and peace.²⁰ Commercial sociability was hardly the same as perpetual harmony.²¹ Commercial competition could be fraught and even incite war.²² Yet competition was not itself war. Nor did it have to lead to war, if nations committed themselves institutionally, Federalists argued, to upholding treaties and the customary law of nations at home.²³ A fundamental premise of Enlightenment theory about international relations was that increased interaction between people from different nations would generate extra-national connections and interdependence that

19. Hulsebosch, *Revolutionary Portfolio*, *supra* note 1, at 763. In a typical formulation, James Wilson wrote: “The general principle, says Burlamaqui, ‘of the law of nations, is nothing more than the general law of sociability, which obliges nations to the same duties as are prescribed to individuals.’” 1 JAMES WILSON, *Of the Law of Nations*, in THE WORKS OF THE HONOURABLE JAMES WILSON 145, 155 (Bird Wilson ed., 1804).

20. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 940-41.

21. See *id.* at 976.

22. See *id.* at 976 & n.178.

23. See *id.* at 980-81.

would discourage rash destruction of those ties in war.²⁴ That was the premise beneath the skein of commercial treaties immortalized in theory by the Treaties of Utrecht.²⁵ Everyone knew that these treaties had failed to preserve peace.²⁶ International agreements with only the sanctions of “good faith” were incapable of laying the groundwork of peaceful international relations.²⁷ What was needed instead, American constitutional reformers argued, was to build those commitments into national constitutions.²⁸ In the absence of an international coercive governance regime, municipal governments would have to discipline themselves.²⁹ Many members of the founding generation subscribed to these notions and did not view international obligations as trespasses upon sovereignty.³⁰ A powerful structure for conducting foreign affairs, adhering to treaties, and facilitating foreign commerce would integrate the Union into the Atlantic world of commerce. In sum, the Constitution was supposed to reconcile the twin goals of the Revolution that had been announced in the Declaration of Independence: popular sovereignty and international recognition.³¹

The desire to modulate democratic influence on the management of foreign affairs did not extend to the power to declare war.³² Developing the Enlightenment ideal of perpetual peace glossed most recently by Adam Smith, the founding generation believed

24. See GILBERT, *supra* note 12, at 44-48; see also ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 100-13 (1977).

25. See Doohwan Ahn, *The Anglo-French Treaty of Commerce of 1713: Tory Trade Politics and the Question of Dutch Decline*, 36 *HIST. EUR. IDEAS* 167 (2010), and Antonella Alimento, *Commercial Treaties and the Harmonisation of National Interests: The Anglo-French Case (1667-1713)*, in *WAR, TRADE AND NEUTRALITY: EUROPE AND THE MEDITERRANEAN IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 107 (Antonella Alimento ed., 2011), for discussions of the Treaty of Utrecht.

26. See, e.g., THE FEDERALIST NO. 15, at 94 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

27. *Id.*

28. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 989-90.

29. For elaboration, see *id.*

30. See *id.* at 994.

31. On the Declaration as a petition for recognition, see DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007). For a recent reinterpretation of the Declaration that emphasizes the economic and developmental dimensions of the revolutionary grievances, see STEVE PINCUS, *THE HEART OF THE DECLARATION: THE FOUNDERS' CASE FOR AN ACTIVIST GOVERNMENT* (2016).

32. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 991.

that the people would resist wars because they bore the costs in blood and treasure.³³ Vesting this power in the people, through their direct representatives in Congress, was one of the most radically republican elements in the Constitution, at once distinguishing it from European kingdoms and intending to contribute to the Enlightenment project of reducing the propensity for war.³⁴ Again, muting popular passions in diplomatic and commercial relations, while ensuring that popular concerns about taxation and bodily security were activated when determining the question of war, were together supposed to generate a new kind of state, a fiscal-commercial state.³⁵ And that state was supposed to fit sociably, therefore profitably, within the traditional community of civilized states.³⁶

B. European Audiences for the Constitution: Friends, Enemies, and Debt

The European audiences for American constitution-making can be divided roughly in two: former wartime enemies and wartime friends. All were concerned about debt. The desire to collect outstanding debts did not exhaust Europeans' interest in the American political system, but it was a common denominator. It also epitomized the hard—but in the eighteenth century, hopeful—fact of economic integration. Credit, the flip side of debt, symbolized complicated networks of exchange, some that preceded the Revolution and others forged in it. Few wanted those relationships to end.

The most important audience was the British, the recent enemy. In the imperial economy, most credit circulating in the American colonies had originated in key British trading cities, not just London but also Bristol, Glasgow, Liverpool, and other seaports.³⁷ Goods were continuously bought and sold, but coin rarely changed hands.³⁸ Imperial trade ran instead on credit: bonds, promissory notes,

33. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 259-73 (Kathryn Sutherland ed., Oxford Univ. Press 1993) (1776); see Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 1011-15.

34. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 1011-15.

35. See *id.* at 993-94, 1011-15.

36. See *id.* at 970.

37. See JACOB M. PRICE, *CAPITAL AND CREDIT IN BRITISH OVERSEAS TRADE: THE VIEW FROM THE CHESAPEAKE, 1700-1776*, at 68-69 (1980).

38. See generally *id.*

letters of credit, and simple contracts on open accounts.³⁹ It was a complicated skein of obligation in which debtors restructured old loans, opened new credit lines, and borrowed from multiple creditors simultaneously without disclosing existing debts.⁴⁰ This commercial world did not neatly divide debtors and creditors. Most merchants and producers were both.⁴¹ This was true even of the large Scottish and English creditors to whom North Americans, especially Virginians, owed millions of pounds of sterling.⁴² These transatlantic traders were in turn indebted to domestic Britons who lent their spare capital to overseas trading firms.⁴³ They were trading with other people's money. But they owed those people a steady rate of return. Like banks, they lent in multiples of their reserves.⁴⁴ American private debts to British creditors were, therefore, rarely fully retired but instead extended and refinanced.⁴⁵ Within the colonies, debts originating in the ports fractionated and multiplied throughout the towns and backcountry, and they similarly cycled around for years.⁴⁶ This continuous process of restructuring and holding settlement in abeyance was evidence of the confidence and optimism undergirding the imperial credit system. Despite occasional credit crises during the colonial period, liberal credit permitted Britain's imperial economy to expand faster than any of its competitors in the eighteenth century.⁴⁷

39. *See generally id.*

40. The best source on the mechanics and operation of the imperial trading economy in the eighteenth century is the *oeuvre* of Jacob M. Price. *See, e.g., id.*

41. *See id.* at 44.

42. *See id.*

43. *See id.*

44. *See id.* at 59-60.

45. *See id.* at 5-6.

46. *See id.* at 16.

47. Price examines the diversified, fractional capitalization and liberal lending practices of British merchants in PRICE, *supra* note 37. *See also* Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 WM. & MARY Q. 511 (1962); Richard B. Sheridan, *The British Credit Crisis of 1772 and the American Colonies*, 20 J. ECON. HIST. 161 (1960). To some contemporary observers the continuous debt was more sinister. *See* PRICE, *supra* note 37, at 5-6. Thomas Jefferson estimated that Virginians owed half of American private debt to British creditors. *See id.* "The advantages made by the British merchants on the tobaccos consigned to them," he maintained,

were so enormous that they spared no means of increasing those consignments. A powerful engine for this purpose was the giving good prices and credit to the planter, till they got him more immersed in debt than he could pay without selling his lands or slaves. They then reduced the prices given for his tobacco so

The Revolution sent this circulatory system into arrest. The peacemakers tried to resuscitate the system. Fellow subjects before the war, who had operated within and against the confines of imperial law, now found themselves negotiating what had become an international relationship under the Treaty of Peace (1783) and the law of nations.⁴⁸ The peace commissioners who charted the new relationship were intimately familiar with the old one. The Scot Richard Oswald and the South Carolinian Henry Laurens had long been central players in the Anglo-American credit system.⁴⁹ Before the war, Laurens had been Oswald's slave-trading agent in South Carolina.⁵⁰ Two other commissioners, Englishman David Hartley and Philadelphia's Benjamin Franklin, had moved through the same intellectual circles, including the Bowood Circle, a group of Enlightenment intellectuals who met regularly in the country house of their patron, the Earl of Shelburne.⁵¹ It was no coincidence that Shelburne led the administration that negotiated peace.⁵² He (like Adam Smith) had long imagined a less formal, more open, and more commercially robust relationship between Britain and North America.⁵³ Not the way he had hoped, but the opportunity arrived in 1782.⁵⁴

that let his shipments be ever so great, and his demand of necessaries ever so oeconomical, they never permitted him to clear off his debt. These debts had become hereditary from father to son for many generations, so that the planters were a species of property annexed to certain mercantile houses in London.

Additional Queries, with Jefferson's Answers, in 10 THE PAPERS OF THOMAS JEFFERSON 20, 27 (Julian P. Boyd ed., 1954). See generally HERBERT E. SLOAN, *PRINCIPLE AND INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT* (1995) (analyzing Jefferson's thoughts about debt and his financial indebtedness). Contrary to Jefferson's reckoning, Price estimates that British merchants purchased (rather than accepted on consignment) more than half of the tobacco they exported out of America. PRICE, *supra* note 37, at 6.

48. See DAVID HANCOCK, *CITIZENS OF THE WORLD: LONDON MERCHANTS AND THE INTEGRATION OF THE BRITISH ATLANTIC COMMUNITY, 1735-1785*, at 391-95 (1995).

49. See *id.* at 391.

50. *Id.* at 391 n.13.

51. See generally AN ENLIGHTENMENT STATESMAN IN WHIG BRITAIN: LORD SHELburne IN CONTEXT, 1737-1805, at 197, 205 (Nigel Aston & Clarissa Campbell Orr eds., 2011) (exploring several dimensions of Shelburne's Bowood Circle).

52. See Andrew Stockley, *Shelburne, the European Powers, and the Peace of 1783, in AN ENLIGHTENMENT STATESMAN IN WHIG BRITAIN: LORD SHELburne IN CONTEXT, supra* note 51, at 177, 178.

53. See *id.* at 178-79.

54. See *id.* Benjamin Vaughan, Shelburne's private secretary at the negotiations and Franklin's good friend, spent much of the 1780s championing Adam Smith's vision of free

This premise was explicit. Article IV of the Treaty of Peace provided that creditors “shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”⁵⁵ Lord Shelburne had instructed the British peace commissioners that “the debts require the most serious attention,—that honest debts may be honestly paid in honest money,—no Congress money.”⁵⁶ Sterling was the currency demanded, of course. It was a hard-won provision for the British, though in the end it was American commissioner John Adams who seemed most committed to the ideal beneath it.⁵⁷ He arrived in Paris to find a deadlock over whether the United States would agree that debtors should fully repay prewar debts, and whether Congress would pledge to restore confiscated loyalist property.⁵⁸ For practical and legal reasons, the Americans would not budge on confiscated property; in the end Congress only pledged in Article V that it would “earnestly recommend” that the states restore at least some confiscated estates.⁵⁹ Debt was different. “I have no notion of cheating anybody,” Adams declared when he got to Paris and swung the American commissioners over to the British position on the prewar debts.⁶⁰ To test this pledge, British creditors sued in all open courts, petitioned every political institution on both sides of the Atlantic, and lobbied anyone

trade as a mechanism for prosperity and peace. See Andrew Hamilton, *Benjamin Vaughan on Commerce and International Harmony in the Eighteenth Century*, in *SOCIABILITY AND COSMOPOLITANISM: SOCIAL BONDS ON THE FRINGES OF THE ENLIGHTENMENT* 101, 106-07 (Scott Breuninger & David Burrow eds., 2012).

55. Definitive Treaty of Peace, Gr. Brit.-U.S., art. IV, Sept. 3, 1783, 8 Stat. 80, 82.

56. 3 LORD EDMOND FITZMAURICE, *LIFE OF WILLIAM, EARL OF SHELBURNE, AFTERWARDS FIRST MARQUESS OF LANDSDOWNE, WITH EXTRACTS FROM HIS PAPERS AND CORRESPONDENCE* 282-83, 285 (1876) (excerpting Shelburne’s instruction to peace commissioners).

57. 3 JOHN ADAMS, *1782. November 3 Sunday*, in *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 43, 43-44 (L.H. Butterfield ed., 1961); see also RICHARD B. MORRIS, *THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE* 361 (1965).

58. See MORRIS, *supra* note 57, at 361.

59. Definitive Treaty of Peace, *supra* note 55, at 82 (“Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects, and also of the estates, rights and properties of persons resident in districts in the possession of his Majesty’s arms, and who have not borne arms against the said United States. And that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested in their endeavours to obtain the restitution of such of their estates, rights and properties, as may have been confiscated.”).

60. See MORRIS, *supra* note 57, at 361. For analysis of the legal differences between property and debts, see *infra* Part II.A.

who would listen.⁶¹ Because they formed a powerful force in British politics, their claims became the leading diplomatic issue between Britain and the United States from the Treaty of Peace until at least the Jay Treaty (1794).⁶²

Negotiating the division of the Empire and the independence of a new nation, the peacemakers and successive diplomats believed that enduring structures of commerce could keep Britain and America together in an extra-national commercial network.⁶³ There was no formal sense that there was to be some kind of special relation.⁶⁴ Quite the opposite for the Americans. For them, the treaty's financial guarantees, especially, provided ground rules by which the imperial connection became an international one, and those rules would apply to other relationships, too.⁶⁵ Yet there would be, more or less, business as usual.⁶⁶ What historians later termed the "imperialism of free trade," and dated to the mid-nineteenth century, originated, institutionally at least, in the Enlightenment ideal of insulating international commerce from political recrimination

61. See *infra* Part II.A; see also Hulsebosch, *Discrete and Cosmopolitan*, *supra* note 1, at 833-35 (describing loyalists' attempts to recover property).

62. The Jay Treaty established a precedent-setting bilateral arbitral commission that attempted to settle the debts issue. See Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., art. VI, Nov. 19, 1794 [hereinafter Jay Treaty], reprinted in 3 INTERNATIONAL ADJUDICATIONS 5, 5-7 (John Bassett Moore ed., 1931).

63. See Hamilton, *supra* note 54, at 106-07.

64. Cf. CHRISTOPHER JOHN BARTLETT, "THE SPECIAL RELATIONSHIP": A POLITICAL HISTORY OF ANGLO-AMERICAN RELATIONS SINCE 1945 (1992) (arguing that the United States and Great Britain coordinated foreign policy in the Cold War era).

65. The Constitution's guarantee of enforcement of past and future treaties was not limited to Britain, of course. The argument here is that the Anglo-American relationship after the Revolution was different because of the preexisting commercial relations, but the legal framework built to support that relationship could, and was expected to, apply to other commercial relations.

66. Trading firms in Great Britain sought to revive pre-revolutionary networks soon after the Treaty of Peace. By contrast, trading between the United States and the British West Indies was not quickly revived and was a central goal of American diplomacy. FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 65-75 (1973).

during the aftermath of imperial civil war.⁶⁷ And it was negotiated mutually, not imposed east to west.⁶⁸

The second general audience—friends—included treaty partners during or after the war, as well as their subjects. Those friends had lent money to Congress and the individual states, without which the Revolution would have failed.⁶⁹ Owners of this public foreign debt included sovereign governments, such as France and Spain, and also private individuals and partnerships in France and especially the Netherlands.⁷⁰ After the peace, some of these creditors, notably the French government, faced desperate straits and sought repayment.⁷¹ The Confederation, however, defaulted on its loans to France and Spain, and although it was more scrupulous with Dutch creditors, even with them it avoided default through restructuring, taking out new loans to meet interest payments.⁷² Brokers then offered this public debt to hundreds of private investors. They too became part of the international audience. Dutch bankers and investors associated with the Dutch Patriot Party, in particular, sympathized with the revolutionary republic, identifying it with their own eight-decade quest for independence from the Spanish Empire.⁷³ Some

67. See John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 *ECON. HIST. REV.* 1 (1953); see also NICHOLAS ONUF & PETER ONUF, *NATIONS, MARKETS, AND WAR: MODERN HISTORY AND THE AMERICAN CIVIL WAR 187-89* (2006); JAY SEXTON, *DEBTOR DIPLOMACY: FINANCE AND AMERICAN FOREIGN RELATIONS IN THE CIVIL WAR ERA 1837-1873*, at 2-3 (2005); Daniel Hulsebosch, *Magna Carta for the World?: The Merchants' Chapter and Foreign Capital in the Early American Republic*, 94 *N.C. L. REV.* 1599 (2016); Cathy Matson & Peter Onuf, *Toward a Republican Empire: Interest and Ideology in Revolutionary America*, 37 *AM. Q.* 496 (1985).

68. See MORRIS, *supra* note 57, at 361.

69. See RAFAEL A. BAYLEY, *THE NATIONAL LOANS OF THE UNITED STATES, FROM JULY 4, 1776, TO JUNE 30, 1880*, at 5-17 (2d ed. 1882).

70. See *id.*

71. The contribution of the American debt to French fiscal woes in the 1780s, and the causal relationship between those financial problems and the Revolution of 1789, is hotly debated in the historiography of the French Revolution. See, e.g., MICHAEL SONENSCHER, *BEFORE THE DELUGE: PUBLIC DEBT, INEQUALITY, AND THE INTELLECTUAL ORIGINS OF THE FRENCH REVOLUTION* (2007).

72. FERGUSON, *supra* note 4, at 234 (“By concentrating its resources, [the Confederation] Congress managed to save its credit in Holland, but the debt to France was sloughed off, and when Spain did not press its claims, no payment was made.”); see also GEORGE GREEN SHACKELFORD, *JEFFERSON'S ADOPTIVE SON: THE LIFE OF WILLIAM SHORT, 1759-1848*, at 71-94 (1993).

73. See 1 PIETER J. VAN WINTER, *AMERICAN FINANCE AND DUTCH INVESTMENT, 1780-1805, WITH AN EPILOGUE TO 1840*, at 239 (James C. Riley ed. & trans., 1977).

invested nervously; others watched with curiosity.⁷⁴ Together, they represented the leading edge of a foreign audience that, over the next few decades, poured European specie into American public and private investments.⁷⁵ They too, then, were interested participants, not just distant observers.

Just as the Revolution had fascinated Europeans, so too its aftermath remained a subject of fascination across the Atlantic World. Friends and enemies, especially those with money at stake, paid close attention as the new republican states moved from war to peacetime governance.

II. BRITISH GRIEVANCES AND AMERICAN CONSTITUTIONAL REFORM

A. *The Anglo-American Origins of the “Critical Period”*

Credit is never just a private arrangement. Lending demands legal infrastructure.⁷⁶ Historians are well aware that, after the Revolution, American debtors successfully obtained debt relief from many state legislatures.⁷⁷ But creditors had leverage too.⁷⁸ Because many lines of credit in eighteenth-century North America ended in Britain, those creditors sought aid from the British government and supplied it with some of the best information available about the political and legal systems of the American states.⁷⁹

Information about the American political system flowing into the British Privy Council was mountainous in extent and granular in detail.⁸⁰ Three interrelated channels of information kept the two Secretaries of State (Home and Foreign Affairs) well informed between the Treaty of Peace and the appointment of a Minister

74. *Id.*

75. *See infra* Part IV.

76. For currency in particular as a mode of governance, see CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* 266-94 (2014).

77. *See, e.g.*, WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 55-61 (2007) (reviewing state debt-relief legislation).

78. *See, e.g.*, Memorial of the Committee of Merchants Trading to North America to the Board of Trade (Mar. 31, 1787), Foreign Office 4/5, British National Archives (describing debtor relief laws in many states).

79. *Id.*

80. The main evidence comes from reading all Foreign Office files from 1783 to 1803 covering the United States, as well as many related deposits, in The National Archives of the United Kingdom.

