

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

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## INTRODUCTION

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

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

Of course, the exercise of the state's foreign affairs powers will inevitably have an impact on foreign nations and at least sometimes will generate disputes about whether the state has trampled on their legitimate claims or violated the rights of their citizens. On this understanding, however, these are matters that are of peripheral concern from a constitutional perspective. In a

“dualistic” constitutional world, limits on the state’s powers to disregard the rights of other nations and their citizens are properly the concern of international law, and, although the constitution may take up the problem of international law compliance insofar as the national interest seems to require, it generally leaves these problems to the democratic political process relatively free of constitutional constraint. Whatever duties the state may have to the rest of the world, the constitution is not the place to look for their fulfillment.

I am uncertain how far this stylized account reflects common understandings of what constitutions are for throughout the world. I do think it resonates strongly with constitutional intuitions in the United States today and perhaps in other countries as well. Something like it certainly underlies the U.S. Supreme Court’s recent enthusiastic embrace of Congress’s “option of non-compliance” with treaty obligations, which can be exercised not only affirmatively by ousting international legal obligations but passively by simply doing nothing at all.<sup>1</sup>

From a normative perspective, this “nationalist” account of the purpose of the constitution seems unattractive. The constitution constitutes the organs of the state, but international law constitutes the state as a sovereign among sovereigns. For the legal institution of “sovereignty” to be justified in moral theory, it must be tamed by legal principles that limit the freedom of states to disregard the agreements into which they have entered and the kinds of harms that they can inflict on one another and the citizens of each, as well as, arguably, that mandate affirmative obligations to those who lose most from the choice of sovereignty as the central organizing principle of world ordering. Given the overriding moral significance of these duties and obligations – and the role of the constitution in establishing the fundamental principles by which the state is to be governed – it seems persuasive, at least *prima facie*, that the

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

constitution ought to be concerned not only with promoting national well-being but with guaranteeing the state's discharge of its international legal duties. The moral commitments of the constitution ought to be both inward and outward directed.

Be that as it may, the nationalist account of the constitution, at least in the case of the U.S. Constitution, is also ahistorical. In a recent article I co-authored with Professor Daniel Hulsebosch, we argue that the drafting and adoption of the U.S. Constitution was emphatically an international affair. Having won independence on the battlefield, Americans sought integration as an equal sovereign in the European state system, but they quickly discovered that this goal would be at least as difficult to achieve as breaking free of the British Empire had been. Experience under the Articles of Confederation demonstrated that their desire for recognition as a respectable, "civilized" nation could not be accomplished under the weak institutions of their Confederation, which were incapable of ensuring that treaty obligations and the law of nations were reliably enforced. In order to earn their claim to equal standing among the sovereigns of Europe, they needed a governmental structure that would enable the nation to conduct itself honorably on the global stage. It was this realization that impelled them to Philadelphia and to the adoption of a new Constitution, and it explains the pervasive entanglement between the Constitution and international law in the Founding text. Much of the Framers' efforts were devoted to developing innovative institutional mechanisms, consistent with republican principles, which would enable the new nation to respect its international obligations.

In the minds of leading Federalists, the dilemma was inextricably tied to the American experiment in republican government. If not properly channeled, the unprecedented degree of popular participation in democratic politics that characterized their governments, state and federal, would leave the nation's international relations – and, especially, its capacity to uphold

treaty and other international law obligations – vulnerable to the shifting winds of popular sentiment, manipulated by factional leaders and demagogues seeking to exploit delicate, and sometimes embarrassing, international questions for short term political gain. The new Constitution, therefore, included a complex set of institutional arrangements that carefully modulated, depending on context, the extent to which international law compliance would be subject to the authority of the House of Representatives, the branch of the government that would be most directly subject to popular political influence and pressure. In the context of treaty-making, implementation, and compliance, for example, the Constitution virtually excluded the House altogether. Instead, it lodged the relevant powers in the President and the Senate (whose members were appointed by the state legislatures for six year terms, instead of, as in the case of the House, directly elected by the people for two year terms), and in the new federal courts. These branches, they believed, would be better placed to interpret and uphold the nation's obligations with integrity, consistency, and resolve. The Constitution's approach to the law of nations was similar. In contrast, in the context of war, the Framers reversed course, believing that it was Congress – and especially the House – that would be best placed to play the restraining role. The people, they imagined, were pacifistic and would resist wars and the increased taxes that military ventures inevitably engendered. As a result, in this context, the Constitution could harness the people's natural jealousy of war and taxes to discourage executive adventurism and the unnecessary and unjust wars to which it gave rise. The interests of the people and the duties of international justice being aligned, the solution to the problem of "universal peace" was to assign the legislature the power to declare war.

The Framers' design did not go unchallenged. In the state ratifying conventions, Anti-federalists protested the Constitution's federal arrangements, but having lost important ground on

the federal structure, they shifted some of their focus from the states to the House of Representatives, which they too anticipated would be the organ of the new government most closely tied to local popular politics. They skillfully pressed anxious Federalists on just how far the Framers' text had limited the role of the House. In the end, however, the text was ratified as it had come from Philadelphia, and all of the various amendments the Anti-Federalists proposed to modify the Framers' approach were ignored or defeated.

Yet, the Federalist victory was surprisingly short-lived. As reconfigured political factions adjusted to the new institutional environment brought into life by the Constitution, the Anti-Federalist critique partially reemerged in the developing ideology of the Republican party. The sources that prompted this retreat from the Framers' Constitution of 1787 were many. In part it was the continuation of the Anti-Federalist commitment to the primacy of local popular style politics, but other factors seem to have played a larger role. Perhaps, most important was a powerful and seemingly irreconcilable strand of post-Revolution antipathy towards Great Britain, which, in turn, confronted a countervailing strand of attachment to the culture, legal system, and constitution of the mother country, particularly prevalent among New England elites, and which, yet again, was matched by a growing attachment to the new nation's Revolutionary War ally, and British antagonist, France. These simmering differences burst into existential conflict when the course of the French Revolution turned more radical and provoked global wars lasting more than two decades. In response to these momentous events, the previous fault lines opened into giant chasms, and political passions exploded on both sides. In this turbulent situation, considerations of constitutional structure had to be subordinated to some extent to the overriding political question of how the nation would position itself in relation to the ongoing global conflict. That the emerging Republicans perceived public opinion to support

their side undoubtedly influenced their view that the House of Representatives, which was the only branch of the federal government they controlled, should assume a larger role, a consideration that must have seemed all the more justified as the theory of popular sovereignty received a tremendous boost from the successes of the French revolutionary forces.<sup>2</sup>

In this essay, I explore the emergence during the period from the adoption of the Constitution to the War of 1812 of two theoretical conceptions, or models, for the conduct of foreign affairs, which, in turn, were closely related to two corresponding approaches to interpreting the Constitution's foreign affairs provisions. The first, which was associated with the Federalist party under the leadership of Alexander Hamilton, I shall refer to as the model of Enlightened Statesmanship. The second, which was associated with the Republican party under the leadership of Thomas Jefferson and James Madison, I dub the model of Romantic Nationalism. To be sure, this nomenclature exaggerates the differences between them, but it does so for effect. It would certainly be wrong to deny that Jefferson and Madison were as deeply imbued in Enlightenment philosophy and ideals as Hamilton, and, yet, there was a difference. Whether wittingly or not, the slow but steady move in their thinking away from classical republicanism to more popular forms of democratic politics both reflected, and drew them towards, an early kind of proto-romantic nationalism, which influenced not only their constitutional views but also the style and content of their critiques of Federalist foreign policy in the 1790s and later, after the Republican victory in 1801, the style and content of their own diplomacy. Ultimately, their growing nationalism, combined with their antipathy towards Great Britain – which they tirelessly encouraged in their political base – put them on a collision course

