

CONSTITUTIONAL COMMITMENT TO INTERNATIONAL LAW COMPLIANCE?

*David H. Moore**

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* Associate Dean of Academic Affairs and Research and Wayne M. and Connie C. Hancock Professor of Law, Brigham Young University, J. Reuben Clark Law School. This Article benefitted from presentations at the Georgetown Human Rights Colloquium; the Sixth Annual Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference at the University of San Diego Law School; the BYU Law School Faculty Works-in-Progress Series; and the Midwest Political Science Association Annual Meeting. For their comments through these or other avenues, I thank Clark Asay, William Baude, Curt Bradley, Sarah Brinton, Jud Campbell, Justin Collings, John Coyle, Brigham Daniels, Bill Dodge, Jean Galbraith, Cliff Fleming, Fred Gedicks, David Golove, Chris Greene, Christine Hurt, Rebecca Ingber, Matt Jennejohn, RonNell Andersen Jones, Marty Lederman, Tom Lee, Caleb Nelson, Carolina Núñez, John Parry, Saikrishna Prakash, Mike Ramsey, James Rasband, Richard Re, Stephen Sachs, Brett Scharffs, Ryan Scoville, Christi Siver, David Sloss, Paul Stephan, David Stewart, Lisa Grow Sun, Carlos Vázquez, and Lynn Wardle. I also thank Heather Binks, Victoria Carlton, Lacey Curtis, Donny Dayton, Russell Frandsen, Elizabeth Oberan, and Tyler Smith for excellent research assistance, and Shawn Nevers for exceptional library support. This Article is dedicated to Natalie Anne Burton Moore.

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INTRODUCTION

TO what extent does the Constitution commit the United States to comply with international law?¹ The question is a critical one, with implications for both the stature of international law and the conduct of U.S. foreign affairs. The question is also one of degree. Few would argue that the Constitution invariably commits the United States to comply with international law. Most scholars, for example, agree that Congress has discretion to violate international law by statute. At the same time, few would argue that the Constitution leaves the United States free to disregard international law entirely. Scholars agree, for example, that self-executing treaties preempt conflicting state laws, forcing the states to comply with these treaties' terms. The critical question is where along the spectrum between commitment and discretion the constitutional position toward international law lies. This Article asserts that the position tends closer to national discretion to violate international law than constitutional commitment scholarship might suggest.

Scholars who claim a constitutional commitment to international law make both broad and narrow claims. Some argue that the Constitution as a whole reflects a strong commitment to international law compliance. Others find that while the Constitution does not require the United States to comply, it does bind either or both of its political branches to international law compliance. Scholars assert, for example, that the Take Care Clause obligates the President to adhere to the two primary sources of international law: treaties and customary international law ("CIL"). Oth-

¹ My focus is on whether the U.S. Constitution commits the national government, or its agents, to comply with international law rather than on whether norms that may be said to be constitutional in some other sense impose such a commitment. At the same time, the evidence developed in this Article bears on the latter question and suggests the absence of such a norm.

ers contend that the Supremacy Clause obligates U.S. treaty-makers to enter self-executing treaties—that is, treaties that are immediately enforceable in U.S. courts—to preempt state law and prior inconsistent federal statutes.²

Not all scholars who claim a constitutional commitment to international law proceed from historical premises, but many do.³ They invoke Founding-era history to support constitutional obligations to international law. Moreover, to the extent Founding-era history is a relevant guidepost in constitutional interpretation, Founding-era history is relevant to the validity of claims that have not relied on it. Founding-era history yields at least two bodies of evidence in support of a constitutional commitment to international law. First, the Founding era provides a wealth of statements by leading figures underscoring the importance of compliance with international law.⁴ These statements are consistent with theories of law, especially natural law, common to the Founders.⁵

² The judiciary's obligations toward international law are often derivative of the political branches' obligations. If the political branches have discretion to violate international law, the judiciary will be limited in its ability to enforce international law against them. If, on the other hand, the President is obliged to adhere to international law, the judiciary may have a role in enforcing that obligation. See, e.g., Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 *Cornell L. Rev.* 97, 181 (2004) (asserting "that the President is bound by the Geneva Conventions, in a practical sense, because the courts do have a significant role to play in adjudicating some types of potential claims under the Conventions").

³ See, e.g., Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *Vand. L. Rev.* 819, 820 (1989) (observing the common pattern of reliance on eighteenth-century history).

⁴ See, e.g., *id.* (noting that "[a] large number of declarations can be assembled from leading figures of [the Founding] era to the effect that the law of nations was a part of American law and in important respects binding on our government"). At the Constitutional Convention, for example, Madison rejected the notion that the United States could, or should try to, escape its treaty obligations by forming a new Constitution. 2 *The Records of the Federal Convention of 1787*, at 270–71 (Max Farrand ed., 1966) [hereinafter *Farrand*]. In *The Federalist* No. 64, Jay similarly rejected the notion that treaties, as bargains with other states, could be undone unilaterally by the United States. *The Federalist* No. 64, at 362 (Jay) (Clinton Rossiter ed., 1999).

⁵ See, e.g., Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* 344–46 (2007) (discussing the natural law (as well as consensual) foundations of the eighteenth-century law of nations and American leaders' acceptance of those natural law foundations); E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, Prelim., § 6 (Joseph Chitty trans., London, Steven & Sons and A. Maxwell 1834) ("[T]he *law of Nations* is originally no other than the *law of Nature* applied to Nations.").

Second, Founding-era history yields the oft-repeated narrative that the drafting and ratification of the Constitution were motivated, in significant part, by state violations of international law during the period of Confederation. This conventional narrative is true as far as it goes. Under the Articles of Confederation, the states unquestionably violated U.S. treaties, including the Treaty of Peace with Great Britain, causing serious foreign relations problems for the nation as a whole.⁶ Moreover, the Confederation Congress lacked power to mandate compliance with CIL, leaving the states to prosecute CIL violations.⁷ A desire to control state violations of treaties and to empower the national government to respond to CIL violations undoubtedly influenced the terms and ratification of the Constitution.⁸

Yet a strong constitutional commitment to comply with international law does not follow as a matter of logic or history. Logically, the narrative of concern for state violations and state power provides a motive to centralize power. But, centralizing power is different than, and does not require, restraining the power that is centralized. Thus, it is illogical, without more, to rely on the conventional narrative of state violation and state control to find a constitutional commitment to international law compliance.

Nor does history bridge the gap. The oft-times unspoken assumption behind the conventional narrative is that under the Articles of Confederation the national government, unlike the states, was committed to international law but simply lacked the power to comply. The Constitution, it

⁶ See, e.g., Allan Nevins, *The American States: During and After the Revolution 1775-1789*, at 269–74, 306–07, 336–39, 385–89, 416–17, 644–56 (1924) (detailing ways in which the states violated the Treaty of Peace with Britain and thereby created foreign affairs problems for the United States); James Madison, *Vices of the Political System of the United States*, in 9 *The Papers of James Madison* 345, 348–49 (Robert A. Rutland et al. eds., 1975) (identifying state “[v]iolations of the law of nations and treaties” as a vice of the Confederation system) [hereinafter *Madison, Vices*]; Ramsey, *supra* note 5, at 37–39, 44–45 (discussing the problem of state violation of treaties). But cf. Nevins, *supra*, at 287–88, 389–93, 403–04, 416–17 (asserting that state violations of the Treaty of Peace decreased over time).

⁷ See, e.g., Ramsey, *supra* note 5, at 38–39, 43–44 (discussing congressional impotence to respond to violations of the law of nations); *The Publication of Edmund Randolph’s Reasons for Not Signing the Constitution (Dec. 27, 1787)*, in 8 *The Documentary History of the Ratification of the Constitution* 260, 263 (John P. Kaminski et al. eds., 1988) [hereinafter 8 *Documentary History*] (observing “that the law of nations is unprovided with sanctions in many cases, which deeply affect public dignity and public justice,” yet “the confederation does not permit Congress to remedy these defects”). For other foreign affairs deficiencies of the Confederation government, see Ramsey, *supra* note 5, at 39–43.

⁸ See, e.g., Ramsey, *supra* note 5, at 39–40.

is believed, gave the national government the authority to follow through on its commitment to adhere to international law. This catechism has emerged, however, from scholars' unrelenting focus on state practice during Confederation. When the focus broadens to include the national government, the catechism collapses.

The national government under the Articles of Confederation did not manifest consistent compliance with international law. Focusing for the first time on the national government's behavior toward international law during Confederation, this Article reveals that the Confederation government, like the states, violated international law. More specifically, the national government departed from the law of nations governing treaty ratification and engaged in self-interested interpretation, if not violation, of the handful of treaties the United States had entered.

When it came time to create the Constitution, there was unquestionably concern for compliance with international law. The principal documents bearing on the Constitution's creation—the debates of the Constitutional Convention, Federalist Papers, and records of state ratification conventions—clearly reveal, consistent with the conventional narrative, a concern for state violations of international law. But no similar concern was expressed for the national government's departures from international law. Had there been such a concern, it might have led to an express constitutional mandate of national compliance. Rather than adopt such a mandate, the Constitution embraced structural reforms to facilitate adherence to international law. That is, the Constitution transferred foreign affairs powers from the states to the federal government and assigned the exercise of those powers to players and processes that could improve compliance with international law. The result is that just as federalist interests are generally protected today through lawmaking players and processes, compliance with international law appears to be secured through constitutional structure.

This is not to say that there is no evidence to support a commitment to international law compliance by the federal government or a subset of its actors.⁹ The focus of this Article is on the core Founding-era evidence that has been cited to support (or that might bear on, even if not cited by particular scholars) constitutional commitment to international law com-

⁹ The Pacificus-Helvidius debate, for example, has been cited to argue that the President is bound to comply with international law. See, e.g., Jinks & Sloss, *supra* note 2, at 157–59, 158–59 nn.329–32.

pliance. As to that evidence, once one takes into account the national government's departures from international law during Confederation, Founding-era statements in support of international law compliance and the conventional narrative of state noncompliance take on a different hue. The broader history suggests that these statements reflect a general commitment to international law that may yield in the face of concrete national interests.¹⁰ Similarly, the lack of concern during the Constitution's creation for the Confederation government's violations of international law coupled with the Constitution's adoption of structural protections, rather than a substantive mandate, of international law compliance undermine claims of a strong constitutional commitment to international law compliance. The upshot is increased support for constitutional discretion to violate international law.

This Article reaches this conclusion as follows. Part I surveys prominent scholarly arguments for constitutional commitment to international law, noting, in particular, reliance on Founding-era evidence, including the conventional narrative of state violation of international law during Confederation. Section II.A briefly demonstrates that the logic of the conventional narrative—which is the logic of collective action—does not compel constitutional commitment to international law, leaving space for an alternative thesis. Section II.B steps into that space to offer such a thesis. Section II.B departs from the conventional, state-focused narrative to reveal the as-yet-untold story of the national government's actions toward international law under the Articles of Confederation. This Section documents ways in which the Confederation Congress departed from the law of nations and bent treaties to national advantage. Part III explores the primary records of the Constitution's creation—the Constitutional Convention debates, Federalist Papers, and state ratifica-

¹⁰ Other scholars have likewise read Founding-era statements supportive of international law as nuanced to one degree or another. See, e.g., Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am. J. Int'l L.* 461, 464, 481–87, 484 n.100 (1989) (asserting that “[t]he Framers understood duty [to comply with international law] and national self-interest to be conceptually distinct—at least in the short term” and saw both considerations as “equally legitimate and important”); Jay, *supra* note 3, at 820–21 (noting the “large number of declarations [that] can be assembled from leading figures of [the Founding] era to the effect that the law of nations was a part of American law and in important respects binding on our government,” while lamenting that these statements have been cited with little regard for “the historical context [that is, American weakness] that produced the Constitution and formed the setting for American foreign policy decisions under the new government”). For these scholars, the history presented in this Article provides further reason to do so.

tion records—to reveal that the focus during the Constitution’s formation was on state, not national, violation of international law. The Framers did not express concern for the Confederation government’s departures from international law. Consistent with this lack of concern, the Constitution embraced not a substantive mandate to comply with international law, but structural reforms that could facilitate international law compliance.

As a general matter, the national government’s violation of international law during Confederation, the absence of concern for that violation during constitutional creation, and the Constitution’s ultimate adoption of structural protections rather than an obvious substantive mandate of national compliance suggest that claims of a constitutional commitment to international law compliance are overstated. The takeaway is not that the United States or its agents should violate international law. Compliance may, in fact, be the best policy and what the Framers and ratifiers generally anticipated. However, the evidence developed in this Article lends support for national discretion to violate international law.

I. SCHOLARLY CLAIMS OF A CONSTITUTIONAL COMMITMENT TO INTERNATIONAL LAW

Scholars have made a range of claims concerning the Constitution’s commitment to international law compliance.¹¹ As noted, some of these

¹¹ See, e.g., Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1075–77, 1090 (1985) (asserting implied international law limits on constitutional power, including that the President must have congressional approval “to violate an international treaty or a clearly established customary norm” and that, even together, the President and Congress cannot “violate fundamental international norms,” a restriction that should be judicially enforced in appropriate cases); Jay, *supra* note 3, at 829, 835 (arguing that “the persistent idea [in the creation of the Constitution] was to provide a national monopoly of authority [over foreign relations] to assure respect for international obligations” and “that the President could not disregard the law of nations,” even if “the Constitution [did not give] federal courts authority to order compliance with international law by the executive”). But cf. Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984) [hereinafter Henkin, *International Law*] (arguing that “it is inconceivable that the Constitution intended to make it impossible or impermissible—unconstitutional—for the United States to violate a treaty or other international obligation”); Louis Henkin, *The President and International Law*, 80 Am. J. Int’l L. 930, 931 (1986) [hereinafter Henkin, *The President*] (asserting that “it would be foolish—and futile—to attempt to construe the Constitution as forbidding the Government of the United States to violate international law.”). See Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1207 (1988) (“The Constitution does not re-

claims are narrow, focusing on how specific clauses of the Constitution bind certain actors to compliance with international law. Other claims are more expansive, asserting that the Constitution as a whole obliges compliance with international law. In support of both narrow and broad claims, scholars have cited, *inter alia*, statements of Founders both in and out of the process of constitutional creation and ratification,¹² and the concerns created by state violations of international law under the Articles of Confederation.¹³ This Part surveys constitutional commitment claims, beginning with the broadest and paying particular attention to reliance on Founding-era evidence.

A. Broad Constitutional Commitment to International Law

Among scholars who claim a broad constitutional commitment to international law, Professors David Golove and Daniel Hulsebosch provide the most prominent example. Golove and Hulsebosch attempt to recast the conventional understanding of the Constitution's creation by arguing "that the animating purpose of the American Constitution was to facilitate the admission of the new nation into the European-centered community of 'civilized states.'"¹⁴ Central to their argument is the assertion that "experience under the Articles of Confederation led many Americans to conclude that adherence to treaties and the law of nations was a prerequisite to [the achievement of] full [international] recognition."¹⁵ "[S]tate violations of the Treaty of Peace, in particular, helped create the atmosphere of crisis that motivated profederal forces to organize and write a constitution."¹⁶ These and other violations persuaded Federalists that they needed not only to centralize foreign affairs authority but "to insulate officials responsible for ensuring compliance with the

quire obedience to international law by the United States as an entity."); *id.* (asserting that the President may, without congressional authorization, violate CIL).

¹² See Jay, *supra* note 3, at 820, 825–28; Lobel, *supra* note 11, at 1084–90, 1092–100, 1116–19; see also *id.* at 1099–104 (describing gradual departure from "international law limitations on congressional power").

¹³ See, e.g., Jay, *supra* note 3, at 825; Lobel, *supra* note 11, at 1092–93 (briefly mentioning state noncompliance and constitutional provisions addressing that noncompliance).

¹⁴ David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. Rev.* 932, 932 (2010); see also *id.* at 934–36, 947, 979–80.

¹⁵ *Id.* at 932; see also *id.* at 947.

¹⁶ *Id.* at 934–35; see also *id.* at 945–47, 984–85, 990–91.

law of nations from [short-sighted] popular politics.”¹⁷ As a result, the Constitution they crafted not only federalized foreign affairs power, but contained “a novel and systematic set of . . . devices designed to ensure that the nation would comply with treaties and the law of nations.”¹⁸

With regard to treaties, Golove and Hulsebosh assert, these devices included the Supremacy Clause, which not only required states to prioritize treaties over state law but excluded the populist House from “the adoption, repeal, and modification of laws necessary to execute the American side of a treaty bargain.”¹⁹ The result was that compliance was left to the politically insulated courts, “and otherwise [to] the President and Senate.”²⁰

With respect to the law of nations, the constitutional devices designed to secure compliance were more subtle.²¹ The Define and Punish Clause

¹⁷ Id. at 932; see also id. at 980–82, 984–89, 1065–66.

¹⁸ Id. at 932; see also id. at 936, 940, 946, 988–1015, 1065–66.

¹⁹ Id. at 997.

²⁰ Id. This conclusion is problematic from historical and modern perspectives for three reasons. First, as the Supreme Court recognized not long after the Constitution was ratified, not all treaties are self-executing. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), overruled in part by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833) (holding that the treaty obligation that *Foster* characterized as non-self-executing was, in fact, self-executing, without rejecting the principle of non-self-execution). Those that are not self-executing require implementation through the bicameral legislative process in which the House is a necessary player. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 526 (2008). The degree to which treaties should be self-executing is hotly contested. However, the Supreme Court’s most recent pronouncement on the subject endorses a broad notion of non-self-execution and suggests that the treaty makers—President and Senate—decide which treaties will be self-executing and which will not. See, e.g., David H. Moore, Essay, *Medellin*, the Alien Tort Statute, and the Domestic Status of International Law, 50 Va. J. Int’l L. 485, 488–91 (2010). Moreover, even those who argue that the Supreme Court’s broad notion of non-self-execution is unfounded tend to recognize that, for example, treaties that require appropriations require statutory implementation. See, e.g., Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2177 (1999). The notion that the House is bound to exercise its appropriation power in support of concluded treaties has not prevailed. Id. As a result, the House will continue to have a role in treaty execution in critical ways. Second, not all international agreements are concluded by the President and Senate alone. The United States enters most of its international agreements through the congressional-executive process, which involves the participation of the House. See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1258, 1260 & n.53 (2008). Finally, under the last-in-time rule, the House can, by statute, participate in the preemption of prior treaty commitments as a matter of domestic law, leading to noncompliance with the United States’ international obligations. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 115(1) cmt. a–b (Am. Law Inst. 1987).

²¹ See Golove & Hulsebosch, *supra* note 14, at 981–82, 999.

evidenced concern for law of nations compliance.²² More importantly, in describing national powers the Constitution referenced international law concepts such as declarations of war, piracy, and capture, and “[a]rguably . . . incorporat[ed] portions of the law of nations into the powers that the Constitution delegated to the national government.”²³ This effort to bind the national government to international law “was overdetermined in the text” when it came to the presidency.²⁴ Article II specifically stipulated that the President would “take Care that the Laws be faithfully executed.”²⁵

Similarly, Article III recognized federal judicial power over cases of admiralty, including prize, on the apparent understanding that these cases would be resolved by reference to the law of nations.²⁶ That conclusion is reinforced by the fact that Congress did not expressly receive power to regulate admiralty.²⁷ Moreover, the Constitution did not “extend the jury trial right to admiralty cases,” insulating the resolution of those cases from populist impulses.²⁸ Jurisdiction over other cases that might involve the law of nations—for example, cases involving ambassadors—also appeared in Article III.²⁹ Indeed, the U.S. Supreme Court was given original jurisdiction over cases involving ambassadors.³⁰

All these features of the Constitution, Golove and Hulsebosch argue, evidence a constitutional commitment to international law compliance born of experience with state violations of international law during Confederation. While Golove and Hulsebosch do not appear to go so far as to claim that the Constitution embodies a substantive mandate of international law compliance, theirs is a broad claim that the constitutional project includes a strong commitment to observance of international law.

²² *Id.* at 1000. Professors Cleveland and Dodge argue that the Define and Punish Clause also reflected concern for U.S. treaty compliance. See Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 *Yale L.J.* 2202, 2205–07 (2015).

²³ Golove & Hulsebosch, *supra* note 14, at 1000, 1007–09.

²⁴ *Id.* at 1008.

²⁵ *Id.* (quoting U.S. Const. art. II, § 3).

²⁶ *Id.* at 1000–04.

²⁷ *Id.* at 1003.

²⁸ *Id.* at 1004–05.

²⁹ See *id.* at 1005–07.

³⁰ *Id.* at 1005–06.

Other scholars have focused on establishing a more narrow commitment under, for example, the Take Care and Supremacy Clauses.³¹

B. The Take Care Clause and Constitutional Commitment to International Law

The more narrow claims of constitutional commitment to international law tend to focus on the President rather than Congress. Professor Henkin asserts that “[n]either the text nor the history of the Constitution suggests that the framers intended that Congress have authority to disregard the [treaty] obligations of the United States.”³² He acknowledges,

³¹ Other constitutional provisions have been invoked as well. Professor Glennon, for example, asserts that the President lacks an independent power to violate CIL contrary to Congress’s will “because Congress is granted exclusive power to define and punish violations of the laws of nations.” Michael J. Glennon, Raising *The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 Nw. U. L. Rev. 321, 325, 330–31 (1986) [hereinafter Glennon, *Paquete Habana*]; Michael J. Glennon, Can the President Do No Wrong?, 80 Am. J. Int’l L. 923, 924 (1986) [hereinafter Glennon, No Wrong]; see U.S. Const. art. I, § 8, cl. 10. He also argues that the federal judiciary’s Article III powers include authority to create federal common law subject to alteration by Congress. Glennon, *Paquete Habana*, supra, at 343, 347, 362. This common law is supreme law under Article VI, id. at 343, 363, and binds the President as well as other executive officials, see id. at 348–59; Glennon, No Wrong, supra, at 923, 927. Federal common law includes “widely accepted and clearly defined” norms of CIL. Glennon, *Paquete Habana*, supra, at 325, 340, 343–47, 353–56. As a result, the President is bound by these norms of CIL unless Congress authorizes otherwise. See id. at 325, 340, 359–60, 363; Glennon, No Wrong, supra, at 923, 930. But cf. Jonathan I. Charney, The Power of the Executive Branch of the United States Government to Violate Customary International Law, 80 Am. J. Int’l L. 913, 917–22 (1986) (arguing that the President, but not lower level executive officials, must have authority to violate CIL or the President would not be able to exercise her foreign affairs powers to participate in the evolution of CIL, which begins with violation); Anthony D’Amato, The President and International Law: A Missing Dimension, 81 Am. J. Int’l L. 375, 376–77 (1987) (suggesting, from an international law perspective, that whether the President violates her “constitutional obligation to execute the law” in departing from CIL may depend on whether the CIL principle violated is likely to yield, through the violation, to a new CIL norm); Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371, 376 & n.31, 381–83, 386 (1997) (arguing, though not as a matter of constitutional law, that CIL is federal common law that may be superseded by Congress and by valid acts of the President but not lower level executive officials or the courts). Moreover, because CIL includes the obligation to adhere to treaties, the President may not, Glennon asserts, “violate or abrogate treaties to which the United States is a party.” See Glennon, *Paquete Habana*, supra, at 354–55; Glennon, No Wrong, supra, at 924.

³² Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 Harv. L. Rev. 853, 871 (1987) [hereinafter Henkin, Chinese Exclusion]; cf. Jordan J. Paust, Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Cus-

however, that it is well accepted that Congress can, as a matter of domestic law, supplant a prior treaty through a later enacted statute.³³

Similarly, as to CIL, “there are plausible arguments that the Framers accepted customary law as binding on the United States, including Congress.”³⁴ At present, however, “[a]lmost no one claims that CIL binds Congress.”³⁵ Professor Jordan Paust is, perhaps, the most prominent ex-

tom, 28 Va. J. Int’l L. 393, 424 n.59 (1988) [hereinafter Paust, Rediscovering] (citing support for the notion that “Congress [is] bound to fulfill the stipulations of a treaty and may not therefore refuse to enact legislation to carry them out”).

³³ See Henkin, *Chinese Exclusion*, supra note 32, at 872; see also *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2123 (2015) (Scalia, J., dissenting) (“There is no question that Congress may, if it wishes, pass laws that openly flout treaties made by the President.”); Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a) (Am. Law Inst. 1987) (stating that a federal statute “supersedes an earlier . . . international agreement” if intent to supersede is clear or there is irreconcilable conflict); Henkin, *International Law*, supra note 11, at 1563 (stating that Congress may constitutionally “enact law inconsistent with a treaty of the United States”); Jinks & Sloss, supra note 2, at 106 (“It is firmly established that Congress [may] violate U.S. treaty obligations within the scope of Article I by enacting legislation that supersedes a particular treaty provision as a matter of domestic law.”). For a historical claim contrary to the widely accepted modern view, see, for example, Pitman B. Potter, *Relative Authority of International Law and National Law in the United States*, 19 Am. J. Int’l L. 315, 326 (1925) (arguing “that not only are treaties and customary international law . . . superior to national statutes and the Constitution of the United States, but also that national courts in the United States are bound . . . to act upon this fact”).

³⁴ Henkin, *The President*, supra note 11, at 933; see also William S. Dodge, *Customary International Law, Congress and the Courts: Origins of the Later-in-Time Rule*, in *Making Transnational Law Work in the Global Economy* 531, 532–33, 536–44 (Bekker et al. eds., 2010) (citing early judicial opinions that both support and reject the notion that a statute may violate customary international law and attempting to harmonize them by reference to Vattel’s categories of the voluntary versus customary law of nations). If the *Charming Betsy* Canon were grounded in such an assertion, its validity would also be affected by this Article. However, the canon does not appear to be grounded in notions of a constitutional commitment to comply with international law. See, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 484–85 (1998) (addressing arguments that the canon reflects an attempt to discern congressional intent, a (nonconstitutional) policy of complying with international law, and an effort to respect the separation of foreign affairs powers).

³⁵ Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L.J. 1213, 1247 (2005) [hereinafter Ramsey, *Torturing Executive Power*]; see also Ramsey, supra note 5, at 349–50 (arguing that CIL cannot prevail over any of the sources of law included in the Supremacy Clause); Jack M. Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 Va. J. Int’l L. 143, 145–47 (1984) (arguing that the Supremacy Clause and Supreme Court precedent settle the fact that CIL may not supersede a statute); Frederic L. Kirgis, Jr., *Federal Statutes, Executive Orders and “Self-Executing Custom,”* 81 Am. J. Int’l L. 371, 373 (1987) (arguing that “it is extremely doubtful whether any customary rule,” which “exists as an independent source of U.S. law only as federal common law,” “could prevail over a validly enacted earlier federal statute”).

ception. Citing “at least three federal cases, three opinions of the Attorneys General and [a] Draft Restatement” as well as other “partly supportive” material, he asserts “the superiority of customary international law” over statutes.³⁶ Henkin, himself, argues for some customary superiority, though his claim is much more modest. Henkin argues that courts should enforce later maturing CIL over prior inconsistent statutes, but he acknowledges that “Congress . . . can pass laws inconsistent with [prior] international law.”³⁷

Thus, while arguments that Congress is bound by CIL are part of the constellation of constitutional commitment claims, these arguments constitute its dimmest lights. Scholars have focused, instead, on claims that the President is bound to comply with international law. The primary constitutional hook for these claims is the Take Care Clause, assisted by

As a result, Congress could likely authorize the President to violate CIL, even if the President could not do so unilaterally. See Ramsey, *supra* note 5, at 367; Ramsey, *supra*, at 1249; see also Charney, *supra* note 31, at 919 (asserting that the President can violate CIL with congressional approval); Glennon, *Paquete Habana*, *supra* note 31, at 325, 328–30 (asserting that the President may, and perhaps must, violate CIL when Congress so directs); Henkin, *The President*, *supra* note 11, at 933–35 (arguing that “the Executive and the courts are obliged to give effect to [an] act of Congress” that violates preexisting CIL). The result would be that the United States as a whole would remain free to violate CIL. See Ramsey, *supra*, at 1249.

