

THEORIZING THE FOREIGN AFFAIRS CONSTITUTION

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The United States Constitution is not a superpower's constitution. It was the charter of a revolutionary tobacco republic led by an enlightened junto¹ of paramilitary planters, merchants, and lawyers. In framing the Constitution, this cadre—and the informed citizenry who ratified their work product—desired above all to ensure the United States' survival as against the European great powers, to avoid renewed war with the great powers, and to secure the self-proclaimed nation's recognition as a full-fledged, autonomous member of their exclusive society of states. These goals were complicated by the inconvenient truth that the so-called republic was freshly carved out of the society's first member by a bloody rebellion. The essential tasks of survival and acceptance for this militarily weak revolutionary state had to be accomplished in an anarchic world governed by customary rules that acknowledged the sovereign state's resort to war as the ultimate arbiter of controversies between states in the absence of international courts.

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¹“Junto” was the name that Benjamin Franklin gave to his pre-revolutionary debate group and also the name given to the leadership of the Whig Party during the reigns of William III, Anne, and George I. Edmund S. Morgan, *Benjamin Franklin* 40- 43 (2002). The American revolutionaries were great admirers of the radical wing of the Whig party, including John Trenchard, who was associated with the Whig Junto. Bernard Bailyn, *The Ideological Origins of the American Revolution* 35-39 (1967).

In a series of articles over the past five years, I have elaborated the proposition that continental public international law – in addition to English common law – was a body of law that shaped American constitutional—and “super-statutory” — law as it was drafted, ratified, and interpreted in the early and middle Republic.² My particular focus was upon doctrines associated with the third article of the Constitution, on the view that a principal reason for the federal judiciary was the creation of a national corps of quasi-diplomatic judges with foreign-policy expertise and insulated from domestic political pressures to arbitrate international and interstate controversies. Peaceful resolution of international disputes in particular was an extremely important mission for the courts because the rules of the relevant world legal order, which were primarily to be found in the customary law of nations given there were few treaties then, were importantly different from international law today.

Mainstream international law from the late eighteenth to the early twentieth centuries legitimated an extremely violent, anarchic system of international relations. Self-interested sovereign states were the only recognized actors on the international stage and war was an accepted part of life.³ One example of the Hobbesian legal norms the

² Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 *Nw. U. L. Rev.* 1027 (2002) (asserting that the Eleventh Amendment embodied the law-of-nations rule of sovereign equality-- a citizen or subject of a state or a foreign state has no legal rights as against another fully sovereign state); Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign State against States*, 104 *Colum. L. Rev.* 1765 (2004) (interpreting the Original Jurisdiction Clause of Article III to encompass an exclusive original jurisdiction in the U.S. Supreme Court for suits by foreign states against U.S. states for treaty violations to encourage foreign states to sue rather than resort to armed force to vindicate treaty claims); Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 *Colum. L. Rev.* 830 (2006) (construing Article III as implemented by section 9 of the 1789 Judiciary Act to authorize federal jurisdiction over claims of injury to the person or property of aliens by U.S. citizens and agents in order to encourage investment in the United States and to avoid the possibility the alien’s sovereign would exercise its international legal right to espouse the alien’s injury and redress it by belligerent acts).

³ A leading example of the sort of world such rules condoned—and indeed facilitated—was the late nineteenth-century scramble for empire which resulted ultimately, and crushingly, in the First World War. Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*

system embraced was the rule of espousal by armed force, which was retired by multilateral treaty in 1907.⁴ The rule recognized a sovereign's right to use armed force against a country that impedes its citizen's ability to collect contract debts. Another example more to the point was the rule that a sovereign could war against another country if its citizen were "denied justice" in the latter's courts.⁵ As Alexander Hamilton put it in *The Federalist*: "the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war."⁶ This was why it was so imperative for the new Republic to establish national courts as an alternative to partisan state courts and juries, and to ensure that domestic law verdicts and sentences were in line with customary international standards of justice.⁷ A third international legal norm of special concern to early American leaders in light of the 1783 Treaty of Peace was the right, in the event of a breach of treaty obligations, of the aggrieved treaty partner to punish the party in breach by war.⁸ It is unsurprising that Emmerich de Vattel, the Swiss publicist of international law most associated with the mainstream view such rules instantiated, and perhaps the equal to Blackstone in his profound influence on the founders with respect to the foreign affairs Constitution,⁹ was

(2002), details attempts to change the sovereignty-centered and war-permissive view of international law in the latter half of the nineteenth century by the International Law Institute.

⁴ Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, art. 1, 36 Stat. 2241, 2251, 1 Bevans 607, 614.

⁵ Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (1938).

⁶ *The Federalist* No. 80, at 536 (Alexander Hamilton) (Cooke, ed., 1961). Vattel writes: "If there be any [nation] that makes an open profession of trampling justice under foot, of despising and violating the right of others, whenever it find an opportunity, the interest of human society will authorize all others to untie in order to humble and chastise it. Page 221 (Book II, Chapter V, § 70).

⁷ See *id.*

⁸ The norm was a corollary of a bedrock principle of classical international law, *pacta sunt servanda*: treaties must be kept. See opinions in *Ware v. Hylton*. See Kelsen, *Nuremberg indictments*.