Plenipotentiary to America in 1791. One was the stream of loyalist petitions complaining about confiscation and other abuses that continued after the peace; another was a series of memorials from British merchants detailing obstacles to debt collection; and a third was reports from consuls in American seaports. These overlapping sources portrayed governments willfully violating treaty obligations. John Adams, who became the U.S. Minister to Britain in early 1785, repeatedly requested that the two nations begin negotiations with an eye especially toward reopening American trade directly with the West Indies.⁸¹ “No” was the official answer from the Marquess of Carmarthen, Secretary of State for Foreign Affairs, as long as the United States refused to fulfill the terms of the treaty regarding confiscated loyalist property and prewar debts.⁸²

The stream of grievances led Carmarthen to seek an account of all the laws in all the states that violated the Treaty of Peace.⁸³ In Britain, government officials requested information from affected British merchants, some of whom were able to forward printed copies of American legislation.⁸⁴ Over in America, the task first fell to the only British representative in America at the time, Consul General John Temple.⁸⁵ It was not easy to gather the statutes. He was rebuffed when he asked for the assistance of John Jay, who was the

81. Before the Revolution those islands had provided a ready market for American food, a supply of molasses to be refined in American seaports and then re-exported, and a steady traffic for American carriers, thus supporting sailors, shipbuilders, seaports, and support industries that sprawled across the American countryside. RICHARD PARES, *YANKEES AND CREOLES: THE TRADE BETWEEN NORTH AMERICA AND THE WEST INDIES BEFORE THE AMERICAN REVOLUTION* (1956). For a perceptive account of post-revolutionary debates over economic development, see JOHN E. CROWLEY, *THE PRIVILEGES OF INDEPENDENCE: NEOMERCANTILISM AND THE AMERICAN REVOLUTION* (1993).

82. See Letter from Lord Caremarthen to John Adams (Feb. 28, 1786), in 2 *THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA, FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER, 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789*, at 581, 581-82 (1837) [hereinafter *DIPLOMATIC CORRESPONDENCE*] (“[W]henver America shall manifest a real determination to fulfil her part of the treaty, Great Britain will not hesitate to prove her sincerity to cooperate.”).

83. See *id.* at 581-87.

84. See, e.g., Messrs. Waddington to Mr. Frazer (Aug. 20, 1786), Foreign Office 4/4, British National Archives (responding to the ministry’s desire to learn of “any hardships to which British merchants are subjected by partial laws,” enclosing copy of New York’s Trespass Act, and describing the lawsuits pursued under it).

85. See Letter from John Temple to the Marquess of Carmarthen (Feb. 4, 1786), Foreign Office 4/4, British National Archives; Letter from John Temple to John Jay (Dec. 24, 1785), Foreign Office 4/4, British National Archives.

Confederation's Foreign Secretary.⁸⁶ A request for government documents was diplomatic in nature, Jay answered, one that a mere consul was not entitled to make.⁸⁷ This was one of many occasions when Americans reminded the British that, although the United States had sent Adams as an envoy to London in mid-1785, Britain had not reciprocated.⁸⁸ Without assistance from any government official, and before additional consuls arrived in America, Temple hired lawyers across the states to gather information.⁸⁹ The anti-loyalist provisions were so numerous, diverse, and often tucked into more general statutes that it remains difficult even today to compile a complete list. Diplomats, lawyers, and interested parties kept reporting new ones over the next decade.

The appointment of Temple in 1785 and additional consuls up and down the Atlantic coast the following year opened up new conduits of information from America to the British government.⁹⁰ Under the law of nations, consuls did not have full diplomatic status.⁹¹ Their primary responsibility was to aid merchants of their own nation and resolve disputes among them.⁹² Another important function was to gather intelligence. They tracked trading volume, regulations, and the changing commercial environment in their

86. Letter from John Temple to John Jay, *supra* note 85.

87. See Report of Secretary Jay on Reference of a Letter from the British Consul General (Mar. 8, 1786), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 82, at 100, 101 (explaining that Congress need not answer John Temple's letter because it was not a direct or official application on trade and navigation).

88. See Letter from John Adams to the Marquess of Carmarthen (Feb. 6, 1786), Foreign Office 4/4, British National Archives.

89. Letter from John Temple to the Marquess of Carmarthen (Feb. 4, 1786), Foreign Office 4/5, British National Archives (describing the process of collecting statutes and requesting reimbursement for lawyers' fees).

90. See, e.g., Report of John Jay on the Preceding Letter (Oct. 17, 1787), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 82, at 116, 117 (recognizing George Miller as consul for North Carolina, South Carolina, and Georgia); Report of John Jay on the Preceding Letter (Mar. 28, 1787), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 82, at 105, 107 (recognizing Phineas Bond as consul in New York, New Jersey, Pennsylvania, Delaware, and Maryland); Letter from John Jay to John Temple (Dec. 3, 1785), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 82, at 95, 95 (recognizing Temple as "Consul General of his Britannic Majesty").

91. See 1 VATEL, *supra* note 14, at 131 ("The consul is no public minister ... and cannot pretend to the privileges appertaining to such character.").

92. See *id.* ("Among the modern institutions for the utility of commerce, one of the most useful is that of consuls or persons residing in the large trading cities, and especially in foreign sea-ports, with a commission empowering them to attend to the rights and privileges of their nation, and to terminate misunderstandings and contests among its merchants.").

ports, and then sent detailed reports to the Foreign Secretary.⁹³ Because Britain did not send an official diplomatic representative to the United States until late 1791, the consuls provided the most reliable information on which to base policy during the constitution-making period. They functioned much like old imperial agents had before the Revolution.⁹⁴ Some of them had been just that: middling officials in the old empire, longtime residents who were integrated in the social life of their ports. Temple, for example, had been Lieutenant Governor of New Hampshire and Surveyor General of customs.⁹⁵ A native Bostonian, he married Elizabeth Bowdoin, daughter of James Bowdoin, a merchant, massive landholder, and the third Governor of independent Massachusetts.⁹⁶ Temple had moved from Boston to New York City, the British military headquarters, during the war. Now he settled there for the rest of his life.⁹⁷ From one perspective, only his address had changed.

If the consuls' basic role was familiar, the political and legal context for its performance had changed dramatically. Temple was suddenly an alien representing a foreign government. He and the other consuls thus began negotiating what had become an international rather than imperial relationship. No longer investigating the enforcement and violations of the imperial Navigations Acts, they instead detailed compliance and breach of the peace treaty and the law of nations.⁹⁸ The consuls' correspondence back home was

93. See, e.g., JOANNE LOEWE NEEL, PHINEAS BOND: A STUDY IN ANGLO-AMERICAN RELATIONS, 1786-1812, at 73-79 (1968).

94. See generally DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 76-82 (2005) (analyzing long-serving British officials in North America).

95. *Preface to The Bowdoin and Temple Papers*, in 9 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY xiii, vx (1897).

96. See *id.* at xiv-xv. An advantageous match by any standard, it may also have protected Temple from suffering confiscation during the war. When, during the Massachusetts ratifying convention, the ardent Federalist Bowdoin warned that foreign "attention is drawn to the United States; *their* emissaries are watching our conduct, particularly upon the present most important occasion," he was not speaking metaphorically. Speech of James Bowdoin, Massachusetts Convention Debates (Jan. 23, 1788), in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1320 (John P. Kaminski et al. eds., 1976-2017).

97. See *Preface to The Bowdoin and Temple Papers*, *supra* note 95, at xvii.

98. See, e.g., Letter from William S. Smith to John Jay (Aug. 7, 1786), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 82, at 34, 36; Letter from John Temple to John Jay (Apr. 7, 1786), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 82, at 110, 110 ("I cannot but lament the unhappy condition of those unfortunate people ... still held in confinement in direct

formidable. In a typical year, Phineas Bond, the Philadelphia native who served as the British consul in Philadelphia for decades, sent at least a dozen long reports, including reams of trade statistics collected on the wharves of that city, which gave his government a good sense of the commerce flowing through the state's busiest port.⁹⁹ His information came from personal observation and from British and American merchants in the city.¹⁰⁰ In a communications loop of mutual influence, he and his mercantile sources, many of whom had been revolutionaries, developed a critical perspective on the problems besetting the new states.¹⁰¹ Together, this network produced a substantial amount of the intelligence passed up the decision-making chain of the British government.¹⁰²

Consular fellowship was not, however, formal diplomatic respect. In early 1785, the British Ambassador to France asked the American treaty commissioners in Paris—Benjamin Franklin, Thomas Jefferson, and John Adams—“how far the Commissioners can be duly authorized to enter into any engagements with Great Britain which it might not be in the power of any one of the States to render totally fruitless and ineffectual.”¹⁰³ It was a cardinal principle of British diplomacy, developed first on the ground in America and propounded repeatedly at home by Lord Sheffield, who helped topple Shelburne's short-run administration, that Congress could not control the states.¹⁰⁴ The Americans bristled at the implicit indictment of the Confederation and refused to answer the question in those terms. Instead of rephrasing, the Ambassador concluded that it was too soon to negotiate a commercial treaty with the United States. The real problem with the question is that it had no answer, and the American commissioners knew. They also knew

violation ... of the definitive treaty of peace.”).

99. See NEEL, *supra* note 93, at 75-76, 106-07, 136.

100. *See id.* at 44, 55.

101. *See id.* at 172-73.

102. *See generally id.*

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

104. *See* JOHN BAKER HOLROYD, OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES WITH EUROPE AND THE WEST INDIES: INCLUDING THE SEVERAL ARTICLES OF IMPORT AND EXPORT 40-41 (1783). Sheffield derived most of his information about American trade from former congressional diplomat Silas Deane, who did not endorse Sheffield's conclusion. *See* Walter E. Minchinton, *Silas Deane and Lord Sheffield's 'Observations on American Commerce,'* 28 REVISTA DA UNIVERSIDADE DE COIMBRA 83, 83-86 (1980).

that everyone else knew too.¹⁰⁵ “There is no question more frequently asked me by the foreign Ministers,” John Adams, the first minister of the United States to the Court of St. James’s, later reported to Secretary of Foreign Affairs, John Jay,

than what can be the reason of such frequent divisions of States in America, and of the disposition to crumble into little separate societies, whereby there seems to be danger of multiplying the members of the Confederation without end, or of setting up petty Republics, unacknowledged by the Confederacy, and refusing obedience to its laws?¹⁰⁶

Information from British sources in the United States about the state of British rights under the treaty left American diplomats with little leverage in negotiations and dampened the support of even sympathetic Britons. “[T]he existence of some of those laws in the State of New York, and similar ones in other States,” William S. Smith wrote Jay,

in a great degree stop the mouths of our friends here, and give our enemies full scope to censure and abuse; they are held up as a barrier to a treaty and further connexion; and thus justify their own breach of faith in the retaining the posts on these grounds.... I am clearly of opinion that a strict attention to treaties, and a faithful discharge of national obligations, is the sure road to national respectability.¹⁰⁷

Smith, who was secretary to John Adams in London, traveled throughout the continent and married Adams’s eldest daughter, Abigail, remained optimistic that fruitful relationships remained possible. “[W]e have it in our power to regulate the system of [the English] Court,” he assured Jay, “that is, if we have the power amongst ourselves of bringing our federal abilities to a point of dignified operation.”¹⁰⁸

105. Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 957; *see also* Letter from Dorset to the American Commissioners, *supra* note 103, at 55-56.

106. Letter from John Adams to John Jay (Nov. 24, 1785), *in* 2 *DIPLOMATIC CORRESPONDENCE*, *supra* note 82, at 537, 538.

107. Letter from William S. Smith to John Jay, *supra* note 98, at 36.

108. Letter from William S. Smith to John Jay (Aug. 20, 1786), *in* 3 *DIPLOMATIC CORRESPONDENCE*, *supra* note 82, at 38, 41. On Smith, *see* Marcius D. Raymond, *Colonel William*

Smith also corresponded frequently with David Hartley, the British peace commissioner who agreed with his friend Franklin that the best future of human freedom lay in the American backcountry. Hartley had favored the huge land cession included in the treaty as a boon for the United States and for Europe's poor. The new government could use land sales to pay off its debts, and the territory would become a haven for European peasants seeking liberty and property.¹⁰⁹ "The European peasant who toils for his scanty sustenance, in penury, wretchedness, & servitude," Hartley gushed,

will eagerly fly to this asylum for free & industrious labour. The tide of emigration may set strongly outwards, from Scotland, Ireland, & Canada, to this new land of promise. A very great proportion of men in all the Countries of the world are without property, & generally subjects to governments, of which they have no participation, & over which they have no controul. The congress have now opened to all the world a sale of landed settlements, where the liberty & property of each individual, is to be consigned to his own Custody, & defence.¹¹⁰

This vast land, combined with Congress's repeated pledge to admit new states "on an equal footing with the original States,"¹¹¹ could not "fail of producing great effects in the future progress of things."¹¹² It could also make the new republic dangerous to Britain's remaining North American colonies. Therefore, Hartley thought it would be best "to encourage conciliatory & amicable correspondence between them and their neighbours."¹¹³ He also warned that excluding the Americans from the West Indies could

Stephens Smith, 25 N.Y. GENEALOGICAL & BIOGRAPHICAL REC., Oct. 1894, at 153, 153-61 (1894).

109. See Letter from David Hartley to the Marquess of Carmarthen (Jan. 9, 1785), Foreign Office 4/3, British National Archives ("The first is by the sale of lands ... to extinguish the present national debts.").

110. *Id.* Thoughts like this were not limited to philosophers, of course. These thoughts helped stoke European investment in American land. For the galvanizing role of Adam Smith's writings among transatlantic liberal thinkers, especially his role as a "moral historian" who identified commercial with moral progress, see ONUF & ONUF, *supra* note 67, at 187-218.

111. See, e.g., Northwest Territorial Ordinance of 1787, art. V, reprinted in Northwest Territorial Ordinance of 1789, 1 Stat. 50, 51 n.a (1789).

112. Letter from David Hartley to the Marquess of Carmarthen, *supra* note 109.

113. *Id.*

lead to “a commercial war with them,” which might redound to the benefit of France.¹¹⁴

In the meantime, Americans had to reciprocate by repaying their old debts. “Let the foundations of the New World be laid in these principles—to discharge debts of honor and conciliation to the last farthing,” Hartley wrote to Smith, “they may be considered as part of the purchase of independence.”¹¹⁵ Contract along with property was a key premise to the future of liberty. Adams agreed entirely. “The Moral Character of our People is of infinitely greater worth than all the sums in question,” he wrote from Paris during the final peace negotiations:

The Commerce of the World is now open to Us, and our Exports and Imports are of So large amount, and our Connections will be so large and extensive that the least Stain upon our Character in this respect will loose [sic] Us in a very short time Advantages of greater pecuniary Value than all our Debt amounts to.... To talk of a Spung [sic] to wipe out this Debt, or of reducing or diminishing it, below its real Value ... would betray a total Ignorance of the first Principles of national Duty and Interest.¹¹⁶

Two legal factors distinguished debt from land. Both derived from the law of nations. First, many lawyers on both sides of the Atlantic believed that, under the modern interpretation of the laws of war, belligerent powers should not—perhaps could not—confiscate

114. *Id.* Hartley had received a copy of Congress’s Land Ordinance of 1784 (Apr. 23, 1784) possibly from Thomas Jefferson, whom he met in Paris in late 1784, and he enclosed it in a letter to Secretary of State Lord Carmarthen soon afterward. See Letter from David Hartley to Marquess Carmarthen (Jan. 16, 1785), Foreign Office 4/3, British National Archives. For Hartley’s meeting with Jefferson, where the American minister to France gave Hartley a copy of a map he drafted plotting six new states in the Ohio Valley, see Julian P. Boyd, *Editorial Note to Plan for Government of the Western Territory*, in 6 THE PAPERS OF THOMAS JEFFERSON 581, 592-93 (Julian P. Boyd ed., 1952). The seventh section of the Land Ordinance of 1784, which Jefferson drafted, provided that territories carved out of the western cession would be admitted on “an equal footing” with the original thirteen states, once they had as many “free inhabitants” as the least populous of the original states. For the 1784 Ordinance, see *The Ordinance of 1784*, in 6 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 613, 613-15.

115. Letter from David Hartley to William S. Smith (Dec. 1, 1786), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 82, at 56, 57.

116. Letter from John Adams to Robert Morris (July 11, 1783), in 15 PAPERS OF JOHN ADAMS 100, 101 (Gregg L. Lint et al. eds., 2010).

certain kinds of debt. This was not a hard-and-fast prohibition, even under the contested standards of what counted as a binding principle under the eighteenth-century law of nations. But European legal thinkers had begun to classify capital as a species of personal property different from booty on land and prizes at sea.¹¹⁷ The famous case of Silesian loan (1753), which involved the Prussian King's sequestration of debts owed to British lenders, stood for the proposition that public debt contracts, at least, were immune from confiscation under the laws of war.¹¹⁸ Five years later, Emer de Vattel distinguished public debts owed to an enemy, which the indebted belligerent could never confiscate, from private debts, which under the ancient laws of war could be confiscated or sequestered during the war.¹¹⁹ He observed, however, that contemporary European nations refrained from confiscating private debts "in regard to the advantage and safety of commerce."¹²⁰ Already, Vattel maintained that the non-expropriation principle, originating with public contracts, was implied in every international private debt contract between Europeans.¹²¹

To bolster the protection of creditors in Article IV, diplomats, lawyers, and pamphleteers on both sides of the Atlantic repeatedly invoked both the Silesian loan principle, protecting public contracts, and Vattel's argument that the principle had spread, in Europe at least, to private contracts. John Jay, while serving as the Confederation's Foreign Secretary, advised Congress that although the law of nations, "strictly and rigidly considered," permitted the confiscation of debts, "since mankind have become more enlightened, and their manners more softened and humanized, it has not been common as well for those reasons, as for others suggested by the interest of Commerce and mutual intercourse, to practise such severities."¹²² Within several years of the peace treaty, American lawyers such as Alexander Hamilton, James Wilson, and a young James Kent embraced that emerging norm as part of the modern

117. See MORRIS, *supra* note 57, at 361.

118. See generally ERNEST SATOW, *THE SILESIA LOAN AND FREDERICK THE GREAT* (1915).

119. See 2 VATTEL, *supra* note 14, at 28.

120. *Id.*

121. *Id.* ("[Any belligerent] act[ing] contrary to it would injure the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed.")

122. Report from John Jay to Congress (Oct. 13, 1786), in 31 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 781, 801 (1934).

law of nations and even implicitly as part of American constitutional law.¹²³ Their embrace of this principle with an enthusiasm beyond that found in Europe, and contrary at least to short-term national interest, was part of the way these Americans performed membership in the European-centered world of the law of nations. They also reshaped that law.¹²⁴ Their focus was on long-term American national development, where they believed legal duty and national interest converged happily.

The second legal difference was between the people who were targeted by property confiscation and those who were creditors. Although there was overlap, generally those who had lost property were, in American eyes, disloyal citizens and possibly traitors, despite their desire to remain British colonists.¹²⁵ Americans viewed most creditors, by contrast, as “real” British subjects: born or residing in Britain, though usually with local factors in the colonies who might also be British-born subjects. Interpolating the term “real British subjects” into the treaty, the American commissioners sought to distinguish between disloyal citizens and enemy aliens.¹²⁶

123. On the evolving principle of debt’s immunity from confiscation in wartime, see Hulsebosch, *supra* note 67, at 1630-31. For early Americans’ more ambivalent approach to confiscation of other kinds of property, particularly property in enslaved persons, see JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 72-77 (2012).

124. There is no discussion of the Treaty’s prohibition in Article IV (let alone the non-impairment principle) in CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913), and only passing mention of Article IV in HOLTON, *supra* note 77, at 232, and MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 43-45 (2016).

125. Article V’s pledge that Congress would recommend that the states restore property confiscated during the war distinguished among three different classes of people: first, “real British subjects”; second, “persons resident” in royal sectors during the war “who ha[d] not borne arms”; and third, “persons of any other description.” See *Definitive Treaty of Peace*, *supra* note 55, at 82. Americans believed that the first category, “real British subjects,” included short-term or nonresident British landholders who only constituted a small minority of those targeted, while the other two categories embraced people who the revolutionaries considered to be disloyal citizens. See James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 *AM. J. LEGAL HIST.* 208, 218 (1974).