³⁶ Paust, *Rediscovering*, *supra* note 32, at 441–42; see also Jordan J. Paust, *The President Is Bound by International Law*, 81 *Am. J. Int’l L.* 377, 389 (1987) [hereinafter Paust, *Bound*] (arguing that Congress cannot authorize the violation of customary international law); Henkin, *Chinese Exclusion*, *supra* note 32, at 877 (noting, among “persuasive arguments that [CIL] supersedes any United States law,” the assertion that “[t]he framers . . . respected the law of nations, and . . . expected the political branches as well as the courts to give effect to that law”); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 *Calif. L. Rev.* 623, 641 (1972) (noting that “[e]arly in our history, some persons—John Quincy Adams, for example—believed that international law bound Congress as well as the Executive” (footnote omitted)). Paust also relies on the novel but equally unpersuasive argument that CIL is always last in time vis-à-vis statutes “since custom is either constantly re-enacted through a process of . . . expectation and practice or it loses its validity and force as law.” Paust, *Rediscovering*, *supra* note 32, at 418, 444.

³⁷ Henkin, *International Law*, *supra* note 11, at 1562–69, 1562 n.27; see also Henkin, *Chinese Exclusion*, *supra* note 32, at 876–77 (predicting that the Supreme Court will not treat CIL as superior to federal statutes, notwithstanding good arguments for doing so; rather, subsequent statutes will supersede prior norms of CIL); Henkin, *The President*, *supra* note 11, at 933 (predicting that courts will enforce later maturing CIL over prior inconsistent statutes).

the fact that the Supremacy Clause recognizes treaties as the law of the land.³⁸

Many have argued that the President is bound by both treaties³⁹ and CIL as a result of the Take Care Clause.⁴⁰ Under that Clause, the President must “take Care that the Laws be faithfully executed.”⁴¹ The Supremacy Clause makes clear that treaties rank as “supreme Law of the Land.”⁴² As a result, the President is constitutionally bound to adhere to treaties, with one possible wrinkle.⁴³ Early in U.S. history and again recently, the Supreme Court recognized that some treaties are non-self-executing.⁴⁴ What it means for a treaty to be non-self-executing is uncertain, particularly after the Supreme Court’s most recent discussion of the issue in *Medellin v. Texas*.⁴⁵ If a non-self-executing treaty is not domestic law until executed by congressional enactment of a statute, then the President may have no duty under the Take Care Clause to adhere to

³⁸ U.S. Const. art. II, § 3; id. art. VI, cl. 2; see, e.g., Ramsey, *Torturing Executive Power*, supra note 35, at 1231–32, 1234 (relying on the Take Care and Supremacy Clauses to conclude that the President may not “suspend[] treaties in violation of their terms”).

³⁹ See, e.g., Jinks & Sloss, supra note 2, at 106–07, 154–60 (arguing that under the Take Care Clause, “the President [must] . . . obtain congressional approval, in the form of legislation, to violate a treaty provision that is the law of the land,” but may unilaterally withdraw from, suspend, or terminate a treaty when permitted by international law).

⁴⁰ Paust, for example, asserts that “[t]he President must obey and faithfully execute supreme federal law whether it is customary or treaty-based.” Paust, *Bound*, supra note 36, at 378, 387–88; see also Jordan J. Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 *Hastings Const. L.Q.* 719, 726–27, 732, 740–41, 740 n.81, 753 & n.137 (1982) (citing the Take Care and Supremacy Clauses in arguing that “the President is bound by international . . . law,” including in times of war or crisis). But cf. Quincy Wright, *Conflicts of International Law with National Laws and Ordinances*, 11 *Am. J. Int’l L.* 1, 12, 16 & n.45, 21 (1917) (“In the case of a conflict between customary international law and an executive order, it seems that the latter will usually prevail in the same manner as a statute, although a construction will generally be adopted which resolves the conflict.”).

⁴¹ U.S. Const. art. II, § 3.

⁴² Id. art. VI, cl. 2.

⁴³ See Ramsey, supra note 5, at 376; Jinks & Sloss, supra note 2, at 157–60; Paust, *Bound*, supra note 36, at 378–79; Ramsey, *Torturing Executive Power*, supra note 35, at 1232, 1252.

⁴⁴ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314–15 (1829), overruled in part by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833) (holding that the treaty obligation that *Foster* characterized as non-self-executing was, in fact, self-executing, without rejecting the principle of non-self-execution); *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008).

⁴⁵ See, e.g., Moore, supra note 20, at 491 n.46 (documenting and discussing the ambiguity generated by the Court’s opinion in *Medellin*). But cf. *Bond v. United States*, 134 S. Ct. 2077, 2084 (2014) (suggesting that a non-self-executing treaty is domestic law, but not domestically enforceable until implemented by Congress).

non-self-executing treaties.⁴⁶ If, on the other hand, a non-self-executing treaty is domestic law that is simply unenforceable in U.S. courts until executed, then the President likely remains bound by such treaties.⁴⁷ In all events, the argument goes, the President is bound by self-executing treaties under the Take Care Clause.⁴⁸

A similar claim is made as to CIL, although the argument is more difficult to make. Unlike treaties, it is not immediately clear whether CIL is supreme federal law under the Supremacy Clause.⁴⁹ Article VI does not expressly refer to CIL as it does to treaties, and when it refers to laws, it refers to laws “made in pursuance” of the Constitution.⁵⁰ Nonetheless, arguments can be made that CIL is incorporated into the Supremacy Clause, strengthening the case that CIL binds the President under the Take Care Clause.⁵¹

Even if CIL does not qualify as supreme federal law under Article VI, however, it may bind the President under the Take Care Clause, which refers simply to “the Laws” rather than laws made under the Constitution.⁵² As Professor Ramsey argues, as a result of state control over law of nations violations and state violations of treaty obligations during Confederation, “the constitutional generation in America . . . believed compliance with [the law of nations] was a national duty and vital to

⁴⁶ See Ramsey, *Torturing Executive Power*, supra note 35, at 1232–33.

⁴⁷ See *id.* at 1233.

⁴⁸ See *id.* at 1233–34.

⁴⁹ See, e.g., Ramsey, supra note 5, at 348–55 (concluding that the Supremacy Clause does not include the law of nations); William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 17 *Willamette J. Int’l L. & Disp. Resol.* 21, 43–45, 47 (2009) (noting arguments that the Supremacy Clause does not include CIL, while ultimately concluding that it does).

⁵⁰ U.S. Const. art. VI; see, e.g., Dodge, supra note 49, at 43; Ramsey, *Torturing Executive Power*, supra note 35, at 1246.

⁵¹ See, e.g., Ramsey, supra note 5, at 363 (acknowledging that the assertion that the President is bound by CIL “would be much stronger” if CIL “were part of Article VI’s ‘supreme Law’”); Henkin, *The President*, supra note 11, at 932–33 (suggesting that while CIL is not expressly mentioned in the Supremacy Clause, it has been “read into the . . . Clause”); Paust, *Bound*, supra note 36, at 378, 381 n.22 (asserting that CIL “is supreme federal law” and that “[t]he President must obey and faithfully execute supreme federal law whether it is customary or treaty-based”).

⁵² U.S. Const. art. II, § 3; see Ramsey, supra note 5, at 364 (relying on the different text in the Supremacy and Take Care Clauses in concluding that the Take Care Clause binds the President to CIL); Ramsey, *Torturing Executive Power*, supra note 35, at 1248 & n.141 (citing support from Hamilton and early attorneys general).

successful foreign policy.”⁵³ As a result, it is at least plausible that “Laws” in the Take Care Clause includes the law of nations.⁵⁴

Whether under the Take Care Clause alone or in reliance on the Supremacy Clause as well, various scholars have agreed that CIL binds the President.⁵⁵ Yet their claims differ in strength. Some recognize no room for presidential departure from CIL; others are less absolute. Henkin, for example, begins with the assertion that the Take Care Clause binds the President to faithfully execute CIL.⁵⁶ The Framers, he asserts, “evinced no disposition to subordinate [the law of nations] to the new Constitution.”⁵⁷ He recognizes, however, that the President’s independent constitutional powers permit the President to “take actions that [terminate treaty or customary] international obligation[s] of the United States” or that “make limited law in the United States, which would supersede a treaty or principle of” CIL.⁵⁸ The Take Care Clause does not bind the President to follow terminated or superseded international law.⁵⁹ Similarly, Henkin recognizes that courts might refrain from enforcing CIL (or treaty) obli-

⁵³ Ramsey, *supra* note 5, at 344; see *id.* at 343–44, 346–49 (discussing preconstitutional concerns for state control over CIL violations and state violations of treaties).

⁵⁴ Ramsey, *supra* note 5, at 363.

⁵⁵ See Ramsey, *supra* note 5, at 376 (“The Constitution requires the President to obey treaties and the law of nations, as part of the presidential duty to take care that the laws be faithfully executed.”); Dodge, *supra* note 49, at 34–38 (relying on the Pacificus-Helvidius debates and *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), to assert that “the original understanding was that the President was bound by customary international law”); David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. Int’l L. & Pol. 363, 366 (2003) (endorsing the view that the President “is bound [under the Take Care Clause] to uphold customary international law”); Weisburd, *supra* note 11, at 1208 (summarizing the argument that CIL is U.S. law and therefore binding on the President under the Take Care Clause); Charney, *supra* note 31, at 914 (noting that “[t]he classic monist view holds that customary international law is integrated into the law of the United States” which “the President is bound . . . faithfully to execute”); Paust, *Bound*, *supra* note 36, at 378 (asserting that “few academics . . . have had the audacity publicly to” claim presidential power to violate CIL). But see Weisburd, *supra* note 11, at 1208–34 (analyzing historical interpretation of “Laws” under Article III of the Constitution to argue that the Take Care Clause’s reference to “Laws” does not include CIL so that the President is not constitutionally bound to adhere to CIL).

⁵⁶ See Henkin, *Chinese Exclusion*, *supra* note 32, at 879, 886; Henkin, *The President*, *supra* note 11, at 934.

⁵⁷ Henkin, *Chinese Exclusion*, *supra* note 32, at 869.

⁵⁸ Henkin, *Chinese Exclusion*, *supra* note 32, at 879–81; Henkin, *The President*, *supra* note 11, at 936. But see Paust, *Bound*, *supra* note 36, at 384–87 (disagreeing with Henkin’s assertion that the President can make law that violates international law).

⁵⁹ Henkin, *Chinese Exclusion*, *supra* note 32, at 879–80; Henkin, *The President*, *supra* note 11, at 934–36.

gations against the President when the President takes actions that do not create U.S. law but that are supported by the President's "constitutional authority as sole organ or as commander-in-chief."⁶⁰

Professor Kirgis, in response, agrees that the President may make domestic law "as commander-in-chief and as chief diplomat," but in light of Congress's primacy in lawmaking, he emphasizes that this law-making role is limited and should be exercised by the President alone, or through clear delegation to a high-ranking official.⁶¹ At the same time, Kirgis is more permissive than Henkin in suggesting that the President is bound not by all custom but only self-executing custom.⁶² As Kirgis's and Henkin's positions illustrate, there is a spectrum of perspectives on the extent to which the President is bound by CIL.⁶³ The binding thread is the acceptance of some constitutional limit on presidential power to contravene CIL, emanating from the Take Care Clause.

C. The Supremacy Clause and Constitutional Commitment to International Law

As evidenced in the previous Section, the Supremacy Clause has been cited in connection with claims that the Take Care Clause imposes a constitutional duty on the President to conform to international law. Scholars have also asserted that the Supremacy Clause alone constrains the United States toward compliance with treaties. For example, Professor Carlos Vázquez, one of the nation's leading treaty scholars, relies on the history of state noncompliance to assert that the Supremacy Clause generally binds federal treaty-makers to enter self-executing treaties.⁶⁴

⁶⁰ Henkin, *The President*, supra note 11, at 935–37; see also Henkin, *Chinese Exclusion*, supra note 32, at 881–85 (recognizing this argument without endorsing it); Henkin, *International Law*, supra note 11, at 1567–69 (asserting that the President, like Congress, generally "may make decisions within his constitutional authority that put the United States in violation" of treaty or CIL and that "[t]he courts will not enjoin such acts").

⁶¹ Kirgis, supra note 35, at 374–75.

⁶² *Id.* at 372–73, 375.

⁶³ Along this spectrum, Ramsey argues that the President may not violate treaties or the law of nations but possesses some authority to interpret both sources in ways that bind the courts. See Ramsey, supra note 5, at 368–76.

⁶⁴ Professor David Sloss similarly argues that although "the federal government's inability . . . to remedy treaty violations by the states was a major factor underlying the decision to include treaties in the Supremacy Clause," the Supremacy Clause prohibits federal treaty violations as well, for the Framers sought, as a matter of morality and honor, "to ensure U.S. compliance with its international legal obligations." David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 51 n.225 (2002).

Self-executing treaties are immediately enforceable in U.S. courts to preempt inconsistent state laws and prior inconsistent federal statutes; self-execution thereby increases the prospects of U.S. compliance with treaty obligations.⁶⁵

According to Vázquez, “[t]he Framers . . . were acutely aware” that treaties are interstate contracts primarily enforced on the international plane through diplomacy or war.⁶⁶ “[T]hese characteristics of treaties . . . had led to significant problems for the United States under the Articles of Confederation.”⁶⁷ The states violated treaties that Congress entered, including the Treaty of Peace with Britain.⁶⁸ The weak confederated government, according to Vázquez, did not violate treaties.⁶⁹ Yet “the Founders may well have wanted to limit [the national government’s] ability to violate treaties” as well.⁷⁰ State violations had been serious, raising the risk of war and tarnishing the reputation for compliance that might otherwise generate beneficial agreements with other states.⁷¹ “[T]o avoid the foreign relations difficulties . . . result[ing] from treaty violations, and to capture the benefits of a reputation for compliance, the Founders gave treaties the force of domestic law enforceable in domestic courts.”⁷² The result was that U.S. treaties would be enforceable in U.S. courts to the same extent as statutes and the Constitution.⁷³

This does not mean that treaties will always be enforceable; “[a] treaty might be unenforceable in court because it is too vague, or otherwise calls for judgments of a political nature, or is unconstitutional, just as statutes and constitutional provisions might be.”⁷⁴ But as a general rule,

⁶⁵ See, e.g., Restatement (Third) of the Foreign Relations Law of the United States §§ 111(1) & cmt. d, 115 cmt. e (Am. Law Inst. 1987) (treaties are supreme over state law); id. § 111(3) & cmt. h (self-executing treaties are judicially enforceable); id. § 115(2) & cmt. c (self-executing treaties prevail over prior, inconsistent federal laws).

⁶⁶ Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 *Harv. L. Rev.* 599, 605, 616–18, 694 (2008) [hereinafter Vázquez, *Law of the Land*].

⁶⁷ *Id.* at 605; see also *id.* at 616–18.

⁶⁸ *Id.* at 617, 642.

⁶⁹ See *id.* at 676–77.

⁷⁰ *Id.* at 677.

⁷¹ *Id.* at 617–18, 694.

⁷² *Id.* at 605–06, 617–18, 642.

⁷³ See *id.* at 605. But cf. *id.* at 676–77 (acknowledging that U.S. treaty makers’ power to attach declarations of non-self-execution to treaties “cannot rest on the observation that the immediate problem that led to the adoption of the Supremacy Clause (with respect to treaties) was limited to treaty violations by the States”).

⁷⁴ *Id.* at 605.

treaties must be enforced in the same circumstances as statutes and constitutional requirements.⁷⁵ In a reluctant nod to the Supreme Court's early treaty decision in *Foster v. Neilson*,⁷⁶ Vázquez recognizes one exception: The treaty-makers may render a treaty non-self-executing through a clear statement to that end, including a clear statement embodied in a declaration of non-self-execution.⁷⁷ Beyond this exception, federal treaty-makers are not at liberty to enter a treaty that is less than enforceable against the states and prior Congresses.⁷⁸ Binding the treaty-makers in this way promises greater U.S. compliance with treaty obligations.

As this brief review reveals, claims of constitutional commitment to international law fall along a spectrum, from claims that the Constitution as a whole commits the United States to international law compliance to claims that particular clauses bind particular actors to comply. As is also clear, some of these claims rely on Founding-era history, including the conventional narrative that state power with regard to international law and state violations during Confederation gave rise to constitutional change. To the extent Founding-era history is a relevant source of constitutional understanding, that history also bears on claims that have not been grounded in history.

In assessing constitutional commitment to international law compliance by reference to Founding-era history, reliance on the narrow conventional narrative is faulty for two reasons. First, the conventional narrative does not, as a matter of logic, compel the conclusion that the Constitution commits the national government to comply with interna-

⁷⁵ See *id.*

⁷⁶ 27 U.S. (2 Pet.) 253 (1829), overruled in part by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

⁷⁷ See Vázquez, *Law of the Land*, *supra* note 66, at 605–08, 643–44, 694–95. Other scholars find declarations of non-self-execution inconsistent with the Supremacy Clause. See, e.g., Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 *Sup. Ct. Rev.* 131, 148 (summarizing the argument that declarations of non-self-execution violate the Supremacy Clause because that Clause “mandat[es] direct judicial enforceability [of treaties] . . . even when the Senate and President expressly do not desire judicial enforceability”); Malvina Halberstam, *Alvarez-Machain II: The Supreme Court’s Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 *J. Nat’l Security L. & Pol’y* 89, 92, 95–97, 110–11 (2005) (“[A] declaration that a treaty . . . that by its terms would be self-executing is not self-executing, is inconsistent with the language, history, and purpose of [the Supremacy Clause].”).

⁷⁸ But see David H. Moore, *Response, Law(Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 *Harv. L. Rev. F.* 32, 33–34 (2009) (“[f]ocusing on the authority of the lawmakers of the land rather than on treaties’ status as law of the land” to find greater treaty-maker discretion to enter non-self-executing treaties).

tional law. State violations during Confederation were the result of a collective action problem. That problem was solved by centralizing foreign affairs power in the new federal government. The problem did not require committing that government to compliance as well.

Second, and more significantly, focus on the conventional narrative has blinded scholars to critically relevant evidence: the national government's relationship to international law during the period of Confederation. While the national government complied, and expressed concern for complying, with international law in many ways, the national government's relationship with international law was not one of uniform compliance. During Confederation, the national government violated the law of nations and worked to bend treaties to national advantage.

Part II begins by exploring the faulty logic of relying on the conventional narrative to support a constitutional commitment to national compliance with international law. Part II continues by providing original historical research that explores ways in which the Confederation government violated international law. Part III then explores the records of the Constitution's creation and ratification to reveal an absence of concern for this national deviation, suggesting that the Constitution did not seek to eliminate national discretion to violate international law.

II. THE CONVENTIONAL NARRATIVE AND CONSTITUTIONAL COMMITMENT: LOGIC AND HISTORY

A. *The (Il)logic of the Conventional Narrative*

While scholars have invoked the conventional narrative of state violation leading to national injury during Confederation to support a constitutional commitment to international law, the logic of the narrative does not compel such a commitment. The logic of the conventional narrative is the logic of collective action, which recognizes that “rational, self-interested [entities] will not act to achieve their common or group interests.”⁷⁹ Members of the group will defect to pursue their own self-interest, creating a lack of uniformity and harming the collective interest.⁸⁰

⁷⁹ Mancur Olson, *The Logic of Collective Action* 2 (1971) (emphasis omitted).

⁸⁰ See, e.g., *id.* (“[E]ven if all of the [members] in a large group are rational and self-interested, and would gain if, as a group, they acted to achieve their common interest or objective, they will still not voluntarily act to achieve that common . . . interest.”); Keith L.

The collective action problem can be solved by consolidating decision-making power in a centralized entity that considers collective rather than individual interests. The problem does not require a commitment to a particular collective policy, only a commitment of authority to a centralized agency whose interests will be those of the collective. Thus, the collective action problem generated by state discretion to enforce and violate international law during Confederation was solved with centralization of discretion to comply in a federal government that would act out of national interest. It did not logically demand the commitment of the federal government to international law compliance.

B. The Confederation Congress and International Law

Nor does the evidence this Article uncovers of national violation of international law under Confederation support such a commitment. The Confederation Congress departed from international law in a variety of ways, as detailed in this Section. While the most important evidence for purposes of this Article is evidence of the Confederation Congress's violation of international law, it would be improper to suggest that Congress was a simple scofflaw when it came to international law. Congress demonstrated commitment to international law in various ways during this period.

As but one example, in 1786, the British Secretary of State laid before the U.S. Minister to Britain an account of ways in which various states had failed to adhere to the U.S.-Britain Treaty of Peace.⁸¹ The U.S. Secretary for Foreign Affairs reviewed these grievances and, while he did not credit them all,⁸² he agreed that the states had violated treaty obligations, especially the obligation to ensure that “creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted.”⁸³ In the course of reaching this conclusion, he made several positive references

Dougherty, *Collective Action Under the Articles of Confederation* 8–9 (2001) (explaining the states' incentive to free-ride when it came to public goods).

⁸¹ 4 *Secret Journals of the Acts and Proceedings of Congress: Foreign Affairs 187–203* (Boston, Thomas B. Wait 1820–1821) [hereinafter *Secret Journals*].

⁸² See, e.g., *id.* at 258–62 (rejecting certain British complaints).

⁸³ *Definitive Treaty of Peace, Gr. Brit.-U.S.*, art. IV, Sept. 3, 1783, *in* 3 *Secret Journals*, *supra* note 81, at 438–39; 4 *Secret Journals*, *supra* note 81, at 203–87; see also *id.* at 274 (concluding “that the fourth and sixth articles of the treaty have been violated by certain of [the states]”).

to international law. He noted that courts should interpret treaties consistent with “the laws of nations” governing treaty construction.⁸⁴ He interpreted the Treaty of Peace’s prohibition on British withdrawal of certain property in light of the laws of war to exclude property the British had “captured and disposed of as booty.”⁸⁵ He also referenced the need to comply with the Treaty of Peace because the United States accepted the treaty and to depart from it would “permit our national reputation for probity, candour and good faith, to be tarnished.”⁸⁶ He noted that “Congress . . . [had] neither committed, nor approved, of any violation of the treaty.”⁸⁷ And he suggested that the U.S. Minister to Britain “assure his majesty . . . [t]hat [Congress is] determined to execute [the treaty] with good faith.”⁸⁸

Congress endorsed the Secretary’s suggestions and unanimously resolved that treaties were binding on the states, that the states could not adopt their own interpretations of treaties or impede their execution, and that states ought to repeal through a general statute all prior laws “repugnant to the treaty of peace” (both to prevent continuing violations and to avoid the question of these laws’ validity), leaving it to the courts to determine which laws qualified as repugnant.⁸⁹ Congress then sent these resolutions to the states together with a letter outlining the motivation for these resolutions.⁹⁰ In that letter, Congress explained, *inter alia*, that “[n]ot only the obvious dictates of religion, morality and national honour, but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made.”⁹¹ State interference with treaty interpretation and implementation

⁸⁴ 4 Secret Journals, *supra* note 81, at 205; see also *id.* at 332 (same).

⁸⁵ *Id.* at 274–75.

⁸⁶ *Id.* at 212; see also *id.* at 241 (noting that Congress is responsible “to see that national treaties be faithfully observed throughout the whole extent of [its] jurisdiction”).

⁸⁷ *Id.* at 281. Moreover, he argued that the Confederation Congress could require state compliance with treaties in light of “the nature of their sovereignty and the articles of confederation,” the fact that “[t]he United States must . . . eventually answer for the conduct of their respective members,” and that “it would [otherwise] be in the power of a particular state, by injuries and infractions of treaties, to involve the whole confederacy in difficulties and war.” *Id.* at 281–82.

⁸⁸ *Id.* at 285; see also *id.* at 363 (same recommendation from a congressional committee).

⁸⁹ See *id.* at 282–84, 294–96.

⁹⁰ See *id.* at 329–38.

⁹¹ *Id.* at 330.

would lead to “anarchy and confusion at home, and [to] disputes which would probably terminate in hostilities and war with the nations with whom we may have formed treaties.”⁹² Indeed, as Congress informed the states, Britain was refusing to vacate “the frontier posts” due to state noncompliance.⁹³

While the Confederation Congress complied with and paid respect to international law in this and other situations, Congress was not uniformly submissive to international law. As the history provided in this Section demonstrates, Congress also violated international law. With regard to treaty ratification, Congress departed from the law of nations requirement of mandatory ratification.⁹⁴ And in interpreting the small number of treaties the nation had entered, the national government bent treaty obligations to national advantage.

⁹² *Id.* at 333; see also *id.* at 336 (noting that state failure to comply with the Treaty of Peace had called into question “the good faith of the United States” and greatly affected the country’s “essential interests”); *id.* at 338 (noting the need to restore “the publick faith”).

⁹³ *Id.* at 338; see also Letter from John Adams to John Jay (Aug. 25, 1785), *in* 2 *The Emerging Nation: A Documentary History of the Foreign Relations of the United States Under the Articles of Confederation, 1780–1789*, at 769, 770 (May A. Giunta et al. eds., 1996) [hereinafter *Emerging Nation*] (recounting conversation with British Prime Minister who linked British refusal to withdraw to state interference with collection of debts); The Virginia Convention (June 10, 1788), *in* 9 *The Documentary History of the Ratification of the Constitution* 1092, 1129 (John P. Kaminski et al. eds., 1990) [hereinafter 9 *Documentary History*] (George Nicholas, arguing for constitutional ratification as a means to secure treaty compliance and therefore British withdrawal from western forts); Schenectady Farmer (Apr. 20, 1788), *in* 21 *The Documentary History of the Ratification of the Constitution* 1402, 1402 (John P. Kaminski et al. eds., 2005) [hereinafter 21 *Documentary History*] (likewise arguing for constitutional ratification to secure transfer of the western forts). But cf. A Plebeian: An Address to the People of the State of New York (Apr. 17, 1788), *in* 20 *The Documentary History of the Ratification of the Constitution* 942, 960 (John P. Kaminski et al. eds., 2004) [hereinafter 20 *Documentary History*] (suggesting that British retention of the western forts resulted from British interest and lack of American military might, not from defects in the Confederation government). Unfortunately, the worst offenders, Virginia and New York, did not rectify their ways in response. See Nevins, *supra* note 6, at 652–56.

⁹⁴ For an account of early American experience with the laws of war, see John Fabian Witt, *Lincoln’s Code: The Laws of War in American History* 13–47 (2012). In contrast to this Article, the account focuses largely on pre-Confederation experience and on the perspectives of specific Founders rather than on the actions of Congress. See *id.* Nonetheless, the account similarly reveals both (often instrumental) commitment to, as well as departure from, the law of nations.

1. *The Confederation Congress and the Law of Nations*

Under current international law, states may (and frequently do) elect to express their consent to a treaty through signature subject to ratification.⁹⁵ Under this method, the treaty is not binding on states that have signed unless they ratify,⁹⁶ and states retain discretion whether to ratify.⁹⁷ Ratification was not always discretionary, however.