⁹ Lee, 96 *NW L Rev.* 1061-67. Blackstone's *Commentaries* and Vattel's *Law of Nations* were the first two books the U.S. Senate bought for its library. 2 *Journal of the Senate of the United States of America* 44 (Washington, Gales & Seaton 1820) (Mar. 10, 1794).

condemned by Immanuel Kant for formulating a vision of international law that reinforced a stark Hobbesian world order.¹⁰

This Essay has two aims. The first is to introduce and apply international relations theory as an explanatory tool to supplement documentary sources in deriving estimates of the original late eighteenth-century public meanings of not just Article III, but the entire “foreign affairs Constitution.” I use the term “foreign affairs Constitution” expansively to refer to any aspect of the Constitution that applies to interactions between the United States, the states, and its citizens on one hand, and foreign states and their peoples on the other.¹¹ This enterprise is a small but radical step from my conclusion in prior work that international law, rather than the international relations that body of law purported to regulate, was the principal source of influence on the constitutional framework for the conduct of the nation’s foreign affairs and, secondarily by way of analogy, on the constitutional law of federalism. While I continue to believe that classical international law was a major influence on the Constitution, it seems clear to me now that the more important point which the earlier work alluded to but did not draw explicitly was that, since the rules of international law for the most part reflected a realist theory of international relations, it was in fact the dire geostrategic circumstances in which the early Republic found itself that most significantly shaped the original constitutional framework for dealing with foreign states and parties. Accordingly if we can sketch a good picture of how a militarily weak state in the early Republic’s condition

¹⁰ I believe the criticism somewhat unfair. Vattel, in my view, sought to change the international system albeit incrementally, and, more importantly, his seeming accommodation of realism in international politics veiled a pro-republican normative project, that is, a hidden campaign to proliferate the republican form of government as a domestic political matter.

¹¹ Thus, for example, the foreign affairs Constitution would include the Original Jurisdiction Clause (“all Cases affecting Ambassadors, other public Ministers and Consuls, and alienage

might rationally design a fundamental foreign-policy governance framework for an anarchic world inhabited by greater powers and subject to realist rules of war, we would have a reliable blueprint of the original foreign affairs Constitution. The blueprint would be a new and useful tool for resolving controversies about the original public meanings of important constitutional provisions relating to foreign parties given ambiguous text and historical evidence. The second—and secondary—aim of this Essay is to address the present-day relevance of the explanatory leverage afforded by international relations theory into the meaning of the original foreign affairs Constitution.

The implications of the international relations context at the founding for constitutional interpretation have been largely ignored.¹² Indeed, in general, although domestic political theory informs discussion of what the Constitution meant at the time of ratification and should mean today, no one thinks to look to international relations theory for insight into original—or contemporary—constitutional meanings. Put another way, when we ask ourselves what constitutions are for, the near-universal response is that they are for protecting our individual rights and ensuring democratic government. To be sure, the domestic political ends of rights and democracy for the American people were important constitutional goals, but, as a historical matter, the Constitution of the United States was first and foremost about achieving the survival of a new revolutionary nation in a dangerous world order—a condition antecedent to the enjoyment of individual rights or democracy. On this view, the institution of the national judiciary, insofar as its power of judicial review makes it the ultimate arbiter of constitutional meaning, was intended to

¹² Note some attention paid to the fact by historians, most notably Frederick W. Marks. *Independence on Trial: Foreign Affairs and the Making of the Constitution* (1973).

be a foreign-policy and national-security institution,¹³ a point that gets overlooked today when debates about the separation of powers in foreign affairs focus principally on the executive and legislative branches. My methodological aim in this Essay is to introduce the idea that theorizing about the Constitution, at least as it pertains to foreign affairs, belongs as much to the world of international political theory as it is the domain of domestic political philosophers.

This Essay has three parts. The first part theorizes how weaker states generally behave in a realist world order populated by more powerful states and demonstrates the fit of the weak-state perspective to the United States' world standing at founding. The second shifts from political science to law to explore the specific implications of the Framers' original weak-state perspective for the U.S. foreign affairs Constitution. The third addresses the apparent incongruity of applying an original constitutional framework for foreign affairs designed for a weak state in 1789 when the United States has become a hegemonic power in 2007.

I. Theorizing the Militarily Weak State's Foreign Policy Preferences

For the most part, international relations (IR) theory concerns itself with great powers. But there is a small, insightful body of scholarship that deals with the peculiar case of the weak state.¹⁴ The corpus arose in the context of the Cold War, when the

¹³ Casto and Goebel have made this point from a strictly historical perspective.

¹⁴ Bibliography of weak state literature. All of this discussion assumes a rational-actor model of weak state behavior. One of the most interesting parts of the weak-state literature deals with "rogue" weak states like North Korea who act in ways that seem to defy the standard rational-choice model. Because, in my view,

paradoxical influence of weak states on world politics (the “tail wagging the dog” phenomenon) presented an interesting puzzle for IR scholars.

A threshold question the literature confronted was definition. In a classic work, Robert Rothstein defined a “Small Power” as:

A state which recognizes that it can not obtain security primarily by use of its own capabilities, and that it must rely fundamentally on the aid of other states, institutions, processes, or developments to do so; the Small Power’s belief in its inability to rely on its own means must also be recognized by the other states involved in international politics.¹⁵

Robert Keohane did not think Rothstein’s capacious definition fit the contemporaneous Cold War context.¹⁶ In an era of nuclear weapons, weren’t all states other than the United States, the Soviet Union, and the People’s Republic of China “small powers” in Rothstein’s sense? Keohane offered, instead, what he believed to be a more useful definition cued to a state’s ability to influence the world system:

A Great Power is a state whose leaders consider that it can, alone, exercise a large, perhaps decisive, impact on the international system; a secondary power is a state whose leaders consider that alone it can exercise some impact, although

the early Republic clearly sought acceptance into the world community, I think it is accurate to presume that the rational-choice model applied to the American instance.