126. See Kettner, *supra* note 125, at 218. To the British government, however, the colonial-born or long-resident “loyalists” were just as much British subjects as those who lived and traded there temporarily, or who never left Britain at all. Compare Letter from James Duane & Ezra L’Hommedieu to Governor George Clinton (Oct. 15, 1783), in 8 *PUBLIC PAPERS OF GEORGE CLINTON: FIRST GOVERNOR OF NEW YORK* at 259, 263 (1904) (maintaining that the category of “real British subjects” covered “the subjects of Britain whose only particular Interest in America consisted in holding Lands & Property”), with GEORGE CHALMERS,

Article V, covering real property, dealt with the overlap by including special protection for “real British subjects” who lost land¹²⁷: people such as transient and temporary royal governors, for example, whom Americans could not and did not consider to be citizens of their new states.¹²⁸ Those people could safely seek recovery of their land (with no guarantees).¹²⁹ Article IV, by contrast, did not specify how to treat *loyalist* creditors.¹³⁰ Confusion, disagreement, and diplomatic controversy about whether Article IV’s guarantee applied to those loyalists lasted for decades.¹³¹

This emerging norm protecting prewar debts, combined with Americans’ continued reliance on transatlantic capital, helps explain why few Americans proposed outright repudiation of foreign debt, even the debt owed to former enemies. Nor did many wish to repay existing debts and then forswear credit in the future. There were continual anxieties about the corrupting effect of imported luxuries, rebellions against debt collection in periods of currency shortage, and even proposals for insulating the economy.¹³² But,

OPINIONS ON INTERESTING SUBJECTS OF PUBLIC LAW AND COMMERCIAL POLICY; ARISING FROM AMERICAN INDEPENDENCE 8-9 (1784) (denying any such distinction under English law). Historians often misinterpret this distinction, reading “real British subjects” as connoting metropolitan condescension toward North Americans. Cf. MAYA JASANOFF, *LIBERTY’S EXILES: AMERICAN LOYALISTS IN THE REVOLUTIONARY WORLD* 122 (2011). The distinction between loyalists and real British subjects was litigated in American and British courts into the nineteenth century. See Daniel J. Hulsebosch, *The Declaration’s Domestic International Effects*, 65 WM. & MARY Q. 354 (2008) (reviewing DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007)) (discussing court cases that “worked through the domestic consequences of international recognition”).

127. See Definitive Treaty of Peace, *supra* note 55, at 82 (allowing for the “restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects”).

128. See Hulsebosch, *supra* note 126, at 356.

129. See Definitive Treaty of Peace, *supra* note 55, at 82-83; see also Case of Bishop Inglis, in 3 INTERNATIONAL ADJUDICATIONS, *supra* note 62, at 98-100.

130. See Definitive Treaty of Peace, *supra* note 55, at 82.

131. See, e.g., Case of Bishop Inglis, *supra* note 129; Case of Andrew Allen, in 3 INTERNATIONAL ADJUDICATIONS, *supra* note 62, at 238 (detailing the claims of Charles Inglis and Andrew Allen under the Jay Treaty commission).

132. See TERRY BOUTON, *TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 88-104 (2007) (discussing the postwar recession and its impact on small debtors); T.H. BREEN, *THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE* 182-87 (2004) (exploring revolutionary ambivalence about commerce and luxury); HOLTON, *supra* note 77, at 46-54 (arguing that critics of American debtors blamed penchant for luxury consumption); Edmund S. Morgan, *The Puritan Ethic and the American Revolution*, 24 WM. & MARY Q. 3, 8 (1967)

pace American historians' fascination with Shays's tax rebellion in Massachusetts, none of it ever got far. Debt relief stemmed more from currency shortages and the postwar recession than from resistance to a credit-financed economy.¹³³

Congress asked John Jay, Adams's colleague at the Paris negotiations and now Congress's Secretary of Foreign Affairs, to investigate the states' performance of the treaty guarantees, and he expressed his shock at the willful violations.¹³⁴ Congress endorsed Jay's report and asked him to draft a circular of resolutions, which it sent to the states recommending that they repeal any legislation inconsistent with the treaty and, if they had not already, begin enforcing its provisions.¹³⁵ "History furnishes no precedent of such liberties taken with treaties under form of Law in any nation," Congress lectured the states a month before the beginning of the Philadelphia Convention.¹³⁶ "Not only the obvious dictates of religion, morality, and national honor," it continued, "but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made."¹³⁷

Jay's elephantine report got Congress's attention. "If Congs. should be able to agree on any measures for carrying the Treaty into execution," James Madison wrote home to Virginia Governor Edmund Randolph after perusing the report, "it seems probable that the fundamental one will be a summons of the States to remove all legal impediments which stand at present in the way."¹³⁸ Besides being the right thing to do, complying with the Treaty of Peace was the only way to bring Britain back to the negotiating table: "There seems to be no reason to believe that G. B. will comply on any other

(connecting Puritan self-discipline to the boycotts).

133. See Sonia Mittal et al., *The Constitutional Choices of 1787 and Their Consequences*, in *FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S*, at 25, 34 (Douglas A. Irwin & Richard Sylla eds., 2011); Peter L. Rousseau, *Monetary Policy and the Dollar*, in *FOUNDING CHOICES*, *supra*, at 121, 125, 139-145. See generally FERGUSON, *supra* note 4.

134. Report from John Jay to Congress, *supra* note 122.

135. See Congress, Resolutions (Mar. 21, 1787), in 32 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, at 123, 124-25 (1936).

136. Congress to the States (Apr. 13, 1787), in 32 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, *supra* note 135, at 176, 180.

137. *Id.* at 177.

138. Letter from James Madison to Edmund Randolph (Feb. 18, 1787), in 9 *THE PAPERS OF JAMES MADISON 271, 271* (Robert A. Rutland & William M.E. Rachal eds., 1975).

conditions than those signified in the communication of Lord Carmarthen to Mr. Adams.¹³⁹

International morality and national interest coincided here as elsewhere. As usual, it was difficult to pry the two apart, but there is little reason to think that realism led the way. Madison's relentless opposition to paper money at home in Virginia,¹⁴⁰ while at the same time advocating trade discrimination as a diplomatic weapon,¹⁴¹ fit the conventional morality of the law of nations.¹⁴² Trade discrimination was a short-term measure. Raising the cost of or even excluding British goods would, he predicted, force Britain to liberalize its imperial trade network and readmit the American provinces, now under an international treaty rather than pursuant to the municipal Navigation Acts.¹⁴³ Whatever the fate of the balance of power as a political ideal, Americans and especially Southerners had faith that it could succeed as an economic one.¹⁴⁴

While proposing trade discrimination, Madison adamantly opposed debt relief at home,¹⁴⁵ and his stance may have contributed to his near defeat in his first congressional election, when Governor Patrick Henry openly embraced his Antifederalist opponent for the House, James Monroe.¹⁴⁶ Madison construed American interest in line with the law of nations and took the long view on the prospects for economic development.¹⁴⁷ Finance mattered imperatively, trade was the aim, and a nation could withdraw the latter as leverage in negotiations.¹⁴⁸ But if the goal was long-term integration and

139. *Id.*

140. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 44 (1996).

141. See CROWLEY, *supra* note 81, at 97.

142. Cf. Richard B. Lillich, *Economic Coercion and the International Legal Order*, 51 INT'L AFFAIRS 358 (1975) (questioning the legality of economic sanctions in the twentieth-century legal order).

143. Madison sought to "discriminate against British trade, in order to coerce Britain to privilege American commerce as though it were British." CROWLEY, *supra* note 81, at 104-05.

144. See *id.* at 97, 117-21.

145. See RAKOVE, *supra* note 140, at 44.

146. See Editorial Note, *Madison's Election to the First Federal Congress (October 1788-February 1789)*, in 11 THE PAPERS OF JAMES MADISON 301 (Robert A. Rutland & Charles F. Hobson eds., 1977).

147. See James Madison, *Vices of the Political System of the United States*, in 9 THE PAPERS OF JAMES MADISON, *supra* note 138, at 345, 349-50.

148. See CROWLEY, *supra* note 81, at 99, 104.

development, fiddling with currency to aid local interests was doubly wrong: illegal and counterproductive.¹⁴⁹

Madison read Jay's report just as he began to collate what he called the "Vices of the Political System of the States."¹⁵⁰ Perhaps the most famous personal memorandum of the revolutionary era, historians have connected its criticisms directly to Madison's Virginia Plan for constitutional reform.¹⁵¹ Take a closer look at some of the "political vices" that Madison famously identified in the spring of 1787.¹⁵² After beginning with state failures to supply their requisitions to Congress, the second "vice" Madison identified was state "[e]ncroachments ... on the federal authority."¹⁵³ Although such encroachments were "numerous," the first example he used to illustrate this vice was "the wars and Treaties of Georgia with the Indians,"¹⁵⁴ a complaint that raised two Federalist grievances: decentralized war and treaty-making, and also uncontrolled western settlement, aided and abetted by some states.¹⁵⁵ "Violations of the law of nations and of treaties" was third on his list.¹⁵⁶ Attempting to understand the political sociology that had produced such policies, he observed,

From the number of [state] Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year

149. See RAKOVE, *supra* note 140, at 44.

150. See Madison, *supra* note 147.

151. See, e.g., RAKOVE, *supra* note 140, at 46-56, 101. Mary Bilder has suggested, after carefully sorting through Madison's notes surrounding the Convention, that he did not have a coherent theory of interest-based republicanism before arriving in Philadelphia but instead developed it during and after the Constitutional Convention. The "Vices" memo, in particular, might have been a work-in-progress, revised over time, rather than a complete theory. MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 44-45, 243-44 (2015). Bilder demonstrates once again that constitutional reform remained a dynamic experiment before, during, and after the Convention. *Id.* The point here is that Jay's detailed legal analysis of the states' violations of international law was a crucial catalyst in that reform effort.

152. See Madison, *supra* note 147.

153. *Id.* at 348.

154. *Id.*

155. See PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814*, at 94-95 (1993).

156. Madison, *supra* note 147, at 349.

has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated.... The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.¹⁵⁷

He proceeded in the next item—“Trespasses of the States on the rights of each other”—to decry the epidemic of debtor relief laws.¹⁵⁸ “Paper money, instalments [sic] of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States.”¹⁵⁹ These state laws targeted not only in-state creditors, but also creditors from other states and from “foreign nations.”¹⁶⁰ The Articles of Confederation did give Congress “the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.”¹⁶¹ However, that was worthless without the power to block debtor relief laws.¹⁶² Consequently, the federal government needed power “to prevent those frauds on the citizens of other States, and the subjects of foreign powers, which might disturb the tranquility at home, or involve the Union in foreign contests.”¹⁶³ The problems of congressional weakness and state oppression combined in debtor relief laws, where public opinion followed the lowest common denominator, local interests ganged up on interstate and foreign ones, other states retaliated, and there was no way for people with foresight to coordinate at a higher level of government and formulate better policy.¹⁶⁴

Historians have focused on Madison’s concern for the interstate, or national, public good. His theory of factional checks and balances is why many consider him the most thoughtful constitution maker.¹⁶⁵ At the Convention, he sought “a strong enegetic government”

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

162. *See* Madison, *supra* note 147, at 349-50.

163. *Id.* at 350.

164. *Id.* at 349-50.

165. *See* THE FEDERALIST NO. 51, *supra* note 26, at 350-52 (James Madison); *see also* Madison, *supra* note 147, at 355-57.

that would also prevent the state legislatures from invading private rights.¹⁶⁶ But more “energetic” in pursuit of what end? And whose rights? For him, this problem was inextricably tied to a larger good, as revealed when his examples shifted subtly from the interstate to the international. “Is it to be imagined,” he queried, “that an ordinary citizen or even an assembly-man of R. Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in Massts or Connect.?”¹⁶⁷ Similarly, inconsistent trade laws among the states were “a snare not only to our citizens but to foreigners also.”¹⁶⁸ Madison did not, of course, work to create a Constitution primarily for the benefit of those “foreigners.”¹⁶⁹ Still, their rights—rights based on treaties and the law of nations, respect for which would redound to the benefit of the United States—were at the forefront of his mind when he analyzed the structure of constitutional government.¹⁷⁰ In his concern about the international dimensions of constitutional reform, at least, Madison was not unusual.¹⁷¹

Foreign criticism demonstrated to many Americans that although it might be possible for a confederation to operate with decentralized power *internally*, it would not be seen as a full-fledged nation for *international* purposes.¹⁷² And those purposes included making more than symbolic commercial treaties, such as that with Prussia in 1785.¹⁷³ Some took another step: without full commercial and diplomatic relations, it was not possible for a decentralized polity to

166. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 472 (Max Farrand ed., 1911); see also Madison, *supra* note 147, at 354.

167. Madison, *supra* note 147, at 355-56.

168. *Id.* at 354.

169. See, e.g., CROWLEY, *supra* note 81, at 97.

170. See Madison, *supra* note 147, at 349.

171. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 980-1015.

172. See DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 104-05 (David Robertson ed., 2d ed. 1805) [hereinafter DEBATES] (transcribing James Madison's speech at the Convention of Virginia); see also PETER P. HILL, FRENCH PERCEPTIONS OF THE EARLY AMERICAN REPUBLIC 1783-1793, at 111-12 (1988).

173. See DEBATES, *supra* note 172, at 104-05 (transcribing James Madison's speech at the Convention of Virginia); see also MARKS, *supra* note 66, at 154; ONUF & ONUF, *supra* note 155, at 101-02.

function well, even internally.¹⁷⁴ The pathologies flowing from ineffective foreign relations flowed both ways. Increasingly, it was impossible to separate internal from external dimensions of the revolutionary experiment.

B. The Constitutional Infrastructure of International Commerce

The communications circuit that carried information both ways across the Atlantic therefore deeply affected American constitution-making. Most historians instead treat foreign affairs as a discrete contributing factor and interpret its influence through a realist lens emphasizing national security.¹⁷⁵ The intrinsically sociable and integrating premise beneath the critique of the critical period, however, puts constitutional reform in another light. Bare national security was not the goal. The Federalists, as well as many of their opponents, sought much more than that (commercial development), and also a bit less (no permanent defense establishment).¹⁷⁶ They sought national development in hopes of fulfilling a revolutionary vision of thriving seaports, fully engaging in the Atlantic world of commerce, and of American settlers developing the backcountry at a moderate or (for some) fast pace, turning the vast treaty cession into a series of equal states.¹⁷⁷ Achieving these goals required that Americans attract overseas trade, foreign investors, and emi-

174. See, e.g., James Madison, Remarks at the Virginia Convention (June 7, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 1006, 1034 (recording Madison's speech at the Virginia ratifying convention, complaining that "[t]he Confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us").

175. See, e.g., MARKS, *supra* note 66, at 3 (discussing how "individual states undercut congressional prerogative in foreign relations and jeopardized the security of the entire nation"). On constitutional reform generally, see RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781-1789, at 194-96 (1987); ONUF & ONUF, *supra* note 155; and JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979).

176. The Constitution empowered Congress "[t]o raise and support Armies" but such appropriations to two years maximum. U.S. CONST. art. I, § 8, cl. 12.

177. For the Enlightenment debates over the relationship between sociability, commerce, and international integration, see ISTVAN HONT, JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE (2005); and ANTHONY PAGDEN, THE ENLIGHTENMENT AND WHY IT STILL MATTERS (2013). On western settlement, see PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987).

grants.¹⁷⁸ Trade, finance, and labor were therefore central to the constitutional vision,¹⁷⁹ as the document and the debates made clear.¹⁸⁰ Attracting these factors of development required, the constitution makers believed, careful attention to treaties and the law of nations, attention that is apparent in the constitutional text, its gloss, and surrounding contestation over how best to construct the document as a government.¹⁸¹

Before exploring the text and the ratification debate, two historiographical monuments deserve attention. First, Charles Beard famously argued a century ago that the Federalists manufactured their Constitution to guarantee that the federal government would pay congressional debt in which they had heavily invested.¹⁸² Attacked repeatedly for its empirical claim, Beard's "economic interpretation of the Constitution" still shapes much investigation into the making and ratification of the Constitution.¹⁸³ Beard was half right. Economics, and specifically finance, did matter.¹⁸⁴ But the

178. For a contemporary statement of the relationship of the Constitution to political economy of an emerging nation, see John Jay, *An Address to the People of the State of New-York on the Subject of the Constitution* (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 67 (Paul Leicester Ford ed., 1888); see also THOMAS K. McCRAW, *THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY* 357-65 (2012) (describing the political economy of two early Treasury Secretaries).

179. See McCRAW, *supra* note 178, at 335, 354-57.

180. See generally U.S. CONST. arts. I, III, VI.

181. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 980-1061.

182. See BEARD, *supra* note 124, at 290-91.

183. HOLTON, *supra* note 77, at 7-9, 13-16, 274-78, and BOUTON, *supra* note 132, at 83-87, offer variations on Beard's theme, while a sophisticated updating of Beard's coding of the interests of the delegates to the Philadelphia Convention and the state ratifying conventions can be found in ROBERT A. MCGUIRE, *TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION* (2003). Their work in turn shaped the frame of Michael Klarman's narrative of the making of the Federal Constitution. KLARMAN, *supra* note 124. Klarman's book mines the heroic 1-27 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 96, but his work, like Holton's and Bouton's, focuses on domestic debates, not least because the *Documentary History* does too, though it contains more foreign commentary than historians have hitherto noticed. In this they are all faithful to Beard. For criticisms of Beard's use of evidence, see ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* (1956); and FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). For ideological alternatives, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (enlarged ed. 1992); and, especially, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1789* (1998).

184. See BOUTON, *supra* note 132, at 173-76, 178-79; HOLTON, *supra* note 77, at 55-95.

creditors who mattered most were foreigners not involved directly in the drafting and who would not staff the federal government.¹⁸⁵ Finance mattered to the Framers because of the promise that international credit held out for national development, not because—or not just because—of the opportunities that such development offered specific Founders.¹⁸⁶ If there was a conspiracy, it was not a domestic coup, and it is unconvincing to see the international communications circuit that generated the “critical period” diagnosis as an international plot aided by a domestic band of suddenly anti-revolutionary turncoats. The perception of what was learned in the 1780s about the tension between representative government and international commerce did not amount to a Thermidorian reaction. In fact, the Federalists believed that commercial integration had been a goal of the Revolution.¹⁸⁷ Reform was not an economic conspiracy against the Revolution but rather the pursuit of revolutionary political economy.¹⁸⁸

The presence of foreign creditors in what has often been cast as a struggle between discrete classes within the United States raises another monument in the historiography of national development. Douglass North and Barry Weingast argued that the development of a more powerful Parliament after the Glorious Revolution made Britain’s commitments to repay loans more credible.¹⁸⁹ More public participation in government gave investors greater confidence in the government’s willingness and capacity to repay money.¹⁹⁰ North and Weingast focused on domestic creditors, using the effects of England’s Glorious Revolution as the central example.¹⁹¹ The growing strength of the Commons, and its representation of much of the investing public, gave investors greater confidence that the government’s commitments to repay debt were credible.¹⁹² The

185. See *infra* Part III.

186. See BOUTON, *supra* note 132, at 179.

187. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 977-79; Hulsebosch, *Revolutionary Portfolio*, *supra* note 1, at 795-99 (describing the origins and purposes of the Continental Congress’s Model Commercial Treaty).

188. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 977-79.

189. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 804 (1989).