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

with the core commitment of their Enlightenment philosophy to peace. On the constitutional front, it turned on its head their key assumption that the people would be jealous of war and, therefore, that lodging the power over war and peace in Congress would guard against the initiation of imprudent and unjust wars. On the diplomatic front, it overthrew their commitment to Enlightenment impartiality and led them, seemingly ineluctably, to the launching of an imprudent – really, reckless – aggressive, unnecessary, and probably unjust war for national “dignity.” And, yet, though the nation barely survived the war intact – and did so in large measure due to events beyond its control – the conclusion of the war, almost miraculously, succeeded in inspiring a pervasive sense of national dignity, ushering in the Era of Good Feelings and an extended period of national unity.<sup>3</sup>

In Part I of this essay, I briefly summarize the critical aspects of what I call the “Framers’ Constitution,” which emerged from Philadelphia and won ratification without amendment in the states. This victory ensured that the Framers’ constitutional vision would start off on a strong political footing. Nevertheless, the unavoidable ambiguities in the Constitution’s relatively terse text meant that, with time and sufficient motivation, the meaning of many of its key provisions could be contested.

In Part II, I turn to the first great foreign policy dispute of the new government, the Neutrality Crisis of 1793. Revolutionary fervor inspired by the French Revolution; a sense of

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

gratitude towards France for its crucial aid during the American Revolution; smoldering resentment against Great Britain for its resistance to independence, its perceived brutality during the Revolutionary War, and its continuing unwillingness to liberalize trade with the new nation; and righteous outrage at the concerted efforts of the European monarchies to suppress the Revolution by military force, all combined to ensure that there would be widespread and passionate support for France when the Wars of the French Revolution broke out following the execution of Louis XVI. At the same time, continuing cultural and political affinities with Britain; disgust at the execution of America's crucial ally in the Revolutionary War and more largely at the radical turn that the execution reflected in French revolutionary politics; and a prudent recognition of the military weakness of the nation, its vulnerability to military attack, and dependence on continuing trade with Britain for the fiscal solvency of the federal government, equally ensured that pro-French fervor among emerging Republicans would be matched by a similar pro-British, or at least pro-neutrality, fervor among Federalists. All of this occurred, moreover, just as relations between the Hamiltonians and Jeffersonians were reaching a new low, devolving into a state of simmering hostility and outright distrust. Yet, what made matters still more combustible was the old 1778 Treaty of Alliance with France, concluded in the early days of the Revolutionary War, which, as the price of French aid to the Americans, extracted a corresponding promise on the American side to defend (or "guaranty") French possessions in the West Indies. With Britain now part of the reactionary coalition arrayed against France, there could be no question that French possessions would come under naval attack. In this perilous state of affairs, how would the country navigate these world historical events?

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

Contrary to conventional accounts, what is most striking about the exchange is not the many points about which Hamilton and Madison disagreed, but, rather, the extent to which they agreed. Careful analysis of their essays shows that, at this still early date, both continued to adhere to the major features of the Framers' original constitutional vision. Indeed, despite his political interests, Madison soberly rejected virtually all of the revisionist constitutional claims being made by Republican writers in the press. The exchange thus provides powerful evidence confirming that the Federalist Constitution was well understood by leading officials and that its essential contours were less open-ended and more settled than is often supposed.

At the same time, the points on which they disagreed, and the vitriolic character of Madison's rhetoric, pointed out, at least in hindsight, the direction that future developments would take and, even more subtly, revealed the deep tension, if not contradiction, at the heart of the Republican constitutional vision. For the most part, Madison pitched his criticisms of Hamilton's constitutional arguments at a high level of abstraction and was content to leave unclear what the actual concrete implications of their different views might be. Indeed, the single point directly in controversy – how far the President could rightly announce his interpretation that the Treaty of Alliance did not require the United States to defend France under the circumstances of the ongoing European conflict – involved metaphysical subtleties that neither Madison nor Hamilton attempted to resolve. Nevertheless, two clear animating ideas drove Madison's positions. First, on each point of difference, however abstract and limited in scope, Madison was defending a greater role for Congress – meaning the House – in the making of foreign policy. Second, offering eloquent passages extolling the Enlightenment commitment to peace, Madison displayed a keen sensitivity to any respect in which Hamilton's arguments might somehow accord the President influence over questions of war and peace, and he openly accused Hamilton of being a wolf in sheep's clothing. Yet, there was something perverse in Madison's elegant rhetoric. Not only had Hamilton unequivocally acknowledged that the power to initiate war was in Congress – and that under no circumstances could the President launch a war without a declaration from Congress – but the entire purpose of his essays was to convince the American public to support peace (neutrality) rather than war. At that very moment, in contrast, Jefferson and Madison, albeit behind closed doors, were encouraging Republican activists to whip up pro-French sentiment throughout the country, notwithstanding that their brinkmanship was bringing the nation up to the precipice of war. Although perhaps not

appreciated by Madison's audience at the time, nor by Madison or Jefferson themselves, this contradiction – between their commitments to peace, congressional power, and a nationalistic style of popular politics – would continue to play out for the next two decades, until it finally yielded war.

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

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

Led by Madison in the House, Republicans pushed for the adoption of strong measures of economic retaliation, which, in the context of the ongoing conflict in Europe, would almost certainly have been perceived in England as highly provocative, if not as a blatant violation of neutrality. In fact, economic discrimination against Britain had been a favored strategy of Jefferson and Madison for some years, and they would return to it repeatedly in the future, ultimately with disastrous consequences. Federalists largely opposed the idea, instead supporting the Administration's decision, as a last ditch effort, to send Chief Justice John Jay to

London to attempt a negotiated settlement of outstanding issues. Federalists viewed the adoption of economic retaliation in advance of negotiations as unduly provocative, but argued strongly for undertaking preparations for war, given the new government's almost complete lack of any military establishment and the real possibility that negotiations would fail. Oddly, though consistent with Republican anti-war ideology, Madison led the House to resist all such proposals, and, in a further augering of the direction in which his constitutional thinking was headed, he even offered expansive, though dubious, constitutional objections to Federalist proposals that moved far beyond the more limited positions he had developed as *Helvidius*.

When Jay sent home the famous treaty that bears his name, its unsatisfactory features were readily apparent. On the basis of an all things considered judgment, the Federalist dominated Senate nevertheless gave its consent by the requisite two-thirds majority. Before Washington had time to ratify the treaty, however, the text was leaked to the press. The reaction was incendiary. Provoking a year long dispute of most extreme kind, it brought the country to the brink of a constitutional crisis of the first order and ultimately resulted in the consolidation of the Republican and Federalist factions into the nation's first political parties. Throughout the country, Republicans reacted with dismay, viewing the treaty as a national calamity, so unequal in its terms that, if ratified, it would dishonor the nation and destroy its dignity. Perhaps, most disturbingly from the Republican perspective, with only two-thirds of the "Aristocratic" Senate onboard, the treaty would rule out the employment of economic retaliation in the future, thus cutting to the heart of the Republican's foreign policy program and, moreover, given the inevitable French reaction, effectively tilting the nation towards Britain in the ongoing European conflict.