During the 1600s, the diplomat negotiating a treaty was considered the agent of the monarch who sent him.⁹⁸ He carried full powers, a document testifying to his “authority . . . to negotiate and sign” on the monarch’s behalf.⁹⁹ Ratification referred not to acceptance of a treaty’s terms, but to confirmation by the monarch that the agent had acted within the scope of his authority.¹⁰⁰ Ratification “could not be refused unless the envoy had exceeded his authority,” which was often expressed in private instructions.¹⁰¹ This mandatory understanding of ratification gradually receded, to be replaced by the discretionary ratification of to-

⁹⁵ See, e.g., Vienna Convention on the Law of Treaties art. 14(1)(c)–(d), May 23, 1969, 1155 U.N.T.S. 331 (recognizing signature subject to ratification as a method of expressing consent to a treaty); Restatement (Third) of the Foreign Relations Law of the United States § 312 cmt. d (Am. Law Inst. 1987) (“A state can be bound upon signature, but that has now become unusual as regards important formal agreements. For such agreements, signature is normally *ad referendum*, i.e., subject to later ratification . . .”); J. Mervyn Jones, Full Powers and Ratification 66 (1946) (noting that “ratification is customary in the law of nations” even as to treaties “signed in pursuance of express authority”).

⁹⁶ See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 312 cmt. d (Am. Law Inst. 1987). But cf. Vienna Convention, *supra* note 95, art. 18(a) (positing that “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty”).

⁹⁷ Jones, *supra* note 95, at 66.

⁹⁸ See *id.* at 12, 66.

⁹⁹ *Id.* at xii; see also *id.* at 2–3.

¹⁰⁰ See *id.* at 66–67, 87.

¹⁰¹ *Id.* at 66–67; see also *id.* at 2–4, 71, 87 (discussing the mandatory nature of ratification); *id.* at 38–39, 71–72 (noting that ratification was not mandatory where “an agent had exceeded his instructions”); Vattel, *supra* note 5, Book II, § 156 (noting that while treaties signed by a minister are ineffective until ratified by the prince, “every promise which [a minister] makes in the terms of his commission, and within the extent of his powers, is binding on his constituent” and “a prince can honourably refuse to ratify” only if he is “able to allege strong and substantial reasons, and, in particular, to prove that his minister . . . deviated from his instructions”).

day.¹⁰² At the time of the American Founding, however, the law of nations¹⁰³ had not yet completed that transition.¹⁰⁴

¹⁰² See Jones, *supra* note 95, at 12–19, 12 nn.1 & 4; 30–32; 68; 74–79 (describing the gradual adoption of discretionary ratification); Michael J. Glennon, *Constitutional Diplomacy* 172 n.56 (1990) (noting that “[t]he concept that a state might refuse to ratify a treaty signed on its behalf evolved gradually during the nineteenth century”); see also David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 *UCLA L. Rev.* 598, 640–43 (2012) [hereinafter Moore, *Unconstitutional Treaty-making*] (summarizing the transition from mandatory to discretionary ratification).

¹⁰³ Vattel, who had a significant influence on Founding-era thought, divided the unwritten law of nations into three categories. See Vattel, *supra* note 5, Prelim., § 27. The first, the *necessary* law of nations, derived from application of the law of nature to states as groupings of individuals. *Id.* Prelim., § 7; *id.* Book III, § 188. The necessary or natural law of nations was immutable and states could not depart from “it in their own conduct” nor agree with other states to do so by treaty or custom. *Id.* Prelim., §§ 8–9; *id.* Book III, §§ 188–89. At the same time, a state could not, as a general matter, monitor or enforce the necessary law of nations against another because of the natural law principle of sovereign equality. See *id.* Prelim., §§ 9, 21–22, 27. A violation of the necessary law of nations was an internal “crime against . . . *conscience*.” *Id.* Prelim., § 21; see also *id.* Prelim., §§ 9, 27; *id.* Book III, § 189. The second branch of the unwritten law of nations, the *voluntary* law, derived from the equality and independence of states in society and could vary from natural law. See *id.* Prelim., §§ 21, 27; *id.* Book III, § 189. States were presumed to consent to the principles of voluntary law given their duty to cultivate the society of states. See *id.* Prelim., §§ 9, 21, 27; *id.* Book III, § 192. The voluntary law could be externally administered by force. See *id.* Prelim., §§ 22–23. The final category of unwritten law, the *customary* law of nations, derived from state practice and was therefore based on tacit consent. *Id.* Prelim., §§ 25, 27. States could depart from a customary law by making clear that they rejected a customary principle going forward. See *id.* Prelim., § 26.

If mandatory ratification were a principle of customary law, then the Confederation Congress’s departure from the principle might be less probative. However, it is unclear that mandatory ratification was customary law. Vattel, for example, refers to both natural law and customary practice in his description of mandatory ratification (a description that at times seems less stringent than what appears at the Founding). See *id.* Book II, § 156. Vattel says at one point that “we may apply to [the office of plenipotentiary] all the rules of natural law with respect to things done by commission.” *Id.* At another point, he refers to the fact that “it is customary to place no dependence on [princes’] treaties, till they have agreed to and ratified them.” *Id.* State practice with regard to mandatory ratification does not eliminate this confusion. The United States and ultimately the international community did not treat mandatory ratification as an immutable, natural law principle. Consistent with the nature of voluntary law, states protested departures from mandatory ratification; yet the society of states ultimately did not demand obligatory ratification. The United States, for example, eventually abandoned mandatory ratification. Yet it did not make a clear break as Vattel suggested should happen when rejecting customary law. Instead, the Confederation Congress both complied with and departed from mandatory ratification. If Vattel’s categories describe international law practice on other issues at the time of the Founding, they do not when it comes to mandatory ratification. As a result, Vattel’s framework does not undercut the significance of Congress’s departures from mandatory ratification.

¹⁰⁴ See Jones, *supra* note 95, at 12, 66–72 (documenting that during the eighteenth century theorists largely, though not entirely, endorsed, and practice supported, the rule of mandatory

In the early years under the Articles of Confederation, Congress acted in conformity with the law of mandatory ratification.¹⁰⁵ Twice in 1781 and again in 1782, Congress issued full powers in which it committed to ratify whatever agreements its representatives signed.¹⁰⁶ Consistent with

ratification); Jean Galbraith, *Prospective Advice and Consent*, 37 *Yale J. Int'l L.* 247, 265–66 (2012) (noting that “[a]t the time of the Constitutional Convention, . . . nations had an obligation to ratify treaties negotiated by their ministers,” with limited exception); sources cited *supra* note 102 (documenting the nineteenth century decline of mandatory ratification). President Washington made a statement in submitting certain Indian treaties to the Senate that might be read as rejecting a legal connection between signature and ratification:

It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers.

5 John Bassett Moore, *A Digest of International Law* § 744, at 188 (1906) [hereinafter *Digest of International Law*]. Commentators, however, have read this statement as consistent with the rule that ratification was not obligatory if the agent exceeded instructions or as “more prescient than accurate as a reading of international law.” Galbraith, *supra*, at 267 n.89; Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 *Duke L.J.* 1127, 1186 & n.209 (2000).

¹⁰⁵ The Continental Congress had likewise issued full powers with a promise to ratify. See 2 *Secret Journals*, *supra* note 81, at 32–33 (Sept. 28, 1776, full powers of U.S. commissioners charged with negotiating a treaty of friendship, commerce, and navigation with France); *id.* at 42–43 (Jan. 2, 1777, full powers of U.S. commissioner charged with negotiating a treaty of friendship, commerce, navigation, and alliance with Spain); *id.* at 90–91 (May 28, 1778, full powers of U.S. commissioners charged with negotiating treaties of friendship and commerce with Germany, Prussia, and Tuscany); *id.* at 258–60, 264–65 (Sept. 28, 1779, full powers of ministers charged with negotiating treaties of peace and commerce with England, and a treaty of alliance, amity, and commerce with Spain); *id.* at 290–91, 376–77 (Nov. 1, 1779 & Dec. 29, 1780, full powers of commissioners charged with negotiating a treaty of amity and commerce with the United Provinces of the Netherlands); *id.* at 358–60 (Dec. 19, 1780, full powers of minister to Russia, authorizing him to accede to a treaty on neutrality, and to negotiate a treaty of amity and commerce to be transmitted to Congress for “final ratification” with the assurance that Congress “will confirm whatsoever shall by [the minister] be transacted in the premises”); Samuel B. Crandall, *Treaties, Their Making and Enforcement* 22–23 (2d ed. 1916); Galbraith, *supra* note 104, at 266–67; see also 2 *Secret Journals*, *supra* note 81, at 285, 316–18 (commissions of agents to negotiate a loan). But cf. *id.* at 49–50, 54 (July 1, 1777 & July 3, 1777, commissions of U.S. ministers to Germany, Prussia, Tuscany, and the United Netherlands, authorizing the ministers to negotiate but not enter treaties of friendship and commerce); *id.* at 110 (Oct. 22, 1778, instructions to Benjamin Franklin, minister to France, “not to make any engagements, or stipulations,” without prior authorization).

¹⁰⁶ See 2 *Secret Journals*, *supra* note 81, at 447–49 (June 15, 1781, full powers of U.S. ministers to peace treaty negotiations with Britain in which Congress “promis[ed], in good faith, that [it would] accept, ratify, fulfil and execute whatever shall be agreed, concluded and signed by our said ministers plenipotentiary . . . and that [it would] never act nor suffer any person to act contrary to the same, in whole or in any part”); *id.* at 472–74 (Aug. 16, 1781, full powers of U.S. minister charged with negotiating a treaty of alliance with the

this commitment, in 1783 and 1784 Congress ratified two agreements with France and an agreement with Sweden¹⁰⁷ that Benjamin Franklin signed in the exercise of full powers granted by Congress;¹⁰⁸ two agreements with the Netherlands that John Adams had signed pursuant to his full powers;¹⁰⁹ and the preliminary and definitive Treaty of Peace with Great Britain that John Adams, Benjamin Franklin, John Jay, and, as to the preliminary treaty, Henry Laurens, had signed under their full powers.¹¹⁰

In 1783, however, there is also evidence that Congress had begun to depart from the law of mandatory ratification. In 1783, Congress instructed the U.S. representative to Russia to enter a fifteen-year commercial treaty with that country, but resolved “that the same be subject

United Provinces of the Netherlands in which Congress “promis[ed], in good faith, that [it would] accept, ratify and execute, whatever shall be agreed, concluded and signed by him our said minister”); 3 *id.* at 238–39 (Sept. 28, 1782, full powers of U.S. minister charged with negotiating a treaty of amity and commerce with Sweden). This is not to suggest that Congress gave its ministers unfettered discretion in negotiating. It did not. Congress routinely gave its ministers detailed instructions as to what they could or could not concede. See, e.g., *id.* at 146–47 (Aug. 6, 1782, instructions to “the minister plenipotentiary at the court of Spain” not to accede to a treaty “until he shall have transmitted [it] to Congress for their approbation,” unless the treaty is necessary to fulfill “the separate and secret article of [the U.S.] treaty” with France); *id.* at 226–38, 240–41 (Sept. 28, 1782, instructions to Benjamin Franklin, including a proposed treaty of amity and commerce, to guide negotiations with Sweden). As noted, under international law, ratification was mandatory unless the agent exceeded instructions. See Jones, *supra* note 95, at 38–39, 66, 71–72.

¹⁰⁷ Congress ratified the agreement even though it was not identical to the proposed agreement referred to in Franklin’s instructions. Compare 3 *Secret Journals*, *supra* note 81, at 226–41 (Franklin’s instructions and proposed treaty), with *id.* at 368–92 (final, ratified treaty).

¹⁰⁸ See *id.* at 272–88, 418–24 (agreements with France); *id.* at 368–92 (agreement with Sweden).

¹⁰⁹ See *id.* at 289–318. Before ratifying the treaty of amity and commerce with the United Netherlands and consistent with the law of mandatory ratification, a congressional committee compared the treaty that had been signed with the instructions Congress had provided. 24 *Journals of the Continental Congress, 1774–1789*, at 64–65 (1922). Finding “no variations . . . which affect the substance of the plan proposed by Congress,” the committee recommended ratification. *Id.* at 65. The Committee also recommended that Congress ratify the second treaty Adams had signed, “although no express authority ha[d] been delegated by Congress on [the] subject” of that treaty. *Id.*

¹¹⁰ See 3 *Secret Journals*, *supra* note 81, at 329–38 (preliminary treaty); *id.* at 433–43 (definitive treaty). Similarly, in instructing U.S. ministers in 1783 that Congress, upon obtaining independence, no longer wished to enter a “convention of the neutral maritime powers for maintaining the freedom of commerce,” Congress was careful to qualify its instruction “if such a progress is not already made in this business as may render it dishonourable to recede.” *Id.* at 414–15.

to the revisal and approbation of Congress, before they shall be under obligations to accept or ratify it.”¹¹¹ Similarly, a congressional committee suggested that U.S. ministers “be instructed to encourage overtures for treaties of amity and commerce from the respectable and commercial powers of Europe . . . subject to the revisal of Congress previous to their ratification.”¹¹² In harmony with this suggestion, on October 29, 1783, Congress approved instructions that the relevant ministers “meet the advances and encourage the disposition of the other commercial powers in Europe for entering into treaties of amity and commerce with these United States” and “[t]hat such treaties . . . shall not be finally conclusive until they shall respectively have been transmitted to the United States in Congress assembled, for their examination and final direction.”¹¹³

¹¹¹ *Id.* at 353–54 (May 22, 1783). Congress ultimately instructed its minister to Russia to communicate concerning a treaty, “but not to sign it.” Letter from Robert R. Livingston to Francis Dana (May 1, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 844, 844.

¹¹² 3 *Secret Journals*, *supra* note 81, at 401. Congress, at various points, also pursued commissions for entering a commercial treaty with Great Britain. On May 1, 1783, Congress “[o]rdered, [t]hat a commission be prepared . . . authorizing [U.S. representatives] to enter into a treaty of commerce between the United States of America and Great Britain, subject to the revisal of the contracting parties previous to its final conclusion.” *Id.* at 340. Days later, the Secretary for Foreign Affairs submitted draft instructions for the American ministers under which the ministers were to “do nothing definitive in this business, but submit the Treaty after you shall have agreed thereon to Congress” while at the same time entering a convention that would maintain the status quo and thus give Congress sufficient time “to examine and approve or disapprove the Treaty.” Robert R. Livingston’s Report of Instructions to the American Peace Commissioners (May 6, 1783), *in* 2 *Emerging Nation*, *supra* note 93, at 108, 109; see also 24 *Journals of the Continental Congress*, *supra* note 109, at 405 n.1 (reproducing what appears to be a draft full powers for the anticipated temporary convention). On June 19, 1783, a congressional committee proposed “[t]hat the [U.S.] Ministers Plenipotentiary . . . who shall be authorized to negotiate a treaty of commerce with Great Britain, do stipulate that the treaty which may be agreed upon shall be transmitted to Congress, and be subject to their revisal before it is finally concluded on.” *Id.* at 404. A subsequent committee proposed on September 1, 1783, “[t]hat [c]ommissions be forthwith prepared . . . to negotiate a treaty of amity and commerce with . . . Great Britain . . . ; the treaty . . . to be subject to the revision of Congress previous to its being ratified.” 25 *Journals of the Continental Congress*, 1774–1789, at 531 (1922). Congress never followed through on these resolutions and proposals. See Vernon G. Setser, *The Commercial Reciprocity Policy of the United States, 1774–1829*, at 67 (1969). Yet each resolution or proposal sought to preserve congressional discretion in entering the treaty.

¹¹³ 3 *Secret Journals*, *supra* note 81, at 412–13. Some in Congress believed that the policy of congressional review was intended to obstruct treatymaking in order to “confine [U.S.] commerce to France and Holland,” with whom the United States already had treaties. Setser, *supra* note 112, at 68 n.48 (quoting Letter from Elbridge Gerry to John Adams (Jan. 14, 1784), *in* 9 *John Adams, The Works of John Adams* 521, 521 (reprt. 1969) and citing addi-

Before commissions were issued on these instructions, the instructions were supplemented and amended on May 7, 1784.¹¹⁴ As amended, the instructions dropped the reference to congressional revision and authorized the ministers “to negotiate and sign,” but still required the ministers to “transmit[] [treaties they signed] to Congress for their final ratification.”¹¹⁵ The 1784 final commission of Adams, Franklin, and Jefferson that was governed by these instructions recognized these ministers’ “full power and authority . . . to confer, treat and negotiate[,] . . . to make and receive propositions . . . , and to conclude and sign” treaties of amity and potentially commerce, but rather than promise to ratify such treaties, Congress required the ministers to “transmit[] [them] to the United States in Congress assembled for their final ratification.”¹¹⁶ The same form of commission was used to authorize these ministers to pursue treaties with “Morocco and the regencies of Tunis, Algiers, and Tripoli.”¹¹⁷

Consistent with the reservation of congressional ratification in these commissions, Secretary for Foreign Affairs John Jay reviewed the signed U.S.-Prussia Treaty of Amity and Commerce to advise Congress whether to ratify it.¹¹⁸ Jay raised concerns that went beyond whether the American ministers had adhered to their instructions; in particular, he

tional sources); see also Letter from Elbridge Gerry to John Adams (June 16, 1784), *in* 2 *Emerging Nation*, *supra* note 93, at 389, 389–90 (noting that the American ministers’ authority to sign treaties was adopted over a proposal that the ministers only be able “to form *projects* of . . . Treaties, to be reversed & altered by Congress,” which would ensure trade with only “one or two Nations”).

¹¹⁴ See 3 *Secret Journals*, *supra* note 81, at 484–89.

¹¹⁵ *Id.* at 489.

¹¹⁶ *Id.* at 498–99; see also Letter from American Commissioners in Europe to Conde de Aranda (Sept. 22, 1784), *in* 2 *Emerging Nation*, *supra* note 93, at 441, 441 (communicating to Spain that the commissioners had received a commission to this effect).

¹¹⁷ 3 *Secret Journals*, *supra* note 81, at 498–99, 536; see also 4 *Secret Journals*, *supra* note 81, at 361 (noting that Adams and Jefferson concluded a treaty of amity and commerce with Morocco “reserving the same nevertheless to the United States in Congress assembled for their final ratification”); 32 *Journals of the Continental Congress, 1774–1789*, at 356 (1936) (treaty preamble explaining that the American commissioners were authorized “to conclude and sign the [treaty] transmitting it to the United States in Congress assembled for final ratification”). At the same time, a letter from Congress to the Emperor of Morocco “promis[ed] to ratify, confirm and fulfil whatever [the American commissioners] Shall on [Congress’s] Part conclude and agree to.” Letter from the President of Congress to the Emperor of Morocco (Mar. 11, 1785), *in* 2 *Emerging Nation*, *supra* note 93, at 578, 579.

¹¹⁸ See John Jay Report on the Treaty with Prussia (Mar. 9, 1786), *in* 3 *Emerging Nation*, *supra* note 93, at 124, 124–25.

reiterated concerns he had previously expressed¹¹⁹ about adopting a most-favored-nation obligation in the treaty.¹²⁰ Although the treaty was not perfect, Jay concluded that “[u]pon the whole Matter, and particularly considering that the Duration of [the] Treaty is limited to ten Years, . . . it [would] be prudent and best to ratify it.”¹²¹

The above does not mean that Congress entirely abandoned the law of mandatory ratification at this time. In 1785, as Spain and the United States began to negotiate their mutual border, Spain issued full powers to its representative that included a promise of mandatory ratification.¹²² Perhaps because the Spanish representative was stationed in the United States near Congress¹²³ and because Congress had instructed its representative to the negotiations, John Jay, not to make propositions or agree to any treaty terms before communicating them to Congress,¹²⁴ Congress responded to the Spanish full powers by issuing full powers to Jay that promised ratification.¹²⁵ In 1786, seven states, rather than the nine required to approve a treaty, voted to alter Jay’s instructions.¹²⁶ The con-

¹¹⁹ See John Jay’s Report on a Plan of a Treaty of Amity and Commerce (May 17, 1785), in 2 *Emerging Nation*, supra note 93, at 634, 635.

¹²⁰ John Jay Report on the Treaty with Prussia (Mar. 9, 1786), in 3 *Emerging Nation*, supra note 93, at 124, 124.

¹²¹ *Id.* at 125.

¹²² The full powers promised that the King would “approve, ratify and fulfill, and cause to be observed and fulfilled exactly and entirely whatsoever shall be by [his encargado de negocios] stipulated and signed.” 3 *Secret Journals*, supra note 81, at 569–70; see also *id.* at 564.

¹²³ See *id.* at 562–64 (noting the Spanish minister’s appointment “to reside near Congress”); 4 *Secret Journals*, supra note 81, at 300 (Jay, informing the Spanish minister that he hoped the minister “would see the propriety of [Jay] observing the greatest delicacy and respect towards [Congress]” where Congress “were sitting in the same place with” the two nations’ negotiators); *id.* at 340 (Jay, noting that greater sovereign oversight of the negotiator is possible when treaty negotiations occur “at home”).

¹²⁴ 3 *Secret Journals*, supra note 81, at 570. Roughly a month later, on August 25, 1785, Congress gave Jay slightly greater leash, instructing him “that he neither conclude nor sign any treaty . . . with the [Spanish] encargado de negocios, until he hath previously communicated it to Congress, and received their approbation.” *Id.* at 586; see also *id.* (altering the instruction to require Jay to secure certain terms as well as to communicate any treaty to Congress for its approval before Jay concluded or signed it); 4 *id.* at 299–300 (Jay, reporting to Congress that he informed the Spanish minister that “he must not conclude that what [Jay] might think expedient would also be deemed so by Congress”). For more on the debate whether and how to alter Jay’s instructions, see *id.* at 81–132.

¹²⁵ See 3 *Secret Journals*, supra note 81, at 570–71 (“promis[ing] in good faith to approve, ratify and fulfill, and cause to be observed and fulfilled, exactly and entirely, whatsoever be by him . . . stipulated and signed”).

¹²⁶ See 4 *Secret Journals*, supra note 81, at 109–12.

sequences of this change, it was argued, were problematic because “[i]f a treaty entered into in pursuance of instructions be not ratified, by the law of nations it is *causa belli*,” while “under the laws or usages of nations,” the United States is not obligated to ratify a treaty entered in excess of instructions.¹²⁷

Congress relied on these principles¹²⁸ again when it refused to ratify a consular treaty with France that did not conform to the negotiating instructions Benjamin Franklin had been given.¹²⁹ Rather than ratify, Congress sent Thomas Jefferson back to France to renegotiate the treaty to conform to Congress’s instructions and to add a sunset provision, prom-

¹²⁷ *Id.* at 113–14, 125–26.

¹²⁸ See *id.* at 159–70 (Jay, citing the principles of mandatory ratification in advising that Congress need not ratify the convention Franklin signed); see also *id.* at 181–83 (supplementing the secretary’s comparison based on discrepancies between the original draft convention and the copy the secretary had used for comparison). Although Jay concluded that the law of mandatory ratification permitted Congress to refuse ratification, France was not uniformly accepting of the failure to ratify. See Letter from Comte de Vergennes to Louis Guillaume Otto (Dec. 20, 1785), in 2 *Emerging Nation*, supra note 93, at 957, 957 (noting that Congress’s delay in ratifying the initial version of the consular convention “is very irregular in itself, and its duration begins to be disobliging to His Majesty”). On one hand, France was very accommodating when it came to reconsidering the consular convention. See *id.* (commenting that “[i]f, instead of ratifying, Mr. Jay’s observations taking exception are adopted, [France] will examine them with impartiality, however improper we judge them beforehand for form and for content” while also predicting “that henceforth our remarks will not make apology for the ideas nor the logic of this Minister”). But cf. Letter from Comte de Montmorin to Comte de Moustier (June 23, 1788), in 3 *Emerging Nation*, supra note 93, at 801, 803 (ascribing the consular convention’s difficulties solely “to Mr. Jay’s bad will and to his desire to destroy Mr. Franklin’s reputation”). On the other hand, France treated the signed but unratified convention as essentially binding. See Peter P. Hill, *French Perceptions of the Early American Republic, 1783–1793*, at 147 (1988) (noting that, during the Ferrier affair, the French Foreign Affairs Minister directed Otto “to remind Congress that Franklin had had full powers when he signed the convention, and that France had fully complied with its terms ever since”); 4 *Secret Journals*, supra note 81, at 428–29 (French Consul General, complaining of the United States’ action during the Ferrier affair based in part on the U.S.-France consular convention, which was “signed by the respective plenipotentiaries, and which [has] been hitherto religiously observed” by France); Sketch of the Count de Moustier’s Conversation with Mr. Jay, in 1 *The Diplomatic Correspondence of the United States of America, from the Signing of the Definitive Treaty of Peace, 10th September, 1783, to the Adoption of the Constitution, March 4, 1789*, at 270, 271 (Washington, Blair & Rives 1837) [hereinafter *Diplomatic Correspondence*] (French Foreign Affairs Minister, complaining to Jay of Virginia’s ignorance of the U.S.-France consular “convention signed by the respective Plenipotentiaries”).

¹²⁹ See 3 *Secret Journals*, supra note 81, at 66–78 (detailing Franklin’s instructions); 4 *Secret Journals*, supra note 81, at 159–70 (noting differences between Franklin’s instructions and the convention he signed).

ising immediate ratification if the French accepted amendment.¹³⁰ Jefferson, in turn, requested that Congress issue him full powers that were not limited by reference to the draft convention Congress desired even if his instructions were.¹³¹ Congress obliged, providing Jefferson a commission in which Congress “promise[d] to ratify . . . whatever convention” Jefferson entered, provided that the convention expire in no more than twelve years.¹³² After the Constitution was adopted, the Senate asked Jay to opine on whether the United States was obligated to ratify the consular convention that Jefferson had negotiated.¹³³ Jay thought the treaty would “prove more inconvenient than beneficial to the United States,” but thought ratification indispensable.¹³⁴ The convention was better than the version Franklin had signed and was time limited.¹³⁵ Moreover, the

¹³⁰ See 4 Secret Journals, *supra* note 81, at 132–33; see also John Jay’s Report on the Franco-American Consular Convention (Aug. 18, 1786), *in* 3 *Emerging Nation*, *supra* note 93, at 264, 264–66 (recommending this course of action to Congress); Letter from Thomas Jefferson to Comte de Montmorin (June 20, 1788), *in* 3 *Emerging Nation*, *supra* note 93, at 795, 795–99 (communicating to the French changes that needed to be made in the consular convention and arguing that these changes would produce better U.S. compliance); Report of Secretary Jay on the Obligation to Ratify the Consular Convention with France (July 25, 1789), *in* 1 *Diplomatic Correspondence*, *supra* note 128, at 273, 273–75 (recounting the history of the consular convention with France). The French Ambassador to the United States reported “that Congress decided to send Mr. Jefferson new instructions relative to the Consular Convention only from fear of too expressly displeasing the King [of France].” Letter from Comte de Moustier to Comte de Montmorin (July 5, 1788), *in* 3 *Emerging Nation*, *supra* note 93, at 813, 813.

¹³¹ See 4 Secret Journals, *supra* note 81, at 377–78.