¹⁵ Richard Rothstein, *Alliance and Small Powers* (1968).

never in itself decisive, on that system; a middle power is a state whose leaders consider that it cannot act alone effectively but may be able to have a systemic impact in a small group or through an international institution; a small power is a state whose leaders consider that it can never, acting alone or in a small group, make a significant impact on the system.¹⁷

Rothstein's and Keohane's definitions share the core idea that the very identity of a weak state is defined by the fact that it perceives itself—and is perceived by other states—as constrained in its ability to act unilaterally in international affairs, to go it alone.¹⁸ But constrained in its ability to do what? Rothstein frames the limitation unobjectionably in terms of an inability to “obtain security.” We can take that to mean the state's capacity to ensure survival in a manner consistent with its national identity.¹⁹ Keohane's approach was characteristically more functional, phrased in terms of the weak state's capacity to make “some” or a “significant” “impact” on the international system. This may include more than the mere ability to survive, although I would think that at the very least “some” impact means persuading more powerful states with designs to attack it to leave it alone or to survive such an attack if persuasion fails. What Keohane is clear on is that the leaders of what he called “middle” or “small” powers perceived they must act in a “a small group” or through an “international institution” if they are to have even a chance at exercising an impact on the world order.

¹⁶ Robert O. Keohane (1969), *Lilliputians' Dilemmas: Small State in International Politics*. *International Organizations* 23(2) 291-310.

¹⁷ *Id.* at ____.

¹⁸ Less useful are taxonomies that center on material capabilities such as military power, population, size or economic indicators such as GDP. See, e.g., Michael Handel, Marshall Singer, David Vital. These conditions may vary over time; worldviews are more resilient.

¹⁹ See generally *The Culture of National Security* anthology.

The essence of survival for a weak state in a world order that has liberal rules on the permissibility of war is to prevent war with greater powers, and, failing that, to win or bring any such war to an early and acceptable end. To avoid war in the face of a threat, any state has a couple of choices: it can use diplomacy, negotiation, arbitration, or other such peaceful measures to resolve any source of controversy with the threatening foreign state or party; or it can try to deter the threat from materializing into an attack by building up or adding to its military power. If conflict-resolution mechanisms fail, and the threatened state is forced to deter or fight, it can confront the threat with internal and/or external measures. It may balance threat internally by building up its own military power—what IR theorists call “self-help.” Or it may balance externally by aggregating its military power with the power of other states, most notably through alliances and confederations.²⁰ The extent to which a particular state will choose one strategy over the other or a mix of the two will depend to a large extent on its *ex ante* power capacity.

By virtue of its military infirmity, a weak state is by definition constrained in its capacity to balance internally by self-help. This condition has two logical consequences. First, the weak state will place a higher premium on avoiding wars—and maintaining peaceful relations—with foreign states than the great power. It will therefore seek to mitigate potential reasons for foreign states, especially those it perceives to be great powers, to wage war against it and avail itself of mechanisms to restore peace quickly in the event of war. In other words, it will make maximal use of peaceful conflict-resolution devices such as negotiating peace treaties and establishing tribunals to settle

international disputes short of war, and it will adhere to the legal norms of the international community of nations in order to diminish the possibility that violations of those norms could be used as a reason for war against it. Second, the weak state should be more hospitable to alliances and other techniques of external balancing to compensate for its deficiencies in internal balancing.

But the weak state's preferences with respect to alliances are more complicated than the simple first logical cut would suggest. Alliances with great powers are a particularly tricky means of external balancing for weak states. As a general matter, alliances entail the forfeiture of some measure of a state's independence of action and so present a less attractive option than internal balancing, all other things being equal. Additionally, "bandwagoning"²¹ with an ascendant great power that ends up victorious in great-power conflict may result in benefits for the weak state's standing in the world order, but it may also increase the satellite dependence of the weak state on the great power. But "chain-ganging" in an alliance with an ultimate loser in great-power conflict might have the opposite effect, and possibly even result in the destruction of the weak state. It is hard to tell in advance whether an alliance decision will result in bandwagoning or chain-ganging. The weak state that finds itself in the middle of a bipolar or multipolar conflict among great powers must therefore walk a fine line among the great powers. Rather than ally with one or another great power given the risks of

²⁰ See generally Stephen M. Walt, *The Origins of Alliances* (1987).

²¹ Christensen and Snyder, *Chain-ganging and Bandwagoning in Alliances*.

chain-ganging despite the potential benefits of bandwagoning, the weak state might rationally seek to maintain neutrality.²²

Another option besides neutrality for the weak state given the difficulties inherent in alliance with a great power is an alliance or confederation with one or more other weak states in a collective security institution. The great risk in this strategy is that the constituent states are so weak that even an aggregation of their military power would not suffice to deter or balance a great-power threat. To maximize the aggregation would likely require centralized coordination of military forces and important foreign policy decisions, in order to restrain defections to the enemy, disputes among state members of the alliance, and overly aggressive behavior by some states.

In the event that prevention tactics fail and a weak state is drawn into great-power conflict in a realist world order, it will seek a path to peace as soon as possible. By definition, the weak state has a more modest interest in simply maintaining a status quo in which it continues to exist as a sovereign entity, which differs from a great power that is plausibly more interested in maintaining and aggrandizing its power vis-à-vis other great powers.²³ But since survival, at the very least, requires the continuation of the weak state as a territorially independent sovereign, it will fight to maintain its territorial integrity even if victory seems unlikely.

²² D. Reiter on Neutrality and Learning Effects.

²³ There is debate in the IR literature about whether great powers will seek to aggrandize power even at the risk to survival.