Republicans quickly organized anti-treaty political action on a nationwide basis. Jay – and even Washington when, defying the Republican reaction, he decided to ratify the treaty – were burned in effigy in political protests across the nation. Hamilton was allegedly stoned when he tried to defend the treaty at a New York City rally. In a remarkable burst of political energy, and with the aim of forestalling Washington’s ratification, Republican writers produced scathing tracts criticizing the treaty in all of its aspects. Their strategy included the launching of an all out assault on its constitutionality, articulating – to the evident satisfaction of Jefferson in his “retirement” in Monticello – a long list of constitutional objections that, though nearly if not entirely frivolous, would have virtually extracted the treaty power from the Constitution. A more sober Madison refused to join the chorus. Instead, anticipating that the treaty would have to come before the House for a small appropriation of funds to carry out its provisions for the arbitration of outstanding legal disputes, he carefully prepared for an epochal effort to block the implementation of the treaty in the House. Technically, that meant rejecting the self-executing treaty doctrine at the heart of the Supremacy Clause – and of the Framers’ Constitution, as Madison himself had repeatedly recognized in the past – and insisting instead that the House, like the Senate, had legitimate authority to block treaties after all. Though not so frivolous as those of the Republican polemicists, it was a position, which if sustained, might well have ignited a civil war.<sup>4</sup>

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4 When the issue of whether the House has a constitutional duty to fund treaties consented to by the Senate and ratified by the President had arisen as early as 1792 in the context of a relatively minor matter, Jefferson advised Washington that “it certainly would, and that it would be the duty of the representatives to raise the money.” However, he also cautioned that prudence counseled that the President consider the possibility that the House might nevertheless default on its duty. In response, Washington became exercised, expressing dissatisfaction at the need to bring the House into the matter at all and then portentously warning “that if [the House] would not do what the constitution called on them to do, the government would be at an end, and must then assume another form.” Somewhat taken aback, Jefferson then noted in his description of the incident: “[Washington] stopped here, and I kept silence to see whether he would say any

Into this breach stepped Alexander Hamilton who, with characteristic energy and brilliance, assumed the task of justifying the treaty in its entirety to the public and defeating the constitutional arguments that Republicans had so cavalierly pressed. His *The Defence* essays served multiple purposes. Like *The Federalist*, they had a clear political agenda and corresponding polemical elements, and large portions of the essays are devoted to addressing the specific issues raised by the treaty, article by article. At the same time, Hamilton used the occasion as an opportunity to deepen, refine, and extend ideas about the conduct of foreign relations that he had developed in earlier essays going back to his *Phocion Letters* of 1783 and continuing through *The Federalist* and most recently his *Pacificus* essays. Rooted in an account of individual and collective political psychology; the dynamics of factionalism in republican governmental structures; the nature of, and possibilities for, competition and cooperation within the international system; and the roles of power, patriotism, honor, morality, and law in international relations, *The Defence* is Hamilton's most sustained and profound effort to offer the new nation a comprehensive set of principles for the conduct of foreign policy. It includes not only abstract theorizing about government, politics, and international relations, but also an account of the role and methodology of the law of nations, as well as an elucidation of some of its critical principles and institutions. It concludes with an extended treatment of constitutional issues. When taken in connection with positions he argued for elsewhere, including in the *Pacificus* essays, Hamilton's aim was to offer a comprehensive defense of the Framers' Constitution. At the same time, the tight interrelationship between his constitutional views and his larger theory of the conduct of foreign affairs was not accidental. For Hamilton the role of

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

constitutional doctrine, properly understood, was to facilitate the conduct of foreign affairs in accordance with the principles of Enlightened Statesmanship.

In Part IV, I turn to the model of Romantic Nationalism associated with Jefferson, Madison, and the Republican political movement they led. Unlike Hamilton, neither Jefferson nor Madison left a deeply theorized and comprehensive statement of the Republican theory of foreign affairs. Jefferson rarely wrote for the public, prudently relying on the more disciplined Madison to be his ideological mouthpiece, and, though Madison wrote a number of essays and even a full length book on the law of nations, he more often focused narrowly on specific policy questions or engaged in lawyerly types of constitutional and legal argumentation, than on more expansive theoretical ideas or speculations. As a result, there is no canonical statement of Republican thinking. Their views have to be gathered – and to some extent inferred – from a greater diversity of sources.

The difficulty is compounded by two other considerations. First, Jefferson and Madison were as imbued in Enlightenment ideas, and in the writings of the great publicists of the Law of Nations, as Hamilton was, and, in their writings, they invoked many of the same concepts and principles as he did. Indeed, they may well have been influenced, albeit unconsciously or at least without public acknowledgment, by Hamilton's framework of analysis. Given these similarities, it can be difficult to find crisp distinctions between their theoretical views and his. Second, political considerations always played a significant role in the writings of men who were, after all, leaders of a political party, at first in opposition, and later, in control of the government. The same was true of Hamilton and the Federalists, only in reverse. To make matters worse, the initial Republican stridency against reconciliation with the British during the Jay Treaty crisis quickly morphed into a dovish attitude towards relations with France, when French policy turned

hostile to the United States and led the countries only two years later to the brink of war and then somewhat beyond. Correspondingly, the Federalist's pacifism in the crisis with Great Britain morphed equally quickly into hostility towards France, leading ultimately to a limited naval engagement with France in the so-called Quasi-War of 1798-99. These shifting policy positions – and the inevitable polemical elements in the writings of political leaders – further complicate the task of distilling their deeper commitments. Perhaps the best evidence of these commitments, in the Republican case, can be found in the period after they assumed office when their earlier infatuation with the French Revolution slowly gave way, especially in the wake of Napoleon's assumption of power, to a somewhat more balanced assessment of the international situation.

At the core of the Republican approach was a deep opposition to war, which, as articulated by Jefferson and Madison, had both outward and inward looking elements. In part, their approach reflected an Enlightenment belief in the immorality of war and a revulsion against its brutality and wastefulness, as well as a utopian faith that it could be eliminated as legitimate method of resolving international disputes. At the same time, Republicans focused on the internal consequences to which war gave rise: standing armies, expanded executive power, higher taxes, growing public debt, and a consequent diminishment of liberty and increased threat of executive tyranny. For these reasons, war was strictly to be avoided unless no other option remained. Moreover, the gravest threat of war, they believed, emanated from the executive. Indeed, on their view, the republican character of the state could be measured by the extent to which the decision over war and peace was removed from executive control and lodged in the legislature. It was in the legislature that the influence of the people's natural reluctance to

squander their lives and treasure would be most directly felt, and would most effectively restrain the impulse to war.

