2

The Law of Nations and the Founding of the American Nation

JEREMY RABKIN

Amid the Mexican Revolution in the early 20th century, an American journalist secured an interview with the rebel general Pancho Villa. The journalist asked Villa what he thought of the recent Hague Convention on the law of war. Villa, "hugely amused," called it "a funny thing to make rules about war."[1]

One might imagine the leaders of the American Revolution, more than a century earlier, expressing comparable disdain for the notion that European rules could govern the conduct of American militiamen then fighting the British army. One might imagine American leaders would have dismissed any European rules constraining their struggle for independence.

But the American founders were, in fact, quite attentive to American obligations under the law of nations (as international law was then called). That is evident from what American leaders said and did from the Revolution's outset. It is even clearer from debates about adopting a new constitution, soon after the United States secured independence. It is equally clear from the conduct of American diplomacy in the ensuing decades.

One reason the founders were so devoted to international law is that they saw it as largely conforming to principles and premises Americans accepted at home. Where there were differences, they pressed to get other governments to embrace American views of what international practice should be.

Revolution According to Law

The American Revolution's most famous document—the Declaration of Independence—starts and ends with appeals to international law. Today, the Declaration is most often remembered for its second paragraph, asserting the "self-evident" truths that "all men are created equal," endowed with "unalienable Rights." But the first sentence—"When in the Course of human events"—argues that it is the "Laws of Nature and of Nature's God" that "entitle" an independent America, "among the powers of the earth," to a "separate and equal station."

That initial claim might seem more a philosophical speculation than an agreed rule of international law. But the closing sentence then asserts, with much more specificity, that "as Free and Independent States," the United States "have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." It is a claim about not only powers inherent in statehood but also implied limits: Some "Acts and Things" would not be right for states to do. Was this, too, just philosophical speculation?

For the American founders (and many authorities in Europe), there was no sharp distinction between principles of natural law and the law invoked by practicing lawyers. Certainly that was true in regard to international law. By far the most widely cited work on that subject in that era was the treatise of the Swiss diplomat Emer de Vattel, *The Law of Nations*, which had first appeared (in French, as *Le Droit des Gens*) in 1758. The subtitle illustrates the prevailing view: *The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*.

We know the Revolution's leaders were familiar with Vattel. Benjamin Franklin requested that Vattel's publisher send several copies of his work to the Continental Congress, and they were then widely circulated there.[2] It may be that Thomas Jefferson was inspired to write about "Life, Liberty, and the pursuit of Happiness" from a passage in Vattel's treatise, asserting each man's need "by nature of becoming better, and therefore happier."[3]

Certainly the drafters of the Declaration would have drawn confidence from Vattel's explanation of the natural equality of states:

> Since men are by nature equal, . . . Nations . . . are by nature equal and hold from nature the same obligations and the same rights. . . . A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.[4]

That was one major reason why American leaders were keen to invoke prevailing ideas about the law of nations—that they supported the claim of their new, struggling confederation to the same status as well-established states of Europe ("separate and equal station" "among the powers of the earth"). Appeals to the law of nations might also reinforce protests against British abuses, exceeding what states could "of right do"—such as unleashing "merciless Indian Savages" who attacked women and children or deploying German mercenaries who plundered and ransacked civilian towns, reverting to practices of "the most barbarous ages."[5] Vattel's treatise (among others) decried such practices and supported a presumptive or natural claim to engage in trade (corresponding to the Declaration's protest against Britain for "cutting off our Trade with all parts of the world"). Beyond all that, Vattel's treatise stipulated that oppressed people had a natural right to resist tyranny and seek foreign assistance for their efforts.[6]

The Continental Congress, which issued the Declaration, wanted recognition from the "candid world" to which the Declaration was addressed. The Congress hoped the Declaration's argument might help persuade the British to acknowledge American independence. It might make European governments and European bankers more willing to advance loans to the struggling American confederation. And it might open the way to favorable trade agreements with European states.