190. See *id.* at 804-05.

191. See *id.*

192. See *id.*

thesis has been tested or applied in various local contexts.¹⁹³ The relationship between foreign investment and domestic constitutional development has by contrast been much less explored.¹⁹⁴ What is especially interesting about the U.S. case is that the proportion of foreign ownership of U.S. public and private debt also increased over time; it was not just an inheritance of postcolonial revolution.¹⁹⁵ Because foreigners could not vote, constitution makers could not rely on representative government as a signal of commitment, and neither could the investors rely on that mechanism for some kind of virtual representation. The political experience of the 1780s suggested just the opposite.¹⁹⁶

Instead, American constitution makers developed extra-representative structures to signal commitment and make it stick: separated powers, a unified executive, and effective courts, for instance.¹⁹⁷ The Constitution's infrastructure for international relations spread in two directions. Vertically, between the federal government and the states, the Constitution provided that the federal government would have absolute control over war and diplomacy, as well as at least preemptive control over international commerce, and it explicitly disabled the states from making war, raising troops without authority, and imposing external taxes.¹⁹⁸ In short, the Constitution centralized control over war and peaceful interaction with other nations. Horizontally, the Constitution distributed the foreign affairs powers across the three branches, adding a strong Executive, an independent judiciary with jurisdiction over a host of cases implicating foreign affairs, and obliging all branches, as well as the states,

193. See, e.g., DAVID STASAVAGE, *STATES OF CREDIT: SIZE, POWER, AND THE DEVELOPMENT OF EUROPEAN POLITICS* (2011); QUESTIONING CREDIBLE COMMITMENT: PERSPECTIVES ON THE RISE OF FINANCIAL CAPITALISM (D'Maris Coffman et al. eds., 2013).

194. A suggestive study focusing on Article III jurisdiction is Charles Anthony Smith, *Credible Commitments and the Early American Supreme Court*, 42 *LAW & SOC'Y REV.* 75 (2008). Cf. David S. Law, *Globalization and the Future of Constitutional Rights*, 102 *NW. U. L. REV.* 1277 (2008) (tracing commitments to human rights as a global "race to the top" and a signal of civilization).

195. See Peter L. Rousseau & Richard Sylla, *Financial Systems, Economic Growth, and Globalization*, in *GLOBALIZATION IN HISTORICAL PERSPECTIVE* 373, 383 (Michael D. Bordo et al. eds., 2003).

196. See, e.g., Madison, *supra* note 147, at 349; Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 946-70.

197. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 940.

198. See U.S. CONST. art. I, §§ 8, 10.

to treat existing and future treaties as the supreme law of the land.¹⁹⁹ Treaty-making was the province of the President and the Senate, not the more popular House of Representatives.²⁰⁰ Similarly, the Executive would control formal diplomacy.²⁰¹ However, Congress would regulate international commerce, and it retained the ultimate sovereign power: the power to declare war.²⁰²

In addition, a striking characteristic of all the revolutionary constitutions was their disabling provisions. Many of these hallmarks of the “limited government” in the Federal Constitution bore directly on foreign affairs, again in both war and peace. Article I, Sections 9 and 10, in the Federal Constitution, for example, prohibited the federal and state governments from certain actions entirely, and not only to preserve the lines of federalism. Neither could enact *ex post facto* laws.²⁰³ Most prohibitions relative to commerce were, however, aimed at the states.²⁰⁴ In addition to stripping the states of any formal foreign affairs powers, the states could not “emit Bills of Credit[, or] make any Thing but gold or silver Coin a Tender in Payment of Debts,” or make any “Law impairing the Obligation of Contracts.”²⁰⁵

Taking direct aim at the fiscal policy of several states, the prohibition of state paper money and debt relief were controversial.²⁰⁶ Six months before the Convention, in response to county petitions asking the Virginia legislature to print paper money, and reporting that some colonies had used it safely before the Revolution, Madison pleaded in the alternative.²⁰⁷ First, he denied that paper money ever

199. *See id.* arts. II, III, VI.

200. *See id.* art. II, § 2.

201. *See id.*

202. *See id.* art I, § 8, cls. 3, 11.

203. *Id.* art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

204. *See, e.g., id.* art. I, § 10.

205. *Id.* art. I, § 10, cl. 1. The Convention also considered prohibiting the federal government from issuing paper money but in the end balked, apparently not wishing to prevent the government from issuing such as an emergency measure. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (Max Farrand ed., 1911).

206. For a sympathetic account of that resistance, see HOLTON, *supra* note 77. For the efficacy and resistance to paper money in early America, see FERGUSON, *supra* note 4; *see also* JOHN P. KAMINSKI, PAPER POLITICS: THE NORTHERN STATE LOAN-OFFICES DURING THE CONFEDERATION, 1783-1790 (1989) (arguing that paper money continued to function well in a few northern states that possessed revenue, such as customs revenue, to retire the paper).

207. *See* James Madison, *Notes for Speech Opposing Paper Money*, in 9 THE PAPERS OF JAMES MADISON, *supra* note 138, at 158, 158-59.

functioned well.²⁰⁸ Next, he stated that the conventional wisdom about paper money had changed since the colonial period (it was “not then understood”) and, significantly, “w[oul]d[] not then, nor now succeed in Great Britain &c.”²⁰⁹ Driving home the reputational point, Madison added that if Virginia enacted a paper money scheme, it would be “conspiring with the examples of other States to disgrace Republican Govts. in the eyes of mankind.”²¹⁰ Paper money was just no longer, he thought, on the legislative menu for civilized states.²¹¹ In addition, Madison argued that state paper money threatened the interstate and international economy: it facilitated “fraud in States towards each other or foreigners.”²¹²

At the Philadelphia Convention, many delegates joined Roger Sherman on August 28 in believing that “this [is] a favorable crisis for crushing paper money.”²¹³ Sherman’s home state of Connecticut had close commercial ties to Rhode Island, and merchants in the land of steady habits had been harmed by its neighbor’s liberal emission of paper money as legal tender that would be accepted in Rhode Island courts to settle debts.²¹⁴ Under the draft of the Constitution produced by the Committee of Detail and presented to the Convention on August 6th, the states would have been able to request permission from Congress to emit bills of credit (which functioned as legal tender), as they could with tonnage duties, troops, or interstate and foreign compacts.²¹⁵ Sherman proposed instead an absolute prohibition, and only Madison’s Virginia

208. *Id.* at 159.

209. *Id.* Madison was referring to a transformation in British monetary policy, beginning in the 1690s, that legal historian Christine Desan calls “the liberal turn to ‘gold.’” DESAN, *supra* note 76, at 370-403.

210. Madison, *supra* note 207, at 159.

211. *See id.* at 158-59.

212. *Id.* at 159. For recent criticism of the Federalist position, see Farley Grubb, *The U.S. Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and How a Constitutional Transformation of the Nation’s Monetary System Emerged* (Nat’l Bureau of Econ. Research, Working Paper No. 11783, 2005).

213. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 205, at 439.

214. *See* Grubb, *supra* note 212, at 14-16. The tension led to proposals in the Connecticut legislature, on the eve of the Philadelphia Convention, to introduce commodity money as legal tender, but these failed. *See, e.g., DEBATES in the House of Assembly of Connecticut, on a TENDER ACT*, WORCESTER MAG., June 1787, at 3 (reporting debates from May 1787).

215. *See* U.S. CONST. art. I, § 10, cl. 3; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 205, at 435. For the Committee of Detail’s draft of this provision, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 205, at 144.

delegation voted against the proposal.²¹⁶ After this overwhelming vote in favor of banning state paper money, Rufus King of Massachusetts proposed copying the month-old Northwest Ordinance and adding a prohibition on state legislation interfering with the obligation of contracts.²¹⁷ The Contract Clause passed seven states to three.²¹⁸

After the Convention, Madison recycled his notes from the debate in the Virginia legislature to defend the bans on paper money and debtor relief legislation in Article I, Section 10, as necessary to restore confidence between men as well as “the character of Republican Government.”²¹⁹ Different public currencies among the states would hamper trade, “[t]he subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member.”²²⁰ Connecticut’s delegates Roger Sherman and Oliver Ellsworth (who later drafted the Judiciary Act) emphasized in their letter to the state governor transmitting the draft Constitution that the prohibitions on state bills of credit, paper money, and “impairing the obligation of contracts by *ex post facto* laws was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected.”²²¹ Charles Pinckney of South Carolina went further, embracing hard money even more tightly than most Federalists.²²² “This section,” he exclaimed about Article

216. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 205, at 439.

217. *Id.*

218. *Id.* Madison, notably, wondered aloud whether the prohibition of *ex post facto* laws would prevent state interferences with contracts, making King’s proposal redundant. *Id.* at 440. Madison’s assumption that the *Ex Post Facto* Clause extended beyond criminal to civil legislation met resistance by a Blackstone-toting John Dickinson of Delaware, which only demonstrated to Dickinson the necessity of the Contract Clause to prohibit some *ex post facto* civil legislation. *See id.* at 448-49.

219. THE FEDERALIST NO. 44, *supra* note 26, at 300 (James Madison).

220. *Id.* at 301.

221. Letter from Roger Sherman & Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 351, 352; *see also* James McHenry, Speech at Maryland’s Constitutional Convention (Nov. 29, 1787), in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 279, 284 (reporting the Convention’s conclusion that “the best security that could be given for the Public faith at home and the extension of Commerce with Foreigners”).

222. Charles Pinckney, Speech at the South Carolina Convention (May 17, 1788), in 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 353,

I, Section 10, is “the soul of the constitution.”²²³ The prohibitions on the states would “cultivate those principles of public honor and private honesty which are the only sure road to national character and happiness.”²²⁴ Silently invoking Gresham’s Law, he maintained that revolutionary experience proved that paper money chased hard money out of the country, disabling international trade: “[A]ll the foreign merchants trading to America must suffer and lose by it; therefore that it must ever be a discouragement to commerce.”²²⁵ That, he concluded, devastated the export-driven economy of South Carolina and elsewhere.²²⁶ Like Madison, he invoked interstate fairness and the benefits of a uniform public currency.²²⁷ “But above all,” he insisted,

how much will this section tend to restore your credit with foreigners—to rescue your national character from that contempt which must ever follow the most flagrant violations of public faith and private honesty. No more shall paper money—no more shall tender laws, drive their commerce from our shores, and darken,— ... the American name in every country where it is known.... No more shall the widow, the orphan and the stranger become the miserable victims of unjust rulers. Your government shall now indeed be a government of laws.²²⁸

A government of laws did not allow local politics to interfere with international trade.²²⁹

Similarly, during the ratification debates, North Carolina Federalist Archibald Maclaine emphasized the connection between paper money, discrimination against foreigners in the state courts, and the economic recession.²³⁰ “The United States are, and for some

353.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 354.

227. *Id.*

228. *Id.* at 354-55.

229. *See id.* at 354.

230. *See* Archibald Maclaine, *Publicola: An Address to the Freemen of North Carolina*, in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 435, 435-39.

years have been, without any national character,” he argued while trying to move the reluctant state to hold a ratifying convention,

Foreigners say, and they say truly, that we have no government—Even in this state, our policy is so wretched, that we have lost all credit, the very soul of commerce. No foreigner, no not an individual of any of our sister states, will trust us with a shilling. Our paper money, and our judicial decisions, banish all confidence; and the former has banished all gold and silver—Let paper money be no longer a tender, and justice be done to those who have transactions with us, and I will venture to assert that we shall soon have among us, a pound value in gold and silver, for every shilling in paper which we now possess.²³¹

Paper money had served a valuable purpose in colonial America, Federalists conceded. But it was not functioning as well in the independent states. It flowed more easily across borders, rather than remaining, more or less, local, and the states lacked realistic plans for retiring that paper. As the United States entered a new international economy, many Federalists concluded, it had to learn lessons from Britain, which had good credit across Europe.²³² “Were it possible for the nations abroad to suppose Great-Britain would emit bills on the terms whereon they have issued in America,” asked a Maryland Federalist in January 1788,

how soon would the wide arch of that mighty empire tumble into ruins? In no other country in the universe has prevailed the idea of supplying, by *promissory notes*, the want of coin, for commerce and taxes. In America, indeed, they have heretofore served many valuable purposes.... But when every thing demonstrates the season to be past; when the credit of America, in all places, depends on the security she shall give to contracts, it would be madness in the states to be tenacious of their right. So long as Europe shall believe we regard not justice, gratitude and honour, so long will America labour under the disadvantages of

231. *Id.* at 439.

232. See Aristides, *Remarks on the Proposed Plan of a Federal Government*, in 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 224, 246. The editors identify the author as Alexander Contee Hanson, then a judge on the Maryland General Court. *Id.* at 224.

an individual, who attempts to make good his way through the world with a blasted reputation.²³³

Many opponents of these restrictions on state power agreed that paper money and legislative alterations of contracts were generally unwise policy. There were, however, special circumstances that might justify extreme measures. This was the same logic that some Federalists had used at the Convention to defeat the extension of the prohibition to the federal government.²³⁴ In times of “*great public calamities and distress*,” Antifederalist Luther Martin argued, the government should “prevent the *wealthy creditor* and the *monied man* from *totally* destroying the *poor* though even *industrious debtor*.”²³⁵ For men like Martin and Patrick Henry, the claim of state necessity, itself informed by the law of nations, remained valid for the individual states.²³⁶ At the least, they maintained in an early instance of southern constitutional jurisprudence, the states possessed just as much right to claim it as the federal government.²³⁷

If the states could not, or on principle would not, grant debt relief, another route to the same end ran through jury nullification.²³⁸ Henry, never afraid of smoking guns, put it more clearly than most. The Supremacy Clause, federal courts, and the prohibition on state debt relief would combine to ruin Virginia’s farmers.²³⁹ To top it off, the proposed Constitution did not on its face require that the federal courts have juries in civil cases.²⁴⁰ Even that safety valve for local interests was imperiled. “If ... amendments are not obtained,” he warned toward the end of Virginia’s convention, as ratification

233. *Id.* at 246-47.

234. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 205, at 308-10 (recording Edmund Randolph’s statement that “notwithstanding his antipathy to paper money, [he] could not agree to strike out the words, as he could not foresee all the occasions that might arise”).

235. See Luther Martin, *Genuine Information VIII*, in 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 196, 199.

236. Vattel, for example, sprinkled state necessity exceptions among his general principles under the customary law of nations. See, e.g., 2 VATTEL, *supra* note 14.

237. See generally F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA’S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828 (1994).

238. See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 161 (2001).

239. See *id.* at 188-89.

240. *Id.* at 149.

seemed inevitable, “the trial by jury is gone: British debtors will be ruined by being dragged to the Federal Court—and the liberty and happiness of our citizens gone—never again to be recovered.”²⁴¹ Edmund Randolph disagreed, at least about those debts. “The British debts, which are withheld contrary to treaty, ought to be paid. Not only the law of nations, but justice and honor require that they be punctually discharged.”²⁴²

In addition, Article VI pledged that “[a]ll Debts contracted and Engagements entered into” before the Constitution would remain valid against the new federal government.²⁴³ This unusual retroactivity provision was followed by another, in the Supremacy Clause, in which the new government, its courts, and state courts would treat not only the Constitution and federal law as the supreme law of the land, but also “all Treaties made, or which shall be made” under the new government.²⁴⁴ Outstanding confederation debt and existing treaties would bind the new government, and Article III made clear that federal court jurisdiction would extend as well to “[t]reaties made, or which shall be made.”²⁴⁵ There would be no repudiation of domestic or foreign public debt, or of the private British debts.²⁴⁶

Coming away from a Convention filled with compromises, the leading Federalists tried to make sense of just how a system of government based on it would work. What they saw was what they had originally sought: greater insulation of foreign policy from the state legislatures and the more democratic house of Congress.²⁴⁷ Hamilton’s first count in his bill of particulars against the Confederation in *The Federalist* 15 went directly to this point: “Are there engagements to the performance of which we are held by every tie

241. Patrick Henry, Remarks at the Virginia Convention (June 23, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 1464, 1466. See generally Harrington, *supra* note 238 (arguing that Antifederalists demanded civil jury to protect against a range of suits in federal courts).

242. Edmund Randolph, Remarks at the Virginia Convention (June 17, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 1338, 1360.

243. U.S. CONST. art. VI, cl. 1.

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

245. *Id.* art. III, § 2, cl. 1.

246. *Id.* art. VI, cls. 1-2.

247. See Golove & Hulsebosch, *Civilized Nation*, *supra* note 1, at 980-1015; Golove & Hulsebosch, *Known Opinion*, *supra* note 1.

respectable among men?”²⁴⁸ Indeed, “[t]hese are the subjects of constant and unblushing violation.”²⁴⁹ Beyond the repeated breaches of the nation’s international obligations, the states had violated even the Treaty of Peace with Great Britain, which had secured their independence and ceded territory well beyond what they could have secured by arms.²⁵⁰ Citing those violations, the British retained possession of several forts within U.S. territory, and, given the truth of the charges, the Confederation could not even “remonstrate with dignity.”²⁵¹ The predictable result was a state of “national humiliation ... degrad[ing to] the character of an independent nation” and rendering the Confederation incapable of even acting the part of a civilized nation: “Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our Government even forbids them to treat with us: Our ambassadors abroad are the mere pageants of mimic sovereignty.”²⁵² So, too, was Congress.

John Jay offered similar indictments in his early essays. Jay wrote only four numbers, but the contributions of the Confederation’s Secretary of Foreign Affairs focused on the inefficacy of the states’ diplomacy near and far.²⁵³ Sounding a central theme of *The Federalist*, he counseled that the best defense against foreign aggressions was preemptive discipline over the American states and citizens.²⁵⁴ A single national government would control treaty interpretation, rein in both state legislation and private provocations, and have the capacity, through the presidency, to negotiate capably.²⁵⁵ “[A] cordial Union under an efficient national Government, affords them the best security that can be devised against *hostilities* from abroad.”²⁵⁶ Why? Because “the Union tends most to preserve the people in a state of peace with other nations.”²⁵⁷ An effective state was a peaceful one, one able to harmonize policy,

248. THE FEDERALIST NO. 15, *supra* note 26, at 91 (Alexander Hamilton).

249. *Id.*

250. *See* Definitive Treaty of Peace, *supra* note 55, at 81.

251. THE FEDERALIST NO. 15, *supra* note 26, at 91 (Alexander Hamilton).

252. *Id.* at 91-92.

253. *See, e.g.*, THE FEDERALIST NO. 3, *supra* note 26, at 14 (John Jay).

254. *Id.*

255. *See id.* at 14-15.

256. *Id.* at 14.

257. *Id.*

legal interpretation of treaties and the law of nations, and the enforcement of both within the United States.

Hamilton and Madison elaborated that theme, focusing on governmental rather than individual violations of the law of nations. British criticism, loyalist complaints and lawsuits, and Federalist legal analysis had made these violations legion. So it was natural that Hamilton referred to foreign opinion. In *Federalist* 22, for example, he cited a recent Parliamentary debate in which a leading member argued that it was appropriate to continue with a series of temporary, rather than permanent, commercial statutes regulating commerce with the United States “until it should appear whether the American government was likely or not to acquire greater consistency.”²⁵⁸ Hamilton had to confess that the Member of Parliament was right:

No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance to them, while they were apprised that the engagements on the part of the Union, might at any moment be violated by its members.²⁵⁹

The Constitution, Hamilton asserted, would change all of that.²⁶⁰

If Madison’s *Federalist* 10 was the lodestar for the Beardian Constitution of domestic interests, his *Federalist* 63 might be a good candidate for the international Constitution. In that number, Madison put away his doubts about the Senate, with its equal representation of each state, and defended its role in treaty-making instead of the more democratic House.²⁶¹ With full participation of Congress in treaty-making, Madison warned, “the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned; but the national councils will not possess that sensibility to the opinion of the world.”²⁶² He went on to explain that “the judgment of other nations

258. THE FEDERALIST NO. 22, *supra* note 26, at 136 (Alexander Hamilton).

259. *Id.*

260. *See id.* at 146.

261. *See* THE FEDERALIST NO. 63, *supra* note 26, at 423 (James Madison).