Perversely, the ostensibly pacifistic Republicans proved, in practice, to be at least as prone to war as their ostensibly more militaristic Federalist antagonists. Despite their official ideology, there was a sometimes latent, sometimes open, belligerent character to Republican foreign policy that derived ultimately from contradictory philosophical and political commitments. An Enlightenment right brain struggled with a romantic nationalist left brain for dominance, and sometimes lost. Notwithstanding Jefferson's enthusiasm for Smithian "Impartial Spectator" Enlightenment epistemology, for example, his foreign policy thinking was characterized by a striking intellectual and moral partiality, which was subtly but distinctly evident in the foreign policy speeches and writings that he and Madison produced. They eschewed any obligation to acknowledge, let alone seriously to consider, the potential legitimacy of the claims and interests of their foreign adversaries, especially of their arch rival Great Britain. Instead, they simply assumed that United States was unequivocally in the right; painted the motives of British officials as obviously cynical and crassly self-interested; and, emphasizing national honor and dignity, insisted as a first principle on an expansive conception of the idea of sovereign equality, which they were especially quick to find offended – and shocked at the discovery – by the policies of the world's leading empire. When they were out of power, this stance encouraged them to press provocative policies toward – as well as to oppose efforts at conciliation with – Britain, notwithstanding the risk of war and the overriding economic and strategic interests at stake. After they assumed power in 1801, it encouraged them to bind their rhetoric of national dignity to demands for British and French respect for legal principles that were thinly veiled assertions of national economic self-interest, and which they sought to justify,

alternatively, by strident appeals to supposed natural law principles and then, just as stridently, by aggressively pressing highly legalistic defenses of sometimes normatively weak positions. Notwithstanding the immense stakes of the global conflict between Britain and France, moreover, they showed little interest in acknowledging the overriding existential interests of the belligerents that gave powerful impetus to their conduct, nor in taking into account the portentous strategic implications for the United States of a successful French invasion of the British isles, a seemingly critical point in view of the unavoidable dependence of the new nation on the British navy for the protection of its territorial integrity and international trade. Even the immense economic advantages that were accruing to U.S. trade as a result of the war did not alter their thinking, or mitigate, in their minds, the severity of the insults and injuries under which they imagined the nation to be laboring.

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

political parties. The result was to bring foreign policy and diplomacy to the center of democratic politics. However unanticipated, this move was consistent with larger trends in Republican ideology, but it also had the perhaps unintended effect of promoting a budding nationalism. To some extent nationalist strains were likely already present in the thinking of Republican leaders, but the democratization of diplomacy created a mutually reinforcing dynamic in which appeals to national interest and pride had magnifying popular resonance and payoffs in the political realm.

As for Hamilton, constitutional principles for Jefferson and Madison were derived from, and meant to complement, their wider ideas about the conduct of foreign affairs. Only for Republicans, this entailed developing a body of doctrine that, in important respects, moved sharply away from the principles that had informed the Framers' Constitution. The two central questions were war and treaty-making, and with respect to both, their central commitment – at least before they assumed power in 1801 – was to the augmentation of congressional (and, hence, the House's) power, which, not entirely coincidentally, was the only branch of the federal government which they controlled politically. With respect to war, they sought to strengthen the Framers' decision to lodge the power to declare war in Congress by developing supporting doctrines that limited the ability of the executive to interfere in Congress' decision-making processes and that forced all policy judgments that might indirectly affect the ultimate question of war or peace to be made by the legislature. With respect to treaties, the Republicans had a more difficult task, because the Framers' Constitution had, in explicit terms, gone far in removing any role for the House. It was here that the Republican's commitment to popular politics – and their sense of the enormous stakes at issue – necessitated the most radical constitutional measures. To claim a role for the House, Republicans nearly provoked a

constitutional crisis and, perhaps, avoided it only because the Federalists had out-maneuvered them in populist appeals, forcing a bare Republican majority in the House to uphold the Jay Treaty despite an intense year-long effort to kill it.

At the same time, as a matter of constitutional principle, Republicans were generally as strongly committed to compliance with treaties and the law of nations as Federalists. They sought entry for the House into the processes of treaty-making, but they never claimed a power to violate or disregard American duties under properly ratified treaties or the law of nations. Indeed, consistent with respect for international law and the need to govern the executive by law, Republican constitutionalism was especially keen to insist on the duty of the President faithfully to execute treaties and the law of nations, which were, they acknowledged, part of the law of the United States. This position was also consistent with Republican perceptions that the United States was a righteous power only seeking respect for its law of nations recognized rights. As Republicans grew more darkly skeptical about the willingness of Britain to uphold the law of nations, and especially of the independence and impartiality of its Admiralty courts in applying the law of prize, it became a point of national pride to insist on the duty of the American President to observe the law of nations and of the independence of its courts in the enforcement of that law. At the same time, the left flank of the Republican movement, bitter at the failure of mainstream law of nations arguments to achieve respect for perceived American rights, began to develop radical natural law schemes to replace the existing “monarchical” law of nations, especially, unsurprisingly, in the area of neutrality. Although resisted by Madison, their resort to pure abstract natural law reasoning made it all the more possible to assert the validity of rules that advantaged U.S. economic interests dressed in the language of deep moral principle.

Still, the Republican ascension to power in 1801, accompanied by the eclipse and ultimate demise of the Federalist party, placed constitutional issues in a somewhat new light. Once strident Republican constitutional positions began to soften, and the logic of the Framers' Constitution at least partly reasserted itself. Republicans dropped some of their more extreme arguments, adopted Federalist views on some key points, and found ways to agree on compromise positions that set the course for constitutional developments into the 19<sup>th</sup> Century. This shift was reflected in a number of the most salient policy measures of the Jefferson Administration, including the Louisiana Purchase (which involved a broad interpretation of the Treaty Clause), the Embargo Act of 1807 (which involved a broad interpretation of the commerce power), and national security policy in the Mediterranean (which, in the context of the Barbary States, involved a broad, and by previous standards anti-Jeffersonian, interpretation of the President's unilateral war powers). Another telling example pertained to the previously explosive issue of the role of the House in treaty-making and implementation. The great confrontation over this issue, which seemed to raise an uncompromisable issue of first principle, now appeared as mostly an intermural legislative competition between the House and Senate over prerogatives that could be settled by a reasonable accommodation of conflicting institutional interests. When, in the coda to the War of 1812, the issue arose in connection with a new commercial convention concluded with Great Britain to accompany the Treaty of Ghent, a long congressional discussion of the issue ensued. In the end, the two houses reached common ground: The House – this time genuinely – disclaimed a power to veto treaties, but the Senate, in turn, agreed that the House would have some role to play in implementing at least certain kinds of treaty provisions. The only matter that remained was to work out the details of which provision was which.

Finally, in Part V, I turn to the dénouement of the story in the nearly disastrous War of 1812. I trace the course of Republican diplomacy, and the disreputable position into which it backed the nation, and its new President, James Madison, leading seemingly inevitably, albeit senselessly, into an unwinnable war led by committed pacifists. I then puzzle over the twist that a reckless policy implemented incompetently, nearly leading to the dismemberment of the nation from secessionist sentiment internally and military defeat externally, nevertheless unified a fractious polity, destroyed the party that had opposed the policy from the beginning, and provided the foundation for a widespread sense of national dignity. However strange the journey, Republicans had begun a nation building exercise that would, through many twists and turns to come, set the country on a path to national greatness.