The weak state's survival might encompass things other than bare territorial integrity. Can we consider southern France to have "survived" German aggression in 1941 with the Vichy accommodation? Or did Hungary survive Soviet military intervention in 1959? Our intuitive negative responses suggest that survival requires a meaningful form of native self-governance or autonomy in addition to formal territorial integrity. This would seem particularly true with respect to a state the national identity of which is associated with a democratic ideology like the United States.

In summary, we can theorize several distinctive features of the foreign affairs constitution of a militarily weak state facing great-power threats in a realist world order with permissive rules on war, by contrast to the present world order's blanket prohibition on wars other than for self-defense or with United Nations sanction. The constitution will favor judicial (whether by domestic or international tribunals) and diplomatic resolution of disputes with foreign parties to prevent resort to war by the other side. Second, the constitution will make it difficult for the state's leaders to wage offensive war, particularly against great powers, but easier to wage defensive war in cases of invasion where territorial integrity or sovereignty are threatened. By the same token, we can theorize that the constitution will try to make it as easy as possible for state leaders to terminate wars. Fourth, the constitution will permit resort to multilateral alliances for external balancing, although it will seek to provide safeguards against the chain-ganging and bandwagoning risks of alliances with great powers. Fifth, the constitution will seek to maximize the state's compliance with international law (the paradigmatic case being a peace treaty with a great power) to alleviate the possibility that a violation of

international law will give a great power a reason to wage war against it. Sixth, the constitution will restrict the state's ability to cede its own territory or to give up sovereign rights, for instance by treaties affording extraterritorial rights to foreigners. Finally, and as a general matter, given the militarily weak state's basic (and sole) interest in a Hobbesian universe populated by more powerful states is to be left alone to live, it will seek continuance of the status quo by contrast to great powers for whom realists predict a constant struggle for relative gains in power against each other.

Having sketched a model foreign-policy constitution based on the reasonable preferences of a militarily weak state in the face of great-power threat, it remains to be seen if the United States was in fact such a state at the time the Constitution was framed. The case in chief begins with the genesis of the Constitution itself as the charter for a "more perfect union" of the former colonies to aggregate military power in the wake of the proven infirmities of the Articles of Confederation in this regard. The foundational act of constitutional bonding—functionally an alliance of thirteen weak states—was a reaction to a world order perceived to be hostile to the survival of the American states as independent sovereigns. And the threat was perceived as sufficiently severe that the people of the respective states were ultimately willing to submit to a complete surrender of "external" sovereignty, roughly corresponding to the province of the foreign affairs constitution, to a newly formed general government.

The life-or-death threat that the infant United States faced was of interlaced domestic and foreign complexion. The instant concern was the fracture of the

“compound republic”²⁴ into its constituent semi-autonomous states. The several states on their own would be easy pickings for the European great powers whose lands and armies and navies virtually encircled the new republic. First and foremost of these was Great Britain, which retained control of Canada and its Caribbean colonies. Spain claimed ownership of Florida, everything west of the Mississippi River, the river itself, and a good chunk east of it too. France still had colonies in the West Indies and was thought to covet Spanish Louisiana.

From a military strategic standpoint, Britain’s supreme naval power was the most emergent of many dangers, for maritime trade (and fishing) was the lifeblood of the United States. The vast, unruly dimensions of the western frontiers guaranteed a certain measure of safety in that quarter, although British delays in handing over key frontier forts exacerbated American anxiety over threats from Indian tribes. The country was strung precariously along the Atlantic seaboard, and as poor in industry and finance as it was rich in crops and other natural resources. Trade with the European nations, particularly with the Western Indies of the British Empire,²⁵ was essential to make up the deficit. And independence from Britain had been purchased by a war won only with massive foreign military intervention and the assumption of large foreign debts. The Republic’s militarized northwestern borders with its former motherland and enemy presented a vivid reminder of the pendant proximity of sizable British army formations. The prospects of renewed war, a trade embargo, or a cut-off of credit were no idle threats.

²⁴ Madison, Federalist Paper ?.

²⁵ See data from Elkins and McKittrick about extent of trade with Great Britain. See also Marks, Independence on Trial.

After the war, the United States had hoped to expand commerce into the Mediterranean to make up some of the loss of colonial trade preferences, but those ambitions were frustrated by the scourge of the Barbary pirates. Without any naval power (the Continental Navy having been disbanded and its hulls sold with peace), the pre-constitutional republic looked in vain to British or French intercession and did not have the funds to pay the ransoms demanded by the Barbary states on a lasting basis. From a military standpoint, the Barbary republics were even weaker than the early United States, and so American impotence in the face of their challenge is a particularly telling statement about the parlous pits of American military weakness. One possibility that Thomas Jefferson suggested while Minister to France in 1786 was a multilateral alliance of weak and middle powers against the Barbary pirates, including Denmark, Naples, Portugal, the two Sicilies, and Sweden.²⁶ The framing of the Constitution enabled the national governmental internal-balancing solution to the threat that was ultimately implemented: by the Naval Act of 1794, Congress authorized the construction of four forty-gun and two thirty-six gun frigates. The newly constituted United States Navy, in a series of battles in the early nineteenth century, defeated the most aggressive of the Barbary kingdoms. Notwithstanding the significance of this early feat of arms for American trade and early nationalism, it was of negligible effect on the world order, and so entirely consistent with the profile of a militarily weak state.

To be sure, the framers understood that their new Republic possessed great natural resources and many among them envisioned that the United States would one day be a great nation. But they did not necessarily desire or envision that the United States would be a “great power” in the classical world order, that is, a country that would have

²⁶ Thomas Jefferson to John Adams, July 11, 1786, in Wharton’s Diplomatic Correspondence, 1783-89.

sufficient military power to project abroad and influence global politics. Rather, they dreamed of the future United States as “a great nation” apart that would forever remain a “weak state” in IR terms, that is, a state that would have no ability (or desire) to affect the world order beyond the self-defense capacity to ensure its own survival.