262. *Id.* at 422.

is important to every government for two reasons.”²⁶³ The first was that, “independently of the merits of any particular plan or measure, it is desirable on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy.”²⁶⁴ Nations respected other nations that made wise decisions. The second was that “in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed.”²⁶⁵

What did Madison mean by the “opinion of the impartial world”?²⁶⁶ His method was to refer to ancient and modern history and the known rules of international relations. The phrase recalled Adam Smith’s internalized moral compass of “an impartial spectator,”²⁶⁷ and suggested that, for Madison, lessons learned from the past and abroad ought to be internalized in national morality. Jay and Hamilton agreed, looking even more explicitly to the law of nations as a guide to international decision-making.²⁶⁸ The authors of *The Federalist* juxtaposed the traditional customs of international engagement to transient domestic politics and found in the former truths that had been tested over time.²⁶⁹ Those known and conventional rules, tried by history and supported by reason, would offer a better guide to foreign policy than factional or even majoritarian impulses. An opportunistic nation could gain from another nation’s folly, taking advantage of the latter in a zero-sum transaction. But there was a positive-sum alternative to this situation: nations gained more together when each conducted itself honorably, defined as adhering to the law of nations. “What has not America lost by her want of character with foreign nations,” Madison asked, “[a]nd how many errors and follies would she not have avoided, if

263. *Id.* at 423.

264. *Id.*

265. *Id.*

266. *Id.*

267. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 171 (1759).

268. See, e.g., THE FEDERALIST NO. 3, *supra* note 26, at 13-15 (John Jay); THE FEDERALIST NO. 15, *supra* note 26, at 92-94 (Alexander Hamilton); THE FEDERALIST NO. 22, *supra* note 26, at 144 (Alexander Hamilton); THE FEDERALIST NO. 64, *supra* note 26, at 432-33 (John Jay).

269. See MICHAEL P. FEDERICI, *THE POLITICAL PHILOSOPHY OF ALEXANDER HAMILTON* 117 (2012) (“Hamilton placed great authority in the law of nations, because it embodied the deliberative experience of generations of human beings from different nations.”).

the justice and propriety of her measures had in every instance been previously tried by the light in which they would probably appear to the unbiased part of mankind?"²⁷⁰ There was an "unbiased" perspective on national behavior available in the larger world. Real and imagined, it was perceived as insistent in the 1780s.

III. THE FOREIGN RATIFICATION DEBATE

Although the ratification debates featured much discussion of the United States' international obligations—much more than historians typically note—the constitutional protection of *British* rights received, unsurprisingly, less attention in the published literature. As soon as the Convention ended, however, the British consuls read the document and sent home excited commentaries. Federalists then explained to British representatives what the document meant for their interests, sometimes glossing over limitations or not correcting favorable misimpressions. The large exception to their hope was the obstacles British creditors continued to face in Virginia and, to a lesser extent, in South Carolina and Georgia.

A. Persuading the British

Upon reading the document and talking to Federalists, the consuls penned breathless reports home and enclosed the printed document—the first copies to reach Europe. "As far as I can judge," Phineas Bond reported from Philadelphia three days after the Convention ended, "the sober and discreet Part of the Community approve of the Plan in its present Form, & where due Consideration is paid to the democratic Temper of the Times, it is perhaps the best Shape in which it could have been handed forth to the People."²⁷¹ Consul George Miller observed in Charleston,

If it is approved of, and should be adopted, it promises, I think, to rescue Congress from that Inefficient situation in which they have long stood, as it grants sufficient powers to comply with,

270. THE FEDERALIST NO. 63, *supra* note 26, at 423 (James Madison).

271. Letter from Phineas Bond to the Marquess of Carmarthen (Sept. 20, 1787), Foreign Office 4/5, British National Archives.

and enforce their Treaties and other National Engagements, without submitting to the Controul of State Legislatures.²⁷²

By late December, Miller had “little doubt” that South Carolina would ratify it.²⁷³ Already by October 3rd, Sir John Temple confidently reported from New York that he had “no doubt” that the Constitution would be adopted and that George Washington would “undoubtedly” become the first President.²⁷⁴ All that turned out to be correct. At those early dates, however, the perspective betrayed itself as Federalist. Ratification proved to be a longer and more uncertain process.²⁷⁵

The consuls learned much just by reading the short document. It seemed straightforward and addressed several diplomatic concerns. In case they missed anything, American guides were available and occasionally insistent. There was nothing like the printed ratification literature, of course, addressed just to the British and other foreign audiences. But in diplomatic conversations and correspondence, Federalists told British contacts that the Constitution changed everything about British-American relations. To this audience, Federalists presented the Constitution as a package of radical reforms.

The consuls kept close tabs on the ratification debates and on the tally of states in favor of the new document. Rumors abounded that

272. Letter from George Miller to the Marquess of Carmarthen (Nov. 17, 1787), Foreign Office 4/5, British National Archives.

273. Letter from George Miller to the Marquess of Carmarthen (Dec. 24, 1787), Foreign Office 4/5, British National Archives. The state did so five months later. *The South Carolina Convention, Friday, 23 May 1788*, in 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 388, 393-96.

274. Letter from John Temple to the Marquess of Carmarthen (Oct. 3, 1787), Foreign Office 4/5, British National Archives. One semi-official observer—the dyspeptic Peter Allaire, who worked as a spy for an undersecretary of state and tried to undermine Temple and Bond in hopes of replacing them—dissented from the positive reports. He predicted that each state would resist being “reduced to a meer Corporation Town,” that the Confederation would endure without reform, and in a few years the states would dissolve into a “Civil War.” Peter Allaire, Occurrences from 5 August to 5 October 1787 (Oct. 5, 1787), Foreign Office 4/5, British National Archives. He was alone among the local British observers in predicting that ratification would fail, but other foreign observers agreed that the choice was between ratification and dissolution. See HILL, *supra* note 172, at 112 (reporting a French official’s assessment).

275. For an excellent overview, see generally PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010).

North Carolina had rejected it; Virginia and New York might do so.²⁷⁶ It was widely believed that Congress would have to default on foreign loans from its allies in 1788 or 1789 if it did not get the power to tax. It only managed to meet interest payments in 1787, one observer reported to the Secretary of State, by taking out a new loan from Amsterdam.²⁷⁷

Along with the consuls, an important conduit of information from 1788 to 1791 was Major George Beckwith. He had been a British army intelligence officer during the American Revolution and, in the 1790s, began ascending the higher rungs of the imperial ladder, starting with the governorship of Bermuda, then the richer Barbadian governorship, and finally appointment in 1820 as the Commander-in-Chief of the British military in Ireland.²⁷⁸ In the late 1780s, though, he was an aide to Lord Dorchester, the Governor-General of the Canadas.²⁷⁹ With the Secretary of State's approval, Dorchester sent Beckwith several times to the United States in the late 1780s and early 1790s as an unofficial emissary.²⁸⁰ Beckwith's official portfolio remained ambiguous. He did not, for example, possess a commission from the Privy Council but rather only a letter of introduction from Dorchester.²⁸¹ Yet, on at least one occasion, he implied to Alexander Hamilton that Dorchester would not keep sending him without the Cabinet's "knowledge," and during his later trips, after 1790, he acted on the Secretary of State's orders.²⁸²

276. Letter from Phineas Bond to the Marquess of Carmarthen (Sept. 2, 1788), Foreign Office 4/6, British National Archives; Letter from Phineas Bond to the Marquess of Carmarthen (June 28, 1788), Foreign Office 4/6, British National Archives.

277. Peter Allaire, Occurrences from 6 December to the 2d January 1788 (Jan. 3, 1788) (enclosed in Letter from George Yonge to Marquess of Carmarthen), Foreign Office 4/6, British National Archives.

278. Paul David Nelson, *Beckwith, Major George (1753-March 20, 1823)*, in 1 SPIES, WIRETAPS, AND SECRET OPERATIONS: AN ENCYCLOPEDIA OF AMERICAN ESPIONAGE 79 (Glenn P. Hastedt ed., 2011).

279. *See id.* Dorchester, when known as Sir Guy Carleton, had been Commander-in-Chief of North America during the Revolution. *See* Paul David Nelson, *Dorchester, Guy Carleton, Lord (September 23, 1724-November 10, 1808)*, in 1 SPIES, WIRETAPS, AND SECRET OPERATIONS: AN ENCYCLOPEDIA OF AMERICAN ESPIONAGE, *supra* note 278, at 251.

280. *See* DOUGLAS BRYMNER, REPORT ON CANADIAN ARCHIVES xxxvi (1891) [hereinafter CANADIAN ARCHIVES].

281. *See id.*

282. *See id.* at xxxvi-xxxvii. At one point, during the Nootka Sound crisis, Dorchester gave Beckwith two sets of instructions: one open and diplomatic, as an emissary from Canada, to give him access to American officials; and another secret, instructing him to inquire about

Always the military intelligence officer, Beckwith kept extensive notes on his conversations, some redacted and others supposedly verbatim. Dorchester then forwarded Beckwith's notes to London.²⁸³

If Major Beckwith's primary mission was secret, his presence and general purpose were not. Americans saw him as direct connection to the highest levels of imperial government.²⁸⁴ Every time Beckwith traveled south to the United States, cabinet members, Congressmen, state officials, and other notables sought him out. He asked everyone what his superiors wanted to know: Would the new government enforce outstanding treaty obligations? Would it ensure that British creditors got repaid? That assurance was required before the King would send an official envoy and negotiate a commercial treaty. After a few fact-finding trips, Beckwith became modestly impressed with the new government. When visiting in mid-1788, during the ratification campaign, he reported home that

[t]here is a general growing British interest in the states and it will be good policy to hold a friendly language to that country, and to shew [sic] a disposition to form a treaty of commerce with them, whenever they shall have established a government and shewn [sic] that they have something solid to bestow in return.²⁸⁵

specific topics of concern to the larger empire and directing him to report directly to Westminster when appropriate. *See, e.g.*, Letter from Lord Dorchester to Major Beckwith (June 27, 1790), in *CANADIAN ARCHIVES*, *supra* note 280, at 144, 144. For an American assessment of Beckwith's authority, see Memorandum from Alexander Hamilton to George Washington (July 8, 1790), in 6 *THE PAPERS OF ALEXANDER HAMILTON* 484, 484-85 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Secretary of State Jefferson spoke less frequently with Beckwith because he deemed it improper for the Secretary of State to discuss diplomacy with an "informal agent." Thomas Jefferson, Memorandum on Meeting with Senate Committee (Jan. 4, 1792), in 23 *THE PAPERS OF THOMAS JEFFERSON* 19, 22 (Charles T. Cullen ed., 1990).

283. *See* Letter from Lord Dorchester to Major Beckwith, *supra* note 282.

284. The accomplished Jefferson historian Julian P. Boyd was most likely mistaken in believing that President Washington and his cabinet had no clear sense of Beckwith's role. His further argument that Hamilton used the relationship to dupe Washington into believing that Britain was eager for an alliance, and thereby made "secret attempts to control American foreign policy," is not persuasive. JULIAN P. BOYD, NUMBER 7: ALEXANDER HAMILTON'S SECRET ATTEMPTS TO CONTROL AMERICAN FOREIGN POLICY (1964); *see also* Jacob E. Cooke, 81 *POL. SCI. Q.* 130 (1966) (reviewing JULIAN P. BOYD, NUMBER 7: ALEXANDER HAMILTON'S SECRET ATTEMPT TO CONTROL AMERICAN FOREIGN POLICY (1964)). Still, Boyd's outraged tone captures something important about Beckwith's missions: indirect diplomacy was the only diplomacy Britain was willing to offer in the first two years of the Washington Administration.

285. George Beckwith, Opinions and Observations of Different Persons Respecting the

He nicely observed that the Constitution had persuaded “the most enlightened” of the loyalists to become Federalists, reconciling themselves to the fact “that the re-union of the empire is impracticable.”²⁸⁶ But note his judgment that, after ratification and before elections, there was still no government, and also that waning hostility and the emergence of a group favorable to Britain were not sufficient reasons for a new treaty.²⁸⁷

The Constitution was a positive sign, but much remained to be done. An open question was the time period over which the new government should be judged. Shrewdly, though perhaps too pessimistically, Beckwith noted that “sensible federalists view the new system as a work for their posterity” and “doubt[ed] whether any of its advantages w[ould] be felt in their time.”²⁸⁸ Revenue was the largest problem. The new government had to “collect[] taxes and prevent[] smuggling,” which frustrated customs collection.²⁸⁹ These efforts faced popular resistance. To account for the Confederation’s “disordered” finances, Beckwith reported that “the root of the evil” lay in the states and their “successive violations of the public faith and credit, the injudicious circulation of paper money, its various depreciations,” and statutes “undeniably calculated to serve individuals at the general expence.”²⁹⁰ Consequently, “it must be a work both of time and great good sense to give credit and dignity to their Government.”²⁹¹

The United States also needed a military. The existing army was insufficient even to keep peace on “the Indian frontiers.”²⁹² After noticing the American grievance that the British military was still occupying several western forts, and that the army could not subdue the Native American nations there who resisted U.S. sovereignty, Beckwith suggested to Hamilton that Britain participate with the

United States, in CANADIAN ARCHIVES, *supra* note 280, at 100, 103 (enclosed in Letter from Lord Dorchester to Lord Sydney (Oct. 14, 1788)).

286. *Id.* at 102. Though many Loyalists of “the lower order are violent antifederalists,” Beckwith reported, and he hoped that if constitutional reform failed, the states would rejoin the empire. *Id.*

287. *See id.* at 102-04.

288. *Id.* at 102.

289. *Id.*

290. *Id.* at 105.

291. *Id.*

292. *Id.* at 102.

United States in peacemaking efforts with the Ohio Valley nations.²⁹³ The offer probably stemmed from British qualms about ceding western land without even explaining the cession to allied Native American nations as well as from a desire to protect British fur trading interests.²⁹⁴ It was an early example of a proposal that Britain later made for a buffer zone of relative Native American autonomy.²⁹⁵ Hamilton rebuffed this proposal, as Americans would all the others. It was “consistent with our system to terminate Indian differences by accommodation,” Hamilton told Beckwith, at least after operations had moved along so far.²⁹⁶ One reason it was too late was because white settlers in the Ohio Valley would not accept peace: “[W]e could not put a negative upon this business without disobliging our Western people.”²⁹⁷ Beckwith appeared to understand the rejection, and he did not suggest that the Native nations should be accorded full sovereignty. When, two years later, an envoy suggested British mediation and even a “barrier,” Hamilton remained firmly opposed and

resisted [the] insinuation of the good effect that would arise from requesting the Kings mediation, by stating that a part of the Indians, now engaged in war with the United States, lived within their territory and were considered in some measure as their subjects, and that upon that ground no external intervention could be allowed.²⁹⁸

In addition, a three-way negotiation “would degrade the United States in the estimation of the Indians, and sow the seeds of future

293. Conversation with George Beckwith and William Macomb (Jan. 31, 1791), in 7 THE PAPERS OF ALEXANDER HAMILTON 608-13 (Harold C. Syrett & Jacob E. Cooke eds., 1963).

294. For British diplomatic motivations in the Ohio Valley, see ALAN TAYLOR, DIVIDED GROUND: INDIANS, SETTLERS, AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION 111-19 (2006).

295. See Conversation with George Beckwith (Oct. 15-20, 1790), in 7 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 293, at 111, 112.

296. *Id.* at 112-13.

297. *Id.*

298. Conversation with George Hammond (Dec. 15-16, 1791), in 10 THE PAPERS OF ALEXANDER HAMILTON 373, 375 (Harold C. Syrett & Jacob E. Cooke eds., 1966) (quoting Letter from George Hammond to Lord Grenville (June 8, 1792), Foreign Office 4/15, British National Archives); see also LEONARD J. SADOSKY, REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA (2010) (exploring United States diplomacy with the Native American nations in early America).

dissension, as the latter would be tempted to aggression by the expectation of a similar interference on any other occasion.”²⁹⁹ In other words, the United States needed recognition from the Native American nations too, and Britain was crucial to that process too. The British seemed to accept this answer, though they continued offering mediation. However benevolent the intent, these proposals were received as assaults on full American sovereignty: a civilized state, Hamilton insisted, had at least supervisory power over the indigenous people within its territory. European diplomats understood that position. In addition, Hamilton assumed that the Native Americans were familiar with that principle too and would not respect the United States should it forego that prerogative.

An even larger issue was treaty obligations. For Beckwith, the issue was whether Americans would follow the steps necessary to make the Constitution succeed. “[I]t remains yet to be decided,” he wrote to Lord Dorchester just weeks before elections for the new Congress, “whether the people of the states at large are in a disposition to submit to measures unavoidably requisite, *if they are to be a nation, connected with foreign powers*, either, by political or commercial treaties.”³⁰⁰ Would the American people use the Constitution to become a nation, able to undertake relations with other nations? During his return visits, Beckwith tried to answer his own question.

“[T]he real views of communities, as well as of individuals,” he told Hamilton in 1789, “are rather to be gathered from their conduct than from their professions.”³⁰¹ To prove that the treaty would be enforced, his American informants emphasized the role of the Constitution’s Supremacy Clause and the federal judiciary. Hamilton was Beckwith’s most frequent interlocutor. “We have lately established a Government upon principles,” he assured the emissary, “that in my opinion render it safe for any nation to enter into Treaties with us, either Commercial or Political, which has not hitherto been the case.”³⁰² He had written similarly in the *Federalist Papers*

299. Conversation with George Hammond (Dec. 15-16, 1791), *supra* note 298, at 375-76.

300. Beckwith, *supra* note 285, at 102 (emphasis added).

301. Letter from Lord Dorchester to Lord Grenville (Oct. 25, 1789), in CANADIAN ARCHIVES, *supra* note 280, at 121, 126 (enclosing communications with different persons).

302. *Id.* at 125.

in late 1787.³⁰³ Over the next few years, he kept repeating it to British diplomats. The Constitution “has declared Treaties with Foreign powers to be the law of the land,” Hamilton told Beckwith in 1790, “the Judges in general are men whose opinions on this subject are perfectly well ascertained, and nothing but an insurrection in opposition to their decisions can in future prevent the regular and usual course of justice.”³⁰⁴ Similarly, the paper tender laws, which allowed debtors to pay creditors in depreciated currency, were “done away with by the present Government, which has paid the most particular attention to this in the formation and establishment of its Judiciary branch; the District Courts will be in immediate operation; the supreme court very shortly.”³⁰⁵ In sum, Hamilton explained to Beckwith that a leading purpose for the constitutional prohibitions on state power in Article I, Section 10, as well for creating a federal judiciary, was to ensure that American debtors repaid their foreign creditors in full.

Senator William Samuel Johnson also focused Beckwith’s attention on the courts. Johnson (1727-1819) sat on the Connecticut Superior Court in the late colonial period, and on the eve of the Revolution he traveled to London as the colony’s agent.³⁰⁶ He had remained loyal during the war and was arrested for communicating with the enemy when he pleaded for peace with British Commander-in-Chief Thomas Gage.³⁰⁷ Reintegrating smoothly after the war, Johnson served as a Connecticut delegate to the Confederation Congress beginning in 1784,³⁰⁸ to the Constitutional Convention in 1787,³⁰⁹ and then as the state’s federal senator from 1789-1791.³¹⁰ Following in the footsteps of his father, the more famous and active loyalist Samuel Johnson, he was president of Columbia College from

303. THE FEDERALIST NO. 22, *supra* note 26, at 143-44 (Alexander Hamilton).

304. Letter from Lord Dorchester to Mr. Grenville (Nov. 20, 1790), in CANADIAN ARCHIVES, *supra* note 280, at 163, 165 (enclosing communications from different persons).

305. Letter from Lord Dorchester to Lord Grenville, *supra* note 301, at 127.

306. Elizabeth P. McCaughey, *William Samuel Johnson, The Loyal Whig*, in THE AMERICAN REVOLUTION: CHANGING PERSPECTIVES 69, 75-83 (William M. Fowler, Jr. & Wallace Coyle eds., 1979).

307. See E. EDWARDS BEARDSLEY, LIFE AND TIMES OF WILLIAM SAMUEL JOHNSON, LL.D. 112-17 (1876).

308. *Id.* at 120.

309. *Id.* at 126.