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

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

The explosive controversy over the Jay Treaty in 1795-96 provided the context, and motivation, for Hamilton's *The Defence* essays. The origins of the Jay Treaty go back to the beginnings of U.S. national history. In the 1783 Treaty of Peace ending the American Revolution, Great Britain recognized the new nation's independence and agreed to a surprisingly generous territorial settlement. The boundaries extended all the way to the Mississippi River in the west and along a somewhat uncertain line of demarcation in the north. Almost immediately, however, disputes erupted over whether the terms of the treaty were being complied with on both sides. The crucial obligations on the United States were in Articles IV and VI. Article IV

required the United States to remove any impediments to the recovery by British creditors of substantial pre-War debts owed by American debtors. This provision sought to undo the acts of a number of states, which, during the War, had adopted laws confiscating or sequestering the debts. Article VI required the United States to refrain from taking any further reprisals against Loyalists. For its part, the British agreed to remove all British troops from U.S. territory, and, in the process, to refrain, as specified in Article VII, from “carrying away any Negroes (*i.e.*, slaves)” belonging to Americans. Nevertheless, as it withdrew its forces from New York and other areas, the British military evacuated a large number of former slaves. The British government argued that Article VII did not apply to “Negroes” who had been emancipated by the British military during the course of the War, but only to those that were still slaves when the Treaty of Peace was concluded. On the American side, the state governments broadly resisted compliance with Articles IV and VI, leading the British to refuse – or at least giving them an excuse to refuse – to withdraw from a string of forts stretching across New York and the Great Lakes region. The failure to pay the debts quickly emerged as a major diplomatic issue. The inability of the Confederate Congress to force the states to comply with the Treaty seriously undermined the diplomatic credibility of the Confederation not only in Britain but across Europe. It was among the chief considerations that prompted the Philadelphia Convention and powerfully influenced the shape that the Constitution would ultimately take. To add to the difficulties, as the geography of the northern territory became better known, it emerged that the treaty line of demarcation was ambiguous and based, in part, on erroneous topographical assumptions. This added an important boundary dispute to the outstanding diplomatic issues.

These diplomatic disputes generated considerable acrimony, not only between the two nations but among Americans dissatisfied with the behavior of the states and the weakness of the

Confederation. For the British, the payment of the debts was a critical issue. In part, the refusal to comply created significant domestic political complications for the British government. Perhaps even more importantly, in view of the magnitude of British financial capital invested around the globe, to acquiesce in the American treaty violations risked setting a dangerous precedent that the British government could afford to ignore. On the American side, the continued British occupation of the forts had both economic and security consequences. Control of the forts meant control of the valuable fur trade. More importantly, it enabled the British to exercise influence over still powerful Indian tribes in the region, which it could take advantage of in ways that posed serious threats to frontier settlements and further westward expansion. The British unwillingness to pay for the liberated slaves was a source of additional irritation. The acrimony engendered by these issues was compounded by an early decision of the British government following independence to adopt an unfavorable commercial policy towards the new nation, extending the Navigation Act to American trade with Britain's West Indian colonies. This unlooked for consequence of independence inflicted a serious blow to U.S. economic interests and helped to sustain, and inflame, already existing resentments towards the nation's erstwhile enemy.

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

Governor-General of British North America, to local Indian tribes, that seemed to suggest that war was imminent and to encourage Indian hostilities.

News of these developments arrived just as it finally seemed that the Washington Administration had successfully navigated the nation through the crisis provoked by the outbreak of the European wars and the arrival of Citizen Gênet in the United States. The American reaction was uniformly one of shock and outrage. Many people on both sides of the political spectrum seemed to believe that the British actions made war likely, if not inevitable. Led by Madison in the House, Republicans pressed for the immediate adoption of strong measures of economic retaliation. In fact, Jefferson and Madison had long been pressing proposals for commercial discrimination against Britain as a means of coercing changes in its commercial policy. Madison now seized the moment to renew those proposals, only this time in an even stronger form. Moreover, notwithstanding the still simmering controversy over the British debts, Republicans proposed to up the ante further by again sequestering private British debts in the United States, in this case ostensibly to create a fund for the payment of reparations to American victims of the British maritime “spoliations.” Whether Madison was right in thinking that these economic measures would bring Britain to heel is dubious, but it was clear that they were provocative in the extreme. Not only would they inflict real economic injury on Britain – which was their point after all – but they would take effect while Britain was engaged in a major European war, thus favoring the interests of her enemy. Rightly or wrongly, Britain was likely to view them as serious violations of American neutral duties and, consequently, as a just cause of war. Perhaps surprisingly, Republicans emphatically denied that the measures would provoke war and, even as they pressed for reprisals, resisted Federalist efforts to begin undertaking military preparations. In contrast, Federalists – preparing for the worst while hoping for the best

– argued in favor of military preparations but also for a further effort at negotiations. Moreover, they opposed the adoption of reprisals in advance of the negotiations as imprudent and unduly provocative. Washington agreed, and appointed Chief Justice John Jay as envoy in a last effort to find a negotiated settlement of outstanding issues. While the country awaited the results of his mission, there was a kind of stasis in the ongoing disputes, which would quickly prove to have been just the eye of the storm.

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

Second, the treaty contained a number of provisions that dealt with disputed neutral rights questions under the law of nations. On these points, the treaty arguably gave up some ground from the American pro-neutral rights perspective, although how far it actually did so, especially in light of earlier diplomatic concessions, was disputable. Third, the treaty contained a number of commercial provisions that facilitated trade between the two nations, placing it upon a most

favoured nation footing. Putting aside whether these provisions benefitted Britain more than the United States – they undoubtedly benefitted both – the treaty did little or nothing to open up the West Indian trade to American merchant vessels, a crucial U.S. aim. Fourth – and perhaps most irritating to Republicans – the treaty ruled out any measures of commercial discrimination or retaliation, specifically prohibiting as well the sequestration of debts as a war measure or reprisal. In one fell stroke, these provisions obviated a core, and highly treasured, feature of the Republican strategy for dealing with Great Britain, which Jefferson and Madison had made among their highest priorities. It did so, moreover, on the authority of the President and two-thirds of the Senate, overriding the views of the Republicans in the House. It thereby revealed in the starkest terms the political implications of the Constitution's exclusion of the House from the treaty-making process. Lastly, the entire treaty, and some of its specific provisions, were likely to be offensive to France, which would be inclined to see in them, whether rightly or wrongly, violations of the existing Franco-American treaties dating back to the Revolutionary War and a tilting of the United States toward Britain in the ongoing conflict. It would have been hard to deny that ratification of the treaty would auger poorly for U.S.-French relations, and this aspect of the treaty was also played an important role in inflaming Republican sentiment.

Despite the weaknesses of the treaty from the U.S. perspective, the Federalist dominated Senate quickly gave its consent and returned the treaty to Washington, who delayed ratification as he pondered his next step. In the meantime, when the treaty text was leaked to the Republican press, it set off a firestorm of protest. On the substance, dozens of Republican writers – among whom were a number of leading Republican figures – wrote essays attacking the treaty, picking apart its provisions piece by piece and finding virtually every provision not only objectionable but unconstitutional. The core of the Republican critique was the perceived inequality in the

treaty provisions, which, Republicans asserted, rendered it an insult to the nation and ratification dishonorable to the national character. Impassioned essays found indignities throughout the text, and they leveled especially harsh criticisms of Jay. He had kowtowed at the foot of Royalty, conceding everything, while gaining nothing worthwhile in return. Moreover, he should have insisted on U.S. positions on the many outstanding legal disputes, rather than waiving some and sending others to uncertain arbitration. Some even argued that Jay should have demanded reparations as a condition of further negotiation. At all events, he should not have conceded the one effective weapon in the U.S. arsenal, commercial discrimination and sequestration of British debts.