So, in the summer of 1776, as John Adams was consulting with Jefferson on the Declaration of Independence's text, he was working up a draft for a model trade treaty. The Congress then approved plans for a trade treaty with France (and whatever other governments in Europe that might want

to agree to one). It was already a proposal for liberalizing trade, beyond generally accepted practices. But the treaty negotiated with France in 1778 largely followed its provisions, as France was particularly keen to help the embattled new nation. It signed a military alliance shortly after.

The trade treaty's most notable elements were provisions to protect commerce from disruption in wartime (among other things, protections for neutral shipping) and to protect signatories from foreign rivalries (with a most-favored-nation clause assuring further concessions as generous as those granted to any future trade partner). Some 50 years later, John Quincy Adams (then serving as US secretary of state) claimed that the model treaty ought to be ranked with the Declaration of Independence as "parts of one and the same system": The trade treaty was "to the foundation of our commercial intercourse with the rest of mankind, what the Declaration of Independence was to that of our internal Government."[7]

In its early years, however, the United States had only limited success in negotiating similar treaties with other European states. In particular, it could not secure a trade agreement with Britain, even after it recognized American independence—a particular disappointment given that most American trade had centered on Britain in colonial times and might again with supportive agreements. Even after conceding American independence, however, Britain declined for some time to make a generous trade agreement. In part, it held back to protest the United States' failures to honor commitments in the 1783 treaty that ended the War of Independence.

One of the principal arguments for the new federal Constitution was the need to strengthen America's capacity to deal with foreign nations. Of the first dozen Federalist Papers, nine concern international trade or international security. *Federalist* 12, for example, argues that a newly empowered Congress could raise effective tariffs on foreign imports, while separate state tariffs could be easily evaded by unloading foreign cargoes in a neighboring state. That broad federal tariff power could then be wielded to induce foreign states to enter generous trade agreements.

Among notable provisions of the Constitution, Article VI made treaties (along with federal statutes) "supreme Law of the Land," while Article III, Section 2 gave jurisdiction to federal courts to interpret and uphold them—to avoid states inadvertently offending foreign powers by disregarding American treaty obligations. Similarly, the obligation to protect foreign diplomats was safeguarded with provisions in Article III giving federal courts authority over cases concerning such diplomats and allowing the Supreme Court to hear such cases in original jurisdiction (that is, without the delay and possible provocation of lower court trials). By Article I, Section 8, Congress was given power to enact penalties for "Offences against the Law of Nations," so the US could take its part in upholding the law of nations.[8]

As it turned out, the new federal government was no sooner organized than it faced major foreign challenges. Most threatening were the French Revolution and the ensuing wars between France and its neighbors, especially Britain. France and Britain eventually tried to block trade with each other (and third parties trying to trade with the other). The neutral United States argued strongly against these practices as contrary to (what it saw as) accepted international law. The United States even more vehemently opposed the British and French practices of interfering with neutral ships on the high seas to enforce these trade restrictions.

President George Washington borrowed a copy of Vattel's treatise from a library in New York, most likely to sort through these and related challenges. He did not return it, perhaps because these challenges continued, even when the national capital moved to Philadelphia.[9] His secretary of state, Jefferson, produced several state papers on neutral states' rights and obligations in international trade. European governments cited them respectfully decades later.[10]

The European war was still raging, and still threatening American trade, when Jefferson became president. His secretary of state, James Madison, wrote a book-length study aimed at refuting British claims of a right to interfere with neutral shipping, reviewing doctrines of Vattel and earlier European commentators, notably Hugo Grotius, Samuel von

Pufendorf, and Jean-Jacques Burlamaqui, along with court rulings from various nations on related issues.[11] As Madison probably expected, it did not persuade British authorities to change their policies. But it may confirm the general point, that the founders took international law seriously enough to appeal to it in foreign affairs and try to influence the general understanding of what it required.