II. How the U.S. Constitution Reflects the Militarily Weak State in a Hobbesian World Order

We know well the constitutional protections the Framers of the Constitution designed to preserve the state’s respective internal sovereignties while pooling their external sovereignty to deal with the precarious foreign-policy picture. Those protections embodied the constitutional principle of federalism, a principle that survived (in diminished form) the failed secession of the Southern States and the ratification of the Civil War amendments to the Constitution. We sometimes forget that the Bill of Rights, transformed by the twentieth-century doctrine of incorporation into an individual rights manifesto against state as well as federal governmental encroachment, was itself an instantiation of the federalism principle: the animating motivation for its ratification was fear of overreaching by the national government in domestic sovereignty matters cordoned off for the States and their citizens in the original constitutional bargain. Indeed, the constitutional principle of separation of powers at the national level was as much a federalism measure to maintain national governmental weakness vis-à-vis state governments as it was a direct safeguard of individual liberties.

But although commentators recognize the ample allowances the Framers of the Constitution made for the domestic structural condition of federalism, they do not consider that the Framers may have made similar concessions to the foreign structural condition of the American republic's military weakness in the global balance of power. That is to say, they ignore the possibility that the international relations context at the founding shaped the foreign affairs Constitution. Indeed, the far more common move, by both conservative and progressive scholars, is to presume the exact opposite – that the foreign affairs Constitution is largely modeled on the contemporaneous constitution of the British Empire, the most powerful state in the late eighteenth century world balance.²⁷

There are two major reasons for this neglect. First, commentators blithely assume that the English unwritten constitution was the model for the U.S. Constitution. This assumption seems clearly justified with respect to the fundamental laws of individual rights. The English example was admired by the Framers as the liberty-protecting lodestar of the times.²⁸ Indeed, it engendered the ironic seed of the revolution itself.²⁹

With respect to foreign affairs the assumption is not so easily defensible. To be sure, the British precedent was an important source that the Framers consulted in designing their own foreign affairs Constitution. But the late eighteenth century British foreign-affairs constitution, unfixed by text, was a canny constitution of empire³⁰—a vast empire of which the American colonies had until very recently been an eager and then a

²⁷ John Yoo, *The Powers of War and Peace*.

²⁸ See Gordon S. Wood, *The Creation of the American Republic 1776-1787*: 10-11 (1998).

²⁹ *Id.* at 12-14.

³⁰ John Witt's discussion of ambiguity in the British constitution of empire in 2007 *Harvard Law Review*.

reluctant part. By contrast, a poor new republic forged by violent revolution with its armies disbanded occupied a dubious place in the contemporaneous world order. The United States at founding was no empire; some doubted whether it was even a nation. The fundamental rules that an empire formulates to manage its relations with the outside world are not necessarily the rules a new weak state would adopt to ensure acceptance and survival in a world of more powerful, established sovereign states. The possibility that the stark divergence in geopolitical perspectives might have led the Framers to depart from the British example in crafting a uniquely American constitutional framework to deal with the rest of the world has been largely ignored.

Second, from a textual standpoint, accommodations to the world balance of power are not reflected in constitutional text as clearly as the restraints on the national governance organs imposed by enumeration in the original Constitution and by the explicit terms of the ninth, tenth, and eleventh amendments. It is very clear from the text how the domestic balance of power between the national government and the several states and their citizens shaped the domestic affairs Constitution. But, as Louis Henkin has observed, “where foreign relations are concerned the Constitution seems a strange, laconic document.”³¹ That is not to say of course that constitutional recognitions of the external balance of power do not exist.

The constitutional text does yield important clues about the Framers’ weak-state perspective on contemporaneous international relations. For instance, the aforementioned concessions to federalism are nowhere to be found with respect to

foreign affairs: the Constitution denies to the states the most awesome powers in the foreign-policy toolbox of the day such as the powers to make war, to issue letters of marque, to enter alliances, and to make treaties. These powers are vested instead in the newly created general government. Banding together to aggregate power and to coordinate a single foreign policy—and thereby to restrain at one blow both more belligerent and more timid member states—is a classic strategy of political unions who see themselves as weak in the face of militarily powerful foreign threats, as witness the mid-nineteenth century unification of German states to counterbalance French strength. Ironically, a mere 70 years after the founding, the Union had become so much a force to be reckoned with in world politics that the same European powers who had taken opposite sides in the American revolutionary war sought Confederate victory for the global balance-of-power implications of a retrograde cleavage of the United States.

Consider also that the power to initiate offensive war is committed to Congress, the most democratically accountable national governance institution, but the direct power to terminate such wars – permanently by treaty or temporarily by armistice—is committed to the less democratically accountable Senate and the President jointly, and to the President as Commander-in-Chief, respectively.³² Scholars have argued that the Framers vested the declare-war power in Congress because of the fear that a President might wage war for personal glory against the interests of the citizens who would pay for the war and fight and die in its battles.³³ In other words, the assignment of the declare-war power to Congress was, in functional terms, a conflict-avoidance mechanism. To be

³¹ Louis Henkin, *Foreign Affairs and the U.S. Constitution*, 13 (2d ed. 1996).

³² Congress also has the implicit power to terminate wars by cutting off funding for military forces.

sure, this arrangement is mainly—and more commonly—justified from a domestic political standpoint as a protection for citizens, but it is also consistent – as Immanuel Kant argued in *Perpetual Peace*³⁴—with an international relations theory of how wars might be curtailed.