¹³² See *id.* at 379–80; Report of Secretary Jay on the Obligation to Ratify the Consular Convention with France (July 25, 1789), *in* 1 *Diplomatic Correspondence*, *supra* note 128, at 273, 274–75. Jefferson’s instructions likewise included a promise to “ratify any convention” Jefferson entered that was not worse than the one already signed and that was limited to no more than twelve years’ duration. 4 Secret Journals, *supra* note 81, at 381; Report of Secretary Jay on the Obligation to Ratify the Consular Convention with France (July 25, 1789), *in* 1 *Diplomatic Correspondence*, *supra* note 128, at 273, 274–75. The convention Jefferson negotiated “was the first treaty with a foreign nation to be ratified by the government under the Constitution. It was abrogated in 1798, together with the other French treaties.” Setser, *supra* note 112, at 203 n.54.

¹³³ See Report of Secretary Jay on the Obligation to Ratify the Consular Convention with France (July 25, 1789), *in* 1 *Diplomatic Correspondence*, *supra* note 128, at 273, 273–75. Jefferson also recognized that Congress would have to decide whether to ratify. See Letter from Thomas Jefferson to John Jay (Nov. 14, 1788), *in* 3 *Emerging Nation*, *supra* note 93, at 858, 858–59 (reporting the signing of the consular convention and providing a side-by-side comparison of the 1784 and 1788 conventions “for the use of the members who will have to decide on the ratification”).

¹³⁴ Report of Secretary Jay on the Obligation to Ratify the Consular Convention with France (July 25, 1789), *in* 1 *Diplomatic Correspondence*, *supra* note 128, at 273, 274.

¹³⁵ *Id.* at 274–75.

United States had repeatedly represented that it would ratify.¹³⁶ “[I]t seem[ed] to follow as a necessary consequence that the United States ought to ratify it.”¹³⁷ As these examples demonstrate, Congress did not make a clean break from the law of mandatory ratification. Yet Congress began departing from that law during the period of Confederation.

Three arguments might be offered to diminish the import of Congress’s departures from mandatory ratification, but none succeeds. First, it might be argued that CIL evolves through violation, and U.S. practice ultimately became international law. Both statements are true. Changes in the norms of CIL begin with violation.¹³⁸ And discretionary ratification is, as noted, the modern norm.¹³⁹ However, this does not change the fact that at the time the United States began to insist on discretionary ratification, it was departing from international law.¹⁴⁰ Moreover, it does not appear that the United States violated the norm of mandatory ratification with the intent of altering other states’ practice, at least early on. The United States itself did not fully depart from the rule of mandatory ratification until into the nineteenth century.¹⁴¹ The United States insisted, for example, that Spain honor an 1819 full powers that promised ratification, even as the United States argued that it was constitutionally exempt from obligatory ratification.¹⁴² Moreover, while there was some early movement by other states toward discretionary ratification, other states opposed discretionary ratification by the United States well into the nineteenth century.¹⁴³ Indeed, assertions of an obligation to ratify

¹³⁶ *Id.*

¹³⁷ *Id.* at 275.

¹³⁸ See, e.g., Charney, *supra* note 31, at 914–15.

¹³⁹ See source cited *supra* note 97 and accompanying text.

¹⁴⁰ See *supra* notes 102–04 and accompanying text; Paust, Bound, *supra* note 36, at 389 n.73 (asserting that when an actor violates the law to change it, the actor remains a violator).

¹⁴¹ See Jones, *supra* note 95, at 74–76, 92–102, 106 (describing U.S. uncertainty in the 1790s concerning discretionary ratification, U.S. insistence that Spain adhere to a 1819 full powers, which incorporated the norm of mandatory ratification, and U.S. courts’ dedication in the nineteenth and even twentieth centuries to the idea that ratification is retroactive to the date of signature, an idea tied to the notion that ratification is a ministerial act); see also Moore, Unconstitutional Treaty-making, *supra* note 102, at 642 & n.256 (describing the U.S. judiciary’s difficulty in abandoning the norm that ratification was retroactive to the date of signature, notwithstanding the rule’s apparent origin in the ministerial nature of ratification).

¹⁴² See, e.g., 5 *Digest of International Law*, *supra* note 104, § 744, at 188–91; Jones, *supra* note 95, at 75–77.

¹⁴³ See Jones, *supra* note 95, at 77 (noting U.S. communications between 1817 and 1869 to other countries that “refusal or amendments by the Senate indicated no disrespect towards the government with whom the treaty had been negotiated”).

continued to surface into the twentieth century.¹⁴⁴ At the time the United States began deviating from mandatory ratification, mandatory ratification was under pressure, but the weight of authority indicates that deviation from the rule was not well accepted.

A second response to the departure from the law of mandatory ratification might be that America's adoption of a democratic government necessitated the departure. Certainly the evolution of CIL away from mandatory ratification correlates with the American and French Revolutions and the shift from monarchy to democracy.¹⁴⁵ Yet, at least during Confederation, the correlation does not appear to be necessary.¹⁴⁶ An agent can be commissioned and instructed by a collective as well as a unitary principal, and a collective principal can bind itself to the authorized acts of its agents like a unitary principal.¹⁴⁷ As detailed above, the Confederation Congress demonstrated this in issuing some full powers that promised ratification and some that did not. The Confederation

¹⁴⁴ *Id.* at 74–80.

¹⁴⁵ *Id.* at 12–17, 31–32, 74.

¹⁴⁶ But cf. *id.* at 13 (arguing that the change in full powers was a symptom of a change in the conception of treaty-making from “contract[ing] between princes” to “agreement [making] between States”). It is possible that the Senate’s constitutional power to advise and consent is inconsistent with mandatory ratification. Jones argues that “maintenance of the doctrine of obligatory ratification was impossible” under the Constitution as “the senate might frequently disagree with the President.” *Id.* at 15; see also 5 *Digest of International Law*, supra note 104, § 744, at 191 (arguing that “the full powers of [U.S.] ministers abroad are necessarily modified by the provisions of [the] Constitution and promise the ratification of treaties signed by them, only in the event of their receiving the constitutional sanction of our government”). But cf. Ralston Hayden, *The Senate and Treaties: 1789–1817*, at 4–9 (1920) (arguing that the Senate ratified a consular convention with France that had been signed before constitutional ratification in part because of the principle of mandatory ratification); *id.* at 31–34, 55–57 (documenting early Senate actions consistent with mandatory ratification). Yet it would be possible to defer signature until the Senate consented, or for the Senate to advise the President as to what it would accept prior to negotiation, at least reducing the incidence of disagreement between the President and Senate. See Moore, *Unconstitutional Treaty-making*, supra note 102, at 658–59; Hayden, supra, at 10 (noting that the United States could adhere to the law of mandatory ratification “[a]s long as the President negotiated treaties” with the Senate’s advice and consent, which is not how treaty-making developed in practice); Galbraith, supra note 104, at 267–68, 268 n.90 (noting Founding-era arguments for prenegotiation advice and consent or withholding signature to both adhere to the law of mandatory ratification and respect the Senate’s role in treaty-making); cf. Crandall, supra note 105, at 26 (noting that in 1785 negotiations with Spain, Congress prohibited Jay from signing a treaty “until approved by Congress”). Moreover, to the extent Jones is right, the Article II treaty-making process is an example of a constitutional mandate to depart from international law.

¹⁴⁷ This can be true even when the composition of the collective changes over time.

Congress's inconsistency suggests that Congress was not compelled to depart from the law of mandatory ratification by the Articles of Confederation as then understood.

Finally, one might assert that the Confederation Congress acted consistently with mandatory ratification when it made clear in full powers that ratification was reserved. This view was certainly asserted by the United States in the course of its departure from mandatory ratification. As referenced above, in protesting Spain's failure to ratify a treaty pursuant to unqualified full powers, the United States claimed the prerogative of discretionary ratification in light of its new constitutional structure and the corresponding reservation in its full powers.¹⁴⁸ Yet other evidence undercuts the United States' self-serving suggestion that the principle of mandatory ratification could be displaced by such a unilateral reservation. First, in 1794, Secretary of State Edmund Randolph opined that the duty to ratify could not be avoided by unilateral reservation. If a U.S. minister were "permitted to sign a treaty, 'no form of expression [could] be devised to be inserted in it which will not be tantamount to a stipulation to ratify or leave the matter as much at large as if he had no such power'" given the good faith obligation to ratify "a treaty which is stipulated to be ratified."¹⁴⁹ Second, objections attended efforts to escape mandatory ratification through qualified full powers. In the 1840s, France claimed the right of discretionary ratification with regard to a treaty with Britain, pointing out that the French full powers reserved ratification.¹⁵⁰ Britain apparently responded by "express[ing] the view that a refusal of ratification should be accompanied by a statement of good reasons."¹⁵¹

In short, although CIL evolves and although the United States' actions (including the alteration of its full powers) contributed to such an evolution, Congress's actions under Confederation contravened the lingering norm of mandatory ratification.

¹⁴⁸ Jones, *supra* note 95, at 75–77. Jones makes a generic statement that might be read to support this view. He says, full powers "[were] not the exclusive source of the agent's competence, which was governed by customary law, as supplemented and modified by the Full Powers issued for each negotiation." *Id.* at 32–33. In making this statement, however, Jones does not specifically address whether full powers that retain discretion to ratify may change CIL in a particular negotiation.

¹⁴⁹ 5 *Digest of International Law*, *supra* note 104, § 745, at 193 (quoting Letter from Edmund Randolph to President George Washington (May 6, 1794)).

¹⁵⁰ Jones, *supra* note 95, at 77.

¹⁵¹ *Id.*

2. *The Confederation Congress and Treaties*

The Confederation government also took liberties with international law in the treaty context. The line between permissible treaty interpretation and treaty violation is, in the absence of an authorized arbiter, difficult to discern. Yet the law of nations governing treaty interpretation at the time of the Founding provides a sense of when a particular reading of a treaty went too far. The law of nations¹⁵² at that time generally endorsed a textual approach to interpretation.¹⁵³ Vattel, for example, stated that “[i]t is not allowable to interpret what has no need of interpretation.”¹⁵⁴ Thus, “[w]hen a deed is worded in clear and precise terms,—when its meaning is evident, and leads to no absurd conclusion,—there can be no reason for refusing to admit the meaning which such deed naturally presents.”¹⁵⁵ Consistent with this principle, Vattel went on to state that neither party to a treaty “has a right to interpret the . . . treaty according to his own fancy.”¹⁵⁶ Rather, treaty interpretation aims “to discover what the . . . parties have agreed upon, . . . what has been promised and accepted.”¹⁵⁷ Interpretations that depart from the mutual agree-

¹⁵² That the contemporary law of nations addressed treaty interpretation is confirmed by a report from Secretary for Foreign Affairs Jay to the Confederation Congress in 1786, 4 Secret Journals, supra note 81, at 205, the language of which was included in a letter from Congress to the states that was adopted in 1787, id. at 332. These records explain that “[a]ll doubts, in cases between private individuals, respecting the meaning of a treaty . . . are in the first instance mere judicial questions” and courts are bound to resolve them “according to the rules and maxims established by the laws of nations for the interpretation of treaties.” Id. at 205 (citing October 13, 1786 report of John Jay to Congress); see also Andrew Tutt, Treaty Textualism, 39 Yale J. Int’l L. 283, 323–25, 329–36, 344–45, 348–49, 351–53, 355 (2014) (identifying instances in which advocates and judges turned to the law of nations governing treaty interpretation in pre- and early post-constitutional cases). Jay, anxious to see the Treaty of Peace with Britain observed by the states, argues that the state legislatures and even Congress lack power to interpret treaties in such cases, but he does not directly address Congress’s ability to depart from treaties by statute. See 4 Secret Journals, supra note 81, at 204 (citing October 13, 1786 report of John Jay to Congress); id. at 331 (citing April 13, 1787 letter from Congress to the States).

¹⁵³ See Tutt, supra note 152, at 286, 295–309; see also Letter from John Adams to John Jay (June 16, 1786), in 3 Emerging Nation, supra note 93, at 201, 203 (suggesting that the “Intention of the Contracting Parties” to a treaty must be discerned from the text of the treaty such that “any one who reads it may judge as well as one of the Plenipotentiaries”).

¹⁵⁴ Vattel, supra note 5, Book II, § 263 (emphasis omitted); see also id. Book II, § 287 (referring to this principle as an “incontestable maxim” that prohibits ready recourse to purposive interpretation); id. Book II, § 307 (repeating the maxim).

¹⁵⁵ Id. Book II, § 263.

¹⁵⁶ Id. Book II, § 265 (emphasis omitted).

¹⁵⁷ Id. Book II, § 268; see also id. Book II, §§ 270, 277, 280 (repeating that proper interpretation seeks the intent of the parties).

ment reflected in the treaty's text constitute treaty violations. As Vattel put it, nations violate "the faith of treaties" no less through "[un]fair interpretation, than by an open infraction."¹⁵⁸ In light of these principles, efforts to depart from the mutual agreement reflected in a treaty's text to a self-serving interpretation of that text would amount to treaty violations.

Suspect interpretations of treaties appear several times under the Articles of Confederation: with regard to the U.S.-France Treaties of Alliance and Commerce, the U.S.-Britain Treaty of Peace, and the U.S.-Netherlands Treaty of Commerce. While the number of questionable interpretations offered here might not impress today, given the thousands of treaties the United States has entered, the newly independent United States had entered only a handful of treaties before the Articles of Confederation were replaced by the Constitution. As a result, these examples are proportionally telling.

a. U.S.-France Treaties of Amity and Commerce and of Alliance

The first treaty the United States entered was a 1778 treaty of amity and commerce with France.¹⁵⁹ Its second, a U.S.-France treaty of alliance, was entered the same day.¹⁶⁰ France's aid in the Revolutionary War was critical in bringing Britain to the peace table. In early 1782, a congressional committee comprised of Mr. Lovell, Mr. Carroll, and Mr. Madison proposed that those selected to negotiate peace with Great Britain communicate certain U.S. interests to France so that France could help secure those interests.¹⁶¹ The first committee's suggestions were then transmitted to a second committee, comprised of Mr. Carroll, Mr. Randolph, and Mr. Montgomery, which enlarged the report by gathering facts that the U.S. negotiators might use to support the identified U.S. interests.¹⁶² The committees' work reflects something of a realist view of the law of nations and an effort to interpret treaty obligations to U.S. advantage.

¹⁵⁸ *Id.* Book II, § 269.

¹⁵⁹ See 2 Secret Journals, *supra* note 81, at 59–80; see also John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 *Colum. J. Transnat'l L.* 302, 307 (2013) (noting that "[t]he United States entered its first [friendship, commerce and navigation] treaty with France in 1778").

¹⁶⁰ See 2 Secret Journals, *supra* note 81, at 82–89.

¹⁶¹ See 3 *id.* at 150–61.

¹⁶² See *id.* at 161–201.

Both the first and second committees identified fishing rights as a key U.S. interest to press during peace negotiations.¹⁶³ At the same time, both committees recognized that the law of nations concerning fisheries was grounded in power and was contestable. The first committee noted that the law of nations recognized exclusive rights within three leagues of a state's shore, but common rights (which could be relinquished by treaty or by inaction in the face of exclusion) were recognized beyond that.¹⁶⁴ England, the committee reasoned, could not deny the United States its law of nations rights without injuring its own honor and sovereign interests.¹⁶⁵ But England could not be trusted to adhere to a three-league limit. Thus, if England attempted to exclude the United States from the important fisheries off Newfoundland by arguing that the law of nations recognizes exclusive rights beyond three leagues, the committee offered an argument to counter that claim: "[T]hat the fisheries . . . on the banks of Newfoundland . . . [were] so vast . . . [that they] might with much greater reason be deemed appurtenant to the whole continent of North America than to the inconsiderable portion of it held by Great Britain."¹⁶⁶ Moreover, the committees did not rest the case for fishing rights solely on the law of nations, but on U.S. interests as

¹⁶³ See *id.* at 156–59, 161–67. The securing of fishery rights was of prime importance to the Massachusetts delegates, who in late 1781 wished to rescind France's role as "master of the [peace] negotiations" and to "demand[] the admission of the Americans to the fisheries as a condition *sine que non* of the treaty of peace." Letter from Chevalier de la Luzerne to Comte de Vergennes (Jan. 1, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 273, 274; see also 2 Farrand, *supra* note 4, at 541 (Gerry of Massachusetts, identifying "the fisheries" as among "the dearest interests [that might] be at stake" in peace treaties); *id.* at 548 (Governor Morris of Pennsylvania, describing "the Fisheries [and navigation rights on] the Mississippi" as "the two great objects of the Union"). While the majority in Congress apparently did not wish to rescind the trust it had placed in France, delegates were aware that they might be drawn by popular concern for fishery rights to take a different stance. See Letter from Chevalier de la Luzerne to Comte de Vergennes (Jan. 1, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 273, 276–77; Letter from Robert R. Livingston to Benjamin Franklin (Jan. 7, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 285, 290–91.

¹⁶⁴ See 3 *Secret Journals*, *supra* note 81, at 156–57; see also Letter from Robert R. Livingston to Benjamin Franklin (Jan. 7, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 285, 289–90 (recognizing that "the Laws of Nations allow [states] to appropriate" the sea within a certain distance of their coasts, but recognize common rights beyond that in the course of arguing for U.S. rights to ply the Newfoundland fisheries). The Continental Congress had similarly resolved to respect Britain's exclusive fishing rights within three leagues from shore, "if a nearer distance cannot be obtained by negotiation." 2 *Secret Journals*, *supra* note 81, at 208.

¹⁶⁵ See 3 *Secret Journals*, *supra* note 81, at 158.

¹⁶⁶ *Id.* at 157.

well.¹⁶⁷ The committees noted how critical the fisheries were to U.S. prosperity.¹⁶⁸ Similarly, the first committee declined to rely solely on English recognition of the law of nations to secure U.S. fishing interests, hoping instead for “a stipulation on the part of Great Britain, not to molest them in the common use of the fisheries.”¹⁶⁹ The committees’ positions reflect a degree of realism with regard to the law of nations.

The second committee expanded the first committee’s work by citing Britain’s uneven practice in asserting exclusive fishing rights in order to undermine expansive British claims to the Newfoundland fisheries.¹⁷⁰ More important for our purposes, the committee recognized that certain provisions in the U.S.-France “treaty of amity and commerce” might “from a little ambiguity in their language” be read “to forbid [the United States from] insist[ing] on a participation of the fisheries on the banks of Newfoundland.”¹⁷¹ In particular, the treaty enjoined “the United States and their citizens not to disturb [French] subjects . . . in the exercise of the right of fishing on the banks of Newfoundland, nor in their indefinite and exclusive privileges on the coast of the island of that name.”¹⁷² France took the position that the treaty guaranteed them exclusive fishing rights.¹⁷³ With more than a little creativity, the second committee read the treaty as allowing U.S. citizens to “fish, if they do not disturb” France’s “indefinite and exclusive privileges.”¹⁷⁴ The French Minister to

¹⁶⁷ See *id.* at 158 (first committee, noting the importance of the Newfoundland fisheries to the survival and commerce of “the inhabitants of a considerable part of the United States”); *id.* at 165 (second committee, same); see also *id.* at 243, 548 (later report adopted by Congress which refers to “participation of the fisheries . . . not only as . . . indubitable rights, but as essential to . . . prosperity”). These sorts of arguments were not limited to members of the committee. See, e.g., Letter from Chevalier de la Luzerne to Comte de Vergennes (Jan. 1, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 273, 274–75 (summarizing various policy arguments made in support of fishing rights sought by the Eastern states and especially Massachusetts).

¹⁶⁸ See 3 *Secret Journals*, *supra* note 81, at 158, 165.

¹⁶⁹ *Id.* at 158. This hope is reminiscent of Vattel’s observation that “the most prudent nations endeavour to procure by treaties those succours and advantages which the law of nature would insure to them, if it were not rendered ineffectual by the pernicious counsels of a false policy.” Vattel, *supra* note 5, Book II, § 152. That hope was realized in Article III of the Treaty of Peace with Britain. See 3 *Secret Journals*, *supra* note 81, at 334.

¹⁷⁰ See 3 *Secret Journals*, *supra* note 81 at 161–64.

¹⁷¹ *Id.* at 165.

¹⁷² *Id.* at 166.

¹⁷³ See Richard B. Morris, *The Peacemakers: The Great Powers and American Independence* 383 (1965).

¹⁷⁴ 3 *Secret Journals*, *supra* note 81, at 166; see also Letter from Chevalier de la Luzerne to Comte de Vergennes (Jan. 1, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 273, 276 (sum-

the United States was not persuaded. He rejected this interpretation, arguing that the treaty would have included a reciprocal command that France not disturb U.S. fishing rights had the treaty recognized any American rights.¹⁷⁵

Congress did not relent. The desire to secure fishing rights led members of Congress to argue that France was obligated by treaty to conquer England's portion of fishing rights "on behalf of the Americans."¹⁷⁶ The French Minister described this argument as "so false and so contrary to the letter and to the spirit of our treaties that it was easy . . . to refute it."¹⁷⁷ Notwithstanding French opposition to these claims, the Americans pushed for and obtained a guarantee of U.S. fishing rights in the preliminary articles of the Treaty of Peace between the United States and Britain.¹⁷⁸

Not only did the terms of these articles stretch the treaties with France, but the process of entering them did as well. Article VIII of the Treaty of Alliance provided that "[n]either [the United States nor France] shall conclude either truce or peace, with Great Britain, without the formal consent of the other first obtained."¹⁷⁹ Both Congress and the U.S. ministers (Adams, Franklin, Jay, and Laurens) repeatedly affirmed their commitment to this obligation. Congress went so far as to instruct its negotiating ministers "to make the most candid and confidential communications upon all subjects to the [French] ministers . . . to undertake nothing in the negotiations for peace or truce without their knowledge and concurrence; and ultimately to govern [themselves] by [the French ministers'] advice and opinion."¹⁸⁰ Similarly, Congress not

marizing a similar interpretation of the treaty by Mr. Lovell, a member of the first committee).

¹⁷⁵ See Letter from Chevalier de la Luzerne to Comte de Vergennes (Jan. 1, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 273, 276–77.

¹⁷⁶ *Id.* at 277. Congress had previously sought to clarify that a war provoked by British interference with American fishing rights would trigger the treaty of alliance between the United States and France. See 2 *Secret Journals*, *supra* note 81, at 232–35.

¹⁷⁷ Letter from Chevalier de la Luzerne to Comte de Vergennes (Jan. 1, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 273, 277.

¹⁷⁸ See, e.g., Morris, *supra* note 173, at 315, 383 (France's position); 3 *Secret Journals*, *supra* note 81, at 334 (preliminary peace treaty).

¹⁷⁹ Treaty of Alliance Between the United States and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1778, *in* 8 *The Public Statutes at Large of the United States of America* 6, 8 (Richard Peters ed., Boston, Little, Brown & Co. 1867).

¹⁸⁰ 2 *Secret Journals*, *supra* note 81, at 446; see also Morris, *supra* note 173, at 289, 349–51 (noting the instruction and unsuccessful efforts in Congress to eliminate it); 2 *Secret Journals*, *supra* note 81, at 192–93, 195–96 (documenting French protest and congressional rejec-

only “resolved unanimously [t]hat they will not enter into the discussion of any overtures for pacification, but in *confidence* and in *concert* with [France,]” but “directed that a copy of the . . . resolution . . . be furnished to the” French Minister, “be sent to all the Ministers of the United States in Europe, [and be] published to the world.”¹⁸¹

The American ministers expressed their commitment to a joint peace as well. Benjamin Franklin vigorously rebuffed the British suggestion of a peace treaty that excluded France, explaining that “America has too much understanding and is too sensible of the Value of the World’s good Opinion to forfeit it” through disloyalty to its “first Friend” France, with whom America had agreed, by treaty, not to conclude a separate peace.¹⁸² Jay affirmed not only “that propositions for a *separate* [peace]

tion of the suggestion that the U.S.-France treaty of alliance did not require French consent before the United States agreed to peace); Letter from Robert R. Livingston to Benjamin Franklin (Jan. 6, 1783), *in* 2 *Emerging Nation*, supra note 93, at 64, 65 (urging Franklin, consistent with Congress’s instructions, to let no division occur between him and France).

¹⁸¹ See Letter from Robert R. Livingston to the President of Congress (Mar. 18, 1783), *in* 1 *Emerging Nation*, supra note 93, at 790, 790; see also Morris, supra note 173, at 17, 440 (noting Congress’s “timeworn assurances not to ‘enter into the discussion of any overtures for pacification, but in confidence and in concert with’” France); *id.* at 268–69 (discussing Congress’s rejection of a 1782 British delegation seeking peace); Congressional Committee Report (Oct. 3, 1782), *in* 1 *Emerging Nation*, supra note 93, at 596, 597 (noting Congress’s sense that France’s “declaration to the British Minister . . . that [it] will neither treat nor terminate any Negotiation unless the interests of [its] Allies & Friends shall be considered and determined, is entirely correspondent to the part which these United States are resolved to take in any Negotiation for peace”); Congressional Resolution (May 31, 1782), *in* 1 *Emerging Nation*, supra note 93, at 413, 413 (congressional resolution that the Secretary for Foreign Affairs communicate to France “assurances which they have so often and so sincerely repeated of a reciprocal and equal resolution to adhere in every event to the principles of the Alliance and to harken to no propositions for peace which are not perfectly conformable thereto”).

¹⁸² Letter from Benjamin Franklin to David Hartley (Jan. 15, 1782), *in* 1 *Emerging Nation*, supra note 93, at 299, 300–01; see also, e.g., Morris, supra note 173, at 255–57, 261–62, 271, 273, 276 (describing how Franklin repeatedly rebuffed overtures for a separate peace); *id.* at 335–36 (noting Franklin’s reluctance in September 1782 to violate Congress’s instructions by consenting to Jay’s plan to provide the British negotiator with a letter addressing British recognition of U.S. equality); Letter from Benjamin Franklin to Henry Laurens (Apr. 12, 1782), *in* 1 *Emerging Nation*, supra note 93, at 332, 333 (noting that U.S. “Treaties, and [its ministers’] Instructions, as well as the honor and interest of [the] Country forbid” entering a treaty with Britain “separately and quitting [the] present Alliance” with France); Letter from Thomas Grenville to Charles James Fox (May 10, 1782), *in* 1 *Emerging Nation*, supra note 93, at 381, 381–82 (recording Benjamin Franklin’s repeated “professions of a strict adherence to the treaties America had made”); Letter from Thomas Grenville to Lord Shelburne (July 9, 1782), *in* 1 *Emerging Nation*, supra note 93, at 459, 460 (recounting that Franklin had read to Grenville the May 16, 1782, resolutions “that passed unanimously both houses of assembly in Maryland, against making any peace but in concert with France”); Richard Os-

ought not to be listened to,” but also that the United States should not even give an appearance to the contrary by permitting British emissaries into the United States.¹⁸³ And Adams wrote in his journal that “[o]ur Treaty with France must & should be sacredly fulfilled.”¹⁸⁴

wald’s Minutes of Conversations with Benjamin Franklin and John Jay (Aug. 7, 1782), *in* 1 *Emerging Nation*, supra note 93, at 505, 508–09 (noting that, in light of the U.S.-France Treaty of Alliance, Franklin “could not see how” the United States and Britain could conclude their naval conflict as they had their land conflict until Britain also entered a treaty with France); Letter from Benjamin Franklin to Dr. Samuel Cooper (Dec. 26, 1782), *in* 1 *Emerging Nation*, supra note 93, at 736, 737 (lamenting the anti-French sentiment of some Americans and noting the importance of America’s tie with France to America’s international standing and safety from England). But cf. Morris, supra note 173, at 262–64, 269–70 (noting a secret proposal by Franklin to the British); *id.* at 272–74 (noting British negotiators’ reports that Franklin understood that the U.S.-France treaty was over once independence was obtained even as Franklin spoke of enduring obligations to France); Letter from Alleyne Fitzherbert to Thomas Townshend (Aug. 8, 1782), *in* 1 *Emerging Nation*, supra note 93, at 520, 521 (believing that Franklin was untruthful in leading other British ministers “to Understand . . . that though his committ[m]ents were engaged to enter into no peace or truce with [Great Britain] but with ye consent of France, yet that when the independency of America should be acknowledged by us, they should consider that engagement as an encumbrance which they should get rid of as soon as they honourably might”); Letter from Lord Shelburne to Richard Oswald (May 21, 1782), *in* 1 *Emerging Nation*, supra note 93, at 401, 401–02 (postulating that if Benjamin Franklin learned in negotiations for peace with Britain that France did not sincerely seek a peace that Britain could accept that “he will consider himself and his Constituents freed from the Ties which will appear to have been founded upon no Ideas of common Interest”); Letter from Lord Shelburne to Richard Oswald (June 30, 1782), *in* 1 *Emerging Nation*, supra note 93, at 448, 449 (noting that Britain had “adopted [Franklin’s] idea of . . . treating separately with each Party”); Letter from Richard Oswald to Lord Shelburne (July 11, 1782), *in* 1 *Emerging Nation*, supra note 93, at 465, 466–68 (suggesting that Franklin was willing to negotiate a treaty of peace with Britain through a separate commission and felt “restrained by [the U.S.] Alliance with France only in the point of Ratification,” though Franklin apparently coordinated closely with France in negotiations).