Meanwhile, as the founders had expected, many issues involving foreign relations came before federal courts. The Supreme Court in the era of Chief Justice John Marshall (1801–35) is most remembered today for foundational rulings interpreting the Constitution. But the Marshall Court actually handed down three times as many rulings dealing with international law as US constitutional law (195 international cases to 62 constitutional cases).[12] Today's Supreme Court still cites a number of Marshall's opinions on international law, and foreign courts have cited some with approval.[13]

The first extended treatise on American law—James Kent's *Commentaries on American Law*, first published in 1826—also deserves notice. Kent, who started his career as a protégé of Alexander Hamilton in New York, was a nationally renowned jurist (serving on high courts in New York) by the time he gave the lectures gathered in this treatise. Half of the first volume (of four) was devoted to a survey of the law of nations, drawing heavily on Vattel but then reviewing relevant decisions of the Marshall Court and state courts that regarded the law of nations (or some parts of it, such as rules concerning the treatment of foreign ambassadors and foreign ships) as part of the common law. Kent's *Commentaries*, superseding William Blackstone's mid-18th-century *Commentaries on the Law of England*, remained a leading text for American law students to the end of the 19th century.

So the founding generations took international law seriously. But they were not naive about what it could be expected to achieve.

Guarded Expectations

The founders regarded "the law of nations" as a guide to *proper* conduct between states. That did not mean they trusted that states would always conform to it. Early American statesmen tended to view the law of nations as a set of background expectations that might allow for adjustment or exceptions over time. They were quite aware that it remained a law governing sovereigns, and sovereigns could not be readily coerced by legal argument. That was one of the main arguments for authorizing direct federal control over private conduct in some areas, since state governments could not be trusted to do so based on mere admonitions by the central government.[14]

Outside the United States' special constitutional structure, the framers assumed sovereign states would usually give more weight to their own self-interest when interpreting or applying supposed international obligations. As John Jay, an experienced diplomat, warned in an early Federalist Paper, "It is well known that [in international disputes,] acknowledgments, explanations, and compensations are often accepted as satisfactory from a strong nation, which would be rejected as unsatisfactory if offered by a State or confederacy of little consideration or power."[15] As Hamilton warned in a later paper, "The rights of neutrality will only be respected when they are defended by an adequate power."[16] He offered this as a key reason for establishing a federal government with resources to build an American navy, capable of protecting American shipping on the high seas.

Such "realism" was already evident in the conduct of American diplomacy. To take a telling example, the Treaty of Alliance with France in 1778 promised that neither signatory would negotiate a separate peace with Britain and that both would maintain peaceful relations thereafter.[17] Even during the war, however, Washington warned against embracing any military project that would see French troops deployed to Canada. The French, he cautioned, might decide to remain there and eventually prove a threat to American independence.[18]

Later on, American diplomats did engage in separate peace negotiations with British emissaries. France's foreign minister, when informed of this development, protested that it violated the obligation of coordinated action stipulated in the Treaty of Alliance. Jay, one of the American negotiators in Paris, explained to the Continental Congress that the American emissaries "were determined faithfully to fulfil our Treaty [with France], *yet it was a different thing to be guided by their or our Construction of it*."[19] (Emphasis in original.)

After securing independence—with decisive French support—the United States soon found itself faced with more awkward challenges arising from the French treaty. Did it mean the United States was obliged to stand by France in the wars that broke out after the French Revolution? President Washington, relying on a narrow interpretation of the treaty, proclaimed American neutrality. There was much domestic debate on whether the president could make this determination on his own, a dispute engaging Madison and Hamilton on opposite sides of an ensuing pamphlet war (between Hamilton's "Pacificus" papers and Madison's replies as "Helvidius"). But there was not much controversy about the policy's substance. When President Adams subsequently negotiated a new treaty with France, absolving the United States of further obligations, the Senate endorsed it with notably little opposition.[20]

Within a mere two decades thereafter, the United States extended its reach as far as the Pacific. It might not have been able to if it had been extremely scrupulous about international legalities. In 1803, the Jefferson administration accepted France's offer to sell a vast swath of territory on the far side of the Mississippi—following French Foreign Minister Charles Maurice de Talleyrand-Périgord's suggestion not to look too closely into France's claim to have clear title to this territory (rather than Spain, the previous owner). Fifteen years later, General Andrew Jackson marched into Spain's colony in Florida to suppress raids by local Indians into neighboring American territory. Jackson then asserted authority to hang two British nationals accused of arming and inciting Indians in Florida. Secretary of State John Quincy Adams defended these legally

questionable actions and warned of further measures if Spain did not relinquish this territory that it seemed unable to control. Spain agreed to sell Florida to the United States.