The Framers may have been animated by the same conflict-avoidance rationale when they vested the direct war termination powers in the Senate and the President. The power of Congress to terminate a war that the President seeks to continue by refusing to fund it has been a topic of great modern controversy since the Vietnam War. But it is often forgotten that the direct powers of war termination rest with the President and the Senate. The two institutions may not be as democratic as the full Congress, but, by the same token, they are also more insulated from populist desires for retribution and more likely to stop a war that the people want. Implicit in the apparent contradiction between the Framers’ institutional settlement of the initiate-war and the terminate-war powers is the belief that a democracy may be slow to war but once incited to wage war, fights it in a destructive, uncontrollable take-no-prisoners manner, even when a negotiated peace might better advance the national interest.³⁵ The theme is vivid in Thucydides’s account of the self-destructive bloodlust of the Athenian democrats in the Pelopponesian War, and it was likely validated for the Framers by widespread demands for retribution and confiscations against Loyalists and British merchants at the close of the war. The revolutionary war itself was concluded by a treaty of dubious democratic pedigree

³³ See, e.g., Bill Treanor

³⁴ Kant, *Perpetual Peace*.

³⁵ John Dower, *War Without Mercy*.

containing highly unpopular terms with respect to the settlement of British debts and Loyalist estates.

There are a number of similar instances of previously unnoticed constitutional provisions that may be construed as reflecting the special concerns of a militarily weak state. For instance, among the two modes of international law—the customary law of nations and treaties, the Constitution evinces an explicit emphasis on treaties.³⁶ This does not seem very strange today because treaties are prevalent and viewed as the primary currency of international law. But under the classical international law regime of the late eighteenth century, treaties were relatively rare, confined to the war-related realms of treaties of alliance and peace. The vast majority of international legal rules, including most laws of war and of peace were based on the customs of the club of European great powers which were recorded in public-law treatises like Vattel’s *Law of Nations*. The United States was at the very forefront of the treaty movement because, in my view, the capacity to “treat” was viewed as a prerogative of the sovereign state, and so the mere fact of being a signatory to a treaty was a validation of the American Revolution and the United States’ sovereignty. Moreover, a particular treaty, the Treaty of Peace of 1783, was the paradigmatic and most important of all treaties for the United States, marking as it did Great Britain’s concession of any claims to sovereignty over its former colonies.

But not all treaties are created equal for the militarily weak state. Peace treaties, so long as they do not cede territory or autonomy are of especial high value, and so it is important that the constitutional framework permit their ratification, even when they run against democratic sentiments. Treaties of amity and commerce that establish peaceful relations with other sovereign states are also beneficial. But treaties of alliance—beyond

the foundational “alliance” of the thirteen quasi-sovereign former colonies— are possibly detrimental because of the risks of bandwagoning and chain-ganging.

The upshot is that a militarily weak state has an interest in preempting democratic impulses in ratifying treaties of peace and amity and commerce and for making sure that it doesn’t break treaties, since a breach of a treaty supplied a lawful reason to wage war against the party in breach. Hence, the President may treat with the advice and consent of the Senate and the concurrence of two-thirds of Senators present; it is unnecessary to consult the more democratic House. And to guard against a foreign state engaging in the self-help remedy of war to remedy a treaty breach, the Constitution sets up the Supreme Court as a judicial forum for the adjudication of treaty disputes between foreign states and American states, who posed the greatest risk of treaty breach at the framing.³⁷

Another corollary of weak-state IR theory relates to the controversial question of whether treaties should be presumed to be self-executing as a matter of U.S. domestic law. The majority position on the issue is that the Framers presumed that treaties would be binding under domestic law without additional implementing legislation.³⁸ Relying on the British example, a vocal minority claims that the opposite is true.³⁹ There is no answer to the question in the constitutional text, and although, in my view, the weight of the historical evidence supports the majority position of self-execution, reputable scholars have come to a differing conclusion. If we apply the weak state filter to the question, however, the majority position seems surely right: since the treaty partner would likely be an established great power, it would heighten the risk of war to design a constitutional

³⁶ Supremacy Clause

³⁷ Lee, Supreme Court as Quasi-International Tribunal.

³⁸ Flaherty, Vazquez 1999 Colum. L. Rev.

³⁹ Yoo, Colum. L. Rev.

framework where treaties would not be automatically effective upon signature and ratification. Moreover, when one considers that the paradigmatic treaty in the constitutional framework was the Treaty of Peace which concluded the Revolutionary War and which by its terms required domestic legislative performance by virtue of the mandated invalidity of certain state confiscation and currency laws, it seems unimaginable that the foreign affairs Constitution would not have made the treaty effective immediately.

A third controversial topic in modern U.S. foreign relations law is the constitutionality of delegation of judicial Article III functions and legislative Article I functions to multilateral institutions. On the weak state view, there is nothing particularly objectionable about such delegations: the former might be more favored than the latter given their usefulness in resolving international controversies, but the latter also seems unproblematic so long as the multilateral legislation does not result in the cession of territory or other essential attributes of sovereignty.

A related modern controversy is the incorporation of foreign and international legal standards into U.S. domestic constitutional law. Applying the weak-state perspective, it doesn't seem like there is any constitutional problem with this so long as the foreign or international standard is higher than the American standard. This is because in the brutal world legal order that pertained in the late eighteenth century, if an alien were "denied justice" by having been judged under U.S. legal norms that departed from general international customary standards, the alien's sovereign had the right to wage war against the United States. Given this rule, it is hard to imagine that the

constitutional framework would have prohibited the incorporation of foreign or international legal standards into American rules of decision.