¹⁸³ Letter from John Jay to Robert R. Livingston (June 28, 1782), *in* 1 *Emerging Nation*, supra note 93, at 442, 442–43; see also Letter from Richard Oswald to Thomas Townshend (Sept. 10, 1782), *in* 1 *Emerging Nation*, supra note 93, at 563, 564 (reporting Jay’s statement that the United States “were bound by Treaty; which their Constituents were determined honestly and faithfully to fulfill,” to negotiate under France’s umbrella until Britain recognized U.S. independence). At the same time, Jay loathed the congressional instructions to coordinate with France in the negotiations. See Morris, supra note 173, at 245–46.

¹⁸⁴ John Adams’ Journal (Nov. 3, 1782), *in* 1 *Emerging Nation*, supra note 93, at 632, 632; see also Morris, supra note 173, at 198 (noting Adams’s denial of “any sympathy” for “the notion of a separate peace”). When Adams arrived in France in 1780 as the sole American peace negotiator to Britain, he had similarly represented that he would take no significant steps without consulting France. Morris, supra note 173, at 194. But cf. *id.* at 255–56 (describing uncertainty as to whether Adams had rebuffed British feelers as to a separate peace in 1782). Adams reiterated the U.S.-France alliance’s importance to U.S. peace and security even after the incident with the preliminary articles and even though Adams did not trust that the French would promote U.S. interests. See Letter from John Adams to Robert R. Living-

Yet as early as 1780, Jay rattled Vergennes, the French Foreign Minister, by threatening to go “to England to sound out that government on a separate peace.”¹⁸⁵ And in 1782, the American ministers followed through on that threat by unilaterally finalizing preliminary articles of a peace treaty with Britain,¹⁸⁶ by including in those articles a secret article,¹⁸⁷ and by expressing willingness to proceed to peace without France if necessary.¹⁸⁸ Jay led out in pursuing a separate agreement due to mistrust that France was pursuing America’s interests.¹⁸⁹ Jay likewise had a hand in crafting the secret article that would accompany the separate agreement.¹⁹⁰ Should Britain seize West Florida, the article would grant

ston (July 10, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 876, 876–78 (French antagonism to U.S. interests); Letter from John Adams to Robert R. Livingston (July 11, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 878, 878–79 (importance of U.S.-French alliance). Laurens apparently was the most reluctant of the commissioners “to sign the preliminary articles without consulting the French,” but he arrived in Paris only the day before signature. Morris, *supra* note 173, at 377; see also *id.* at 265–67 (discussing Laurens’s resistance to a separate peace).

¹⁸⁵ Morris, *supra* note 173, at 89.

¹⁸⁶ See, e.g., *id.* at 310, 345–46, 348, 374, 380, 382, 399, 405; Letter from John Jay to Robert R. Livingston (Nov. 17, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 662, 673 (noting that proposed treaty articles between Britain and the U.S. were not shared with the French Foreign Minister Vergennes). But cf. Morris, *supra* note 173, at 295 (noting that earlier in the negotiation process, Franklin had shared documents from the British with Vergennes); Letter from John Adams to Robert R. Livingston (July 9, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 874, 875 (arguing that Adams and Franklin communicated the substance of the preliminary negotiations and articles to the French).

¹⁸⁷ See Morris, *supra* note 173, at 344–46, 381–82.

¹⁸⁸ See *id.* at 302, 360; see also Letter from David Hartley to Charles James Fox (Apr. 27, 1783), *in* 2 *Emerging Nation*, *supra* note 93, at 93, 94 (asserting that “Vergennes knows very well that the American Ministers do not think themselves bound to withhold their signatures to the definitive treaty with Great Britain until France may give any formal consent”).

¹⁸⁹ See, e.g., Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 *Duke L.J.* 1127, 1179 n.183 (2000).

¹⁹⁰ Morris, *supra* note 173, at 344–46. Interestingly, if not convincingly, even as Jay pursued both a separate treaty and a secret article, he affirmed the importance of U.S. commitment to the treaty of alliance. He wrote, “we should [not] deviate in the least from our Treaty with France; our Honour and our Interest is concerned in inviolably adhering to it,” but “if we lean on her love of liberty, her affection for America, or her disinterested Magnanimity, we shall lean on a broken reed, that will sooner or later pierce our Hands.” Letter from John Jay to Robert R. Livingston (Nov. 17, 1782), *in* 1 *Emerging Nation*, *supra* note 93, at 662, 674–75. The realism of Jay’s treaty commitment was further manifest by his suggestion to the British that they ought, by recognizing independence, “to cut the Cords, which tied [the United States] to France” for although the United States “were determined faithfully to fulfill [their] Treaty” with France, the United States might be more willing to follow their interpretation rather than the French interpretation of that treaty. *Id.* at 668; see also Morris, *supra* note 173, at 333 (discussing Jay’s proposal to the British).

the British a more favorable border than the United States was prepared to give Spain.¹⁹¹ This secret article was placed after the treaty¹⁹² and, when the preliminary articles of the treaty were signed on November 30, 1782, the secret article was signed separately.¹⁹³

The articles were concluded without French consent. Franklin sent Vergennes a note regarding the preliminary articles the night before they were signed and shortly thereafter transmitted a copy of the articles, but omitted the separate article.¹⁹⁴ Adams “clumsily . . . disclosed that the agreement covered more than was in Vergennes’ copy” when “the Duc de La Vauguyon paid him a call.”¹⁹⁵ Adams apparently showed him the preliminary treaty and was able to prevent him from seeing the substance of the secret article but not the label, “Separate Article.”¹⁹⁶ While the preliminary articles opened with the assurance that the treaty was “not to be concluded until terms of a peace shall be agreed upon between Great Britain and France,”¹⁹⁷ Vergennes had expressed his desire “that all the preliminaries [be] signed simultaneously”¹⁹⁸ although negotiated separately.¹⁹⁹ Moreover, the preliminary articles were not a mere draft; they were “to be inserted in, and to constitute the treaty of peace, proposed to be concluded between the crown of Great Britain and the said United States.”²⁰⁰

Vergennes protested to Franklin that the U.S. ministers had “concluded . . . preliminary articles without informing” the French, contrary to Congress’s instructions.²⁰¹ Two days later, Franklin replied by acknowledging that “in not consulting [France] before [the preliminary articles] were signed, we have been guilty of neglecting a Point of *Bienséance*

¹⁹¹ Morris, *supra* note 173, at 345.

¹⁹² *Id.* at 365.

¹⁹³ *Id.* at 381.

¹⁹⁴ *Id.* at 382.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 3 Secret Journals, *supra* note 81, at 331.

¹⁹⁸ Morris, *supra* note 173, at 275, 337; see also Letter from John Jay to Robert R. Livingston (July 19, 1783), in 1 Emerging Nation, *supra* note 93, at 886, 888 (noting that Vergennes had “often intimated . . . that we should all sign at the same Time and Place”).

¹⁹⁹ Morris, *supra* note 173, at 275, 277 (noting how Vergennes had approved separate negotiation). But cf. *id.* at 197 (noting how Vergennes had, in 1780, rejected Adams’s request to negotiate directly with Britain).

²⁰⁰ 3 Secret Journals, *supra* note 81, at 331.

²⁰¹ Letter from Comte de Vergennes to Benjamin Franklin (Dec. 15, 1782), in 1 Emerging Nation, *supra* note 93, at 720, 720.

[decorum],” but he assured Vergennes that the preliminary articles contained nothing “contrary to the Interests of France” and that “no Peace [was] to take Place between [the United States] and England till [France had] concluded [hers].”²⁰² He expressed the hope that the United States’ “Indiscretion” would “be excused.”²⁰³ Another two days later, the French Minister, having read the preliminary articles, noted how favorable they were to America, but nonetheless expressed his surprise at the American ministers who, “following the instructions of Congress, . . . should have done nothing without [French] participation.”²⁰⁴

Vergennes did not limit his rebuke to the departure from congressional instructions, however. In signing unilaterally, the American representatives had broken “the promise [the United States and France] had made each other only to sign conjointly,”²⁰⁵ suggesting that France would “be ill-paid for what [it had] done for the United States.”²⁰⁶ While Vergennes originally instructed his subordinate to bring the matter to the attention of “the most influential members of Congress,”²⁰⁷ he later withdrew that instruction on assurance that Congress would learn of the incident from the American representatives, and perhaps as a result of Franklin’s suggestion that airing the grievance might confirm the English belief that England had divided the allies.²⁰⁸ Franklin also assured the French Minister that both Congress and the American ministers were committed “to

²⁰² Letter from Benjamin Franklin to Comte de Vergennes (Dec. 17, 1782), *in* 1 *Emerging Nation*, supra note 93, at 721, 722. For ways in which the preliminary articles harmed France’s interests, notwithstanding Franklin’s assertion, see, for example, Morris, supra note 173, at 383, 399.

²⁰³ Letter from Benjamin Franklin to Comte de Vergennes (Dec. 17, 1782), *in* 1 *Emerging Nation*, supra note 93, at 721, 722.

²⁰⁴ Letter from Comte de Vergennes to Chevalier de la Luzerne (Dec. 19, 1782), *in* 1 *Emerging Nation*, supra note 93, at 727, 727.

²⁰⁵ *Id.* at 728. In a letter to Chevalier de la Luzerne, Vergennes noted how he had been left in the dark regarding the details of British-American negotiations and described the conclusion of the preliminary articles as “most brusque, most unexpected and . . . most extraordinary” as well as “a breach of procedure and of respect of which there exist few examples.” Letter from Comte de Vergennes to Chevalier de la Luzerne (July 21, 1783), *in* 1 *Emerging Nation*, supra note 93, at 889, 892. He believed Congress shared that perspective. *Id.*

²⁰⁶ Letter from Comte de Vergennes to Chevalier de la Luzerne (Dec. 19, 1782), *in* 1 *Emerging Nation*, supra note 93, at 727, 729.

²⁰⁷ *Id.*

²⁰⁸ See Morris, supra note 173, at 384; Letter from Comte de Vergennes to Chevalier de la Luzerne (Dec. 21, 1782), *in* 1 *Emerging Nation*, supra note 93, at 731, 731. Vergennes’s subordinate, Chevalier de la Luzerne, nonetheless brought Vergennes’s disappointment to Congress’s attention. See Morris, supra note 173, at 441; James Madison’s Notes of Debates (Mar. 26, 1783), *in* 1 *Emerging Nation*, supra note 93, at 808, 808–09.

their Engagements” and “would renounce [peace] rather than neglect the obligations they [had] to the King and the gratitude they owe him.”²⁰⁹ Ultimately, the armistice between the United States and Britain was carefully tied to the armistice between Britain, France, and Spain.²¹⁰ Yet, there is no question that the separately signed preliminary articles, and especially the separate article, departed from the U.S.-France Treaty of Alliance.

The American ministers’ deviations from the Treaty of Alliance cannot be assigned, in the first instance, to Congress. As noted above, Congress’s instructions to its ministers were to coordinate closely with France in the peace negotiations.²¹¹ But the deviations can be attributed to Jay—a president of the Continental Congress, Secretary for Foreign Affairs, author of the *Federalist Papers* (including a paper advocating for treaties’ status as supreme law of the land²¹²), and first Chief Justice of the U.S. Supreme Court, who is generally perceived as one of the great Founding internationalists; to Franklin—an ambassador, member of the Continental Congress, member of the Constitutional Convention, and signer of the Constitution; and to Adams—a member of the Continental Congress and President and Vice President of the United States.

Moreover, when Congress considered the ministers’ acts, there were some who were not disturbed.²¹³ They proffered various justifications:

²⁰⁹ Letter from Comte de Vergennes to Chevalier de la Luzerne (Dec. 21, 1782), *in* 1 *Emerging Nation*, supra note 93, at 731, 731. A declaration from the American ministers was also drafted, clarifying that signature of the preliminary articles “will change nothing in the position of the United States toward England so long as peace between [France] and [Britain] is not concluded,” and emphasizing that American “honor and interests equally demand that it establish itself in the general opinion as placing above all else the fidelity and constancy of its engagements.” Declaration of the American Plenipotentiaries (Jan. 20, 1783), *in* 1 *Emerging Nation*, supra note 93, at 757, 757–58. Apparently, however, the declaration was never signed. See Morris, supra note 173, at 384–85.

²¹⁰ See British Declaration of Armistice with the United States, Gr. Brit.-U.S., Jan. 20, 1783, *in* 1 *Emerging Nation*, supra note 93, at 756, 756–57.

²¹¹ See 2 *Secret Journals*, supra note 81, at 446 (directing the commissioners to candidly communicate with the French ministers on all subjects, “to undertake nothing in the negotiations for peace or truce without their knowledge and concurrence; and ultimately to” act according to “their advice and opinion”).

²¹² See *The Federalist No. 64* (Jay), 358, 361–64 (Clinton Rossiter ed., 1999).

²¹³ See Letter from Samuel Osgood to John Adams (Dec. 7, 1783), *in* 7 *Letters of Members of the Continental Congress* 378, 383 (Edmund C. Burnett ed., 1934, reprinted 1963) (describing the mixed reactions of members of Congress). But cf. Morris, supra note 173, at 443 (describing Congress as responding with a “sullen temper . . . save for a few generous spirits”); Letter from Chevalier de la Luzerne to Comte de Vergennes (Mar. 26, 1783), *in* 1 *Emerging Nation*, supra note 93, at 811, 812 (reporting to the French Minister that “most of

the ministers had secured favorable treaty terms, the French Minister had sanctioned separate negotiations obviating any obligation to include the French in those negotiations, the French had triggered the need for secrecy by sacrificing U.S. interests in peace negotiations, communicating the secret article would “rather injure than relieve our national honour,” and the secret article was, in any event, none of France’s business.²¹⁴ Other members of Congress, as well as the Secretary for Foreign Affairs, were more concerned. They lamented how the ministers’ actions had played into British hands to the detriment of the U.S.-France alliance.²¹⁵ James Wilson specifically opined that “signing of the preliminary articles without [France’s] previous consent” violated “the spirit of the treaty with France.”²¹⁶ And several expressed concern for the nation’s reputation²¹⁷ and endorsed revealing the secret article.²¹⁸ Ultimately, the matter was referred to a committee.²¹⁹ Although the Secretary for

the members of” Congress felt “extreme pain” at “the signing of the provisional articles without [his] participation”); Letter from Comte de Vergennes to Chevalier de la Luzerne (July 21, 1783), *in* 1 *Emerging Nation*, supra note 93, at 889, 892 (noting Congress’s “intention of dealing severely with its representatives,” which placated the King of France).

²¹⁴ See James Madison’s Notes of Debates (Mar. 19, 1783), *in* 1 *Emerging Nation*, supra note 93, at 793, 793–800 (Wolcot, Clarke, Rutledge, Williamson, Lee, and Higginson). Others who were more concerned still commended the work of the ministers. See *id.* at 796–98 (Hamilton and Wilson). Indeed, Hamilton independently sent a letter to Jay, congratulating him on the success of the negotiations and omitting any reference to the ministers’ secretive behavior. See Letter from Alexander Hamilton to John Jay (July 25, 1783), *in* 1 *Emerging Nation*, supra note 93, at 898, 898–99.

²¹⁵ See Letter from Robert R. Livingston to the President of Congress (Mar. 18, 1783), *in* 1 *Emerging Nation*, supra note 93, at 790, 790–93; James Madison’s Notes of Debates (Mar. 19, 1783), *in* 1 *Emerging Nation*, supra note 163, at 793, 794, 796–800 (Clarke, Mercer, Hamilton, and Madison).

²¹⁶ James Madison’s Notes of Debates (Mar. 19, 1783), *in* 1 *Emerging Nation*, supra note 93, at 793, 798 (Wilson).

²¹⁷ See *id.* at 793–800 (Mercer, Hamilton, and Madison); Letter from Robert R. Livingston to the President of Congress (Mar. 18, 1783), *in* 1 *Emerging Nation*, supra note 93, at 790, 792; Letter from Robert R. Livingston to the American Peace Commissioners (Mar. 25, 1783), *in* 1 *Emerging Nation*, supra note 93, at 806, 807; Letter from Robert R. Livingston to Benjamin Franklin (Mar. 26, 1783), *in* 1 *Emerging Nation*, supra note 93, at 810, 810.

²¹⁸ See James Madison’s Notes of Debates (Mar. 19, 1783), *in* 1 *Emerging Nation*, supra note 93, at 793, 793–800 (Mercer, Hamilton, Peters, Wilson, and Madison); Letter from Robert R. Livingston to the President of Congress (Mar. 18, 1783), *in* 1 *Emerging Nation*, supra note 93, at 790, 792–793.

²¹⁹ James Madison’s Notes of Debates (Mar. 19, 1783), *in* 1 *Emerging Nation*, supra note 93, at 793, 800.

Foreign Affairs unilaterally sent a rebuke to the American ministers,²²⁰ to which the ministers replied,²²¹ the matter quickly faded from Congress's view in light of the signing of preliminary articles between Brit-

²²⁰ See Letter from Robert R. Livingston to the American Peace Commissioners (Mar. 25, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 806, 806–08 (expressing “no little pain at the distrust manifested” by the concealed signing of the preliminary articles and by the secret article); see also Letter from Robert R. Livingston to Benjamin Franklin (Mar. 26, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 810, 810 (briefly expressing regret at the ministers’ concealment from France, while referring to his March 25 letter for more on the subject). Morris, with possible exaggeration, characterizes Livingston’s letter as “a severe dressing down.” Morris, *supra* note 173, at 443.

²²¹ Adams, Jay, Franklin, and the ministers together replied to Livingston on the matter. See Letter from John Adams to Robert R. Livingston (July 9, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 874, 874–76; Letter from the American Peace Commissioners to Robert R. Livingston (July 18, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 882, 882–86; Letter from John Jay to Robert R. Livingston (July 19, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 886, 886–89; Letter from Benjamin Franklin to Robert R. Livingston (July 22, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 894, 894–96; see also Morris, *supra* note 173, at 444–45. Adams responded that Livingston’s reproof was “not well adapted to give spirits to a melancholy man, or to cure one sick of a fever.” Letter from John Adams to Robert R. Livingston (July 9, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 874, 874. Together the letters sought to justify the ministers’ actions by asserting (a) the impossibility of negotiating with the British while “communicat[ing] every, the minutest, thing to” France, who, though bound by the same treaty, did not communicate with the American ministers, *id.* at 875; Letter from John Jay to Robert R. Livingston (July 19, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 886, 889; (b) that an immediate, unilateral signature was necessary to obtain the favorable terms negotiated and to stop the war, in part because France did not support the claims the United States had advanced, Letter from John Adams to Robert R. Livingston (July 9, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 874, 875–76; Letter from John Jay to Robert R. Livingston (July 19, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 886, 886–88; (c) that the secret article was part of a quid pro quo by which the United States was to strengthen claims to certain lands, Letter from the American Peace Commissioners to Robert R. Livingston (July 18, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 882, 883; (d) that disclosure of the article would have hindered peace prospects between Britain and Spain and required France to act against American interest, even though France had no interest in the article and no treaty right to block the article’s negotiation, *id.* at 882, 883–84; (e) that signature of the preliminary articles without France’s knowledge did not violate the treaty, Letter from John Jay to Robert R. Livingston (July 19, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 886, 888; (f) that the preliminary articles did not harm French interests, should please her, and would not become effective until France reached peace with Britain, Letter from the American Peace Commissioners to Robert R. Livingston (July 18, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 882, 884; Letter from Benjamin Franklin to Robert R. Livingston (July 22, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 894, 894; and (g) that the ministers would never wish to sacrifice national faith and honor for convenience, Letter from the American Peace Commissioners to Robert R. Livingston (July 18, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 882, 884. According to Morris, Adams and Jay did not soon forgive the actions of “their critics in Congress.” Morris, *supra* note 173, at 443–44.

ain, France, and Spain, as well as an armistice among all belligerents.²²² Congress formally ratified the preliminary articles on April 15, 1783.²²³

Interestingly, the commissioners' actions resurfaced in the Constitutional Convention when Colonel Mason, urging the Convention to depart from the limited mandate it had received, praised the commissioners for "boldly disregard[ing] the improvident shackles of [Congress] . . . [to] give[] to their Country an honourable & happy peace."²²⁴ "[I]nstead of being censured for the transgression of their powers," Mason continued, the commissioners "had raised to themselves a monument more durable than brass."²²⁵

Jay's delinquent behavior with regard to the U.S.-France Treaty of Alliance apparently did not end with the Treaty of Peace with Britain. In 1788, the French Minister of Foreign Affairs complained to the French Ambassador to the United States of "Jay's opinion that the alliance between [France] and the United States no longer exists," an opinion that "singularly astonished" "[t]he King and his council."²²⁶ The French Minister wrote that "it is probably because we do not have the weakness to

²²² See Morris, *supra* note 173, at 442–43, 446 (explaining that "the preliminaries between Spain and Britain transferring West Florida to [Britain] rendered the separate article completely nugatory" and that Congress adjourned without endorsing the pro-French effort to censure the ministers, leaving the Secretary for Foreign Affairs' letter as the last word from the national government on the issue); Letter from Chevalier de la Luzerne to Comte de Vergennes (Mar. 26, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 811, 812 (noting that "Congress . . . was . . . occupied with the manner of showing its displeasure to its Plenipotentiaries when the news of peace arrived" and "that the news of peace" undercut the purpose of the resolution, though "[s]ome resolution will nevertheless be passed on this subject").

²²³ See 3 *Secret Journals*, *supra* note 81, at 329–38. Congress ratified the preliminary articles over the recommendation of a congressional committee that the ultimate treaty—but not the proposed treaty reflected in the preliminary articles—required ratification. See Crandall, *supra* note 105, at 30–31. The definitive peace was signed September 3, 1783, Congress ratified the treaty on January 14, 1784, and British and American ratifications were exchanged on May 12, 1784. See 3 *Secret Journals*, *supra* note 81, at 442; Morris, *supra* note 173, at 447–48.

²²⁴ 1 Farrand, *supra* note 4, at 338.

²²⁵ *Id.*; see also *id.* at 346 (Mason, "The treaty of peace, under which we now enjoy the blessings of freedom, was made by persons who exceeded their powers. It met the approbation of the public, and thus deserved the praises of those who sent them."); *id.* at 349.

²²⁶ Letter from Comte de Montmorin to Comte de Moustier (June 23, 1788), *in* 3 *Emerging Nation*, *supra* note 93, at 801, 802; see also Letter from Comte de Moustier to Comte de Montmorin (Jan. 19, 1789), *in* 3 *Emerging Nation*, *supra* note 93, at 915, 917 (expressing "hope to have succeeded in restoring the idea that the United States should regard the alliance with [France] as existent").

yield to so many unreasonable demands that we are accused . . . of having abandoned the alliance.”²²⁷

In sum, U.S. behavior under its first two treaties demonstrated a realist perspective on the law of nations, attempts to avoid the United States’ acceptance by treaty of French fishing rights, and the departure of U.S. ministers—who also were or would be prominent figures in the national government—from the Treaty of Alliance, especially its commitment to conclude peace in tandem with France, a departure that some members of Congress endorsed.

b. The U.S.-Britain Treaty of Peace

Similar behavior occurred with regard to the critical Treaty of Peace with Britain. As noted above, in 1786 in response to British complaints, the U.S. Secretary for Foreign Affairs found that the states had violated Treaty of Peace provisions concerning prewar debts and amnesty for wartime acts.²²⁸ In evaluating the British complaints, the Secretary generally interpreted the treaty with an eye to compliance. However, as to the obligation that “creditors . . . shall meet with no lawful impediment to the recovery of . . . bona fide debts heretofore contracted,” he opined that juries might be able to refuse interest claims that were grounded in custom not contract (given the countervailing equities raised by the war) or in “the idea of damages for wrongful and vexatious delays of payment.”²²⁹ He also dismissed complaints that there was “opposition to the payment of interest prevailing in Pennsylvania” and that lawyers were

²²⁷ Letter from Comte de Montmorin to Comte de Moustier (June 23, 1788), in 3 *Emerging Nation*, supra note 93, at 801, 802.

²²⁸ See 4 *Secret Journals*, supra note 81, at 205–42, 266–74; supra notes 81–88 and accompanying text.

²²⁹ 4 *Secret Journals*, supra note 81, at 206, 212–13 (internal quotations omitted); see also Letter from John Adams to John Jay (June 16, 1786), in 3 *Emerging Nation*, supra note 93, at 201, 202–03 (arguing that Congress should require the states to repeal acts that violate the Treaty of Peace while either “declaring at the same time, that Interest upon Book Debts and simple Contracts, during the War, cannot be considered as any Part of the Bona Fide Debts intended in the Treaty” or leaving “the [interest] Question . . . to *Judges and Juries*, who upon the strictest Construction of Law Equity and the treaty may in my opinion in most Cases if not in all, deny the Interest during the War to the Creditor”). The United States earlier attempted to enter an understanding with Britain regarding what the Treaty of Peace meant for interest obligations. See Letter from John Adams to John Jay (Aug. 25, 1785), in 2 *Emerging Nation*, supra note 93, at 769, 770–71. The effort to reach an understanding demonstrated respect for treaty-making, though the U.S. position that the war interrupted interest obligations served U.S., more than British, interests. See *id.*

disinclined to “commenc[e] actions for the recovery of [British] debts” as these could not be considered, absent a tie to the state, “legal impediments.”²³⁰ In a similar legalistic reading, the Secretary rejected complaints that South Carolina had failed to take certain steps to facilitate the recovery of confiscated property because the Treaty of Peace only obligated Congress to recommend certain actions to the states; the states were “at liberty to comply or not to comply” with those recommendations.²³¹ Although these interpretations might be legally supportable, they lacked generosity toward the goals of the treaty.

c. The U.S.-Netherlands Treaty of Commerce

The willingness of some members of the national government to interpret treaties in self-serving ways is more apparent in the interpretation of the most-favored-nation provision of the U.S.-Netherlands Treaty of Amity and Commerce. Most-favored-nation provisions in treaties may take two forms: conditional or unconditional. Unconditional clauses were the common fare during the 1700s.²³² In their unconditional form, most-favored-nation provisions ensure that if a trade benefit is extended to one country, including in exchange for a concession, the privilege is extended to all with most-favored-nation status.²³³ Under conditional clauses, by contrast, the privilege is available to all with most-favored-nation status only if they make “a return concession equivalent to that given by” the country who first secured the privilege.²³⁴

In February 1787, the United Netherlands complained of a Virginia statute “exempting French brandies imported in French and American vessels from certain duties, to which the like commodities imported in

²³⁰ 4 Secret Journals, *supra* note 81, at 225; see also *id.* at 240–41 (reasoning that popular opposition to repayment of debts does not violate the treaty if courts “bear down that opposition” and continue to enforce the debts).