Soon after, further pressure won Spain's acceptance of American claims to extend its Louisiana territory to the Pacific coast, at least north of Spain's province of California. Still, it is notable that the United States wanted to settle its claims with formal treaties, often (as with the acquisition of Florida) by paying monetary compensation. American diplomacy sought to show that territorial cessions were not merely the result of force (even if the threat of force might have played some role in closing the bargain).

The United States was willing to see lawyers (not merely diplomats) take a role in settling disputes—but with safeguards. Thus, in 1794, Washington sent Jay, now chief justice, to negotiate a treaty with Britain to resolve lingering disputes arising from the War of Independence. Among other things, the Jay Treaty provided for arbitration panels to settle property claims by Tory loyalists whose property had been confiscated in America and by American merchants claiming that the British had wrongly seized their property. It was the first modern venture in international arbitration. Some critics questioned whether this could be consistent with the Constitution's entrusting "the judicial Power of the United States" to federal courts—an argument advanced at the time by the new congressman from the new state of Tennessee, Andrew Jackson.[21]

But the precedent established was not merely to allow arbitration panels to obligate American government payments but also to require Senate agreement, with a separate international convention, to the issues thus submitted—a practice honored down to the mid-20th century. As president, Jackson would commend France for agreeing to pay compensation for depredations against American commerce (back in the 1790s) without arbitration of individual claims—though by then accepting that this could be a lawful resort.[22]

Other ventures in international decision-making were still resisted. Notably, Congress agreed in 1808 to prohibit the importation of slaves to

the United States, and the US Navy was assigned to patrol Atlantic waters to stop slave trading. But when Britain proposed that an international tribunal judge charges of slave trading, the United States declined to participate. There were again constitutional concerns that such a tribunal would, in effect, be exercising American judicial authority—not merely (as with the Jay Treaty panels) by financial awards against the Treasury but by direct prosecution of private (and possibly American) citizens. Some opposition may have reflected slave states' concerns, but the leading opponent of the scheme was Secretary of State Adams, who would prove himself in later years a principled opponent of slavery.[23]

As president, Adams resisted American participation in a congress of newly independent Latin states unless it was made clear it would not establish a hemispheric authority compromising American independence. The wrangling on this point was so extended that by the time American delegates were authorized to attend—with emphatic cautions to act only as observers—the conference had already broken up.[24]

Whatever other diplomatic or political considerations may have influenced these stands, Adams had powerful logic on his side. Americans had fought a war to establish their independence and another war, starting in 1812, to make sure Britain would respect it. There was therefore understandable wariness about placing America under any foreign or even multinational constraint. American legal commentators were among the first to embrace the new term "international law"—coined precisely to emphasize that this law was about relations between states, not more generalized norms that many states happened to regard as moral or proper.[25] The early American republic sought from the beginning to champion what it regarded as just or favorable doctrines of international law, but always with the understanding that they would respect America's own constitutional structure.

Even as that structure was debated, Madison in the Federalist Papers praised the constitutional provision allowing the federal government to protect the states from "invasion" and "domestic violence." He even voiced the wistful thought that it would be a "happy" result "if a project equally

effectual could be established for the universal peace of mankind"—but then dismissed such a "project" as "chimerical."[26] As he noted in a later paper, "A power independent of the society may as well espouse the unjust views of the major, as the rightful interest of the minor party, and may possibly be turned against both parties."[27]

Madison elaborated the thought a few years later, in a 1792 essay on "Universal Peace" in which he noted that Jean-Jacques Rousseau's proposal for a European peace federation, guaranteeing every member state's territory and authority, would have "the tendency . . . to perpetuate arbitrary power wherever it existed; and, by extinguishing the hope of one day seeing an end of oppression, to cut off the only source of consolation remaining to the oppressed."[28] The point hardly needed elaborating for readers of that era. They would have been well aware that America had gained its independence by defying the British Empire's peace and territorial integrity. They would have shuddered at the thought that all the European powers could have been obligated to safeguard all Britain's territorial claims as they happened to exist in 1776.