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

offered a host of other constitutional arguments that sought to narrow the scope of the treaty power even further. Thus, it was not only treaty stipulations on subjects falling within the scope of Congress' Article I powers that were unconstitutional. So, too, were treaty stipulations on subjects reserved to the legislative authority of the states, such as, for example, those dealing with the rights of aliens to own real property, a typical subject of treaties in this era and one which had been included in a number of the treaties concluded during the Confederation (as well as in Article 9 of the Jay Treaty). Moreover, treaty stipulations that could result in the cession of national territory (like the Jay Treaty articles referring the boundary issues to arbitration) were also unconstitutional, at least if not justified by circumstances of extreme necessity and even then only with the consent of the states whose territory would be affected. Furthermore, treaty stipulations for the arbitration of international legal controversies (like those at the core of the Jay Treaty) were unconstitutional because they interfered with the appointments power (in that the other nation's commissioners would not be nominated by the President and confirmed by the Senate), the exclusive jurisdiction of the federal judiciary, and the 7<sup>th</sup> Amendment right to a jury trial, and because they violated due process in not requiring the arbitration commissions to apply the common law rules of evidence. There was a flippant – or perhaps a revolutionary – quality to the Republican's arguments that was captured in Jefferson's frank acknowledgment that he saw “not much harm in annihilating the whole treaty making power.”

This extreme Republican reaction was prompted in part by a growing conviction – much confirmed by the Jay Treaty itself – that the Presidency was a “monarchical,” and the Senate an “aristocratical,” institution, and that the survival of republicanism depended urgently on ousting them of the power to determine the nation's fate, as the treaty power now appeared to empower them to do. Even more immediate was the goal of convincing a wavering Washington to decline

ratification. Although wrong-headed as an interpretation of Washington's psychology, Republicans seemed to believe that throwing up a lot of dust might help push him in their direction. When that proved mistaken – and when Madison assumed more direct control over Republican political strategy in opposition to the treaty – they moved away from these radical critiques and planned instead for a more disciplined effort to assert a role for the House in the treaty-implementation process that would enable them to veto the treaty in the branch over which they had majority influence. The wisdom of this shift became all the more evident after Hamilton entered into the debate with a crushing reply to their earlier constitutional positions.

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

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

At the same, building on ideas that he had developed in earlier foreign policy essays, Hamilton took the opportunity to offer the public a fully developed account of the principles that ought to guide the conduct of foreign affairs. Presumably, he imagined that casting his more casuistic arguments as applications of a sophisticated theoretical framework would enhance their persuasiveness, but it seems clear as well that he hoped to offer the nation a lasting framework for carrying out the most delicate, and potentially most consequential, duty of its new government. This must have seemed all the more necessary to him in view of the Republican reaction to the treaty and the highly politicized, and undisciplined, manner in which they had promoted opposition to it. Hamilton must have had a disturbing sense of *déjà vu*. From his perspective, the Republican attacks seemed to reveal that little progress in the understanding of the proper principles of foreign relations had been made since the days of the Confederation when the states that had resisted compliance with the Treaty of Peace justified their action with arguments that were eerily similar to those now being offered against the Jay Treaty.

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

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

In presenting his framework, Hamilton starts by examining the internal political dynamics within a state – especially a republican state like the United States – that threaten to

undermine the proper and rational conduct of its foreign affairs. Here, he offers an account of faction and of individual and collective political psychology that focuses on the unique features of the foreign affairs context and especially of the problem of national passions. He then shows how the obstacles to rational action that arise from these internal dynamics are compounded in the context of the interactions between two states, both of which are affected by similar internal dynamics, in addition to the systemic dynamics that arise from their state to state interactions. Yet a further complicating factor results from the potential involvement or interference of third party states. These complications make the rational conduct of foreign relations especially difficult to manage, and they account for the peculiar delicacy of international relations, with its constant potential for downward spirals into irrational violence, mutual self-destruction, injustice, and ultimately national calamity.

To avoid these self-destructive cycles, Hamilton offers a series of principles, or maxims, designed to guide the conduct of foreign affairs. In part, these are principles of prudence; in part, principles of justice and international law. Their proper application depends on a capacity for sober assessment of the long-term rational interests of the state and of its real economic and military capacities; a commitment to candidness and impartiality in evaluating the claims and pretensions of one's own nation; an ability to overcome national passions, vanity and pride, and to acknowledge error; a willingness to compromise; and a recognition of the need to understand, and the flexibility to accommodate, the important interests even of an adversary. These principles, in turn, give rise to conceptions of patriotism and national honor as rational ideals, which affirm the value of standing up for truth and impartiality even in the face of popular criticism and negative political consequences and which resist the seductions of false pride and resentment. Even national humiliation, on Hamilton's account, occurs not just when the state

acquiesces in the insults of a foreign power, but equally when the state violates its duties of justice and the law of nations. The law of nations defines the state's duties of justice, and natural law methodology for Hamilton is appropriately used not to insist on the state's perspective in the face of contrary conventional and customary practices but to restrain the state from engaging in unjust practices even when the customary or conventional law of states is more permissive. At the same time, however, none of this implies that war is always unjustifiable or that the state should acquiesce in violations of its rights or injuries and insults. In Hamilton's view, war is an unavoidable necessity in the international state system, and states accordingly have to prepare for its eventuality or ultimately suffer dishonor. Still, war should only be resorted to as a last measure in response to insults or violations of fundamental interests of the state, which cannot be satisfactorily resolved through negotiations. Even when war is necessary, it should be conducted in accordance with liberal principles of humanity and the law of nations. Both the interests of the state and its honor coincide in rendering justice and compliance with law essential principles for the conduct of war and foreign affairs.

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

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

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

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

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

It is only to consult the history of nations, to perceive, that every country, at all times, is cursed by the existence of men who, actuated by an irregular ambition,

scruple nothing which they imagine will contribute to their own advancement and importance: in monarchies, supple courtiers; in republics, fawning or turbulent demagogues, worshipping still the idol—power—wherever placed, whether in the hands of a prince or of the people, and trafficking in the weaknesses, vices, frailties, or prejudices of the one or the other.

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

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

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

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

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

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

Starting with these general observations, Hamilton dug deeper into the political psychology of foreign policy-making, focusing on the dysfunctionality of permitting foreign policy to be governed by national pride and passions. With some understatement, he noted that “[n]ational pride is generally a very untractable thing,” adding: “The truth unfortunately is, that the passions of men stifle calculation; that nations the most attentive

to pecuniary considerations, easily surrender them to ambition, to jealousy, to anger, or to revenge.” Thus, for example, although there was consensus on the proposition that war was an evil generally to be avoided – a proposition that applied with special force to the United States – the ability of people to reason clearly in applying it was frequently undermined by confusions engendered by national passions:

“Peace, in the particular situation of this independent country, is an object of such great and primary magnitude, that it ought not to be relinquished, unless the relinquishment be clearly necessary to preserve our honor in some unequivocal point, or to avoid the sacrifice of some right or interest of material and permanent importance.” This is the touchstone of every question which can come before us respecting our foreign concerns.