²³¹ *Id.* at 258; cf. Letter from Francisco Rendón to José de Gálvez (Jan. 30, 1784), in 2 *Emerging Nation*, *supra* note 93, at 288, 289–90 (reporting that Congress, which lacked power to do more, fulfilled its obligations under the Treaty of Peace to recommend certain acts to the states thereby “protecting itself from being accused of” noncompliance, though it was highly unlikely the states would follow the recommendation concerning restoration of confiscated property).

²³² Setser, *supra* note 112, at 19.

²³³ See *id.*

²³⁴ Eric V. Youngquist, *United States Commercial Treaties: Their Role in Foreign Economic Policy*, 2 *Stud. L. & Econ. Dev.* 72, 80 (1967).

Dutch vessels [were] left liable.”²³⁵ The United States’ treaty of commerce with France contained a conditional most-favored-nation clause: If the United States granted a commercial concession to another state, France was to “enjoy the same favour freely, if the concession was freely made, or, on allowing the same compensation, if the concession was conditional.”²³⁶ By contrast, the analogous provision in the United States’ treaty with the United Netherlands was drafted in unconditional terms: The United Netherlands were to “enjoy all the rights, liberties, privileges, immunities and exemptions in trade, navigation and commerce, which [most-favored nations] do or shall enjoy.”²³⁷

²³⁵ 4 Secret Journals, supra note 81, at 407–08; see also Setser, supra note 112, at 64 (discussing the Netherlands’ complaint); Letter from P.J. van Berckel to John Jay (Feb. 20, 1787), in 3 Diplomatic Correspondence, supra note 128, at 437, 437–39 (Netherlands’ complaint).

²³⁶ 2 Secret Journals, supra note 81, at 60–61 (reporting the U.S.-France Treaty of Amity and Commerce, Fr.-U.S., Feb. 6, 1778); 4 Secret Journals, supra note 81, at 408 (quoting U.S.-France Treaty of Amity and Commerce art. 2, Fr.-U.S., Feb. 6, 1778). According to Setser, the conditional clause appears to have been included at France’s suggestion to “demonstrat[e] to the world that, as far as the French government was concerned, the United States remained perfectly free to make commercial arrangements with any country whatever without France benefitting therefrom.” Setser, supra note 112, at 19–20. Beginning with the treaty with France, the conditional approach to most-favored-nation status became part of U.S. policy. *Id.* at 19, 41–42 (noting adoption of the policy); *id.* at 56 (noting inclusion of the conditional clause in the commercial treaty with Sweden, the third such treaty entered by the United States); *id.* at 72 (noting negotiation instructions adopting the conditional clause). But see *id.* at 32–33 (noting that “[t]he conditional clause was omitted” from the commercial treaty with the Netherlands). In 1783, France proposed explanatory articles to the U.S.-France Treaty of Amity and Commerce to “explain away the ‘conditional’ principle in” that treaty. *Id.* at 47. While that proposal did not advance, “in 1784, Congress agreed to a declaration that it did not intend to admit any nation to greater commercial privileges than France.” *Id.* at 47–48, 73; see Letter from Benjamin Franklin to Count de Vergennes (Sept. 3, 1784), in 2 Treaties and Other International Acts of the United States of America 159, 159 (Hunter Miller ed., 1931). Subsequently, Britain received unconditional most-favored-nation privileges in the contested Jay Treaty of 1795 as did France in the Convention of 1800 and in the Louisiana Purchase Treaty of 1803. See Setser, supra note 112, at 130 & n.91, 140, 197–98. In connection with the 1803 agreement, however, Secretary of State John Quincy Adams represented to France “that the conditional clause was implied, even when not specifically expressed, in every statement of the most-favored-nation principle.” *Id.* at 201–02.

²³⁷ 4 Secret Journals, supra note 81, at 408–09 (quoting U.S.-United Netherlands Treaty of Amity and Commerce art. 2, U. Neth.-U.S., Jan. 23, 1783); see also U.S.-United Netherlands Treaty of Amity and Commerce arts. 2–3, 9, U. Neth.-U.S., Jan. 23, 1783, in 24 Journals of the Continental Congress, supra note 109, at 66, 69, 71. To be fair, U.S. treaties with other nations, including France, had similar clauses cast in unconditional language, but these treaties also had a general conditional most-favored-nation clause that was absent from the U.S.-Netherlands Treaty. See U.S.-France Treaty of Amity and Commerce, arts. 2–5, Fr.-U.S., Feb. 6, 1787, in 2 Secret Journals, supra note 81, at 82–89; U.S.-Sweden Treaty of Amity

Both the congressional committee assigned to consider the Netherlands' complaint and the Secretary for Foreign Affairs, John Jay, acknowledged that the provision in the Netherlands treaty took "no notice of cases where compensation is granted for privileges."²³⁸ Nonetheless, both asserted that, consistent with "[r]eason and equity," the clause should be read precisely like the conditional clause in France's treaty.²³⁹ Otherwise, "the Dutch would . . . have better terms than the most favored Nation, France, and, therefore, more than is stipulated for, in the treaty," giving France "reason to complain."²⁴⁰

Jay apparently did not have the Virginia statute before him when he interpreted the Netherlands' most-favored-nation clause, but he understood the statute to grant concessions to France without consideration.²⁴¹ Thus, even under a conditional interpretation of the Netherlands treaty, the Netherlands were entitled to receive the same favor that Virginia had granted France.²⁴² The unnatural reading of the Netherlands treaty thus

and Commerce, arts. 2–4, Swed.-U.S., July 29, 1783, *in* 3 Secret Journals, *supra* note 81, at 368–92; U.S.-Prussia Treaty of Amity and Commerce arts. 2–4, 26, Prussia-U.S., May 17, 1786, *in* 4 Secret Journals, *supra* note 81, at 25–43.

²³⁸ 4 Secret Journals, *supra* note 81, at 407–09 (Jay's conclusion); Congressional Committee Report on the Dutch Protest of Import Duties (Sept. 24, 1787), *in* 3 Emerging Nation, *supra* note 93, at 594, 594 (congressional committee report).

²³⁹ 4 Secret Journals, *supra* note 81, at 407–09 (Jay's conclusion); Congressional Committee Report on the Dutch Protest of Import Duties (Sept. 24, 1787), *in* 3 Emerging Nation, *supra* note 93, at 594, 594–95 (congressional committee report); see also Setser, *supra* note 112, at 64 n.37 (noting that Secretary Jay's interpretation "was the first expression of the American interpretation that the conditional principle was implied even in the unqualified statement of the most-favored-nation clause").

²⁴⁰ Congressional Committee Report on the Dutch Protest of Import Duties (Sept. 24, 1787), *in* 3 Emerging Nation, *supra* note 93, at 594, 595.

²⁴¹ See 4 Secret Journals, *supra* note 81, at 408, 410 (noting "no official knowledge of the said act"). The congressional committee, by contrast, concluded that Virginia exempted French brandies "in compensation . . . for certain favors and exemptions in commerce . . . France had liberally granted to the United States, and especially to Virginia." Congressional Committee Report on the Dutch Protest of Import Duties (Sept. 24, 1787), *in* 3 Emerging Nation, *supra* note 93, at 594, 594; see also Letter from Charles Alexandre de Calonne to Thomas Jefferson (Oct. 22, 1786), *in* 3 Emerging Nation, *supra* note 93, at 351, 351–53 (detailing commercial privileges France had granted). At the same time, the committee concluded that France apparently made these concessions "without . . . knowing whether they would be gratuitous" or reciprocated, leaving it to the United States to decide. See Congressional Committee Report on the Dutch Protest of Import Duties (Sept. 24, 1787), *supra*, at 594, 596.

²⁴² See 4 Secret Journals, *supra* note 81, at 410.

did not change the Netherlands' entitlement in the case at hand but altered the nature of the treaty going forward.²⁴³

Interestingly, this was not the first time the United States took a problematic, self-interested approach to its commercial policy. The United States commissioned ministers to pursue commercial treaties with other countries between 1784 and 1786 and was courted by "all the important commercial states [of Europe] . . . with whom the United States did not already have treaties," but the United States did not succeed in concluding a single additional treaty.²⁴⁴ Although this failure is often attributed "to Europe's lack of respect for an ineffective government," there is also the fact that the United States, convinced of the value of American trade, had adopted an exceptional stance, "demanding special consideration, privileges such as no European country had ever granted to another."²⁴⁵ The United States' self-interested interpretation of the treaty with the Netherlands was consistent with this broader exceptionalism in early U.S. commercial policy.

As these examples illustrate, the national government under the Articles of Confederation did not uniformly comply with the law of nations or U.S. treaty obligations. The Confederation government's departures from international law would not be relevant today if the Constitution adopted a national mandate to comply. The next Subsection evaluates the drafting and ratification of the Constitution to assess whether the Constitution did so.

²⁴³ Consistent with the committee's and the Secretary's suggestions, Congress ultimately resolved that whenever states grant privileges to one nation, they ought to grant them to all nations who, by treaty, have most-favored-nation status, and that this resolution and the United Netherlands' complaint be sent to Virginia so that it could conform its act to the treaty with the Netherlands and could repay any duties improperly exacted from the Dutch under the contested act. See *id.* at 410–11, 413; Congressional Committee Report on the Dutch Protest of Import Duties (Sept. 24, 1787), *in* 3 *Emerging Nation*, *supra* note 93, at 594, 597; Congressional Resolutions Regarding Most-Favored Nation Treatment (Oct. 13, 1787), *in* 3 *Emerging Nation*, *supra* note 93, at 628, 628.

²⁴⁴ Setser, *supra* note 112, at 74.

²⁴⁵ *Id.*; see also Letter from American Peace Commissioners to the President of Congress (Sept. 10, 1783), *in* 1 *Emerging Nation*, *supra* note 93, at 936, 938 (opining that prospects of a commercial treaty with Britain depended on whether the United States could "act as an entire united Nation, faithfully executing and obeying the Constitutional Acts of Congress" with regard to foreign relations and foreign commerce).

3. The Drafting and Ratification of the Constitution

The drafting, defense, and ratification of the Constitution in the Convention, Federalist Papers, and state ratification debates provide relatively little information about the constitutional standing of international law. What they do provide, however, reflects only qualified support for international law compliance. These sources demonstrate an element of instrumentalism, a view of compliance as a means to achieve national interest.²⁴⁶ The national interest could not be entrusted to the states, whose individual decisions externalized costs to the nation as a whole and who could not speak with uniformity. Consequently, there were reasons to transfer foreign affairs authority to the national government. But there was no talk of concern for the national government's departures from international law during Confederation.²⁴⁷ Consistent with this lack of concern, the Constitution adopted, not an express substantive mandate to comply with international law, but structural provisions to facilitate

²⁴⁶ For instrumental discussions of international law compliance outside the Constitution-making process, see, for example, Letter from John Adams to John Jay (Apr. 24, 1785), *in* 2 *Emerging Nation*, *supra* note 93, at 609, 609–10 (urging U.S. compliance with the Treaty of Peace to secure British compliance and American interests); Letter from John Jay to John Adams (Aug. 3, 1785), *in* 2 *Emerging Nation*, *supra* note 93, at 719, 719 (responding in agreement with same); Letter from Benjamin Franklin to Charles Thompson (May 13, 1784), *in* 2 *Emerging Nation*, *supra* note 93, at 364, 364 (“If we do not convince the World that we are a Nation to be depended on for Fidelity in Treaties; if we appear negligent in paying our Debts, and ungrateful to those who have served and befriended us; our Reputation, and all the Strength it is capable of procuring, will be lost, and fresh Attacks upon us will be encouraged and promoted by better Prospects of Success.”); *cf.* Letter from Thomas Jefferson to John Adams (July 11, 1786), *in* 3 *Emerging Nation*, *supra* note 93, at 220, 220–22 (opining, based largely on cost-benefit analysis, that the United States should secure a treaty establishing peace with the Barbary States through war rather than through the demanded payment); Letter from Comte de Moustier to Comte de Montmorin (July 5, 1788), *in* 3 *Emerging Nation*, *supra* note 93, at 813, 814–15 (Massachusetts delegate to Congress, opining that “[i]nterest [is] the guide of men and of nations”); Letter from Comte de Moustier to Comte de Montmorin (Nov. 18, 1788), *in* 3 *Emerging Nation*, *supra* note 93, at 874, 875 (reporting that General Washington expressed America’s “lively and sincere gratitude to [France]” while recognizing “that . . . interest alone could fix the connections between nations”). That there was an instrumental strain as to international law is unsurprising given the fact that the Founding era was also an era of power politics. See, e.g., 1 *Emerging Nation*, *supra* note 93, at 1 (noting that “[e]ighteenth-century European diplomacy was nothing if not Machiavellian. Benevolence between nations always had its price, and no alliance or dynastic link could stand in the way of the good of the state”); *infra* text accompanying note 251.

²⁴⁷ Granted, statements that the national government or a subset of its branches could violate international law are also missing. Yet, such statements would have been unnecessary given the status quo ante of national discretion to violate international law.

international law compliance. In so doing, the Constitution preserved room for national discretion to violate international law.

a. Concerns Motivating the Constitution's Creation: Instrumentalism, Collective Action, but Not National Violation

An instrumental view of international law was evident during the Constitution's creation. Compliance with international law secured a favorable reputation for the United States as well as peace by avoiding just, and even pretextual, grounds for war against the young nation. Thus, Jay notes the "high importance to the peace of America that she observe the laws of nations towards" her treaty and commerce partners, many of whom were powerful enough to injure America.²⁴⁸

This evidence of instrumentalism coheres with the Framers' understanding that international law was subject to the vagaries of power and

²⁴⁸ The Federalist No. 3, at 11 (Jay) (Clinton Rossiter ed., 1999); see also *id.* (arguing for union because it will trigger fewer treaty violations and aggressive uses of force, and therefore fewer just causes for war against the United States); 1 Farrand, *supra* note 4, at 316, 326, 333 (Madison, arguing against the New Jersey Plan for its failure to "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars"); The Federalist No. 80, at 444, 448 (Hamilton) (Clinton Rossiter ed., 1999) (arguing that, for reasons of public peace and national reputation, the federal judicial power "ought to have cognizance of all causes in which [foreign states or] the citizens of other countries are concerned," and to cases involving treaties, "ambassadors, other public ministers, and consuls"); The Federalist No. 81, at 455–57 (Hamilton) (Clinton Rossiter ed., 1999) (arguing that for reasons of public peace and respect for other nations' sovereignty, the Supreme Court's original jurisdiction should extend to cases involving public ministers and its appellate jurisdiction to reexamination of facts in certain cases such as prize cases); The Federalist No. 83, at 772 (Hamilton) (Clinton Rossiter ed., 1999) (arguing against jury trial "in cases which concern the public peace with foreign nations—that is, in most cases where the question turns wholly on the laws of nations" given the "danger that the rights of other nations might be infringed by their decisions so as to afford occasions of reprisal and war"); Jay, *supra* note 3, at 839 ("The primary consideration that forced the United States to pay respect to the law of nations was the country's weakness in relation to the European powers."); 3 Farrand, *supra* note 4, at 347–48 (Davie, noting that under the law of nations treaties are supreme over statutes and that states have accepted this rule because "[a] due observance of treaties makes nations more friendly," reduces hostilities, and promotes commerce).

Jay also sought to dissuade other states from warring against the United States for unjust reasons—such as the threat of increasing U.S. power—through the creation of a national government that could be led by the best the nation has to offer to pursue unified, national objectives using broad national power. See The Federalist No. 4, at 14–16 (Jay) (Clinton Rossiter ed., 1999); see also 1 Farrand, *supra* note 4, at 467, 473 (Hamilton, "No Governmt. could give us tranquility & happiness at home, which did not possess sufficient strength to make us respectable abroad." "Unless your government is respectable, foreigners will invade your rights . . .").

state interest. As Hamilton expressed in Federalist 11, “[t]he rights of neutrality will only be respected when they are defended by an adequate power.”²⁴⁹ In the course of arguing for something more than a treaty union among the states, he similarly observed that while there was “nothing absurd or impracticable in the idea of a league or alliance,” such treaties are “subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting parties dictate.”²⁵⁰ Europe’s experience with such treaties provided “an instructive but afflicting lesson to mankind how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.”²⁵¹

Madison expressed a similar view of international law. He asked, “What is the situation of the minor sovereigns in the great society of independent nations, in which the more powerful are under no controul but the nominal authority of the law of Nations? Is not the danger to the former in proportion to their weakness.”²⁵² Madison likewise noted that if the states were independent of each other rather than united under a single government, “they would be independent nations subject to no law, but the law of nations.”²⁵³ In such a scenario, “the smaller states would have every thing to fear from the larger.”²⁵⁴ In short, compliance with international law could secure national interests, but international law itself was subject to such interests.

The national interest in international standing and success that could be secured through compliance could not be left to the states. The harms caused by the states to the national government and to the national interest under the Articles of Confederation were consistent themes during the Constitution’s formation. Sometimes the observations were generic,

²⁴⁹ The Federalist No. 11, at 55 (Hamilton) (Clinton Rossiter ed., 1999).

²⁵⁰ The Federalist No. 15, at 76–77 (Hamilton) (Clinton Rossiter ed., 1999); see also The Federalist No. 33, at 172–73 (Hamilton) (Clinton Rossiter ed., 1999) (arguing that a constitution that was not supreme “would . . . be a mere treaty, dependent on the good faith of the parties”); The Federalist No. 75, at 418 (Hamilton) (Clinton Rossiter ed., 1999) (noting that the “objects [of the treaty power] are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith”).

²⁵¹ The Federalist No. 15, at 77 (Hamilton) (Clinton Rossiter ed., 1999).

²⁵² 1 Farrand, *supra* note 4, at 448–49.

²⁵³ *Id.* at 449.

²⁵⁴ *Id.*; see also *id.* at 456.

focusing on the tendency of the states toward self-interest and overreach.²⁵⁵ Often, however, the observations focused specifically on how state actions harmed the nation's foreign affairs.²⁵⁶ “The want of [na-

²⁵⁵ See, e.g., *id.* at 155–56 (Mason, observing that so far “we have only seen the evils” of state encroachment on national authority, though “[t]here is danger on both sides no doubt”); *id.* at 166–67 (Wilson, noting that one of the defects of the Articles of Confederation was “the want of an effectual control in the whole over its parts” leaving the threat that “the general interest [would] be continuously sacrificed to local interests”); *id.* at 282–84, 296 (Hamilton, noting that the states “constantly pursue internal interests adverse to those of the whole”); *id.* at 285, 302 (Hamilton, explaining that the states “will generally be an overmatch for the Genl. Govt. and render any confederacy, in its very nature precarious”); *id.* at 316–17 (Madison, “The tendency of the States to these violations [of the law of nations] has been manifested in sundry instances.”); *id.* at 356–58, 363 (Madison, “[O]ur own experience had fully illustrated [the] tendency” “to a disobedience of the members than to usurpations of the federal head.”); *id.* at 415 (Randolph, “The state governments will always attempt to counteract the general government.”); *id.* at 511–14 (Morris, noting that a government chosen by the states would be based on “mere treaty,” would be “no Govt. at all,” and would be “altogether dependent—on the States, and [would] act over again the part which Congs. has acted”); *id.* at 552 (Morris, lamenting that “[i]t had been one of our greatest misfortunes that the great objects of the nation had been sacrificed constantly to local views”); 2 Farrand, *supra* note 4, at 8 (Madison, noting that “[a]ll the principal parties to [the Confederation’s] compilation, joined immediately in mutilating & fettering the Governmt. in such a manner that it has disappointed every hope placed on it”); *id.* at 27 (Madison, “The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system, unless effectually controuled.”); *id.* at 240 (Madison, explaining that “[t]he necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices”); *id.* at 241 (King, asserting that “this scheme of erecting the Genl. Govt. on the authority of the State Legislatures has been fatal to the federal establishment”); 3 *id.* at 115 (Pinckney, observing that the states “whenever their State-policy, or interests prompted, used their retained Sovereignty, to the injury and disgrace of the Federal Head”); The Connecticut Convention (Jan. 4, 1788), *in* 3 The Documentary History of the Ratification of the Constitution 541, 542 (Merrill Jensen ed., 1978) [hereinafter 3 Documentary History] (Ellsworth, arguing that “States, as well as individuals, are subject to ambition, to avarice, to those jarring passions which disturb the peace of society”); The Publication of Edmund Randolph’s Reasons for Not Signing the Constitution (Dec. 27, 1787), *in* 8 Documentary History, *supra* note 7, at 260, 263 (noting “the injuries, which our faith, honor and happiness have sustained by the failures of the states”).

²⁵⁶ See, e.g., 1 Farrand, *supra* note 4, at 18–19 (Randolph, noting among the defects of the Confederation the violation of treaties); *id.* at 126–27 (Madison, apparently lamenting state contravention of treaties); *id.* at 164, 171 (Pinckney, noting that “foreign treaties [had not] escaped repeated violations” pre-Constitution); *id.* at 164 (Madison, “Experience had evinced a constant tendency in the States . . . to violate national Treaties.”); *id.* at 347–48, 352 (Sherman, noting that the federal government’s inability to pay its debts, due to state failure to respond to requisitions, had greatly embarrassed the United States); *id.* at 498 (Davie, stating, notwithstanding his desire to preserve the states, that “every treaty must be the law of the land as it affects individuals”); 3 *id.* at 113 (Pinckney, asking whether “there [is] a

tional power over trade and finance] ha[d] . . . operated as a bar to the formation of beneficial treaties with foreign powers.”²⁵⁷ Indeed, in Hamilton’s view,

[n]o nation acquainted with the nature of [the] political association [under the Articles of Confederation] would be unwise enough to enter into stipulations with the United States, conceding on their part privileges of importance, while they were apprised that the engage-

treaty which some of the States have not infringed?” in the course of proposing state exclusion from “every foreign concern”); *The Federalist* No. 22, at 119 (Hamilton) (Clinton Rossiter ed., 1999) (lamenting that because U.S. treaties under the Articles of Confederation were “liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction . . . [t]he faith, the reputation, the peace of the whole Union [were] thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it [was] composed”); *The Pennsylvania Convention* (Dec. 7, 1787), *in* 2 *The Documentary History of the Ratification of the Constitution* 512, 517 (Merrill Jensen ed., 1976) [hereinafter 2 *Documentary History*] (Wilson, “[T]he truth is, and I am sorry to say it, that in order to prevent the payment of British debts, and from other causes, our treaties have been violated, and violated too by the express laws of several states in the Union.”); *The Connecticut Convention* (Jan. 4, 1788), *in* 3 *Documentary History*, *supra* note 255, at 541, 544 (Ellsworth, lamenting that while “[t]he Treaty of Peace with Great Britain was a very favorable one for us . . . it did not happen perfectly to please some of the states, and they would not comply with it”); *One of the Middle-Interest, Massachusetts Centinel* (Dec. 5, 1787), *in* 4 *The Documentary History of the Ratification of the Constitution* 385, 387 (John P. Kaminski et al. eds., 1997) (noting that under the Articles of Confederation Congress could make treaties but could not prevent “any one State . . . [from] render[ing] the whole treaty a nullity”); *The Massachusetts Convention* (Jan. 21, 1788), *in* 6 *The Documentary History of the Ratification of the Constitution* 1276, 1282, 1288–89 (John P. Kaminski et al. eds., 2000) [hereinafter 6 *Documentary History*] (Dawes, same); *Virginia Herald* (Oct. 11, 1787), *in* 8 *Documentary History*, *supra* note 7, at 52, 52 (complaining that “[e]ven the treaties which [the Confederation Congress] solemnly entered into, have been infringed by the positive and deliberate acts of a state legislature”); *Cato Uticensis, Virginia Independent Chronicle* (Oct. 17, 1787), *in* 8 *Documentary History*, *supra* note 7, at 70, 72 (noting that under the Articles of Confederation, Congress “could make treaties of commerce, but could not enforce the observance of them”); *The Virginia Convention* (June 7, 1788), *in* 9 *Documentary History*, *supra* note 93, at 1006, 1034–35 (Madison, lamenting the foreign affairs problems caused by state treaty violations and state failure to provide funds to pay national debts); *Schenectady Farmer* (Apr. 20, 1788), *in* 21 *Documentary History*, *supra* note 93, at 1402, 1402 (noting the harm done by state violation of the Treaty of Peace with Britain); *The New York Convention* (June 19, 1788), *in* 22 *The Documentary History of the Ratification of the Constitution* 1681, 1696 (John P. Kaminski et al. eds., 2008) [hereinafter 22 *Documentary History*] (Livingston, suggesting that “[t]he power of Treaties [under the Articles of Confederation was] . . . a power of involving us in distress . . . because left to the will of the seperate [sic] States”).

²⁵⁷ *The Federalist* No. 22, at 111–12 (Hamilton) (Clinton Rossiter ed., 1999); see also 1 *Farrand*, *supra* note 4, at 19 (Randolph, observing that the Confederation could not “counteract[] . . . the commercial regulations of other nations”).

ments on the part of the Union might at any moment be violated by its members.²⁵⁸

Madison similarly lamented “[t]he tendency of the States to” “violations of the law of nations & of Treaties,” which the States had “manifested in sundry instances.”²⁵⁹ He observed that “[t]he files of Cong[ress] contain complaints already, from almost every nation with which treaties have been formed . . . [t]he existing confederacy does (not) sufficiently provide against this evil.”²⁶⁰

The states’ creation of foreign affairs problems derived, as noted above, from the collective action incentives of the states, which in turn generated national externalities, and from the hopelessness of state uniformity. In calculating their moves, states sought to achieve their own interests and externalized the associated foreign affairs costs to the nation as a whole.²⁶¹ Similarly, states prevented the nation from speaking with uniformity. The national government under the Articles lacked the power to counter these pathologies.²⁶² As a result, there was significant

²⁵⁸ The Federalist No. 22, at 112 (Hamilton) (Clinton Rossiter ed., 1999); see also *id.* at 119 (asking incredulously if “foreign nations can either respect or confide in . . . a government” subject to preemption by its composite parts); The Pennsylvania Convention (Dec. 11, 1787), *in* 2 Documentary History, *supra* note 256, at 550, 581 (Wilson, observing that “[i]f we offer to treat with a nation, we receive this humiliating answer: ‘You cannot in propriety of language make a treaty because you have no power to execute it’”); The Virginia Convention (June 7, 1788), *in* 9 Documentary History, *supra* note 93, at 1006, 1034–35 (Madison, making the same arguments as Hamilton). Hamilton’s view was not without empirical support. See Letter from Duke of Dorset to the American Commissioners in Europe (Mar. 26, 1785), *in* 2 Emerging Nation, *supra* note 93, at 596, 596 (responding to the American commissioners’ interest in negotiating a commercial treaty with Britain by asking whether the commissioners were “merely commission’d by Congress, or whether they [had] receiv’d separate Powers from the respective States . . . experience having taught . . . how little the authority of Congress could avail in any respect, where the Interests of any one individual State was even concern’d”); 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 18 (photo. reprint 1996) (Jonathan Elliot ed., 2d ed. 1891) [hereinafter *Elliot’s Debates*] (Davie, discussing British refusal to enter a treaty the United States could not compel its citizens to respect).