But that was all long ago. Does the United States still need to worry about overreaching international projects? Does it need to care much about validation from other nations?

Contemporary Resonance

The United States' situation in its earliest years was quite different, of course, from today. The early United States, a string of small states along the Atlantic Seaboard, faced threats from powerful colonial empires—British, French, Spanish—on its borders or in its immediate vicinity. It faced formidable trade barriers with major states in Europe. It faced serious threats to its shipping on the high seas. In the 21st century, with a hundred times the population, with territory from the mid-Pacific to the Caribbean basin, and with the world's largest economy, the United States is a superpower. Do we need to care quite as much about international law?

There are obvious reasons to think so. Almost by definition, a superpower has interests stretching far beyond its neighborhood. We seek trade relations with countries around the world and security arrangements—including agreements on hosting American troops, warships, and airfields—in foreign lands. It is a natural instinct of smaller states to be wary of great powers, so it is a particular challenge for a superpower to win allies' and partners' trust. Demonstrating respect for treaty commitments and international law obligations is one important way of cultivating trust.

The point hardly needs belaboring, as a general rule. The United States gains trust by showing that it is trustworthy. There may be necessary or justifiable exceptions to our adherence to international law—even to our own understanding of it—in special circumstances. As Madison noted, in a case of "absolute necessity," the "great principle of self-preservation" must prevail; "the transcendent law of nature and of nature's God" declares "all institutions must be sacrificed" to "the safety and happiness of society."[29] The founders would not likely have seen threatening force to annex Greenland or the Panama Canal (in current circumstances) as excused by absolute necessity.

But it is worth noticing that the founders did not simply focus on the foreign policy benefits of adhering to acceptable conduct in foreign relations. They were also interested in how American conduct toward foreign nations would affect Americans' views of their own government or country.

So, within days of the signing of the peace treaty ending the American War of Independence, John Adams, one of the three American negotiators, wrote to the president of the Continental Congress, urging that

> Congress ought in all their proceedings to consider, the Opinion that the United States or the People of America will entertain of themselves. We may call this national Vanity or national Pride, but it is the main Principle of the national Sense of its own Dignity and a Passion in human Nature, without which nations cannot preserve the Character of Men.[30]

Adams accordingly urged renewed efforts to secure diplomatic representation at the Austrian and Russian imperial courts to reassure Americans of their new country's status, even if it secured no concrete commercial advantage.[31]

A few years later, Hamilton made a similar point at the Constitutional Convention:

> It had been said that respectability in the eyes of foreign Nations was not the object at which we aimed; that the proper object of republican Government was domestic tranquility & happiness. This was an ideal distinction. No Governmt. could give us tranquility & happiness at home, which did not possess sufficient stability and strength to make us respectable abroad.[32]

What did he mean by "respectable"? Among other things, the capacity to keep promises and conform to a reliable course of conduct despite temptations or threats. So Madison, in the Federalist Papers, warned that the United States was now "held in no respect by her friends" and would become "prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs."[33] Yet "every government" would find it "desirable" that its actions "should appear to other nations as the offspring of a wise and honorable policy."[34] The argument is actually part of a more general argument for the benefits of a senate with more seasoned members, giving more foresight and stability to the government. The application to foreign affairs is merely one illustration of the argument, but Madison seemed to regard it as a particularly compelling one, as foreigners' disdain might seem particularly demoralizing (and dangerous).

International law could supplement other brakes on impulsive action. So in Washington's second term, Hamilton defended Washington's neutrality policy in a pamphlet that argued against treating France's aid in the Revolution as a claim on enduring American friendship, noting that when one nation bestows benefits on another, the benefactor's "predominant

motive" is "the interest or advantage of the [bestowing] Nation." But he was then quick to disclaim the idea that America should adopt "a policy absolutely selfish," urging Americans instead to embrace "a policy regulated by their own interest, *as far as justice and good faith permit*."[35] (Emphasis added.)