What about the old chestnut question of whether the ancient constitution authorized national judges to promulgate a federal common law of crimes? To the extent that the paradigmatic such criminal violations were crimes against aliens committed by U.S. citizens at sea, it would be consistent with the weak-state perspective to commit this power to federal judges. Once again, a failure to afford generally acceptable justice in this instance would have left the United States open to war should the alien's sovereign espouse his claim and vindicate it by armed force as it had the right to do under the rules of international law. But it does not necessarily follow that the judges could enforce a free-ranging federal common law of crimes outside of this sphere.

What about the application of the weak state perspective to the controversial question of whether American constitutional protections are available for aliens who are not located in U.S. territory? There is no easy answer here. A militarily weak, survival-oriented state would not have likely envisioned a situation where its domestic legal protections could plausibly be applied to aliens abroad, except perhaps on the high seas—for instance, in a situation where an alien is seized by an American warship. For such a case, it seems to me likely that the constitutional blueprint of a militarily weak state would incline to giving the alien at least as much protection as he would receive under fundamental domestic laws, to avoid the possibility that the foreign sovereign would allege that the captor had denied justice to its citizen and retaliate with armed force as permitted under the then law of nations.

For my last two examples, I'd like to focus on controversial issues where a hypothesis based on weak-state IR theory generates an answer that diverges from the principal null hypothesis, namely domestic democratic political theory. A case of convergence may be helpful to understand the importance of such examples: one could explain the framers' fear of standing armies as motivated by a fear of dictatorship, by a concern about forecasting hostile intent to foreign states, or by both. By contrast, democratic theory and weak-state IR theory generate divergent explanations of the originalist pedigree of the later-in-time rule, which states that an after-enacted statute may overrule a prior ratified treaty as a matter of domestic law. The rule seems doubly justified from a democratic theory perspective: congressional statutes have a stronger democratic pedigree than treaties ratified by senatorial advice and consent, and it makes sense to privilege the most recent manifestation of legislative consent. However, using the weak-state lens, the later-in-time rule insofar as it applies to after-enacted statutes (versus treaties) cannot be justified, since the prior treaty would still be valid as a matter of international law notwithstanding a subsequent contrary statutory enactment, and a failure to perform the treaty obligation because of the statute would still be classified as a breach that redressible by armed force. Of course, we don't know for certain whether the later-in-time rule is consistent with original intent, and so the first example is useful primarily to illustrate the possibility of divergent explanations.

The second example of divergence concerns the only category of federal judicial power that must be vested under the Constitution—the original jurisdiction of the Supreme Court. It is the more significant example because it is a case that fits well the weak-state theory but does not fit a democratic account of constitutional provisions. The

Original Jurisdiction Clause covers “all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” In an earlier article, I demonstrated how the State-Party sub-clause contemplated Supreme Court original jurisdiction over cases between States and between States and foreign states. The purpose of this jurisdiction was to prevent interstate conflicts between States and international wars with foreign states by providing for the adjudication of State-foreign state controversies in the U.S. Supreme Court. If the Clause were motivated by concerns about democracy, surely it would have provided for jurisdiction over federal question cases. It is telling that the one aspect of the federal judicial power that the Constitution requires to be vested independent of congressional authorization related to easing potential tensions among States and with foreign states.

These are only a few examples; my intent here is not to give a deep historical account of all such instances in which the foreign affairs Constitution embodies a weak state’s conflict-avoidance orientation, although it is surely a principal part of my project to sketch them. The larger purpose, from a methodological standpoint, is to introduce the notion that the international relations theory may have as much to say about the meaning of key aspects of the U.S. constitutional scheme as domestic political theory whether framed in terms of individual liberty and justice or democratic legitimacy. When applied to specific constitutional provisions and doctrines, the weak-state perspective suggests answers to enduring debates about such disputed topics in U.S. foreign relations law as the scope of the executive’s war-making powers, the judiciary’s power in foreign affairs (including the propriety of deference to the political branches), the scope of American constitutional protections for aliens abroad, the domestic bindingness of the law of

nations, the self-executing character of treaties, and the constitutionality of delegating governance power to multilateral organizations and alliances. For scholars and jurists of originalist stripe in particular, international relations theory as applied to the world political standing of the United States at the founding provides a powerful tiebreaker in the face of ambiguous historical evidence on these questions and displaces an uncritical reliance on the inapposite, nebulous, and mutable British constitution of empire.

III. Translating the Foreign Affairs Constitution

If theorizing the preferences of a militarily weak state in a world of great powers under a state-centered legal regime sanctioning war produces an accurate model of the original foreign affairs Constitution, should the model be applied today when the United States is a military hegemon and international law exhibits an altogether different character? The United States' dramatically different standing in world politics would seem to compel a negative, anti-originalist response: it seems inapt for a military hegemon to stick to a constitutional framework for dealing with the outside world designed two centuries ago for a militarily infirm revolutionary state seeking acceptance as a sovereign state in a Hobbesian world. The misfit seems exacerbated by the fact that modern international law no longer reflects the permissive attitudes to war and the pro-sovereignty bias of the classical system.

My own view is that there is a good case for keeping the original foreign affairs Constitution, but it is not necessarily an originalist case. On the originalist view, if the weak-state filter is accurate as an explanatory theory of the foreign affairs Constitution as

ratified, then we must continue to apply it today despite intervening changes in the world order and its governing law.⁴⁰ But many prominent constitutional theorists do not believe the Constitution should be hidebound to text and original public meanings at all. For them, it may be necessary to consider other justifications for why a hegemon might want to keep an old, weak-state blueprint for its conduct of foreign affairs.