²⁵⁹ 1 Farrand, *supra* note 4, at 316, 326, 333.

²⁶⁰ *Id.* at 316.

²⁶¹ See *supra* notes 255–56.

²⁶² See, e.g., 1 Farrand, *supra* note 4, at 19, 24–25 (Randolph, noting that Congress was unable to prevent war by “caus[ing] [state] infractions of treaties or of the law of nations, to be punished” and that “particular states might by their conduct provoke war without controul”); *id.* at 304 (Hamilton, noting among the defects of the Confederation that “the great interests of the nation”—including “[a]ll matters in which foreigners are concerned”—are entrusted “to hands incapable of managing them” and that the federal government has the “[p]ower of treaty without [the] power of execution”); *id.* at 424 (Hamilton, noting that un-

support for strengthening the national government in the area of foreign affairs.²⁶³

der the Articles “many of the great powers appertaining to Govt. particularly all those relating to foreign Nations were not in the hands of the Govt”); 3 *id.* at 145 (McHenry, summarizing Randolph’s observations to the Constitutional Convention that the Confederation lacked sufficient authority to defend “against foreign invasion” or punish offending states).

²⁶³ See, e.g., 1 *id.* at 501 (Bedford, noting the people’s desire to strengthen the Confederation government, including with the power to lay imposts, regulate trade, and “discharge our foreign and domestic debts”) (internal quotation marks omitted); *id.* at 47, 54, 61, 162, 164–72, 225, 229, 236 (Convention, endorsing a provision by which the national legislature could “negative all laws passed by the several States contravening . . . any treaties subsisting under the authority of the union” without endorsing a general negative power); *id.* at 245, 247 (New Jersey Plan, endorsing not only characterization of treaties as supreme law but federal use of force “to enforce and compel . . . an Observance of such Treaties”); 2 *id.* at 275 (Wilson, asserting that “War, Commerce, & Revenue were the great objects of the Genl. Government”); *id.* at 583, 666 (Convention, noting in a letter transmitting the proposed Constitution to Congress that “[t]he Friends of our Country have long seen and desired that the Power of making war, Peace and Treaties, that of . . . regulating Commerce, and the correspondent executive and judicial Authorities should be fully and effectually vested in the general Government of the Union”); 3 *id.* at 112–13 (Pinckney Plan, proposing that “in every foreign concern . . . the States must not be suffered to interfere”) The Pennsylvania Convention (Nov. 30, 1787), *in* 2 *Documentary History*, *supra* note 256, at 424, 435–39 (Yeates, celebrating the centralization of authority in the Constitution); A Landholder I, Connecticut Courant (Nov. 5, 1787), *in* 3 *Documentary History*, *supra* note 255, at 398, 399–400 (expressing support for national authority to regulate trade); The Massachusetts Convention (Jan. 21, 1788), *in* 6 *Documentary History*, *supra* note 256, at 1276, 1288–89 (same); 4 Elliot’s Debates, *supra* note 258, at 18 (Davie, supporting “a power in the federal government to compel the performance of our engagements with foreign nations”); The Publication of Edmund Randolph’s Reasons for Not Signing the Constitution (Dec. 27, 1787), *in* 8 *Documentary History*, *supra* note 7, at 260, 266 (asserting “that, as the general government will be responsible to foreign nations, it ought to be able to annul any offensive measure, or inforce any public right”); George Lux, Maryland Journal (Mar. 25, 1788), *in* 12 *The Documentary History of the Ratification of the Constitution* 560, 567 (John P. Kaminski et al. eds., 2015) [hereinafter 12 *Documentary History*] (expressing support “for a General Convention, to correct the defects of our present languid confederation, . . . by vesting exclusively in an energetic general government all commercial regulations [and] foreign affairs”); A Citizen of New-York: An Address to the People of the State of New York (Apr. 15, 1788), *in* 20 *Documentary History*, *supra* note 93, at 922, 930, 932 (noting the Confederation Congress’s lack of power with regard to foreign affairs and the wide support for “a national government *competent to every national object*”); The New York Convention (June 23, 1788), *in* 22 *Documentary History*, *supra* note 256, at 1801, 1823 (Jay, commenting, in support of the Constitution, that “[t]he objects of the general government . . . comprehend the interests of the States . . . in relation to foreign powers”). This does not mean that all powers that might bear on foreign affairs were entrusted to the national government. For example, the power to tax exports, which some thought necessary to “procur[e] equitable regulations from other nations,” was denied the national government. See 2 Farrand, *supra* note 4, at 361–62. But *cf.* *id.* at 361–62 (revealing that others did not think that the power to embargo was addressed by this denial; McHenry thought the power “included in the power of war”).

Speaking from the externality perspective, for example, Hamilton argued that “the peace of the WHOLE ought not to be left at the disposal of a PART.”²⁶⁴ Rather, “the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.”²⁶⁵ Madison echoed this sentiment in explaining that there should be “immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.”²⁶⁶

From the perspective of achieving uniformity, Hamilton argued that treaty questions should “be submitted, in the last resort, to one SUPREME TRIBUNAL” in order “[t]o produce uniformity.”²⁶⁷ Madison argued that the national government’s exclusive authority to issue letters of marque was “fully justified by the advantage of uniformity in all points which relate to foreign powers.”²⁶⁸ He likewise argued that

²⁶⁴ The Federalist No. 80, at 444 (Hamilton) (Clinton Rossiter ed., 1999).

²⁶⁵ *Id.*

²⁶⁶ The Federalist No. 44, at 249 (Madison) (Clinton Rossiter ed., 1999); see also Madison, *Vices*, supra note 6, at 349 (stating that “disputes with other nations, . . . being among the greatest of public calamities, . . . ought to be least in the power of any part of the Community to bring upon the whole”); The Federalist No. 42, at 233 (Madison) (Clinton Rossiter ed., 1999) (complaining that the Articles of Confederation omitted a national “power to define and punish . . . offenses against the law of nations . . . leav[ing] it in the power of any indiscreet member to embroil the Confederacy with foreign nations”); The Federalist No. 44, at 250 (Madison) (Clinton Rossiter ed., 1999) (noting that “the Union [could] be discredited and embroiled by the indiscretion of a single member” if states retained power to publish paper money); *id.* at 255 (observing that if state constitutions could trump federal law, the world “would have seen the authority of the whole society everywhere subordinate to the authority of the parts”); 1 Farrand, supra note 4, at 316, 326, 333 (Madison, arguing that “[a] rupture with other powers [through the violation of international law] is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole”). In the context of arguing for greater federal power over foreign affairs, Madison made his famous statement that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.” The Federalist No. 42, at 232 (Madison) (Clinton Rossiter ed., 1999).

²⁶⁷ The Federalist No. 22, at 118 (Hamilton) (Clinton Rossiter ed., 1999); see also The Federalist No. 82, at 462 (Hamilton) (Clinton Rossiter ed., 1999) (arguing that appeal should lie from state courts to the U.S. Supreme Court on matters of national concern as “that tribunal . . . is destined to unite and assimilate the principles of national justice and the rules of national decisions”); The New York Convention (June 19, 1788), in 22 *Documentary History*, supra note 256, at 1681, 1687, 1696 (Livingston, noting the need for a federal judiciary that could interpret treaties and thereby prevent states from undermining treaties and causing war); The New York Convention (Jul. 19, 1788), in 23 *The Documentary History of the Ratification of the Constitution* 2233, 2245 (John P. Kaminski et al. eds., 2009) [hereinafter 23 *Documentary History*] (Hamilton, suggesting that “[o]n treaties & Laws of Nations . . . the supreme Judicial ought to be the last resort”).

²⁶⁸ The Federalist No. 44, at 249 (Madison) (Clinton Rossiter ed., 1999).

failing to grant Congress power “to define . . . piracies and felonies committed on the high seas” would prevent “uniformity [and] stability in the law.”²⁶⁹

The decision to place the national government more firmly at the wheel in international relations would promote the desired uniformity. It would also respond to the collective action problems of state-created externalities by entrusting decisions affecting the whole to the government representing the whole. Such an arrangement would produce more accurate calculations of the national interest. Indeed, not only would the national government be influenced by national interests, rather than local impulses, it would be able to both resist and punish those who would pursue a local policy (such as violating the Treaty of Peace with Britain or instigating war with Indian Tribes) at the expense of the nation.²⁷⁰ The desire to entrust national interests to the national government is evident, not only in the Constitution’s delegation of foreign affairs powers to the national government, but in such things as the Constitutional Convention’s remarkably consistent support for federal jurisdiction over cases implicating foreign affairs, including cases involving treaties and affecting foreign nationals, ambassadors, and other public ministers.²⁷¹

²⁶⁹ 2 Farrand, *supra* note 4, at 316 (internal quotation marks omitted).

²⁷⁰ The Federalist No. 3, at 11–13 (Jay) (Clinton Rossiter ed., 1999); cf. The Federalist No. 22, at 118–19 (Hamilton) (Clinton Rossiter ed., 1999) (noting that state courts are susceptible to the influence of local interests).

²⁷¹ See, e.g., 1 Farrand, *supra* note 4, at 22, 28 (Randolph, proposing as part of the Virginia Plan a national judiciary to hear “all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdiction may be interested, . . . and questions which may involve the national peace and harmony”); *id.* at 124 (Wilson, supporting exclusive national jurisdiction in admiralty, because “it related to cases not within the jurisdiction of particular states & to a scene in which controversies with foreigners would be most likely to happen”); *id.* at 224, 231, 232, 237 (recording support for national jurisdiction to address “questions which involve the national peace and harmony”); *id.* at 238 (Convention, leaving the description of federal jurisdiction to a committee on the understanding that “the object . . . at present is[, inter alia,] to establish . . . the security of foreigners where treaties are in their favor”); *id.* at 244, 247 (Patterson, proposing as part of the New Jersey Plan a federal judiciary to have jurisdiction over appeals “in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade”); *id.* at 292 (Hamilton, supporting a federal court with original jurisdiction over “all causes of capture, and an appellate jurisdiction in all causes in which . . . the citizens of foreign nations are concerned”); 2 *id.* at 39, 46, 132–33 (Convention, endorsing the Virginia Plan of national jurisdiction over “questions as involve the national peace and harmony”); *id.* at 136, 159 (Pinckney Plan, proposing that Congress receive “the exclusive Right” to create admiralty courts as well as authority to

But entrusting the national interest to the national government would not ensure that the national interest always favored international law compliance. And the Framers did not seem to have an appetite for restricting pursuit of national interests through a general constitutional mandate to comply with international law.

The Framers did not express any concerns about the national government's departures from international law during the period of Confederation. Consistent with the conventional narrative, Hamilton famously lamented the "national humiliation" that the United States had suffered in its foreign relations, noting, among its causes, state violations of the Treaty of Peace with Britain.²⁷² Yet nowhere is there an express refer-

create a federal judiciary to which appeals from state courts could be brought "in all Causes wherein Questions shall arise on the Construction of Treaties made by [the] U.S.—or on the Law of Nations—or on the Regulations of U.S. concerning Trade"); *id.* at 157 & n.15 (New Jersey Plan, endorsing a "Judiciary [to] have authority . . . by Way of Appeal, in all Cases touching the Rights of Ambassadors—in all Cases of Capture from an Enemy—in all Cases of Piracies and Felonies on the high Seas . . . —in all Cases in which Foreigners may be interested in the Construction of a Treaty, or which may arise on any Act for regulating Trade or collecting Revenue *or on the Law of Nations, or general commercial or marine Laws*"; 4 *id.* at 48 (Committee of Detail, supporting legislative power to grant the highest court jurisdiction "in disputes, in which subjects or citizens of other countries are concerned"); 2 *id.* at 172–73, 186 (Committee of Detail, supporting original Supreme Court jurisdiction over "all cases affecting Ambassadors, other Public Ministers and Consuls" and appellate jurisdiction over "all cases of Admiralty and maritime jurisdiction; . . . controversies . . . between a State or the Citizens thereof and foreign States, citizens or subjects"); *id.* at 424 (Convention, endorsing Supreme Court original jurisdiction over "cases affecting Ambassadors, other public Ministers and Consuls" and appellate jurisdiction in all other cases unless the Legislature provided otherwise); 4 *id.* at 54–55 (describing a plan for the federal judiciary that apparently was not presented to the Convention, but included jurisdiction over cases affecting ambassadors, under treaties, etc.); 2 *id.* at 576, 600–01 (in drafts committed to and reported from the Committee of Style, extending "[t]he Judicial Power . . . to all cases both in law and equity arising under this Constitution and the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting Ambassadors, other Public Ministers and Consuls; to all cases of Admiralty and Maritime Jurisdiction; to Controversies . . . between a State or the citizens thereof and foreign States, citizens or subjects[.]" and providing the Supreme Court original jurisdiction "[i]n cases affecting Ambassadors, other Public Ministers and Consuls" and appellate jurisdiction in other cases as regulated by Congress); see also *id.* at 73–74 (Elseworth, asserting that judges, not the executive, "will have competent information" about "[t]he law of Nations," in the course of arguing that the executive and judiciary should together exercise revisionary power over legislation). At the same time, the Constitution left it to Congress to create lower federal courts. See U.S. Const. art. III, § 1; *infra* note 297 and accompanying text.

²⁷²The Federalist No. 15, at 74 (Hamilton) (Clinton Rossiter ed., 1999); see also 4 Elliot's Debates, *supra* note 258, at 119–20 (Davie, arguing that "[a]ll civilized nations have concurred in considering [treaties] as paramount to an ordinary act of legislation" while noting the "imbecility of the Confederation" when it came to securing treaties against the states); *id.*

ence to the national violations of international law documented in this Article.²⁷³ Scholars have not detected any significance in this omission because they have not been aware of the national government's general relationship to international law during Confederation. The conventional narrative of the United States' relationship to international law before the Constitution has consistently focused on the states. By exploring the national government's treatment of international law, this Article reveals that the lack of concern during constitutional creation for the national experience with international law during Confederation is significant. It suggests a level of comfort with national discretion to violate international law that has hitherto gone unnoticed.

In response, one might argue that the omission of commentary on the national violation of international law was motivated by the relative insignificance of the national government's departures when compared to the violations committed by the states. However, when discussing the problems created by state violation, it would have been natural to speak of national violation as well. This is especially true because the many failings of the national government were matters of significant and on-going concern during the drafting and ratification of the Constitution.

The absence of commentary on national violation of international law might also have resulted from ignorance of the national government's behavior during Confederation.²⁷⁴ Yet, this possibility is remote. Many

at 278–79 (C.C. Pinckney, arguing for U.S. compliance with treaties while noting how state violation had impeded that goal). The Federalist No. 63 likewise bemoaned “[w]hat . . . America [had] lost by her want of character with foreign nations” and wondered “how many errors and follies . . . she . . . [would] have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind.” The Federalist No. 63, at 350 (Hamilton or Madison) (Clinton Rossiter ed., 1999). The Federalist No. 63 does not make clear, however, whether it alludes to state policies, the impotence of the national government, or something else. See *id.*; cf. 1 Farrand, *supra* note 4, at 515 (Gerry, expressing concern that if the union failed, “[w]hat . . . [would] become of our treaties—what of our foreign debts . . . [?]”).

²⁷³ Hamilton does note generally “[t]he imbecility of our government” and “constant and unblushing violation” of “engagements to the performance of which we are held by every tie respectable to men.” The Federalist No. 15, at 74–75 (Hamilton) (Clinton Rossiter ed., 1999).

²⁷⁴ One passage in the Virginia ratifying debates suggests some support for this view. James Monroe, an anti-Federalist, stated in those debates, “[t]he instruction is the foundation of the treaty; for if it is formed agreeable thereto, good faith requires that it be ratified.—The practice of Congress hath also been always, I believe, in conformity to this idea.” The Virginia Convention (June 13, 1788), in 10 *The Documentary History of the Ratification of the Constitution* 1228, 1232 (John P. Kaminski et al. eds., 1993) [hereinafter 10 *Documentary*

of the members of Congress during Confederation also served in the Constitutional Convention and state ratifying conventions.²⁷⁵ It appears

History]. As Monroe was a delegate to both the Confederation Congress and the Virginia ratifying convention, his statement might be read as suggesting that even members of the Confederation Congress were not aware of Congress's departures from the law of mandatory ratification. Yet another reading appears. As an initial matter, Monroe treats mandatory ratification as a principle of good faith rather than a provision of the law of nations. More importantly, the context of Monroe's statement indicates that he was not focused on whether Congress always adhered to the law of mandatory ratification, but on whether it treated instructions as critical restraints on negotiators. Monroe made the statement in the course of explaining why he opposed John Jay's request that a congressional committee be formed to instruct him in treaty negotiations with Spain. See *id.* Such a change would have allowed Jay to relinquish U.S. claims to the Mississippi River notwithstanding instructions from a supermajority of Congress that Jay insist on navigation rights to that river. See *id.* Monroe's statement should thus be read to emphasize that Congress treated instructions as critical limitations in treaty formation rather than as emphasizing that Congress never reserved the right to reject a treaty that had been negotiated consistent with instructions. Indeed, Monroe's address continues with a focus on instructions, stating that "[t]he instructions under which our commercial treaties have been made were carried by nine States.—Those under which [Jay was then] . . . act[ing] were passed by nine States." *Id.* Monroe notes that he left Congress before the issue of changing Jay's instructions by fewer than nine states was resolved. *Id.* at 1234.

Interestingly, following Monroe, William Grayson, another delegate to both the Confederation Congress and Virginia ratifying convention, addressed the fact that seven states had unconstitutionally tried to change the instructions Jay received by vote of nine. See *id.* at 1236. Grayson stated, "If I recollect rightly, by the law of nations, if a negotiator makes a treaty, in consequence of a power received from a sovereign authority, non-compliance with his stipulations is a just cause of war." *Id.* Based on this principle, those who opposed the change to Jay's instructions argued that there was a risk that if Jay approved a treaty on the altered instructions, the treaty would be violated, justifying war by Spain. See *id.* at 1236–37. Grayson's argument, then, recognized the possibility of noncompliance with the treaty, notwithstanding the principle of mandatory ratification.

²⁷⁵ For a list of members of the Confederation Congress (both those who did and did not attend), see *Biographical Directory of the United States Congress 1774–2005*, H.R. Doc. No. 108-222, at 34–38 (2005). For a list of delegates to the Constitutional Convention, see *Delegates Who Attended the Constitutional Convention*, in 1 *The Documentary History of the Ratification of the Constitution* 230, 230 (Merrill Jensen ed., 1976). For a list of delegates to the state ratifying conventions, see *The Pennsylvania Convention* (Nov. 21, 1787), in 2 *Documentary History*, supra note 256, at 326, 326–27; *Delegates to the Delaware Convention*, in 3 *Documentary History*, supra note 255, at 106, 106; *Members of the New Jersey Convention*, in 3 *Documentary History*, supra note 255, at 178, 178; *[Georgia] Convention Roster and Attendance Roll*, in 3 *Documentary History*, supra note 255, at 270, 270; *Connecticut Convention Roster*, in 3 *Documentary History*, supra note 255, at 536, 536–39; *Delegates to the Massachusetts Convention*, in 6 *Documentary History*, supra note 256, at 1152, 1152–60; *Payment to [Virginia] Convention Delegates*, in 10 *Documentary History*, supra note 274, at 1565, 1565–68; *Delegates to the Maryland Convention*, in 12 *Documentary History*, supra note 263, at 622, 622–23; *Delegates to the New York Convention*, in 22 *Documentary History*, supra note 256, at 1676, 1676–77; *Delegates to the Rhode Island Convention*, in 26 *The Documentary History of the Ratification of the Constitution* 904, 904–05 (John P. Kaminski

that, of the 55 delegates who attended some portion of the Constitutional Convention, 32 (or ~58%) had been members of the Confederation Congress (and actually attended) between 1781 and 1789.²⁷⁶ Though not a member of the Confederation Congress, another delegate to the Constitutional Convention—Benjamin Franklin—had been intimately involved in the conduct of foreign affairs during Confederation, as recounted above.²⁷⁷ The state ratifying conventions reflect a similar dynamic. Of the 208 members of Congress who attended between 1781 and 1789, it appears that 70 (or ~34%)²⁷⁸ were delegates to state ratifying conventions.²⁷⁹ As a result, it seems highly unlikely that no one in the Constitutional Convention or state ratifying conventions knew of the national government's behavior toward international law during Confederation. Had there been concerns with that behavior, it seems there were many who could have raised them.

The absence of concern for national departures from international law strengthens the case for placing the constitutional commitment to compliance with international law toward the discretion end of the spectrum. It does not, however, support the more extreme conclusion that the Framers promoted violation of international law. The nation was weak and it is clear that the violations states had committed threatened the nation as a whole. As a result, a level of comfort with national discretion

et al. eds., 2013); Journal of the Proceedings of the Convention of the State of New Hampshire which Adopted the Federal Constitution, 1788, *in* 10 Provincial and State Papers: Miscellaneous Documents and Records Relating to New Hampshire 1, 2–7 (Nathaniel Bouton ed., n.p. 1877); Minutes of the North Carolina Constitutional Convention at Hillsborough North Carolina, *in* 22 Colonial and State Records of North Carolina 1, 1–6 (n.p., n.d.) (First North Carolina Convention); Minutes of the North Carolina Constitutional Convention at Fayetteville, *in* 22 Colonial and State Records of North Carolina 36, 36–39 (n.p., n.d.) (Second North Carolina Convention); 4 Elliot's Debates, *supra* note 258, at 338–40 (South Carolina).

²⁷⁶ See sources cited *supra* note 275. An additional 4 delegates (or ~7%) to the Constitutional Convention had been members of the Confederation Congress but had never attended Congress: William Paterson (New Jersey), John Blair (Virginia), Luther Martin (Maryland), and Alexander Martin (North Carolina). *Id.* I note them here because it is possible that, despite their absence, they nonetheless learned about Congress's actions by virtue of their office.

²⁷⁷ See *supra* Subsections II.B.1–2.

²⁷⁸ Of these 70 members, 16 participated in the Constitutional Convention as well. See sources cited *supra* note 275.

²⁷⁹ See sources cited *supra* note 275. An additional 25 members of the Confederation Congress who did not attend Congress were delegates to state ratifying conventions. See sources cited *supra* note 275. Of these 25 members, 2 participated in the Constitutional Convention as well. See sources cited *supra* note 275.

did not mean a policy of flouting international law, but nor did concern for the consequences of violation mean a constitutional prohibition on violating international law. The closest the Framers came to a general prohibition on federal violation of international law was the Supremacy Clause, which made treaties the supreme law of the land.²⁸⁰ But the Supremacy Clause expressly focused on the states, mandating that “Judges in every State shall be bound [by treaties], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁸¹ Moreover, at least one prior constitutional proposal had been more aggressive, including a federal power to execute treaties against the states by force.²⁸²

b. Structural Protection of International Law Compliance

Neither promoting violation of, nor mandating compliance with, international law, the Framers and ratifiers adopted a middle course, a course that would preserve national discretion while not producing thoughtless or unintentional international law violations. They protected the interest in international law compliance through constitutional structure rather than substantive commitment.²⁸³ In this regard, the constitutional relationship of the national government to international law is like the relation of the national government to federalism after *Garcia v. San Antonio Metropolitan Transit Authority*.²⁸⁴ In *Garcia*, the Supreme Court held that constitutional protection of federalism is structural rather

²⁸⁰ See U.S. Const. art. VI.

²⁸¹ See *id.*; see also Henkin, *International Law*, supra note 11, at 1566 (“The Supremacy Clause was addressed to the states, and was designed to assure federal supremacy.”); cf. Tim Wu, *Treaties’ Domains*, 93 *Va. L. Rev.* 571, 573–75, 582–94 (2007) (finding, empirically, that the Supreme Court consistently enforces treaties against states, but consistently refuses to do so against Congress and has a mixed record with regard to executive officials).

²⁸² Patterson’s New Jersey Plan would have made “all Treaties . . . the supreme law of the respective States” and authorized “the federal Executive . . . to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel . . . an Observance of such Treaties.” 1 Farrand, supra note 4, at 245, 247; 2 *id.* at 157–58. Similarly, the Convention originally gave Congress power “to inforce Treaties,” 4 *id.* at 45, but this power was later deleted as “superfluous since treaties were to be ‘laws,’” 2 *id.* at 390.

²⁸³ Golove and Hulsebosch recognize that the Framers pursued their interest in international law compliance through “a novel and systematic set of constitutional devices designed to ensure that the nation would comply with treaties and the law of nations.” Golove & Hulsebosch, supra note 14, at 932; see also supra Section I.A.

²⁸⁴ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

than substantive.²⁸⁵ That is, state sovereignty is protected through “procedural safeguards inherent in the structure of the federal system” rather than by judicially enforced substantive restrictions on federal overreach.²⁸⁶ International law compliance is likewise protected through constitutional structure. As the records surrounding the Constitution’s creation and ratification reveal, the Framers and ratifiers adopted at least eight structural features²⁸⁷ that they believed would facilitate international law compliance.²⁸⁸

First, the Constitution transferred foreign affairs authority to the national government.²⁸⁹ Consolidating power in the national government would secure national power to comply with international law, a chief weakness of the Confederation. Indeed, certain provisions, such as the Supremacy and Define and Punish Clauses, would cure specific national deficiencies during Confederation—state violation of treaty obligations

²⁸⁵ See *id.* at 550–54; see also Jesse H. Choper, *The Scope of the National Power vis-à-vis the States: The Dispensability of Judicial Review*, 86 *Yale L.J.* 1552, 1557, 1560 (1977) (arguing that constitutional questions concerning whether the federal government has infringed on state authority should be resolved in the political branches—where structure protects states’ rights—rather than in the courts); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 558 (1954) (arguing that “the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states”). But cf. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 *S. Cal. L. Rev.* 1311, 1312 (1997) (arguing that the Supreme Court has assumed a renewed role in protecting federalism).

²⁸⁶ *Garcia*, 469 U.S. at 552. While the Court has engaged in a limited revival of substantive federalism, structural protection of federalism remains the Court’s dominant approach. See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2585–91 (2012) (opinion of Roberts, C.J.) (limitation on Commerce Clause power); *id.* at 2642–50 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (same); *id.* at 2677 (Thomas, J., dissenting) (same); *United States v. Lopez*, 514 U.S. 549, 566–68 (1995) (same); *United States v. Morrison*, 529 U.S. 598, 617–21, 627 (2000) (limitation on Commerce Clause and Fourteenth Amendment powers); *City of Boerne v. Flores*, 521 U.S. 507, 533–36 (1997) (limitation on Fourteenth Amendment power).

²⁸⁷ Not all structural features that were proposed to promote international law compliance made it into the Constitution. See, e.g., 2 Farrand, *supra* note 4, at 248–49 (Pinckney, proposing that officials in the legislature, executive, and judiciary “be possessed of competent property to make them independent & respectable” in light of the fact that “[t]he Judges would have . . . important causes . . . where foreigners are concerned”).