A few years later, critics in Congress were furious at the Adams administration for agreeing to extradite an American citizen accused of murder on a British ship. Critics demanded that, rather than extradite the accused to British authorities, the sailor be tried by Americans in an American court. A Virginia congressman gave such a masterful account of why this would be contrary to the law of nations that Adams appointed that congressman—the young John Marshall—secretary of state and then chief justice.[36] Many of Marshall's subsequent Supreme Court decisions limited the reach of American power in deference to the law of nations, particularly in regard to actions against foreign ships on the high seas. These rulings may have reassured foreign powers, but they also made the point to Americans that the United States respects established law, even in dealing with foreign states.

It is probably still true today, as in the first decades of our history, that a government that acts in international affairs as if power is the only limit on its actions will risk undermining its own citizens' confidence in its trustworthiness at home. The effect may be illustrated by the drop in public support (at least as measured by opinion polls) for the aggressive and seemingly erratic tariff policy initiated in the first months of the second Trump administration. Even many of those who hoped for economic benefits seem to have felt some alarm that such extreme measures could be launched, with only the most tenuous basis in domestic law and with entire disregard for international trade agreements, previously accepted as legally binding on the United States.

The founders looked to the law of nations not only as a brake on impulsive action, however, but also as a potential basis for mobilizing American opinion for hard measures, including resort to war. Thus, when Madison urged Congress to declare war on Britain in 1812, he rehearsed

the abusive British practices—interfering with American shipping on the high seas (and conscripting captured American citizens into the service of the Royal Navy)—depicting them as clear violations of international law. But the legal argument was then used to launch a more primal appeal to national self-respect. There could be no further delay in deploying force, Madison warned,

> without breaking down the spirit of the nation, destroying all confidence in itself and in its political institutions and either perpetuating a state of disgraceful suffering or regaining by more costly sacrifices and more severe struggle our lost rank and respect among independent nations.[37]

Such rhetoric may seem far from the technical legal parsing of treaties or accepted international practice that legal specialists now present as international law. But statesmen of the early republic did not make a sharp distinction between "law" and "justice and good faith" (to adopt Hamilton's phrase). And intensive legal analysis does not completely displace citizens' more general expectation—or, at least, hope—that their government will act in ways that are justifiable and legitimate, worthy of foreign states' respect. Perhaps putting it that way slips from precise legal claims to generalized claims of honor or reputation. But it was hardly whimsy or superstition that led early American statesmen to make such associations.

Honor, Nature, and Law

The United States began with a war for independence. But independence is a complicated, almost paradoxical idea. When still living alone on his island refuge, Robinson Crusoe had no need to proclaim his independence any more than to assert property rights or trading privileges. In international affairs, as in private life, independence is relational. It does

not confer a right to follow any impulse that arises. It is the right to do what is rightful or generally accepted as such.

Eighteenth-century thinkers and commentators expressed this thought by positing that in the state of nature, where there is no government, there is still a law of nature limiting what individuals may do to others. Vattel, borrowing from Locke, insisted that independent nations remained in a state of nature with each other but were still bound by certain principles of proper conduct (particularly regarding avoidance of aggression).[38] This was common wisdom in founding-era writings.

Where there are no reliable courts, individuals must make their own efforts to assert their rights. They are unlikely to do so effectively, however, if constantly quarreling with neighbors even on small matters. To have the confidence to assert one's rights—in the absence of courts and sheriffs—requires something beyond legalistic doctrines, something once called character or honor. Harsh necessities may still claim priority in extreme situations. But in extreme situations, there is more room for doubt about what conduct is justifiable. It helps if one can invoke a good reputation earned by decent practice in the general run of situations, even amid pressures and temptations. It helps to be recognized as honorable.

The Declaration of Independence opens with a sentence appealing to what is "necessary." But the Declaration's last word—literally the very last word of the text—is "honor." The signatories appealed not to the achievements of battlefield commanders but to political leaders' honor, justifying their defiance of constituted authority (and the regular claims of legality) with arguments from natural law and the law of nations.