There are at least three other sorts of justifications for why the United States might stick with the original foreign affairs Constitution today. A Rawlsian justification would be to assert that even a hegemon should adopt the framework for dealing with other state actors that a weak state would choose because that would be what any state would do under a hypothetical veil of ignorance concerning its relative power in the world community. Indeed, the anthropomorphism may be more persuasive than its human formulation because there are only a couple hundred sovereign states and it is a proven fact – perhaps the only undeniable empirical truth in international relations—that no state or political entity has maintained world supremacy forever. Moreover, there are many instances in which the weak have become strong and the strong weak, as witness the trajectories of the Netherlands, Portugal, Spain, China, and the United States; indeed many leading members of historical world orders have ceased to exist altogether.

A second sort of non-originalist justification would be to accept the ancient framework because it is likely a better solution to a structural problem that has endured in essential respects notwithstanding the growth of American power. The world community has grown to a truly global dimension and international law has come to embrace the idea

⁴⁰ An originalist way to duck the question altogether might be to assert, ironically, that the original constitutional provisions do not have fixed meanings, that they were intended to be sufficiently flexible to allow evolution of rules to fit present exigencies, including American hegemony in world affairs. No

of individual human rights and restrictions on aggressive war, but the sovereign state remains the principal actor on the international stage and the international governance institutions that have been developed are a far cry from a world government. And, if one were to discount the importance of a state's relative standing in the world, it seems fair to conclude that the framers thought more carefully about how to ensure national flourishing and security in the context of a hostile world order than the leaders of a presently hegemonic state might.

The third sort of justification is pragmatic. To wit, it so happens that the weak-state foreign affairs Constitution is a good fit for a hegemon, although it would not be such a good fit for a super power or a great power. This is so because a weak state's basic interest vis-à-vis the rest of the world is to maintain its status quo position in the world, preserve peace, and to avoid sovereign-to-sovereign armed conflict. It does not seek to change the fundamental rules of the world order because it cannot in fact alter them. Ironically, a hegemon also does not seek fundamental changes to underlying rules even though it assuredly could because it has successfully resorted to them to attain hegemony. A good example of this counter-intuitive confluence would be to consider the presumption of self-executing treaties. A military weak state would prefer self-executing treaties because it does not want to run the risk of breaching a treaty with a greater power by failing to enact implementing legislation. By contrast, a great or super power is more comfortable with breaching by failing to enact implement legislation if it perceives the possibility of a relative power gain. However, a hegemon, by definition, has asymmetric bargaining power to dictate the terms of a treaty, and so it bears no costs by making the

originalist I know makes such a claim, for making it to win this battle would necessarily concede the entire purpose of a backward-looking mode of constitutional interpretation.

treaty self-executing, since it can be assumed that treaty terms favor the hegemon. It is important to qualify that this will not necessarily be true as to treaties concerning subjects in which the hegemon does not have hegemonic power. To give an example, a military hegemon like the United States can be assumed to be able to dictate favorable terms with respect to treaties of alliance or peace to end a war, but not with respect to, for instance, economic treatise where U.S. power is not as pronounced.

Conclusion

Because the United States was a weak state in the global balance of power at the founding, the Constitution naturally reflects a weak state's perspective on the appropriate framework for the conduct of the nation's foreign policy. And, importantly, because that framework was not renovated in the way the constitutional rules of federalism and individual rights were revised by the Civil War Amendments, there is no plausible textual basis on which to tack a sea change in the foreign affairs Constitution to track the dramatic rise in the United States' global standing. On its face this incongruity provides a profound new reason to reject originalism as an interpretive theory of the foreign affairs Constitution: a constitutional framework for foreign policy designed to cope with a world of more powerful states in 1789 seems inapt for a hegemonic power in 2007. Thus, it appears at first glance that original intent as applied to the foreign affairs Constitution may be criticized on the same abstract basis of changed circumstances that is a principal critique of using original intent to construe the domestic affairs Constitution.

But the two instances are different. It is hard to deny that a late eighteenth century system of constitutional rules pertaining to individual rights and federalism premised on the belief that political power does and should rest with propertied white men (with the right to own black slaves) whose first loyalty is to their states does not fit the twenty-first century United States. And intervening constitutional amendments explicitly modified the original rules. However, a web of constitutional rules for foreign policy that brakes the executive's – or any other national political branch's—use of armed force, authorizes multilateral cooperation, promotes adherence to international law, and permits and indeed encourages the deployment of the judiciary in sensitive national security issues may be as sound now in a unipolar setting where the principal foreign threat is a diffuse non-state terrorist group with potential access to weapons of mass destruction that is relatively immune to conventional military power, as it was in the context of a minor power seeking to survive in a world of multiple great powers. Put another way, a constitutional framework for international relations with a status-quo peace orientation may be as valid a strategy for a nation that dominates the world order as it is for a nation that lacks the capacity to influence it.

It bears noting that the same scheme may *not* be suited to a highly competitive multipolar or bipolar world order where the key threats to national security are other powerful states with commensurate military power. In other words, a foreign-policy governance structure tailored to the geopolitical context of the late eighteenth United States is pragmatically well suited to the twenty-first century United States, although it may not have been the right fit for the United States of the mid-to-late twentieth century

spanning the World Wars and the Cold War. Indeed, it may be fair to assert, as a descriptive matter, that U.S. foreign relations law practice evolved away from original understandings in the twentieth century for this very reason of misfit⁴¹ and that, as a normative matter, this is as it should be.

⁴¹ See Ted White, Va. L. Rev. 1999.