310. See *id.* at 133, 138.

1787 to 1800.³¹¹ William's son and fellow loyalist attended the Inns of Court during the Revolution, and then pursued patronage to serve in the remaining British American colonies.³¹² Senator Johnson drew on his old connections with British officials to request assistance in obtaining a place for his son on the Bermuda Council in 1790.³¹³ Although the application ultimately failed, the Consul-General Temple in New York vouched that Johnson had been "constantly attached to his Majesty & to his Government" during the war, "had a great share in framing the New Constitution and would probably be sent Minister to London if the states were not fearful of his being too much attached to the Interests & Government of G. Britain."³¹⁴

At the same time that he sought patronage for his son, Johnson tried to persuade Beckwith that the new Constitution marked a dramatic change in Anglo-American relations, one that should compel Britain's government to send an accredited diplomat to the new republic.³¹⁵ He promised Beckwith in 1790 that the new federal judiciary would give British creditors "the most perfect satisfaction in their proceedings," although the impoverishment of many debtors remained a practical obstacle to collection.³¹⁶ Johnson added that

it is remarkable that the present Chief Justice (Mr. John Jay) was the Minister for foreign affairs, who reported the various infractions of the Treaty of Peace, by the State Legislatures, and is it possible to suppose, that what he openly acknowledged in his political character, will not equally affect his decisions on the Bench ...?³¹⁷

311. *Id.* at 129, 163.

312. *See* Letter from John Temple to the Marquess of Carmarthen (Oct. 2, 1788), Foreign Office 4/6, British National Archives.

313. *See id.*

314. *Id.*

315. *See* Letter from Lord Dorchester to Mr. Grenville (May 27, 1790), in CANADIAN ARCHIVES, *supra* note 280, at 133, 135, 138.

316. *Id.* at 137.

317. *Id.*; *see also* Letter from Lord Dorchester to Mr. Grenville, *supra* note 304, at 165 (communicating Secretary of the Northwest Territory Winthrop Sargent's report that "our Judiciary has declared Treaties with Foreign powers to be the law of the land; the Judges in general are men whose opinions on this subject are perfectly well ascertained, and nothing but an insurrection in opposition to their decisions can in future prevent the regular and usual course of justice"). For Johnson's and Sargent's identities as the sources quoted in these letters, *see* CANADIAN ARCHIVES, *supra* note 280, at xli-xlii; *see also* BOYD, *supra* note 284, 33

Johnson, like Hamilton, never failed to connect such promises with requests that Britain send an accredited diplomat to America.³¹⁸

Other senators developed the theme that the courts would do justice to British creditors. Amidst the second session of the first Congress, New Jersey Senator (and future Supreme Court Justice) William Paterson reported to Beckwith that American debtors fully realized that the new judiciary would hear claims based on the Treaty of Peace.³¹⁹ Indeed, in the states south of Maryland, “the expected operation of the federal Courts has given the most serious alarms” because “in these States the Merchants and Planters are greatly indebted to the Merchants of England, and to be sure for years past a Spirit of Government has been manifested equally dishonest and unjust.”³²⁰ The Southerners realized that, under the new federal government, “this must now cease.”³²¹ Other observers were more cautious. Consul George Miller in Charleston was disappointed that the southern legislatures continued to pass debt-relief legislation, which left him “not so sanguine” about the effect of the new federal government.³²² Still, he could not “help expressing his hopes, that the Federal Courts of Justice will pay little or no regard to many of them [that is, debtor relief laws].”³²³

These promises about the federal courts became even more plausible after the passage of the Judiciary Act in late September of

n.67.

318. See Letter from Lord Dorchester to Mr. Grenville, *supra* note 315, at 135, 138.

319. See *id.* at 139.

320. *Id.*

321. *Id.* Paterson told Beckwith that the state governments in the South were more “democratic” than those in the North,

where the science of Government is better understood.

Mr. Jefferson is a proof of this, he is a man of some acquirements, extending even to elegant literature, but his opinions upon Government are the result of fine spun theoretic systems, drawn from the ingenious writings of Locke, Sydney and others of their cast, which can never be realized[;] such opinions very probably are the favorite ones with those who now conduct the revolution in France.

Id. at 139-40.

322. George Miller, Report upon the Following Points, in Obedience to the Command of his Grace the Duke of Leeds, His Majesty’s Principal Secretary of State for Foreign Affairs (Jan. 28, 1790), Foreign Office 4/8, British National Archives. Francis Godolphin Osborne, the Marquess of Carmarthen, succeeded his father as the Duke of Leeds in 1789 and remained Secretary of State for Foreign Affairs until mid-1791. G.F. Russell Barker, *Osborne, Francis, Fifth Duke of Leeds (1751-1799)*, in 42 DICTIONARY OF NATIONAL BIOGRAPHY at 286 (Sidney Lee ed., 1895).

323. Miller, *supra* note 322.

1789. British observers read the statute closely. The day before the President signed the bill into law, Consul-General Temple, who had read the statute, exclaimed in a letter to the Foreign Secretary that

the Definitive Treaty is now acknowledged to be the Law of the Land, and every thing contrary to that Treaty is, by Congress, repealed in the several states, if therefore any British subject meets with injustice in the recovery of his debts from the subjects of these states, or of the lawful interest due upon the same, he may have justice done him by applying to the Federal Courts now Established agreeably to the Constitution.³²⁴

To him, the creation of federal courts promised the enforcement of the treaty.

The Judiciary Act deserved more careful analysis than Temple gave it. He assumed that this jurisdictional statute automatically executed the Supremacy Clause and the specific prohibitions on state legislation in Article I, Section 10. Creditors still needed to bring judicial cases to work out whether those state laws actually did impose forbidden “impediment[s].”³²⁵ Temple also did not mention the absence of original federal question jurisdiction, which included cases arising under treaties, or the jurisdictional minimum for alienage cases (\$500).³²⁶ However, he rightly emphasized that the courts offered a new enforcement mechanism to vindicate British rights.³²⁷

Early in 1790, Temple exultantly reported that “[t]he Supreme Federal Court opened in this City yesterday, in which Court it is to be supposed every foreigner may now obtain Justice.”³²⁸ A reintegrated loyalist sent the same news to the British Secretary of State’s office on the same day, adding that the event proved that “we [are] now in Every Respect—A Nation.”³²⁹ Many federal courts,

324. Letter from John Temple to the Duke of Leeds (Sept. 23, 1789), Foreign Office 4/7, British National Archives. The Judiciary Act was enacted on September 24, 1789. Judiciary Act of 1789, 1 Stat. 73, 93.

325. See Definitive Treaty of Peace, *supra* note 55, at 82-83.

326. See Judiciary Act of 1789 §§ 11-12, 1 Stat. 73, 78-80.

327. See Letter from John Temple to the Duke of Leeds, *supra* note 324.

328. Letter from John Temple to the Duke of Leeds (Feb. 4, 1790), Foreign Office 4/8, British National Archives.

329. Letter from Peter Allaire to George Yonge (Feb. 4, 1790), in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 688, 688 (Maeva

especially in the North, immediately began to set aside state law conflicting with treaty rights.³³⁰ For example, a federal circuit court in Connecticut held that a statute abating interest during the war violated the Treaty of Peace and was void.³³¹ The circuit court included Chief Justice John Jay and Justice William Cushing, along with District Judge Richard Law.³³² Interest during the war, which at 5 percent for eight years made up a substantial fraction of the outstanding debts,³³³ was a major point of controversy between debtors and creditors.³³⁴ Federalists exulted. “Died last Thursday,” read a mock obituary.³³⁵ “It received its death wound by the adoption of the New Constitution” and “the two-edged sword of justice; gave its last fatal stroke, and it expired without a groan.”³³⁶ This account was republished in several states³³⁷ and seems to have landed on Phineas Bond’s desk in Philadelphia.³³⁸ He excitedly reported to London that, according to the federal judges, “whatever might have been the Situation of the Contract, during the War, it was revived by the Peace; not partially, but in its full Extent,” including interest: “[T]here was a moral obligation to pay it, with the principal, whenever the public Tranquillity was restored.”³³⁹

The Constitution did more than protect rights, meaning in British eyes international rights, of course. It also empowered the new Congress to make commercial policy without interference from the states.³⁴⁰ Inconsistent and conflicting policies among the states, and

Marcus et al. eds., 1985). He added that the proliferation of courts—local, state, federal—made it a “fine [ti]me for the Lawyers.” *Id.* (alteration in original).

330. See 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 1790-1794, at 122-23 (Maeva Marcus et al. eds., 1988).

331. *Id.* at 123.

332. *Id.*

333. See Sheridan, *supra* note 47, at 166 n.19, 167.

334. See 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 330, at 123.

335. *By Last Evening’s MAILS, Connecticut*, COLUMBIAN CENTINEL (Boston), May 11, 1791, at 66.

336. *Id.*

337. See 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, *supra* note 330, at 123 n.6.

338. See Letter from Phineas Bond to Lord Grenville (Dec. 6, 1791), Foreign Office 4/11, British National Archives.

339. *Id.*; see also Letter from MacDonogh to Leeds (May 11, 1791), Foreign Office 4/10, British National Archives (reporting the same case).

340. See U.S. CONST. art. I, § 8, cl. 3; *id.* art. I, § 10, cl. 1.

between them and Congress, had bedeviled commercial negotiations throughout the 1780s.³⁴¹ Some states used import duties to raise revenue, penalize Britain, or both.³⁴² In a textbook example of inter-jurisdictional competition, others posted low rates, trying to lure trade away from their high-taxing neighbors.³⁴³ This crazy quilt of trade regulations was one reason why the British refused to enter negotiations for a commercial treaty.³⁴⁴ By contrast, French diplomats had not been displeased by inconsistent trade laws, hoping that their slow-moving merchants would eventually capitalize on state discrimination against British trade.³⁴⁵ Now Congress alone had the power to regulate international commerce. It threatened to use it to retaliate against Britain for refusing to grant American ships access to the West Indian trade.³⁴⁶ In the first Congress, Madison proposed two forms of retaliation. The first was to raise the import and tonnage duties on British goods and ships above those paid by other European traders.³⁴⁷ The second was to prohibit British ships trading with the West Indies from docking in the United States for resupply.³⁴⁸ In other words, British traders would not be able to use American ports as way stations to and from the Caribbean.³⁴⁹

These discriminatory proposals failed to pass the Federalist-dominated Senate³⁵⁰ but got the attention of British merchants and

341. See *infra* Part II.B.

342. See HILL, *supra* note 172, at 63.

343. Connecticut, for example, lowered its tariffs and loosened antiloalist laws to attract loyalists and British subjects from neighboring New York. See Oscar Zeichner, *The Rehabilitation of Loyalists in Connecticut*, 11 NEW ENGLAND Q. 308 (1938).

344. See *infra* Part II.B.

345. HILL, *supra* note 172, at 63.

346. See Drew R. McCoy, *Republicanism and American Foreign Policy: James Madison and the Political Economy of Commercial Discrimination, 1789 to 1794*, 31 WM. & MARY Q. 633, 634-35 (1974).

347. See 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 260-61 (Charlene Bangs Bickford et al. eds., 1992).

348. See *id.* Madison had supported discrimination since the mid-1780s, and it marked Republican foreign policy up until 1812. See generally McCoy, *supra* note 346; Drew R. McCoy, *The Virginia Port Bill of 1784*, 83 VA. MAG. HIST. & BIOGRAPHY 288 (1975).

349. See 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, *supra* note 347, at 260-61.

350. See 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 1950-51 (Charlene B. Bickford & Helen E. Veit eds., 1986).

their government.³⁵¹ If nothing else, the proposals demonstrated that Congress now controlled commercial policy. Britons were amazed that Americans believed that commercial threats would work.³⁵² If the United States wished to gain privileges from Britain, it had to negotiate in good faith, not make threats.³⁵³ As Lord Dorchester's secretary put it, "The idea of seeking commercial friendship by commercial hostilities, the apprehension of Great Britain monopolizing the commerce of the world and the comparison of it to a great whale swallowing up the ocean, are equally whimsical and preposterous."³⁵⁴ Britons responded in two ways. One was to seek accommodation. Despite what he saw as flawed American reasoning—or perhaps because it was so flawed—Dorchester's secretary counseled "moderation" toward the United States, attributing such illogic to commercial frustration.³⁵⁵ The American threat indicated that it was "high time" to settle all the outstanding grievances stemming from the Treaty of Peace.³⁵⁶

Others, however, were less accommodating. If Americans discriminated against Britain, Britain should reciprocate.³⁵⁷ It would start by simply placing American trade with Britain on the same footing as all other foreign trade.³⁵⁸ Eight years after the Treaty of Peace, the United States still enjoyed privileges in Britain that no other nation did.³⁵⁹ High on the list was the exemption of American merchants from paying the Alien Duty when unloading goods in British ports, an unintended benefit of the British government's unwillingness to rethink its trade relationship with the new nation from the ground up.³⁶⁰ Americans were excluded from intra-imperial commerce, especially the rich West Indian trade.³⁶¹ Nonetheless,

351. See Letter from Lord Dorchester to Lord Grenville, *supra* note 301, at 127-28.

352. See *id.* at 127.

353. See *id.*

354. Letter from Henry Motz to Lieutenant Colonel Beckwith (May 6, 1791), in CANADIAN ARCHIVES, *supra* note 280, at 169, 170; see also Letter from Lord Dorchester to Lord Grenville, *supra* note 301, at 127-28.

355. Letter from Henry Motz to Lieutenant Colonel Beckwith, *supra* note 354, at 170.

356. *Id.*

357. See REPORT OF A COMMITTEE OF THE LORDS OF THE PRIVY COUNCIL ON THE TRADE OF GREAT BRITAIN WITH THE UNITED STATES 38-43 (1791) [hereinafter REPORT].

358. See *id.* at 34.

359. See *id.* at 8, 32.

360. See *id.* at 8, 40.

361. See *id.* at 42, 45.

they enjoyed some odd holdovers from the colonial period.³⁶² For example, customs officers in London continued to treat all merchants from North America, including those from the United States, as subjects, as under pre-revolutionary customs statutes.³⁶³ Hamilton, who had become the first Federal Treasury Secretary, realized that American merchants enjoyed “certain indulgencies” in Britain and understood that, if Congress passed discriminatory legislation, Britain could justifiably take away these privileges and “place us precisely on the footing of all other foreign powers.”³⁶⁴ Although he had championed the cause of congressional commercial power during the ratification campaign because it would give the United States the power to threaten Britain, Hamilton was reluctant to use that power. It was an early example of a persistent theme in the Washington Administration. No cabinet member supported building national capacity and defense more than Hamilton. Yet time and again he warned of the dangers of using that power recklessly. Consistently from the Revolution until his death he argued that some degree of power was necessary to be taken seriously by other nations. Once attained, however, power should remain in reserve, while pursuing negotiations and seeking compromise.³⁶⁵ It was the same advice he gave his private legal clients: litigation was often not worth the cost and uncertainty.³⁶⁶ So too his public counsel. He preferred the United States to appear as a hawk and maneuver like a dove. Prominent opponents favored the reverse.

362. *See id.* at 8, 32.

363. *See id.* at 32.

364. Letter from Lord Dorchester to Lord Grenville, *supra* note 301, at 128.

365. Hamilton’s threshold for deploying power domestically was much lower, as demonstrated in his reactions to tax rebellions in Pennsylvania. *See* THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 119 (1986).

366. For an example of Hamilton’s advice to a private client to seek accommodation rather than continue to litigation, see Letter from Alexander Hamilton to Thomas Jefferson (Apr. 19, 1792), in 11 *THE PAPERS OF ALEXANDER HAMILTON* 317 (Harold C. Syrett & Jacob E. Cooke eds., 1966) (recalling a famous Trespass Act case that ended in a “voluntary compromise” that Hamilton supported). For Hamilton’s advice in that case, see Memorial of Benjamin Waddington & Co. Late of the City of New York in North America, British Merchants & Subjects, Respecting Prosecutions Carried on Against Joshua Waddington Their Late Servant Under a Law Called the Trespass Act Passed by the Legislature of That State Since the Peace, & Directly in the Face of the Treaty (Aug. 20, 1786), Foreign Office 4/4, British National Archives (advising defendant to compromise “because the Law was express and the Juries, independent of Party prejudices, were all interested in a similar manner with Rutgers the Plaintiff”).

A New York City merchant named Telfair, who identified as a British subject, offered Beckwith the perspective of Wall Street.³⁶⁷ He paid close attention to congressional debates over commercial policy, in particular Madison's proposal to discriminate against British trade. On the one hand, Telfair thought that the new nation was not capable of retaliation, "whatever Mr. Jefferson, Mr. Maddison [sic] and that party may insinuate to the contrary."³⁶⁸ The new government depended on customs revenue.³⁶⁹ Because the government could not tax much in other ways, cutting off British trade would impoverish it.³⁷⁰ Telfair was nonetheless concerned. He admitted that trade discrimination was a valid exercise of national power, not an act of belligerency.³⁷¹ Still, it could cascade into a series of antagonistic measures.³⁷² In the small world of American commerce and politics, Telfair had talked directly to Madison.³⁷³ This was the spring of 1790, as Spain and Britain rattled swords in the Nootka Sound over jurisdiction to the Pacific Northwest.³⁷⁴ If Britain and Spain went to war, the latter might invoke a treaty commitment and request that France fight as well.³⁷⁵ In turn, if France construed the war as defensive, it could request that the United States join as well in defense of its Caribbean colonies, as required by the Franco-American Treaty of Alliance (1778).³⁷⁶ In what turned out to be a dry run for the wars of the French Revolution, all hoped that France would not make the fateful request.³⁷⁷ Spain effectively capitulated and settled the matter peaceably, along the way teaching the Americans a lesson in how to negotiate with that kingdom.³⁷⁸ Still,

367. Wall Street had become associated with securities trading at least by 1792. See WALTER WERNER & STEVEN T. SMITH, *WALL STREET* 22-23 (1991) (recounting the establishment of a stock exchange partnership on Wall Street in early 1792).

368. Letter from Lord Dorchester to Mr. Grenville, *supra* note 315, at 140.

369. *See id.* at 140-41.

370. *See id.*

371. *See id.*

372. *See id.*

373. *See id.* at 140.

374. On the Nootka Sound Dispute, see Lennox Mills, *The Real Significance of the Nootka Sound Incident*, 6 CANADIAN HIST. REV. 110 (1925).

375. *See id.* at 112-13.

376. Treaty of Alliance, Fr.-U.S., art. 11, Feb. 6, 1778 (requiring the United States to "guarantee ... the present Possessions of the Crown of France in America as well as those which it may acquire by the future Treaty of peace").

377. *See* Mills, *supra* note 374, at 112-13.

378. *See id.* at 113.

Madison told Telfair that in the event of a Franco-British war, he would propose preventing British ships from refitting in American ports while “assist[ing] the fleets of France ... in every respect.”³⁷⁹ Telfair replied that “such behaviour by the law of Nations would be construed as actual hostility,”³⁸⁰ which was a fair opinion, one that President Washington’s cabinet embraced unanimously three years later in the Neutrality Controversy.³⁸¹ Even merchants were schooled enough in the law of nations to know the effect of what was termed “imperfect neutrality” between warring nations.³⁸² Madison’s proposal demonstrated that Congress knew it had power and was willing to use it.³⁸³ Whether bad policy, fiscally ruinous, or a step down a slippery slope, these proposed measures got Britain’s attention.

Another informant was Daniel McCormick, an Irish merchant who immigrated to New York in the 1760s, remained loyal during the Revolution, and afterward picked up where he left off, brokering deals between American and British merchants.³⁸⁴ By 1790 he identified himself as an American citizen but remained essentially a British-American merchant who invested heavily in United States securities and land, and he sold both to British investors.³⁸⁵ McCormick’s conversation with Beckwith was all business.³⁸⁶ What he added was a transatlantic merchant’s sensitivity to the changing

379. Letter from Lord Dorchester to Mr. Grenville, *supra* note 315, at 140.

380. *Id.*

381. See Neutrality Proclamation (Apr. 22, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 472-73 (Philander D. Chase et al. eds., 2005).