Notes

1. Margaret MacMillan, *War: How Conflict Shaped Us* (Random House, 2020), 205–6.
2. Franklin wrote, "I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly, that copy . . . has been continually in the hands of the members of our congress." Benjamin Franklin to Charles-Guillaume-Frédéric Dumas, December 9, 1775, Founders

Online, https://founders.archives.gov/documents/Franklin/01-22-02-0172. Dumas had just published a new edition of Vattel's treatise in the Netherlands. He would go on to publish translations of the American Declaration of Independence and early state constitutions, becoming an unofficial publicist for the American cause. The National Archives website Founders Online includes more than 50 letters from Franklin to Dumas in 1775–89, mostly to inform Dumas of American diplomatic initiatives.

3. Emer de Vattel, *The Law of Nations*, trans. Charles G. Fenwick (1758; Carnegie Institution of Washington, 1916), vol. 1, chap. 2, sec. 21.

4. Vattel, *The Law of Nations*, introduction, sec. 18.

5. It was at least partly to uphold the Continental Army's reputation as a reputable and honorable force that General Washington insisted on treating British (and Hessian) prisoners of war in accord with European standards of proper care. David Hackett Fischer, *Washington's Crossing* (Oxford University Press, 2004), 378–79.

6. "A Nation may depose a tyrant and refuse obedience to him." Vattel, *The Law of Nations*, bk. 1, chap. 4, sec. 51. In civil war or contest over domestic authority, other states may "assist the party which seems to have justice on its side, should that party ask for help." Vattel, *The Law of Nations*, bk. 3, chap. 18, sec. 296.

7. John Quincy Adams, "Extracts from Mr Adams' Instructions to Mr Anderson, Minister Plenipotentiary to Colombia, Dated 27th May, 1823," in Jonathan Elliot, *The American Diplomatic Code* [. . .] (Washington, DC, 1834), 652. Colombia was the first of the new Latin American republics with which the United States exchanged diplomatic envoys, so the instructions to Anderson were expected to serve as a model for subsequent diplomatic ventures in the Americas.

8. US Const. art. VI; US Const. art. III, § 2; and US Const. art. I, § 8.

9. New York Society Library, "Historic Mount Vernon Returns Copy of Rare Book Borrowed by George Washington in 1789 to the New York Society Library," May 21, 2010, https://www.nysoclib.org/historic-mount-vernon-returns-copy-rare-book-borrowed-george-washington-1789-new-york-society. The library does not seem to have tried to collect fines for the late return.

10. For example, British Foreign Secretary George Canning said, "If I wished for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington, and the secretaryship of Jefferson. . . . Here, Sir, I contend is the principle of neutrality upon which we ought to act." HC Deb. (2d ser.) (16 Apr. 1823) (8) cols. 1056–57.

11. James Madison, *An Examination of the British Doctrine Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace* (London, 1806).

12. J. B. Moore, "John Marshall," *Political Science Quarterly* 16, no. 3 (1901): 402, 405, https://www.jstor.org/stable/pdf/2140254.pdf.

13. For a concise overview highlighting major decisions, see David L. Sloss et al., eds., *International Law in the U.S. Supreme Court* (Cambridge University Press, 2011), chap. 1.

14. For example, European schemes to secure

> the peace of that part of the world . . . [give] an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties

> which have no other sanction than the obligations of good faith . . . to [restrain] the impulse of any immediate interest or passion. . . .
>
> . . . There is, in the nature of sovereign power, an impatience of control, that disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain or direct its operations.

Federalist, no. 15 (Alexander Hamilton).

15. *Federalist*, no. 3 (John Jay).

16. *Federalist*, no. 11 (Alexander Hamilton).

17. Treaty of Alliance Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1778, 8 Stat. 6.

18. George Washington to Henry Laurens, November 14, 1778, Founders Online, https://founders.archives.gov/documents/Washington/03-18-02-0147.

19. John Jay to Robert R. Livingston, November 17, 1782, Founders Online, https://founders.archives.gov/documents/Jay/01-03-02-0076.