As a general proposition, scarcely any will dispute it; but in the application of the rule there is much confusion of ideas—much false feeling, and falser reasoning. The ravings of anger and pride are mistaken for the suggestions of honor.

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

But the misfortune is, that men will oppose imagination to fact. Though we see Great Britain predominant on the ocean; though we observe her pertinaciously resisting the idea of pacification with France, amidst the greatest discouragements; though we have employed a man whose sagacity and integrity have been hitherto undisputed, and of a character far from flexible, to ascertain what was practicable; though circumstances favored his exertions; though much time and pains were bestowed upon the subject; though there is not only his testimony, but the testimony of other men who were immediately on the scene, and in whom there is every reason to confide, that all was attained which was attainable: yet we still permit ourselves to imagine, that more and better could have been done, and that by taking even now a high and menacing tone, Great Britain may be brought to our feet.

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

It is curious to observe the inconsistency of certain men. They reprobate the treaty as incompatible with our honor, and yet they affect to believe an abortion of the negotiations would not have led to war. If they are sincere, they must think that national honor consists in perpetually railing, complaining, blustering, and submitting.

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

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

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

In a case of incontestable *mutual* infractions of a treaty, one of the parties is to demand, peremptorily of the other, an unconditional performance upon his part, by way of preliminary, and without negotiation. An envoy sent to avert war, carrying with him the clearest indications of a general solicitude of his country that peace might be preserved, was, at the very first step of his progress, to render hostility inevitable, by exacting, not only what could not have been complied with, but what must have been rejected with indignation. The government of Great Britain must have been the most abject on earth, in a case so situated, to have listened for a moment to such a demand. And because our envoy did not pursue this frantic course—did not hold the language of an imperious Bashaw to

his trembling slave, he is absurdly stigmatized as having prostrated the rights of freemen at the foot of royalty. . . . To have taken, therefore, the imperious ground which is recommended, in place of that which was taken, would have been not to follow the admonitions of honor, but to have submitted to the impulse of passion and phrensy.

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

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

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

A core principle that underlay many of Hamilton's more specific maxims was the necessity of acting in ways that are respectful of the dignity of the other nation and that

eschew the making of demands that might be viewed as insulting or humiliating. Such gestures are likely to provoke the nation's pride and make compromise impossible.

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

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

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

For this reason, it would have been a mistake to adopt measures of reprisal, as

Republicans had proposed, before seeking a negotiated solution to the outstanding disputes with Britain.

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

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

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

the unity of the state's own people when the privations of war lead them to reevaluate how they find themselves in this position.

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

Nor does national honor require the adoption of reprisals before negotiations proceed.

On the contrary, "it is consistent with honor to precede rupture by negotiation, and whenever it is, reason and humanity demand it. Honor cannot be wounded by consulting moderation."

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

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

compromise, which secures substantially the objects of interest, is almost always preferable to war on so punctilious and unmanageable a point?

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

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

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

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

The discussion in the last two numbers has shown, if I mistake not, that this country by no means stands upon such good ground, with regard to the

inexecution of the treaty of peace, as some of our official proceedings have advanced, and as many among us have too lightly credited.

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

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

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

In the interpretation of treaties, things odious or immoral are not to be presumed. The abandonment of negroes, who had been induced to quit their masters on the faith of official proclamation, promising them liberty, to fall again under the yoke of their masters, and into slavery, is as odious and immoral a thing as can be conceived. It is odious, not only as it imposes an act of perfidy on one of the

contracting parties, but as it tends to bring back to servitude men once made free. The general interests of humanity conspire with the obligation which Great Britain had contracted towards the negroes, to repel this construction of the treaty, if another can be found. . . .

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

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

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

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

a more certain arbiter? Of all uncertain things, the issues of war are the most uncertain. . . .

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

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

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

Let me add as a truth—which, perhaps, has no exception, however uncongenial with the fashionable patriotic creed—that, in the wise order of Providence, nations, in a temporal sense, may safely trust the maxim, that the observance of justice carries with it its own and a full reward.

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

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

Hamilton was particularly motivated to show that the article of the Jay Treaty prohibiting the sequestration of private debts was not only wise and just policy but an affirmation of the law of nations. Given how deeply this article interfered with

Republican policy for dealing with Great Britain, he was at pains to insist on its status under the law of nations, even without regard to the treaty, and, perhaps because of its uncertain status as a customary principle, he made elaborate natural law arguments to establish the principle. (His argument extended over four full essays). He also offered an extended examination of the methodology of the law of nations to help support his larger claim. He concluded:

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

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

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

But so degrading an idea will be rejected with disdain, by every man who feels a true and well-informed national pride; . . . by every man, in fine, who, though careful not to exaggerate, for rash and extravagant projects, can nevertheless fairly estimate the real resources of the country, for meeting dangers which prudence cannot avert. Such a man will never endure the base doctrine, that our security is to depend on the tricks of a swindler. He will look for it in the courage

and constancy of a free, brave, and virtuous people—in the riches of a fertile soil—an extended and progressive industry—in the wisdom and energy of a well-constituted and well-administered government—in the resources of a solid, if well-supported, national credit—in the armies, which, if requisite could be raised—in the means of maritime annoyance, which if necessary, could be organized, and with which we could inflict deep wounds on the commerce of a hostile nation. He will indulge an animating consciousness, that while our situation is not such as to justify our courting imprudent enterprises neither is it such as to oblige us, in any event, to stoop to dishonorable means of security, or to substitute a crooked and piratical policy, for the manly energies of fair and open war.

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

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

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

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

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

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

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

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

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

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

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

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

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

Hamilton's theory of the conduct of foreign affairs is important in its own right, but for present purposes, the crucial point is to appreciate the relationship between it and

his approach to the constitutional law of foreign affairs. To be sure, his model of Enlightened Statesmanship does not neatly compel one set of constitutional doctrines. However, it does provide the normative underpinnings for his general approach, and the close fit between the two is evident on investigation.

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

1. Hamilton devotes the bulk of his constitutional argument in the final three numbers of *The Defence* to defending a broad construction of the treaty power. This focus clearly reflects the central role of the treaty power in connection with the Jay Treaty debate and in the constitutional challenges that Republican writers launched in the early period after the text became public. Note, one weakness in Hamilton's constitutional discussion was his choice to focus on the early arguments of Republican writers, rather than the more plausible and monumental argument that it was already clear, by the time Hamilton wrote his constitutional essays, would arise in the House of Representatives: Did the House have a constitutional duty to implement the treaty by appropriating the necessary funds to carry out its provisions for arbitration? That question, in turn, would involve examination, if not resolution, of the further questions of whether treaties could become domestic law unless first implemented by congressional legislation (the self-executing treaty doctrine) and, more generally, what power Congress had, if any, to disregard or violate treaty obligations (the last-in-time rule). These issues, in turn, were various doctrinal manifestations of the ultimate constitutional question: Did the Constitution contemplate that, like the Senate, the House would have a veto over treaties? Hamilton had already addressed these issues in earlier writings (including *Pacificus No. 1*), but, except briefly at the outset, and indirectly in the course of analyzing

other issues, he chose not to address them in *The Defence*. I suspect the reason was that he perceived a political indelicacy in assuming that the House would assert a power that was – at least in his view – a clear and blatant violation of a fundamental structural feature of the Constitution. Were the House so to act, he warned,

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

Better to assume that no “man in either house of Congress, who values his reputation for discernment or sincerity, will publicly hazard it by a serious attempt to controvert the position.” Doing any more than briefly alluding to the issue, Hamilton must have believed, would tend to legitimate the argument. Not surprisingly, Hamilton did, in fact, simultaneously take these issues up, but only in a lengthy private memorandum he sent to Washington, which became the basis for Federalist arguments in the House. On the other hand, Hamilton’s failure to address these issues – and to controvert only the radical and implausible arguments of the Republican writers – led Fisher Ames, a leading Federalist ally, to mock him gently: Hamilton, he noted pointedly, “holds up the aegis against a wooden sword. Jove's eagle holds his bolts in his talons, and hurls them, not at the Titans, but at sparrows and mice.”