382. See Letter from Lord Dorchester to Mr. Grenville, *supra* note 315, at 140.

383. See *id.*

384. McCormick did not bear arms and was not attainted during the Revolution, but he remained behind British lines and served as an auctioneer of American prizes captured by British privateers operating out of New York City. Soon after the war, he, like many loyalists, became acquainted with Hamilton and for twenty years served (with a few other loyalists) on the board of directors of the Bank of New York. See 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 131 nn.7-8 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980). He was one of several Irish merchants such as William Constable and William Edgar who navigated between both sides of the Revolution and emerged better off than before. See *id.* On the cadre of Irish merchants in New York, who for two generations played all sides of most imperial conflicts, see generally THOMAS M. TRUXES, *DEFYING EMPIRE: TRADING WITH THE ENEMY IN COLONIAL NEW YORK* (2008).

385. See 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 384, at 131, 141, 236, 254 n.40, 260, 266 n.21.

386. See Letter from Lord Dorchester to Mr. Grenville, *supra* note 315, at 140.

political environment. A few years earlier (this was the spring of 1790), British merchants had decreased their trade with America because they could not obtain payment in sterling.³⁸⁷ The specie imbalance forced Americans to undertake some manufacturing and to increase their exports, particularly of wheat, which brought back hard money.³⁸⁸ Now that specie was again flowing, British merchants returned to American markets.³⁸⁹ They had even begun “to speculate largely in our Continental floating paper of various kinds, from their opinion of our present Government and from the then low value of those securities.”³⁹⁰ The bottom line was that British investors were betting on the health of the new federal government. It nonetheless remained a sensitive market. McCormick noted that American bond prices had recently “fallen somewhat from the delays in our funding system, and in particular from the debates in our house of representatives respecting the assumption or non-assumption of our State Debts.”³⁹¹ Besides informing Beckwith of the bond market’s reaction to a healthier economy and to the new federal government, McCormick revealed just how closely investors followed the vicissitudes of American politics. What are recorded now as political landmarks—the establishment of the federal government, the passage of the Judiciary Act, discrimination bills that passed one house but failed in the other, the assumption of state debt, and the charter for the Bank of the United States—were then breaking news for transatlantic merchants, figured into business calculations, and affected the nation’s reintegration into the Atlantic economy.

While promising that the federal courts would enforce the treaty, Hamilton kept nudging the secret emissary toward the “reciprocal appointment of Ministers.”³⁹² The United States did not want to send a minister first again, as in 1785. Why had Britain not sent

387. *See id.*

388. *Id.*

389. *Id.*

390. *Id.* Foreign investors were engaged in the reverse of Beardian behavior: they invested in government securities after the ratification of the Constitution, not before.

391. *Id.* Bond prices recovered and then rose in the mid-late 1790s, when all the pieces of Hamilton’s funding system came together. *See* Richard Sylla, *Financial Foundations: Public Credit, the National Bank, and Securities Markets*, in *FOUNDING CHOICES*, *supra* note 133, at 59.

392. Letter from Lord Dorchester to Mr. Greenville, *supra* note 315, at 135.

one then? “I replied,” Beckwith told Dorchester, “that the condition of the States at that time had been such, as to have rendered it impracticable for a Minister from *us* to have remained at New York, and if otherwise, from the nature of their then Government he could have been of no service.”³⁹³ The political situation had changed. The request became insistent. “Will you send us a Minister?” Hamilton pleaded.³⁹⁴ “[P]erhaps we shall not wish to send [one] a second time without assurances of this nature, or your taking a lead in it.”³⁹⁵ Then he invoked the American people: “[I]t would be a popular measure and tend greatly to set everything in motion in a good humoured way.”³⁹⁶ Formal representation would not only be good for diplomacy but also good for domestic politics, which in turn affected the diplomatic environment. In a republic, good optics served diplomacy.

Only a commissioned envoy could negotiate a commercial agreement. For Americans the wait seemed interminable. But Spain had not fully recognized the United Provinces of the Netherlands for eighty years after the provincial revolt of the 1560s.³⁹⁷ In the end, the United States waited only eight years.

B. The Board of Trade Reviews the Constitution

In 1790, while considering whether to send a minister plenipotentiary to the United States, and to assist in drafting instructions, Britain’s Privy Council asked the Board of Trade to analyze the state of government and commerce in the United States.³⁹⁸ The

393. *Id.*; see also *id.* at 136 (“[W]e have had a Minister at your Court [referring to John Adams in the mid-1780s], you did not send one in return, we should find a difficulty in taking the lead again in such a nomination.”). Julian Boyd argued that the *Canadian Archives* mislabeled the conversations on pages 134-36, transcribing as Number 1 what was actually Number 7: namely, Hamilton. BOYD, *supra* note 284, at 33 n.67. Following Boyd, the attribution here is to Hamilton.

394. Letter from Lord Dorchester to Lord Grenville, *supra* note 315, at 138.

395. *Id.*

396. *Id.*

397. Spain recognized the independence of the Netherlands in the Peace of Munster (1648), which ended the Eighty Years War. See Laura Manzano Baena, *Negotiating Sovereignty: The Peace Treaty of Münster, 1648*, 28 HIST. POL. THOUGHT 617 (2007).

398. The Privy Council was the ancient royal advisory council that was then being supplanted by its subcommittee known as the cabinet. See generally ALBERT VENN DICEY, *THE PRIVY COUNCIL* 130-45 (repr. ed. 1979) (1860). On the operation of the Board of Trade in the

Board spent months collecting and digesting information before reporting in January 1791.³⁹⁹ It sifted through mounds of consular correspondence, Phineas Bond's trade statistics, merchant memorials, and other sources.⁴⁰⁰ It also queried merchant interest groups from the key ports of London, Bristol, Liverpool, and Glasgow.⁴⁰¹ The report's prime architect was Lord Hawkesbury, who served as President of the Board of Trade for almost twenty years, viewed trade as a zero-sum game that Britain should dominate, and was disinclined to make exceptions for former colonists enjoying a peace treaty he had opposed.⁴⁰² Yet the main message of the report was the admission that this debate could no longer be framed in terms of Britain's discretionary choice.⁴⁰³ The organizing fact within that report was the new Constitution and establishment of the federal government under it.⁴⁰⁴ Harsh and grudging as it was, the report effectively ended Tory fantasies that Britain would someday recover its old North American provinces.

The report discloses more clearly than any other source that the establishment of the federal government under the new Constitution was the proximate cause for sending an official envoy to the United States and commencing trade negotiations. If one bottom line was not much different from Lord Sheffield's eight years earlier—the United States still needed British commerce more than the reverse—another was that it was time to open formal diplomatic relations with the new government.⁴⁰⁵ The report concluded that the Constitution gave the federal government the power to resolve outstanding grievances under the treaty as well as the power to

eighteenth century, see Alison G. Olson, *The Board of Trade and London-American Interest Groups in the Eighteenth Century*, 8 J. IMPERIAL & COMMONWEALTH HIST. 33 (1980). The Rockingham Whigs abolished the 160-year-old Board of Trade at the end of the Revolution; William Pitt reconstituted it two years later.

399. Privy Council Committee on Trade, Report on Two Acts Passed by the Congress of the United States of America to the Privy (Jan. 28, 1791), Foreign Office 4/9, British National Archives, later printed as REPORT, *supra* note 357.

400. *See id.*

401. *See id.* at 4.

402. On Charles Jenkinson, Lord Hawkesbury (later the first Earl of Liverpool), and his role on the Board of Trade in the 1780s and 1790s, see 2 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 144 (John Holland Rose et al. eds., 1940).

403. *See* REPORT, *supra* note 357, at 99-100.

404. *See id.* at 6.

405. *See id.* at 99-101.

discriminate against British trade, and was considering doing so.⁴⁰⁶ In sum, the new government appeared capable of fulfilling its duties and also exercising its sovereign rights under the law of nations.

The report began by stating that although Britain had “acknowledg[ed]” the independence of the states in 1783 and had from that date excluded American ships from colonial trade, it had not yet developed “new principles, on which a new system of commerce might be founded.”⁴⁰⁷ The post-Revolutionary states had made such a system impossible because they “were governed in all commercial matters by separate and distinct Legislatures, which were [all] independent of each other, and had different interests to pursue.”⁴⁰⁸ Instead, Parliament had granted the Privy Council authority each year to make “provisional regulations” to govern British-American trade.⁴⁰⁹ But the states now had agreed to “a new Constitution” that vested the power to regulate commerce in a “general government,” and they should “now ... be considered as One Body Politic.”⁴¹⁰ As the Board noted when commenting on Madison’s proposals to discriminate against British imports, “The United States are now an Independent Nation.”⁴¹¹

The Board blamed the states for two obstacles that had prevented the development of a formal commercial policy. First, the individual states had passed inconsistent trade laws.⁴¹² The result was a patchwork of state laws so various and mutable that it was “hardly possible to obtain a complete account of them.”⁴¹³ There were echoes here of Madison’s criticism of the mutability and multiplicity of state legislation four years earlier in his memo on the vices of the political system of the states.⁴¹⁴ The bottom line from the available information was that some states had discriminated against British goods and shipping by charging higher impost and tonnage fees compared not only to American goods and ships but

406. See *supra* notes 346-56 and accompanying text (describing Congress’s threat to discriminate against British trade and some British reactions).

407. REPORT, *supra* note 357, at 6.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at 70.

412. *Id.* at 15.

413. *Id.*

414. See generally Madison, *supra* note 147.

also to those imposed on commerce from other European empires.⁴¹⁵ Second, many state laws blocked British creditors from collecting debts in violation of the peace treaty.⁴¹⁶ The Board concluded that these laws constituted a valid grievance that had to be resolved before beginning commercial negotiations.⁴¹⁷ Cancelling “mercantile contracts, or other private and personal obligations” during war was “unjust.”⁴¹⁸ The Board implicitly drew on the emerging norm in the law of nations that belligerent powers should not, perhaps *could* not, interfere with private contracts, especially executory debt contracts, between their respective subjects. In addition, the United States had agreed in Article IV of the Treaty of Peace that creditors on either side would face “no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”⁴¹⁹ Violating this pledge, the states had imposed many impediments, which the Board described with detail derived from the consuls’ letters and creditors’ petitions.⁴²⁰ In outline form, the summary of these “lawful impediments” included:

1. Installment laws that postponed repayment “to a very distant period”;⁴²¹

415. See REPORT, *supra* note 357, at 15.

416. See *id.* at 15-16.

417. *Id.*

418. *Id.* at 16.

419. Definitive Treaty of Peace, *supra* note 55, at 82.

420. In 1789, the Board sent a list of questions to the Secretary of State, who forwarded them to the American consuls. Bond, at least, responded with a key that led back to his letters over the previous few years. Letter from Board of Trade to the Duke of Leeds (June 30, 1789), Foreign Office 4/7, British National Archives; Letter from Phineas Bond to the Duke of Leeds (Nov. 10, 1789), Foreign Office 4/7, British National Archives. The Board cited Phineas Bond’s charts of trading and tonnage volume but did not cite particular letters. See REPORT, *supra* note 357, at 44-54. However, there was nowhere else to gain some of the information. For example, the precise description of a colloquy between Pennsylvania Chief Justice Thomas McKean and a Federalist juror, who asked whether it was proper under the treaty, as McKean had charged the jury, to deduct interest on a British debt for the period of the war, REPORT, *supra* note 357, at 18, could have come only from Bond’s account of this unreported case, which was appended to a letter in 1789, Letter from Phineas Bond to the Duke of Leeds, *supra*.

421. REPORT, *supra* note 357, at 17. Many sources informed the Secretary of State’s office about the installment laws, for example: Letter from the Memorial of the Committee of Merchants Trading to North America to the Marquess of Carmarthen (Feb. 19, 1789), Foreign Office 4/7, British National Archives (South Carolina); Letter from George Miller to Marquess of Carmarthen (Nov. 30, 1788), Foreign Office 4/6, British National Archives (South Carolina); Letter from Peter Allaire to Sir George Yonge (June 6, 1787), Foreign Office 4/5, British National Archives (Maryland).

2. Prohibition laws that forbade creditors from bringing suit to collect debts, also “till a distant period”;⁴²²
3. Statutes that delayed execution of judgments in favor of creditors;⁴²³
4. Statutes that allowed debtors to repay their creditors in “depreciated paper-currency”;⁴²⁴
5. Statutes that allowed debtors to repay their creditors in land, valued at inflated prices, even though state courts held that British creditors were aliens and therefore, according to the common law, could not hold lands, which meant that the land so tendered escheated to the state;⁴²⁵
6. A statute that forbade suit until the creditor applied in writing to the debtor for repayment;⁴²⁶
7. A gubernatorial proclamation in one state that banished all British subjects or factors of British merchants who intended to recover debts;⁴²⁷
8. Legislation and judicial rulings holding that interest tolled during the six or seven years of the war.⁴²⁸

422. REPORT, *supra* note 357, at 17. Several sources informed the Secretary of State’s office of Virginia’s 1787 statute that prevented British creditors from suing in Virginia courts until Britain complied with the peace treaty. *See, e.g.*, Letter from Phineas Bond to Lord Carmarthen (Mar. 30, 1788), in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, at 561, 562-63 (1897).

423. REPORT, *supra* note 357, at 17.

424. *Id.* at 15. Several sources informed the Secretary of State’s office of depreciation laws. *See, e.g.*, George Miller, Report upon the Following Points, in Obedience to the Command of His Grace the Duke of Leeds, His Majesty’s Principal Secretary of State for Foreign Affairs (Jan. 28, 1790), Foreign Office 4/7, British National Archives.

425. REPORT, *supra* note 357, at 17. Many states also reenacted the old Parliamentary statute that permitted attachment of colonial land in debt cases—something not allowed in England. But British creditors avoided using these statutes for the same reason that they could not safely assume title to land, because they were not legally aliens. Letter from George Hammond to Thomas Jefferson (Apr. 6, 1792), in 23 PAPERS OF THOMAS JEFFERSON 379, 380 (Charles T. Cullen et al. eds., 1990) (referring to Maryland’s reenactment of the British attachment statute). On the Parliamentary attachment statute of 1732, see Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 389-90 (2006).

426. REPORT, *supra* note 357, at 17.

427. *Id.*; *see* Letter from John Hamilton, Cumberland Wilson, & Robert Gilmour to Evan Nepean (Jan. 1790), Foreign Office 4/8, British National Archives.

428. Phineas Bond sent summaries of three cases in which state courts had refused to award interest on debts due to British creditors. Letter from Phineas Bond to the Duke of Leeds, *supra* note 420; *see also* REPORT, *supra* note 357, at 18.

The Board noted approvingly that the Confederation Congress had recommended, in the spring of 1787, that the states repeal all laws violating the Treaty of Peace.⁴²⁹ Some states ignored the recommendation or, like Virginia, complied conditionally.⁴³⁰ The Confederation's failure to enforce good faith compliance only proved its political weakness.

The new Constitution changed all this. "In a word," the Board reported,

many of the injustices and partialities, hitherto practised by the Legislatures of particular States, have thus been condemned by the United Voice of the People of America assembled in convention; and it is certainly reasonable now to expect that the present Congress, which is composed of a body of men assembled from every part of the United States, and who act upon a larger scale, and in support of a more extensive and general interest, will not commit the like acts of injustice, to which the Legislatures of particular States were too frequently liable, in favour of the immediate and pressing interests of the persons by whom they were elected, and sometimes even to relieve the distresses of the very individuals who composed these Provincial Legislatures.⁴³¹

The notion that the larger federal republic would filter up more cosmopolitan representatives was a keystone of Federalist argument and is associated particularly with James Madison and his *Federalist* 10.⁴³² Most domestic audiences had not fully grasped the full

429. REPORT, *supra* note 357, at 18-19. For Jay's report, see *supra* notes 134-37 and accompanying text.

430. See REPORT, *supra* note 357, at 19-20. In Virginia, the home of thousands of debtors who owed British creditors, the state legislature declared that it would open its courts to British creditors only when Britain complied with the Treaty of Peace by evacuating the western posts and returning the enslaved persons who fled under British protection at the end of the war. In short, Virginia assumed the power to determine whether Britain had breached and to retaliate for breach. See An Act to Repeal So Much of All and Every Act or Acts of Assembly as Prohibits the Recovery of British Debts (Dec. 12, 1787), in 12 WILLIAM WALLER HENING, STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 528 (1823) (suspending an earlier act prohibiting Britons from suing in state court on condition that Britain comply with the Treaty of Peace).

431. REPORT, *supra* note 357, at 59-60.

432. THE FEDERALIST NO. 10, *supra* note 26, at 63-65 (James Madison); see also THE FEDERALIST NO. 3, *supra* note 26, at 15 (John Jay).

range of Madison's argument in that essay.⁴³³ The Board of Trade did not spell out Madison's logic of interest cancellation, in which a large republic would produce a multiplicity of interests such that no single one could dominate. Nonetheless, it understood, first, that the states were assaulting individual rights—rights of British subjects guaranteed by the law of nations and the Treaty of Peace—and, second, that in the larger legislature a more general interest—what Madison had called the “public good,”⁴³⁴ defined in large part as upholding international obligations—would triumph over local interests. That is how the Board told the British cabinet to understand the Constitution.

Stepping back from the document, the Board concluded that many of its provisions “took their rise from defects which had been perceived in the former system of Government. These Regulations [that is, constitutional provisions] are founded on principles of Justice; and they are certainly favourable to Commerce in general.”⁴³⁵ If Congress implemented all its provisions, “many of the laws made by the Legislatures of Individual States, imposing partial burthens on British Commerce, and British Ships ... will be *ipso facto* repealed.”⁴³⁶

The Board identified about ten commercial provisions that merited special notice. Analyzing some in depth, it observed that Congress now had the power to harmonize interstate commercial policy, and again it might use that power to try to coerce Britain into opening its markets, especially in the West Indies.⁴³⁷ The Board advised that Parliament should not capitulate.⁴³⁸ The Caribbean slave-based colonies were not, it argued, dependent on the United States because the remaining British colonies in North America could adequately supply those islands.⁴³⁹ Even if they could not fill that void entirely, the British monopoly over colonial shipping was too crucial

433. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 615, 658 (1999).

434. THE FEDERALIST NO. 10, *supra* note 26, at 62 (James Madison).

435. REPORT, *supra* note 357, at 58.

436. *Id.*

437. *Id.* at 73-74 (observing that Congress had debated whether to discriminate against British trade and decided against doing so, but it could change that policy at any time, and therefore recommending that “it may be of use to bind the United States to the observance of this rule in future”).

438. *See id.* at 80-81.

439. *Id.*

for the empire's health to permit its erosion in the transatlantic trade.⁴⁴⁰

The Board also observed that under the Supremacy Clause, which declared treaties to be the law of the land binding state judges, "it may be expected, that British Creditors will now reap the benefit of the 4th Article of the late Treaty of Peace."⁴⁴¹ They would now be able to collect debts.⁴⁴²

Similarly, the Board concluded that under the provision declaring "that no State is to pass any *ex post facto* law, impairing the Obligation of Contracts, all the laws, made by the Legislatures of Individual States, to prevent British Merchants from recovering the full value of their legal debts, must be considered as *ipso facto* repealed."⁴⁴³ This observation ran together two different restraints on state legislation contained in Article I, Section 10: "No State shall ... pass any ... *ex post facto* Law, or Law impairing the Obligation of Contracts."⁴⁴⁴ In a revealing conflation, the Board assumed that the *ex post facto* clause had civil effect.⁴⁴⁵ To be fair, so had several Americans and Britons.⁴⁴⁶ Prohibiting the states from impairing the obligations of contracts was not enough. Some debtors argued that "obligation" covered only the principal of each loan; interest was legally separate.⁴⁴⁷ To the Board's eager eyes, however, the *Ex Post Facto* Clause was not limited to criminal laws and, as a civil

440. *See id.*

441. *Id.* at 58.