20. Lawrence S. Kaplan, *Colonies into Nation: American Diplomacy, 1763–1801* (Macmillan, 1972), chap. 10.

21. US Const., art. III, § 1; and Andrew Jackson to Nathaniel Macon, October 4, 1795. Jackson was protesting against the Jay Treaty for (among other things) "erecting courts not heard of in the Constitution."

22. Andrew Jackson, "Third Annual Message to Congress," December 6, 1831, https://millercenter.org/the-presidency/presidential-speeches/december-6-1831-third-annual-message-congress. When France delayed in delivering payment, Jackson threatened to confiscate French property in the United States to provide satisfaction—despite American appreciation of France's "liberal institutions" since its 1830 revolution: "In maintaining our national rights and honor all governments are alike to us." Andrew Jackson, "Sixth Annual Message to Congress," December 1, 1834, https://millercenter.org/the-presidency/presidential-speeches/december-1-1834-sixth-annual-message-congress.

23. Eugene Kontorovich, "The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals," *University of Pennsylvania Law Review* 158, no. 1 (2009): 39–115, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1123&context=penn_law_review.

24. "The assembly will be in its nature diplomatic and not legislative; nothing can be transacted there obligatory upon any one of the States to be represented at the meeting, unless . . . subject to the ratification of its constitutional authority at home." John Quincy Adams to House of Representatives, March 15, 1826, American Presidency Project, https://www.presidency.ucsb.edu/documents/special-message-104. For an overview of the dispute, see David Currie, *The Constitution in Congress*, vol. 2, *The Jeffersonians, 1801–1829* (University of Chicago Press, 2000), 212–16.

25. In a book published in 1789, English legal reformer Jeremy Bentham urged that "law of nations" should be replaced by the new term "international law" to make clear

that it dealt with "mutual transactions between sovereigns" rather than shared practices in "internal jurisprudence." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London, 1789), chap. 17, para. 25. Henry Wheaton's *Elements of International Law* (1836) was the first full-length treatise in English adopting this term. Wheaton had been court reporter to the US Supreme Court (1816–27) before serving as a US diplomat in Europe and shared his treatises with Marshall.

26. *Federalist*, no. 43 (James Madison).

27. *Federalist*, no. 51 (James Madison).

28. James Madison, "Universal Peace," *National Gazette*, February 2, 1792, https://founders.archives.gov/documents/Madison/01-14-02-0185.

29. *Federalist*, no. 43 (Madison). Madison paraphrased the Declaration of Independence to make a more general point.

30. John Adams to Elias Boudinot, September 5, 1783, in *Papers of John Adams*, vol. 15, *June 1783–January 1784*, ed. Gregg L. Lint et al. (Massachusetts Historical Society, 2010), 255.

31. Adams to Boudinot.

32. Alexander Hamilton, speech, June 29, 1787, in *Records of the Federal Convention of 1787*, ed. Max Farrand (Yale University Press, 1937), 1:466–67.

33. *Federalist*, no. 62 (James Madison).

34. *Federalist*, no. 63 (James Madison).

35. Alexander Hamilton, "Pacificus No. IV," July 10, 1793, Founders Online, https://founders.archives.gov/documents/Hamilton/01-15-02-0066.

36. For background on this dispute, see Ruth Wedgwood, "The Revolutionary Martyrdom of Jonathan Robbins," *Yale Law Journal* 100, no. 2 (1990): 229–368, https://www.jstor.org/stable/796618.

37. James Madison, "Special Message to Congress on the Foreign Policy Crisis—War Message," June 1, 1812, https://millercenter.org/the-presidency/presidential-speeches/june-1-1812-special-message-congress-foreign-policy-crisis-war.

38. Independent states "may be regarded as so many free persons living together in a state of nature." Vattel, *The Law of Nations*, introduction, sec. 12. "He who enters upon a war for motives of gain only, without justifying grounds, acts without any right, and wages an unjust war." Vattel, *The Law of Nations*, bk. 3, chap. 3, sec. 33.