²⁸⁸ I say “they believed,” because it is not clear that all the structural provisions they adopted have actually secured compliance with international law.

²⁸⁹ For an overview of the foreign affairs powers vested in the federal government, see, for example, Moore, *Unconstitutional Treatymaking*, *supra* note 102, at 616–19.

and national incompetence to prosecute law of nations violations.²⁹⁰ As discussed above, the national government would consider national interests, rather than local impulses, in deciding national policy and would be able to resist and punish those who would pursue local interests at the expense of the nation.²⁹¹ The national government would also interpret and execute international law in a uniform way, reducing the likelihood of divergent interpretations that might violate that law.²⁹² Finally, “an efficient national government” would attract “the best [leaders] in the country” both because “more general and extensive reputation for talents and other qualifications [would] be necessary to recommend” candidates to national office and because the national government would be able to draw from a wider pool of prospects.²⁹³ As a result, the “decisions of the national government[, whether legislative, executive, or judicial, would] be more wise, systematical, and judicious than those of individual States, and consequently more satisfactory with respect to other nations.”²⁹⁴

Second, the Constitution created a Supreme Court and provided for the creation of a national judiciary that could hear cases concerning in-

²⁹⁰ See U.S. Const. art. I, § 8, cl. 10; *id.* art. VI, cl. 2; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va. J. Int'l L.* 587, 642–43 (2002) (explaining that the Constitution included the Define and Punish Clause to correct national inability during Confederation “to punish offenses against the law of nations”).

²⁹¹ *The Federalist No. 3*, at 11–13 (Jay) (Clinton Rossiter ed., 1999). The national government would take account of national interests both because it would be charged with addressing national questions and because a large republic would serve to mute the problem of factions. See *The Federalist No. 10*, at 51 (Madison) (Clinton Rossiter ed., 1999).

²⁹² See *The Federalist No. 3*, at 11 (Jay) (Clinton Rossiter ed., 1999) (arguing that “[u]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner”); 2 *Farrand*, *supra* note 4, at 182, 316 (Madison, supporting a power in Congress “to define . . . piracies and felonies committed on the high seas,” as leaving that power to the states would prevent “uniformity [and] stability in the law”) (internal quotation marks omitted). Of course, the reality is that the three branches of the federal government often diverge on questions of foreign affairs and international law. See, e.g., David H. Moore, *Beyond One Voice*, 98 *Minn. L. Rev.* 953, 999–1001, 1011–12 (2014).

²⁹³ *The Federalist No. 3*, at 11–12 (Jay) (Clinton Rossiter ed., 1999). Further, Jay believed that the constitutionally mandated qualifications and electoral processes for selecting the President and Senate would ensure that those “so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence.” *The Federalist No. 64*, at 359 (Jay) (Clinton Rossiter ed., 1999).

²⁹⁴ *The Federalist No. 3*, at 11 (Jay) (Clinton Rossiter ed., 1999).

ternational law compliance.²⁹⁵ The Supreme Court would have original jurisdiction of “all Cases affecting Ambassadors, other public Ministers and Consuls” and appellate jurisdiction, subject to congressional regulation, over “Cases . . . arising under . . . Treaties,” “Cases of admiralty and maritime Jurisdiction,” and “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”²⁹⁶ Congress could create lower federal courts to exercise original jurisdiction over all these matters.²⁹⁷ Aside from the more general act of centralizing power over foreign affairs, these judicial reforms are probably the most prominent way in which the Framers paved the way for compliance.²⁹⁸ The ultimate aim of these reforms, according to Hamilton, was to respond to both international law violations and harms to foreign nationals that might threaten national peace and reputation.²⁹⁹ As noted above, delegates to the Constitutional Convention were surprisingly consistent in their support for federal jurisdiction over matters implicating compliance with international law.³⁰⁰

²⁹⁵ See U.S. Const. art. III, §§ 1–2.

²⁹⁶ *Id.* art. III, § 2.

²⁹⁷ See *id.* art. III, §§ 1–2. Today it is accepted that Congress need not vest all Article III jurisdiction in federal courts. See 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3526 (3d ed. 2008) (noting the “orthodox view [that] Congress is free to grant or withhold” Article III jurisdiction). As a result, even if Article III jurisdiction was designed to secure international law compliance, the federal lawmakers retained discretion in deciding how much compliance-inducing jurisdiction to confer. Further, the Constitution did not “delineate which cases involving alleged violations of the law of nations by the United States would be subject to judicial review. Indeed, the Constitution does not expressly provide that the federal courts have a role in constraining the other branches from violations of international law.” Jay, *supra* note 3, at 834. As a result, even as the Constitution embraced structural reforms that facilitated international law compliance, it left room for national discretion to depart from international law.

²⁹⁸ See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 36–38, 43–46 (1952) (observing that the Constitutional Convention addressed concern for violations of international law “chiefly in relation to proposals for a national judiciary”).

²⁹⁹ See *The Federalist* No. 80, at 444–45 (Hamilton) (Clinton Rossiter ed., 1999); see also *The Pennsylvania Convention* (Dec. 7, 1787), *in* 2 *Documentary History*, *supra* note 256, at 512, 517–18 (Wilson, arguing that the inclusion of “all cases arising under treaties” in the federal judicial power “will show the world, that we make the faith of treaties a constitutionally part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry them into effect, let the legislatures of the different states do what they may”).

³⁰⁰ See *supra* note 271 and accompanying text.

Third, international law compliance would benefit from the Senate's active role in foreign relations.³⁰¹ In the Constitutional Convention and state ratifying debates, there was pressure to include the populous House in treaty-making as well.³⁰² Treaties could address issues of major national importance and were not to be made lightly.³⁰³ Thus, for example, Governor Morris proposed that "[t]he Senate shall have power to treat with foreign nations, but no Treaty shall be binding on the United States which is not ratified by a Law."³⁰⁴ Madison suggested more narrowly that some treaties might require the concurrence of "the whole Legisla-

³⁰¹ See generally Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 3 Farrand, *supra* note 4, at 131, 133 (referring to the Senate as "the great anchor of the Government"). But see 1 *id.* at 552 (Morris, opposing the proposed makeup of Congress, which would protect individuals in one house, the states in another, and have no provision "for supporting the dignity and splendor of the American Empire").

³⁰² See, e.g., 2 Farrand, *supra* note 4, at 297 (Mercer, asserting that "Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority"); *id.* at 538 (Wilson, asserting that "[a]s treaties . . . are to have the operation of laws, they ought to have the sanction of laws also"); 4 Elliot's Debates, *supra* note 258, at 119 (Porter, "observ[ing] that, as treaties were the supreme law of the land, the House of Representatives ought to have a vote in making them, as well as in passing them"); Many Customers, *Independent Gazetteer* (Dec. 1, 1787), *in* 2 Documentary History, *supra* note 256, at 306, 307–09 (publishing the report of a citizen committee that felt it essential that treaties only be supreme if approved by a majority of the House of Representatives); The Pennsylvania Convention (Dec. 12, 1787), *in* 2 Documentary History, *supra* note 256, at 586, 598 (Whitehall, proposing that the Constitution be amended to render invalid treaties that contradicted existing law until the law was altered); The Dissent of the Minority of the [Pennsylvania] Convention, *in* 2 Documentary History, *supra* note 256, at 617, 634–35 (observing that "[i]t is the unvaried usage of all free states, whenever treaties interfere with the positive laws of the land, to make the intervention of the legislature necessary to give them operation"); Hampden, *Pittsburgh Gazette* (Feb. 16, 1787), *in* 2 Documentary History, *supra* note 256, at 663, 666 (complaining, post ratification by Pennsylvania, that "the House of Representatives, which hath the best chance or possessing virtue and public confidence [was] entirely excluded" from treaty-making); Robert R. Livingston's Annotation of the Constitution (June 17, 1788–Jul. 26, 1788), *in* 23 Documentary History, *supra* note 267, at 2545, 2548 (referencing an amendment that would ensure "[t]hat no treaty shall abrogate Law of the United States or alter the constitution of a particular State"); Moore, *Unconstitutional Treaty-making*, *supra* note 102, at 628 (discussing pressure to include the House in treaty-making); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *Colum. L. Rev.* 1955, 2025, 2027, 2033–38, 2040, 2043, 2045–47, 2049, 2054, 2060–63, 2067 (1999) [hereinafter Yoo, *Original Understanding*] (same).

³⁰³ See, e.g., Yoo, *Original Understanding*, *supra* note 302, at 2034.

³⁰⁴ 2 Farrand, *supra* note 4, at 382–83, 392–94.

ture.”³⁰⁵ None of these proposals succeeded.³⁰⁶ The House was not well suited to the secrecy, dispatch, and consistency that treaty-making required.³⁰⁷ As a result, the House was excluded from treaty-making, leaving the more temperate Senate to oversee the process.

³⁰⁵ Id. at 394; see also 4 id. at 58 (proposing that treaties reducing the United States’ boundaries, or its fishing and navigation rights, require the House’s concurrence); Federal Farmer: An Additional Number of Letters to the Republican, Letter XI (Jan. 10, 1788), in 20 Documentary History, supra note 93, at 1011, 1018–19 (interpreting the proposed Constitution to require “all commercial treaties [to require confirmation] by the legislature”). Sherman made a similarly narrow suggestion: “that no . . . rights [“established by the Treaty of Peace”] shd be ceded without the sanction of the Legislature.” 2 Farrand, supra note 4, at 548. Mason ultimately refused to sign the Constitution in part because exclusive legislative powers had been vested in the President and Senate by virtue of treaties’ status as supreme federal law when this problem “might have been avoided by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety.” Id. at 639.

³⁰⁶ See, e.g., 2 Farrand, supra note 4, at 382–83, 392–94 (roundly rejecting Morris’s proposal, at least in part because ratification by statute would mean “that the acts of a Minister with plenipotentiary powers from one Body [the Senate], should depend for ratification on another Body [the House]”); id. at 538 (rejecting Wilson’s motion by a vote of ten to one); 3 id. at 371 (Washington, noting that the Convention rejected the notion that only treaties ratified by law would bind the United States). But cf. id. at 374 (Madison, opining that the Convention’s actions were consistent with the view that only treaties that embrace “Legislative objects” require legislation to be binding); Yoo, Original Understanding, supra note 302, at 1962, 1985–2094 (recognizing that efforts to include the House in treaty-making were unsuccessful, but asserting an original understanding under which treaties affecting domestic law would require implementing legislation). Professor Galbraith suggests that exclusion of the House may implicitly have been grounded in the law of mandatory ratification. See Galbraith, supra note 104, at 267 & n.88. Even if true, this is far from saying that the Constitution embraced a commitment to abide by that law. Moreover, as Galbraith recognizes, U.S. practice post-ratification did not demonstrate such a commitment. See id. at 267–68.

³⁰⁷ See, e.g., 2 Farrand, supra note 4, at 538 (Sherman, arguing “that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature”); id. (Wilson, acknowledging but dismissing secrecy concerns in favor of other concerns favoring House involvement); 3 id. at 251–52 (C.C. Pinckney, recalling that “the secrecy and despatch . . . so frequently necessary in negotiations evinced the impropriety of vesting” the treaty power in Congress as a whole or in the House of Representatives alone); A Landholder VI, Connecticut Courant (Dec. 10, 1787), in 3 Documentary History, supra note 255, at 487, 490 (questioning whether “the representative branch [is] suited to the making of treaties which are often intricate and require much negotiation and secrecy”); Americanus VII, New York Daily Advertiser (Jan. 21, 1788), in 20 Documentary History, supra note 93, at 629, 632 (arguing that treaty “[n]egotiations . . . require a management and secrecy ill-suited to the turbulence and party violence of a numerous House of Representatives”); Federal Farmer: An Additional Number of Letters to the Republican, Letter XI (Jan. 10, 1788), in 20 Documentary History, supra note 93, at 1011, 1018–19 (expressing doubt about the Senate’s role in treaty-making, while agreeing that “the house of representatives is too numerous to be concerned in treaties of peace and of alliance”); Yoo, Original Understanding, supra note 302, at 2035–36, 2038–39, 2047 (noting reasons why the House was excluded from treaty-making). In the state

Fourth, the Constitution rendered treaty-making difficult by requiring the concurrence of the President and “two thirds of the Senators present.”³⁰⁸ As Governor Morris opined, “[t]he more difficulty in making treaties, the more value will be set on them.”³⁰⁹ By adopting the Supremacy Clause, the Constitution combined the difficulty of entering treaties with increased ease in adhering to them.

Fifth, the terms of office for both the President and Senators were selected with an eye toward international law. Those terms would allow the key national players in foreign affairs to learn what they might need to know of the nation’s interests and treaties, other nations’ law and policy, and the law of nations.³¹⁰ The Senate was particularly important in promoting wise national policy. The lengthy terms in the Senate would

ratification debates, Yoo argues, the House’s unsuitability for treaty-making was insufficient to counter pressures to include the House, and Federalists responded by arguing that the House would have a role in treaty implementation. See, e.g., *id.* at 2040, 2045–48, 2050, 2060–68, 2070–73; cf. The Pennsylvania Convention (Dec. 11, 1787), *in* 2 Documentary History, *supra* note 256, at 550, 562–63 (Wilson, explaining that there were strong reasons for excluding the House from treaty-making while asserting that the House’s “legislative authority will be found to have strong restraining influence upon both President and Senate”).

³⁰⁸ U.S. Const. art. II, § 2, cl. 2; see also 2 Farrand, *supra* note 4, at 548 (“Madison observed that it had been too easy in the [Confederation] Congress to make Treaties altho’ nine States were required for the purpose.”); 3 *id.* at 424 (King, noting “a peculiar jealousy . . . in the Constitution concerning the power which shall . . . make treaties with foreign nations. Hence the provision which requires the consent of two-thirds of the Senators”). The Convention at one point endorsed but ultimately rejected efforts to make it easier to enter treaties of peace. See *id.* at 533–34, 540–41, 543–44, 548–49. Various proposals to alter the two-thirds requirement to make it both easier and harder to enter treaties were likewise rejected. See 2 *id.* at 540, 544, 547–50.

³⁰⁹ *Id.* at 393.

³¹⁰ See The Federalist No. 64, at 359–61 (Jay) (Clinton Rossiter, ed., 1999) (addressing terms of the President and Senate); see also The Pennsylvania Convention (Dec. 10, 1787), *in* 2 Documentary History, *supra* note 256, at 532, 535–36 (McKean, supporting the proposed term of Senators as their treaty and war-making responsibilities will require “them to be conversant [through study and experience] with the politics of the nations of the world and the dispositions of the sovereigns, and their ministers”); The New York Convention (June 24, 1788), *in* 22 Documentary History, *supra* note 256, at 1836, 1843–44, 1846–47, 1849 (Livingston, supporting Senators’ six-year term as the Senate will participate in treaty-making, which “requires a comprehensive knowledge [gained from experience] of foreign politics,” foreign negotiators, and U.S. foreign interests); 2 Farrand, *supra* note 4, at 318 (Pinckney, commenting that “[t]he Senate would be . . . more acquainted with foreign affairs”); The Federalist No. 53, at 302–03 (Madison) (Clinton Rossiter ed., 1999) (addressing the terms of Representatives).

allow the Senate to check the democratic impulses of the House³¹¹ and secure stability in the nation's treaty relations.³¹²

³¹¹ See 1 Farrand, *supra* note 4, at 218–19, 222, 228 (Convention, voting to make Senators' term seven years with Randolph and Madison reasoning that the Senate needed to be "a firm body" to check the democratic House); *id.* at 421–23 (Madison, arguing that the Senate should be a firm, small body whose terms were sufficiently long to allow them to "acquir[e] a competent knowledge of the public interests" in order to protect against the people's "transient impressions"); *id.* at 435 (noting argument that the "[d]uration of the Senate [is] necessary to its Firmness"); 3 *id.* at 340 (Davie, asserting that "[t]he stability of the laws will be greater when the popular branch, which might be influenced by local views, or the violence of party, is checked by another, whose longer continuance in office will render them more experienced, more temperate, and more competent to decide rightly"); see also 2 *id.* at 6 (King, asserting that the Senate "was . . . meant, to check the [House], to give more wisdom, system, & stability to the Govt"); *id.* at 52 (Morris, explaining that the Senate was "meant as a check . . . on the propensity in the [House] to legislate too much to run into projects of paper money & similar expedients"); *id.* at 277 (Madison, noting the "Utility of the [Senate] check" on the House). But cf. *id.* at 274 (Mason, fearing that the Senate, with its longer terms of office, would lead Senators to "settle themselves at the seat of Govt. [and to] pursue schemes for their own aggrandizement," and would "be able by wearyg out the H. of Reprs and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose").

Some wished for even longer terms. Hamilton, for example, argued that those who find a seven-year term "a sufficient period to give the Senate an adequate firmness" have not "duly consider[ed] the amazing violence & turbulence of the democratic spirit." 1 Farrand, *supra* note 4, at 289. He argued that Senators, like the Executive, should serve for life. "On this plan we should have in the Senate a permanent will, a weighty interest, which would answer essential purposes." *Id.* at 290, 299–300, 309–10. Mr. Morris similarly argued that the Senate ought to be "chosen for life" in order to check "the turbulency of democracy," or in other words, the "precipitancy, changeability, and excess" to which the House "will ever be subject." *Id.* at 517; see also *id.* at 426 (Wilson, arguing for a nine-year term); *id.* at 512–13 (Morris, arguing that the object of the Senate was "to check the precipitation, changeableness, and excesses of the first branch" and that "[t]o make [the Senate] independent, it should be for life"). Others feared the Senate's lengthy terms. See 2 *id.* at 632, 635 (Gerry, withholding his signature from the Constitution in part due to "the duration and re-eligibility of the Senate"); *id.* at 638 (Mason, explaining, in refusing to sign the Constitution, that the Senate's powers and relation with the President coupled with "their duration of office and their being a constantly existing body, almost continually sitting, joined with their being one complete branch of the legislature, will destroy any balance in the government, and enable them to accomplish what usurpations they please upon the rights and liberties of the people"); see also The New York Convention (June 24, 1788), in 22 Documentary History, *supra* note 256, at 1836, 1849–50, 1852 (Lansing, rejecting the argument that the Senate's foreign affairs responsibilities required lengthy terms).

³¹² See 1 Farrand, *supra* note 4, at 426 (Wilson, proposing a senatorial term of "9 years with a rotation" to provide the stability and permanency to sustain treaty relationships); *id.* at 517–18 (Morris, arguing for lengthy senatorial terms with their attendant permanency as the United States would lose the confidence of others "if we continue changing our measures by the breath of democracy"); *id.* at 513 (Morris, warning that "[i]f we change our measures no body will trust us: and how avoid a change of measures, but by avoiding a change of men"); The New York Convention (June 24, 1788), in 22 Documentary History, *supra* note 256, at

Sixth, and related to the prior point, Senators, due to their small number, would possess a “sense of national character” that would lead them to be sensible “to the opinion of the world.”³¹³ That sensibility was important because there is value in other nations’ perception that American policy is “wise and honorable” (whether or not it, in fact, is), and because “in doubtful cases . . . the presumed or known opinion of the impartial world may be the best guide” to wise policy.³¹⁴

Seventh, if the features of the national legislature did not prevent pursuit of the excesses exhibited by the states, the executive veto would provide a check. As Madison explained,

The Legislatures of the States had betrayed a strong propensity to a variety of pernicious measures. One object of the Natl. Legislre. was to controul this propensity. One object of the Natl. Executive, so far as it would have a negative on the laws, was to controul the Natl. Legislature, so far as it might be infected with a similar propensity.³¹⁵

Eighth, to the extent there were actions that caused foreign offense, the “acknowledgments, explanations, and compensations” offered by “a

1836, 1865–66, 1868, 1870 (Hamilton, arguing that Senators’ six-year terms are necessary given the Senate’s foreign affairs responsibilities, which require knowledge gained by experience as well as the continuity necessary to preserve foreign respect). See generally 1 Farrand, *supra* note 4, at 430 (Madison, arguing Senators’ “permanency in office secures a proper field in which they may exert their firmness and knowledge”).

³¹³ The Federalist No. 63, at 350 (Hamilton or Madison) (Clinton Rossiter ed., 1999). Number was important because “a due sense of national character” can, with limited exception, “only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual.” *Id.* at 350–51. But cf., e.g., An Officer of the Late Continental Army, *Independent Gazetteer* (Nov. 6, 1787), *in* 2 *Documentary History*, *supra* note 256, at 210, 212 (warning that “the *Senate* is so small that it renders its extensive powers extremely dangerous”); The Pennsylvania Convention (Dec. 8, 1787), *in* 2 *Documentary History*, *supra* note 256, at 525, 527 (Whitehill, warning that “[a]ll our constitutions may be altered by treaties made by a few Senators”); The Dissent of the Minority of the [Pennsylvania] Convention (Dec. 18, 1787), *in* 2 *Documentary History*, *supra* note 256, at 617, 634 (objecting that “the president and 10 senators” by treaty may affect any “power, privilege, or liberty of the state governments, or of the people”); The New York Convention (June 24, 1788), *in* 22 *Documentary History*, *supra* note 256, at 1836, 1836 (Gilbert Livingston, decrying the powers that could be exercised by few Senators); 2 Farrand, *supra* note 4, at 286 (Gerry, warning that “[i]f great powers should be given to the Senate we shall be governed in reality by a Junto as has been apprehended” since Senators will be so few in number that eight of them can achieve “all great purposes,” their terms will be long, and they will not be “subject to recall.”); 4 Elliot’s *Debates*, *supra* note 258, at 119 (M’Dowall, complaining that ten Senators and the President “may make treaties and alliances”).

³¹⁴ The Federalist No. 63, at 350 (Hamilton or Madison) (Clinton Rossiter ed., 1999).

³¹⁵ 2 Farrand, *supra* note 4, at 110 (footnote omitted).

strong united nation” would be more likely to be accepted than the same from “a State or confederacy of little consideration or power.”³¹⁶ This final point ties the prior points together—the transfer of power not only to a centralized, but to a well-structured, government would improve the U.S. position with regard to international law and relations.

In short, the creation of the Constitution evidences a desire to decrease state-induced violations of international law by taking power from the states and vesting it in a government of the whole, whose structural features and natural inclination to national interests could reduce violations of that law. At the same time, reduction is not elimination, and structural incentives toward international law compliance are not a constitutional mandate to comply with international law. The Confederation government had not adhered strictly to international law. The Framers and ratifiers of the Constitution expressed no concern for international law violation committed by the national government. Structural protection of international law compliance left room for similar national discretion in the future.

c. Implications and Counter-Concerns

The evidence developed in this Article undermines both broad and narrow claims of constitutional commitment to comply with international law, albeit to differing degrees. The broad claims are most readily undercut. One cannot square this Article’s finding of enduring national discretion to violate international law with suggestions that the Constitution as a whole commits the national government to comply with international law. With regard to the narrower claims, the Article’s impact is more modest. The evidence developed here undercuts reliance on Founding-era statements and the conventional narrative to find particular commitments to international law compliance, such as a constitutional requirement that the President comply with international law. When viewed in the broader context provided by this Article, Founding-era statements and the conventional narrative offer less support for finding that specific actors must comply with international law. The weakened

³¹⁶ The Federalist No. 3, at 13 (Jay) (Clinton Rossiter ed., 1999). Jay also asserted that the national government would be better able to settle foreign offenses because it would “be more temperate and cool” and less prideful, and thus more able “to act with circumspection than the offending State.” *Id.*

support may not be fatal in light of other evidence to support such requirements.³¹⁷

As to some claims, however, the evidence may be quite significant. Ramsey asserts that while the historical evidence to support the President's constitutional duty to adhere to CIL is slim, "there is no material evidence in the other direction."³¹⁸ The fact that the Confederation Congress, arguably acting in an executive capacity, departed from the law of nations provides such countervailing evidence. Of course, some might argue that the evidence developed in this Article is of violation by the Confederation Congress and therefore not probative when it comes to the President, or to the treaty-makers. While it is true that differences in the Confederation and constitutional governments make it difficult to draw a straight line from the Confederation Congress to the President or treaty-makers, connections can be made. Part of the perceived difficulty in inferring lessons from the Confederation Congress for the President or treaty-makers derives from an anachronistic characterization of the Confederation Congress.

The Confederation Congress was essentially the sole political organ of the national government during the period of Confederation—"there were no 'branches' of government."³¹⁹ Congress exercised "all functions entrusted to the national government"; it was both the legislature and the executive.³²⁰ Indeed, perhaps surprisingly given our current perception of Congress, the Confederation Congress was arguably more executive than legislative.³²¹ "A 'congress' [at the time] was a meeting of diplomats; lawmaking bodies were called 'parliaments,' 'assemblies,' 'legislatures,' and the like."³²² Consistent with this nomenclature, the Confederation "Congress had little lawmaking power. Its great powers lay in foreign affairs—war and diplomacy."³²³ From a separation of powers perspective, then, the Confederation Congress exercised largely execu-

³¹⁷ See *supra* note 9 and accompanying text.

³¹⁸ Ramsey, *supra* note 5, at 365.

³¹⁹ *Id.* at 31 (noting also that Congress exercised "all functions entrusted to the national government"). While Congress did establish a Secretary for Foreign Affairs, Congress at least initially maintained close control over the Secretary's actions. See, e.g., Crandall, *supra* note 105, at 23, 25–26; Swaine, *supra* note 104, at 1179 n.184.

³²⁰ Ramsey, *supra* note 5, at 31.

³²¹ See *id.* at 46 (noting that "Congress was not primarily a lawmaking body"); Yoo, *Original Understanding*, *supra* note 302, at 2009–11 (asserting that Congress under the Articles of Confederation was more executive than legislature).

³²² Ramsey, *supra* note 5, at 36.

³²³ *Id.*

tive power. From a functional perspective, one of its key tasks was treaty-making. Consequently, the Confederation Congress's actions, though collective, are instructive in understanding the constitutional executive and treaty-making powers.

CONCLUSION

Returning to the original question, to what extent does the Constitution reflect a commitment to international law compliance? Scholars have made both broad and narrow claims of a constitutional commitment. Scholars have relied on Founding-era evidence, including the conventional narrative of state violation of international law during Confederation, in making these claims. As this Article demonstrates, the conventional narrative is true as far as it goes. The history of state violations did lead to constitutional reforms intended to facilitate international law compliance. As a matter of logic, however, the narrative requires only the centralization of power, not international law constraint of that power. More importantly, the conventional narrative has blinded scholars to other critical evidence—the national government's experience with international law under the Articles of Confederation. As this Article reveals, the national government departed from both sources of international law during Confederation. The Confederation Congress violated the law of mandatory ratification and bent treaty obligations to national advantage. Significantly, the Framers and ratifiers expressed no concern over this behavior during the Constitution's creation. Consistent with this lack of concern, the Constitution adopted, not a clear substantive commitment to international law compliance, but structural protections toward that end.

The national government's violation of international law during Confederation, the absence of concern for this violation during constitutional creation, and the Constitution's ultimate adoption of structural protection of international law compliance particularly undermine broad claims of constitutional commitment to international law. Although not conclusive, this history also weakens more narrow claims that particular federal actors are constrained by international law. Overall, the Confederation history of national noncompliance and the Constitution's adoption of structural protections for international law compliance suggest that the Constitution's position on international law compliance lies closer to national discretion to violate than claims of a constitutional commitment to international law might otherwise suggest.