2. Hamilton framed his constitutional argument as a response to the central Republican claim that the treaty power does not extend to treaty stipulations that deal with subjects falling within the scope of Congress’ Article I powers. In refuting this claim, Hamilton pressed on every front, from the text of the Treaty and Supremacy Clauses, to the structure of the federal government, to the past practice of the United States under the Confederation and the Constitution itself. His core normative point was

to reject the imposition of artificial restraints on the treaty power derived from constitutional limitations on domestic legislation. In view of the principles prescribed by the model of Enlightened Statesmanship, any such restrictions on the scope of the treaty power ran the risk of complicating executive diplomacy and constraining its capacity to compromise in order to manage the peaceful resolution of international disputes and avoid conflict and war. Such limitations were, therefore, inconsistent with the fundamental aims of the conduct of foreign relations.

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

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

With regard to the objects of the treaty, there being no specification, there is, of course, a *carte blanche*. The general proposition must, therefore, be, that whatever is a proper subject of compact, between nation and nation, may be embraced by a treaty between the President of the United States, with the advice and consent of the Senate, and the correspondent organ of a foreign state.

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

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

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

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

Hamilton also sought to make his larger point in more theoretical terms, responding to a common confusion about the relationship between treaty and legislative power. There was a tendency to analyze the constitutionality of exercises of treaty power by focusing only on those aspects of treaties that impose obligations on the state, particularly those that create rules or laws governing domestic activities. This tendency, he argued, rested upon a serious conceptual error. Treaties were in the nature of contracts and were thus entirely different from legislation, which involved a unilateral determination of the rules that were to govern those subject to the jurisdiction of the state, but which could impose no duties or obligations on foreign countries as to their comparable domestic legislation. When thinking about the principles governing treaties, it was therefore essential to consider not only the domestic effect of treaty obligations but their effect on the law and activities of the other state to the agreement. The aim of treaties, after all, was not domestic regulation as such, but the obtaining of promises by another nation to exercise its legislative powers (or to refrain from exercising its

legislative powers) in ways that promoted the national interest. From a legal and practical perspective, legislation simply could not accomplish what treaties could. It was therefore a grave error to hobble the power to enter treaties, as if, in managing its relations with foreign countries, it was possible, or desirable, to insist on inflexibly adhering to the ordinary rules and procedures applicable to domestic legislation. To illustrate this point, Hamilton addressed the difference between the legislative power to regulate foreign commerce, and the power by treaty to enter into binding international commercial treaties. Legislation could prescribe the rule of domestic law applicable to conduct in the national territory.

But it is clearly foreign to that mutual regulation of trade between the United States and other nations, which, from the necessity of mutual consent, can only be performed by treaty. It is indeed an absurdity to say, that the power of regulating trade by law is incompatible with the power of regulating it by treaty; since the former can, by no means, do what the latter alone can accomplish; consequently, it is an absurdity to say, that the legislative power of regulating trade is an exception to the power of making treaties.

For this reason, the legislative powers of Congress were not a limitation on the treaty power. Indeed, it was the other way around:

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

3. Hamilton specifically addressed each of the arguments that Republicans had made in favor of various restrictions on the treaty power. The argument that limited the

treaty power by the legislative powers of Congress, he noted, would have absurd consequences, in addition to the more subtle objections already noted above:

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

Moreover, if the power of the executive department be inadequate to the making of the several kinds of treaties which have been mentioned, there is, then, no power in the Government to make them; for there is not a syllable in the Constitution which authorizes either the legislative or judiciary departments to make a treaty with a foreign nation. And our Constitution would then exhibit the ridiculous spectacle of a government without a power to make treaties with foreign nations; a result as inadmissible as it is absurd; since, in fact, our Constitution grants the power of making treaties, in the most explicit and ample terms, to the President, with the advice and consent of the Senate.

Hamilton then addressed more specific implications of this position:

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

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

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

The same reasoning applies to all the other instances of supposed infraction of the legislative authority: with regard to piracies and offences against the laws of nations, with regard to expenditures of money, with regard to the appointment of officers, with regard to the judiciary tribunals, with regard to the disposal and regulation of the national territory and property. In all these cases, the power to

make laws and the power to make treaties are concurrent and co-ordinate. The latter, and not the former, must act, where the co-operation of other nations is requisite.

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

As to Article III, he observed:

To the objection of the Charleston committee, that the article erects a tribunal unknown to our Constitution, and transfers to commissioners the cognizance of matters appertaining to American courts and juries, the answer is simple and conclusive. The tribunals established by the Constitution do not contemplate a case between nation and nation arising upon a breach of treaty, and are inadequate to the cognizance of it. Could either of them hold plea of a suit of Great Britain, plaintiff, against the United States, defendant? The case, therefore, required the erection or constitution of a new tribunal; and it was most likely to promote equity to pass by the courts of both the parties.

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

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

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

The second example was the problem of resolving boundary disputes.

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

The submission of this question to arbitration has been represented as an eventual dismemberment of empire, which, it has been said, cannot rightly be agreed to, but in a case of extreme necessity. This rule of extreme necessity is manifestly only applicable to a cession or relinquishment of a part of a country, held by a clear and acknowledged title; not to a case of disputed boundary.

It would be a horrid and destructive principle that nations could not terminate a dispute about the title to a particular parcel of territory, by amicable agreement, or by submission to arbitration as its substitute; but would be under an indispensable obligation to prosecute the dispute by arms, till real danger to the existence of one of the parties should justify, by the plea of extreme necessity, a surrender of its pretensions. . . .

The question is not, in this case, Shall we cede a part of our country to another power? It is this—To whom does this tract of country truly belong? Should the weight of evidence be on the British side, our faith, pledged by the treaty, would demand from us an acquiescence in their claim. Not being able to agree in opinion on this point, it was most equitable and most agreeable to good faith to submit it to an impartial arbitration. . . .

Republicans also argued for federalism based limits on treaties leading to a cession of territory. Even in cases meeting their standard of extreme necessity, the consent of individual states affected, they claimed, would be necessary. In response, Hamilton observed:

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

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

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

The VIth article of the Constitution of the United States declares, that “the Constitution and the laws of the United States, made in pursuance thereof, all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, any thing in the constitution or laws of any State to the contrary notwithstanding.” A law of the land, till revoked or annulled, by the competent authority, is binding, not less on each branch or department of the government than on each individual of the society. Each house of Congress collectively, as well as the members of it separately, are under a constitutional obligation to observe the injunctions of a pre-existing law, and to give it effect. If

they act otherwise, they infringe the Constitution; the theory of which knows, in such case, no discretion on their part.

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

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