442. *See id.* At this early date, the Board had received the optimistic reports from the consuls and other sources but not yet about creditors' continued frustrations in Virginia. *See* Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176 (1984) (detailing problems British creditors encountered in Virginian and federal courts).

443. REPORT, *supra* note 357, at 58-59.

444. U.S. CONST. art. I, § 10, cl. 1.

445. *See* REPORT, *supra* note 357, at 58-59.

446. *See Marcus I*, in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 96, at 161, 164 (interpreting the clause as prohibiting retroactive alteration of common law land tenures); Letter from John Hamilton to Lord Grenville (June 22, 1796), Foreign Office 5/5, British National Archives (describing a 40 percent depreciation law in North Carolina as "an *ex post facto* law"); *supra* note 224; *see also supra* note 218.

447. *See supra* note 428 (describing Consul Bond's account of three state cases in which interest was denied); *see also* Report from John Jay to Congress, *supra* note 122, at 801-06 (advising the Confederation Congress that U.S. debtors owed interest under the treaty). As Bond reported to London, some state courts denied interest for the period of the war. *See, e.g.,* Hoare v. Allen, 2 U.S. (2 Dall.) 102, 104 n.* (1789) (state court denying interest followed by reporter's note referring to similar decisions in New York and Maryland).

provision, was not redundant either.⁴⁴⁸ Instead, it prohibited states from impeding the collection of interest as well as principal—nearly twenty years of accumulated interest at 5 percent, or almost equal to the underlying principal itself.⁴⁴⁹ In sum, the Board concluded that the two provisions prevented any statute from altering contracts, the underlying principal, the interest, or any remedy.

In addition, the Board celebrated federal control over coinage and the provision in Article I, Section 10, forbidding states to allow anything but sound money to be proffered in payment of debts.⁴⁵⁰ This meant that existing state laws that “oblige British Merchants to take, in payment of their debts, any thing besides what is thus made legal tender, must be considered also as *ipso facto* repealed.”⁴⁵¹ In the Board’s eyes, this rectified yet another grievance: the state tender laws that permitted debtors to pay creditors in state paper rather than, as provided in such contracts explicitly or by commercial custom, in specie.⁴⁵²

Finally, the Board highlighted federal question jurisdiction in Article III. This grant of jurisdiction over cases arising under the Constitution, national laws, and treaties

affords just reason to expect that these Fundamental Articles [that is, the Constitution] will be carried into complete execution; and that in all these respects the Legislatures of the Individual States, and the Courts of Judicature dependent on them, will no longer have the power of resisting, under any pretence, the supreme authority of Congress.⁴⁵³

Later in the report it noted that the first Congress had passed the Judiciary Act, which, the Board believed, now provided for federal enforcement of new customs laws and “Trial of all Suits arising under the New Constitution, as well as under Treaties.”⁴⁵⁴ The Board incorrectly implied that Congress had given the courts original federal question jurisdiction; in fact the Judiciary Act

448. See REPORT, *supra* note 357, at 17-19.

449. Cf. Sheridan, *supra* note 47, at 166 n.19.

450. See REPORT, *supra* note 357, at 59.

451. *Id.*

452. See *id.* at 15, 59.

453. *Id.* at 59.

454. *Id.* at 67-69.

extended only appellate jurisdiction to the federal courts in cases arising under the Constitution, national laws, and treaties.⁴⁵⁵ In other words, most suits alleging violations of federal law still had to begin in state courts, with review permitted in the federal circuit courts.⁴⁵⁶ The Board also did not notice that the Judiciary Act created foreign diversity, or alienage, jurisdiction, which is how many British creditors were able to bypass the state courts and sue directly in the federal circuit courts. Nor did it mention the significant five hundred dollar jurisdictional minimum for those suits.⁴⁵⁷ The Board's streamlined impressions reflected the information it received from America, perhaps framed by their own national legal system, which did not divide jurisdiction vertically by subject matter.⁴⁵⁸ Confusions and omissions aside, the Cabinet learned that the federal courts were open to British creditors and were supposed to decide their cases according to the peace treaty, not state legislation.

Six months after receiving this report, the Privy Council drafted instructions for George Hammond as minister plenipotentiary to the United States.⁴⁵⁹ The Council instructed Hammond "to convince" the American government that Britain had conformed to Article I of the Treaty of Peace and was treating the United States "in all Respects, particularly in commercial Matters, as Free, Sovereign and Independent States."⁴⁶⁰ This hardly ended controversies between the two governments. A commercial treaty took three more years to complete, with Chief Justice John Jay sailing to London for negotiations, and when it came, it was deeply controversial in the United States.⁴⁶¹

455. *See id.* at 68-69.

456. Judiciary Act of 1789 § 25, 1 Stat. 73, 85-87.

457. *See id.* §§ 11-12; *cf.* REPORT, *supra* note 357, at 67-69.

458. *See* HULSEBOSCH, *supra* note 94, at 9-10, 223-24 (contrasting American and English conceptions of court jurisdiction); Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 386-87 (examining Federalist extension of original "arising under" jurisdiction to federal courts in the short-lived 1801 Judiciary Act (quoting U.S. CONST. art. III, § 1, cl. 1; THE FEDERALIST NO. 82, *supra* note 26, at 554)).

459. Instructions to His Majesty's Minister Sent to the United States of America (Draft) (July 4, 1791), Foreign Office 4/10, British National Archives. In a nice coincidence, the Council sent the instructions to the Secretary of State on July 4th. *Id.*

460. *Id.*

461. Treaty of Amity, Commerce and Navigation, *supra* note 62; *see John Jay's Treaty*,

Nonetheless, as the Board reported, British merchants were already plunging back into American trade and once again became American merchants' partners of choice.⁴⁶² A central reason was liberal British credit.⁴⁶³ Lord Sheffield had predicted in 1783 that the United States would remain dependent on British merchants' exceptionally liberal credit.⁴⁶⁴ He was right. The Board of Trade noted that European traders' "great expectations" of trading directly with North America, a trade foreclosed when the thirteen states were part of the British Empire, had by then been dashed.⁴⁶⁵ "They learned by experience that this Trade was not to be carried on, without trusting the Americans with their goods, and without giving them longer credit than is usually given in the Trade carried on to European Countries."⁴⁶⁶ Only Britain's transatlantic merchants could offer the credit terms necessary for trading manufactured goods across the Atlantic.⁴⁶⁷ The lesson might apply not only to the new United States. Perhaps if other European colonists gained independence from imperial monopolies, they too would turn to the British:

All new established countries (and such are the United States) can trade only with those nations, who are able to afford them an extensive credit, and to incur the risque [sic] resulting therefrom: If all the Colonies belonging to European Nations in America and the West Indies, were to become Independent, Great Britain would have undoubtedly the greatest share in the Commerce carried on with them.⁴⁶⁸

1794-95, U.S. DEP'T STATE OFF. HISTORIAN, <https://history.state.gov/milestones/1784-1800/jay-treaty> [<https://perma.cc/2GFQ-5D48>].

462. See REPORT, *supra* note 357, at 49 (noting the reluctance of European traders to offer extensive credit to Americans); *id.* at 70-71 ("The excellence and cheapness of the manufactures of Great Britain, and the Credit, which British Manufacturers are able and willing to give, will always ensure them a greater share in the Trade of Export to the United States, than can be enjoyed by any other European Nation.").

463. See *id.*

464. See HOLROYD, *supra* note 104, at 41.

465. REPORT, *supra* note 357, at 49.

466. *Id.* The unusually liberal credit arrangements between British and American merchants suggested to the Board that the government should not impose aggressive trade restrictions against the United States. See *id.* at 78.

467. See *id.* at 49, 70-71.

468. *Id.* at 71.

The Board did not develop this insight. But it is early evidence that even mercantilist thinkers like Lord Hawkesbury saw the attraction of “the imperialism of free trade” and why many Britons supported the Latin American revolutions over the next generation.⁴⁶⁹

Dependence cut both ways. The Board also accepted the merchants’ warning that a tariff war might damage their comparative advantage in financing American trade.⁴⁷⁰ The Lords of Trade therefore recommended that Parliament avoid discriminating against American trade, no matter what Congress did, and also continue offering curious holdover benefits from the colonial period that Americans still enjoyed, such as exemption from the Alien Duty.⁴⁷¹

These early cracks in the Navigation Acts demonstrated the influence that transatlantic merchants had in Whitehall. They also reveal that Britons traveled with Americans along the path from early modern empire to nineteenth-century international relations, and together they constructed the legal infrastructure of a developing nation.

IV. THE FIRST DEVELOPING NATION?⁴⁷²

As diplomatic relations normalized between Britain and the United States, British investors also began buying American securities and land in large amounts.⁴⁷³ Transatlantic capital flows to North America were not new, of course.⁴⁷⁴ But for two centuries they

469. The classic discussion is in Gallagher & Robinson, *supra* note 67.

470. REPORT, *supra* note 357, at 88.

471. *Id.* at 94-95.

472. *Cf.* SEYMOUR MARTIN LIPSET, THE FIRST NEW NATION 239-47, 307-12 (1963) (suggesting that political stability depends more on political culture than government structure); RICHARD B. MORRIS, THE EMERGING NATIONS AND THE AMERICAN REVOLUTION 181, 193-95 (1970) (suggesting the influence of American democratic ideals in the decolonizing empires of the twentieth century).

473. In 1803, foreign investors owned 56 percent of the domestic debt, over half of it in British hands. WILKINS, *supra* note 15, at 35-36, 36 tbl.2.2. Alexander Hamilton was the lawyer for the agent of the English Pulteney family, which purchased over a million acres in central New York in the 1790s. *See generally* 3 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 384, at 758-812. In a related investment, shortly after the opening of the Erie Canal, the British owned more than half of the state bonds floated to finance it. *See generally* NATHAN MILLER, THE ENTERPRISE OF A FREE PEOPLE: ASPECTS OF ECONOMIC DEVELOPMENT IN NEW YORK STATE DURING THE CANAL PERIOD, 1792-1838, at 99-111, 261-63 (1962).

474. *See, e.g.*, WILKINS, *supra* note 15, at 3-27 (exploring colonial investment in North America by British trading corporations and merchant houses).

had represented imperial investment.⁴⁷⁵ Now it was international.⁴⁷⁶ Capital flowed into public securities, the national bank, private corporations, mercantile accounts, and land.⁴⁷⁷ The degree of international investment in the early United States was unprecedented in the European world, and led to a welter of legal questions about commerce, in war and peace, on a scale that no legal community had before encountered, generating tremendous legal creativity.⁴⁷⁸

Many factors affected European investors' assessment of the risks and rewards of American investment in the decade after ratification. Not least was the spread of French revolutionary wars across the European continent beginning in 1793, which made diversification abroad an attractive strategy.⁴⁷⁹ But by then investors had already bet on the safety of American assets, and they referred to the Constitution and the institutions built upon it to justify their confidence.⁴⁸⁰ The limited information presently available on American securities prices suggests that prices rose at key moments in the process of federal state-building.⁴⁸¹ In the first few years, and

475. *See id.*

476. *See id.* at 28-48.

477. *Id.*; *see also* RILEY, *supra* note 11, at 185-94 (documenting Dutch investment in U.S. public securities and suggesting that investors possibly overreacted to the Constitution); 1 VAN WINTER, *supra* note 73. For specific examples, see PETER E. AUSTIN, *BARING BROTHERS AND THE BIRTH OF MODERN FINANCE* (Routledge 2016) (2007); HELEN I. COWAN, *CHARLES WILLIAMSON: GENESEE PROMOTER—FRIEND OF ANGLO-AMERICAN RAPPROCHEMENT 15-57* (1941); PAUL DEMUND EVANS, *THE HOLLAND LAND COMPANY 3-35* (1924); and FRANÇOIS FURSTENBERG, *WHEN THE UNITED STATES SPOKE FRENCH: FIVE REFUGEES WHO SHAPED A NATION* (2014).

478. For some of that creativity, see generally the classic MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). I disagree with the nascent consensus that the early United States became something like an economic tributary of Great Britain. At least, that is not how many early Americans saw the process. *Cf.* ONUF & ONUF, *supra* note 67, at 187-88; SEXTON, *supra* note 67, at 2-3.

479. European (largely British) imports increased rapidly during 1789-1793, before the outbreak of the French wars. Sylla, *supra* note 391, at 73.

480. *See, e.g.*, 1 VAN WINTER, *supra* note 73, at 239 ("Some information on the changes in government structure being considered in America reached Amsterdam during 1787, and produced a marked increase in the interest of Dutch investors in American domestic debt.").

481. This tentative observation is based on the author's examination of bond price quotations in early American and British newspapers between 1787 and 1800. *See, e.g.*, *THE TIMES* (London) (Sept. 22, 1789) (letter to the editor claiming that "the inhabitants of the United States, by adopting their New Constitution, have formaly [sic] and solemnly pledged themselves for the payment of their public debt" and possessed much public land to pay down that debt); *THE TIMES* (London) (Oct. 15, 1790) (reporting that "Congress have determined to apply one million Dollars, the revenue product of last year, to the reduction of the public

before the European wars, these moments included the publication of the Constitution in the fall of 1787; the inception of the federal government in 1789; and the establishment of Hamilton's financial institutions in the early 1790s. In addition, qualitative evidence indicates that the text circulated abroad as a prospectus for the commercial environment of the new Republic.⁴⁸² Even more important were the institutions built upon the spare text. These institutions, such as a funded debt, a nationally incorporated bank whose notes could be redeemed at taxes, and federal assumption of the states' revolutionary debt, had been in Hamilton's mind for years.⁴⁸³ His legendary energy, backed by George Washington's essential support, turned American debt into internationally credible commitments.⁴⁸⁴ "States, like individuals, who observe their engagements, are respected and trusted," Hamilton wrote in his first report on public credit in January 1790.⁴⁸⁵ Already by that point, "intelligence from abroad announces" that prices were rising, just as they were on the domestic market.⁴⁸⁶ He noted that Europeans, "particularly ... the Dutch," had grasped the economic potential of the new republic: "Our situation exposes us less, than that of any other nation, to those casualties, which are the chief causes of expence": namely, war.⁴⁸⁷ In addition, the United States had unparalleled supplies of land and natural resources.⁴⁸⁸ These raw materials of development functioned as indirect collateral for the capital that would fuel American growth.⁴⁸⁹ Consequently, he predicted that "no

debt—in consequence of which the American funds have had a considerable rise"). For the history of interest rates in the United States beginning in the nineteenth century, see SIDNEY HOMER & RICHARD SYLLA, *A HISTORY OF INTEREST RATES 270-93* (4th ed. 2005).

482. 1 VAN WINTER, *supra* note 73, at 239.

483. Hamilton sketched the outlines of funding and a national bank, for example, in his *Continentalist* essays, written in 1781-1782. Alexander Hamilton, *The Continentalist No. I* (July 12, 1781), *reprinted in* 2 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 282, at 649, 649-52; Alexander Hamilton, *The Continentalist No. IV* (Aug. 30, 1781), *reprinted in* 2 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 282, at 669, 669-74.

484. See MAX M. EDLING, *A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783-1867*, at 37 (2014); FERGUSON, *supra* note 4, at 289-91; McCRAW, *supra* note 178, at 97-109; ROBERT E. WRIGHT, *HAMILTON UNBOUND: FINANCE AND THE CREATION OF THE AMERICAN REPUBLIC 195-98* (2002).

485. *THE REPORTS OF ALEXANDER HAMILTON* at 3 (Jacob E. Cooke ed., 1964).

486. *Id.* at 4.

487. *Id.* at 23.

488. See *id.* at 26.

489. See *id.*

country will be able to borrow of foreigners upon better terms, than the United States, because none can, perhaps, afford so good security.”⁴⁹⁰ Hamilton’s reports showed that information about American governance would continue to flow transatlantically in both public and private communications. The familiar story of Hamilton’s financial program was also an episode of creative constitution-making—and an international event. His public offering of America extended across the Atlantic.

As capital continued to flow, so too did legal creativity. Statesmen, lawyers, and judges built upon transatlantic conversations of the 1780s and early 1790s and continued to construct their Constitution with a focus on maintaining foreign faith, all with the aim of stoking national economic development. The spare text of the Contract Clause, the Commerce Clause, and the Treaty Clause all underwent precedent-making construction in the first few decades after ratification. Almost all of the hallmark doctrines of constitutionally “vested rights,” for example, bore directly on international investment. Most of the leading cases of the early years of the Supreme Court—such as *Georgia v. Brailsford*,⁴⁹¹ *Glass v. The Sloop Betsey*,⁴⁹² *Ware v. Hylton*,⁴⁹³ and even *Chisholm v. Georgia*⁴⁹⁴—involved foreign affairs.⁴⁹⁵ In addition, several of the defining Marshall Court cases usually associated with internal nation-building, such as *Fletcher v. Peck*⁴⁹⁶ and *McCulloch v. Maryland*,⁴⁹⁷ also

490. *Id.* at 23.

491. 3 U.S. (3 Dall.) 1, 4 (1794) (construing state statute as sequestering rather than confiscating British debts).

492. 3 U.S. (3 Dall.) 6, 16 (1794) (holding that “every [federal] District Court in the *United States*, possesses all the powers of a court of Admiralty”).

493. 3 U.S. (3 Dall.) 199 (1796) (holding that the peace treaty revived private debt despite payment of debt to Virginia under the state’s wartime sequestration statute).

494. 2 U.S. (2 Dall.) 419 (1793) (holding that federal court has jurisdiction over suits brought by creditor against state).

495. Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 *BYU L. REV.* 1 (analyzing the overwhelmingly “foreign” docket of the lower federal courts in the 1790s); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 *YALE L.J.* 855, 872 (2005) (finding that one-fourth of the early Court’s docket involved international disputes).

496. 10 U.S. (6 Cranch) 87 (1810) (holding that state land patents were contracts for purposes of the Contract Clause). *Fletcher* protected land grants, as contracts, held by what were not just interstate but often multinational land partnerships and companies.

497. 17 U.S. (4 Wheat.) 316 (1819). *McCulloch* upheld the national bank, in which foreigners invested as Hamilton had hoped, and it also facilitated payments by the United States

implicated foreign interests. The complicated intersection of law and commerce in such cases meant that American lawyers and judges played central roles in constructing not only the Federal Constitution, but also the emerging liberal legal infrastructure of international trade and investment.

CONCLUSION

This Article has argued that the Federal Constitution was constructed in part to appeal to foreigners who did or might conduct commerce—trade and/or capital investment—in the United States. Seen from abroad, it guaranteed hard money, pledged public faith to uphold preexisting debt, protected private contracts from state interference, and prohibited uncompensated confiscation.⁴⁹⁸ It made treaties the supreme law of the land, enforceable in courts, and included special legal protections for aliens.⁴⁹⁹ Many of these provisions were innovative and soon became standard constitutional features of economic liberalism, which creditors began to demand from developing nations in the nineteenth century.⁵⁰⁰ In the United States, they were not imposed. Neither were they simply authentic expressions of American commercial character. They represented instead attempts to institutionalize a certain set of sociable and commercial ideals of the Enlightenment in the newly postcolonial United States. In turn, the resulting governmental structures helped lay out the constitutional infrastructure of a developing nation. Here, as elsewhere, key features of the Constitution and its law developed out of an international dialogue about what was necessary to make the revolutionary experiment succeed on its own terms: to create a government based on the people that could “keep good faith with the rest of the World,” as George Washington had

Treasury, whose bonds bulked even larger in foreign portfolios. *See supra* notes 473-80 and accompanying text.

498. *See generally* REPORT, *supra* note 357.

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

500. CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 3-33 (1985); Christopher A. Casey, *Abroad: Law, Migration, and Capitalism in an Age of Globalization* 48-58 (Summer 2017) (unpublished Ph.D. Dissertation, University of California, Berkeley) (on file with author).

hoped in 1785, and become “one of the most respectable Nations upon Earth.”⁵⁰¹

501. Letter from George Washington to James Warren (Oct. 7, 1785), *in* 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 298, 299 (W.W. Abbot ed., 1994).

