
The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution

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This article argues that American constitution-making in the founding era was an international process. At the outset of the Revolution, the Continental Congress and the revolutionary assemblies collaborated to construct a portfolio of foundational documents that American diplomats carried across the Atlantic to seek European support. In the spring and summer of 1776, Congress drafted three of the documents: the Declaration of Independence, the Articles of Confederation, and the Model Treaty. At exactly the same time, Congress recommended that the states draft a fourth type of document: state constitutions. Two dimensions of internationalism operated in the making of this portfolio. One was classically diplomatic: The documents were designed to persuade foreign states and their subjects to acknowledge American independence. The other was cultural and intellectual: The concepts and language with which the revolutionaries drafted their portfolio were part of a common transatlantic political culture, and the resulting documents were premised on the Enlightenment goal of redesigning government within and among nations to foster commerce and reduce the propensity for war. The portfolio thereby contributed to what can be called the “Constitutional Enlightenment.” This second dimension was related to the first, in that legible government would help induce Europeans to see the American states as true states. The transatlantic elements of the portfolio provided European audiences with a stylized description of governance on the ground and an aspirational program for the new governments in progress. However, this intellectual dimension was also autonomous from diplomacy because it permitted Europeans to detach the revolutionary portfolio from the human events transpiring in North America

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and make it the object of transnational discussion about the optimal forms of institutional design, a discussion that could in turn be brought to bear on politics in Europe. The portfolio therefore helped transform the classical study of politics into the modern and potentially revolutionary project of comparative constitutionalism.

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*“This is not Independency you know.—What is? Why Government in every Colony, a Confederation among them all, and Treaties with foreign Nations, to acknowledge Us a Sovereign State, and all that.”*¹

INTRODUCTION

Americans and their historians have long viewed constitution-making in the Founding Era as a local event with global repercussions. It is a story of American ideals and interests in which American drafters, voters, and ratifiers made key decisions.² Americans then began to work out the meaning of their constitutions in state and federal institutions, which required that some officeholders be citizens.³ Only after the ratification of the federal Constitution did foreign nations take heed, through imitation and (later) force.⁴ This myth of the originally authentic, and later diffusionist constitution, is not limited to

1. Letter from John Adams to Abigail Adams (Apr. 12, 1776), in *Adams Family Papers: An Electronic Archive*, MASS. HIST. SOC., http://www.masshist.org/digitaladams/archive/popup?id=L17760412ja&page=L17760412ja_1.

2. See generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* (2010) (setting forth recent account of federal constitution-making).

3. See U.S. CONST. art. I, §§ 2-3, art. II, § 1, art. III, § 1 (requiring citizenship for offices of President, Senators, and Representatives, though not judicial officials). Legislation required the same for some federally created institutions such as the board of directors of the Bank of the United States. See *An Act to Incorporate the Subscribers to the Bank of the United States*, ch. 10, § 7(III), 1 Stat 191, 193 (1791).

4. See generally GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE* (2009) (recounting reception of American constitutionalism in Europe and Latin America); ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009) (attempting to quantify diffusion of constitutional provisions as part of ongoing comparative-constitutions project).

the United States.⁵ It has been the dominant conception of constitution-making in many times and places.

In fact, American constitution-making began as an international process. All the American constitutions of the Founding Era, state and federal, were made with foreign, as well as domestic, audiences in mind. International factors, from wartime imperatives to calculations of long-term commercial advantages, contributed to American constitution-making from the beginning. Indeed, the founding documents of the early United States—the state constitutions, the Articles of Confederation, the Declaration of Independence, and the Model Commercial Treaty—were designed at least in part as diplomatic instruments that, together, formed a revolutionary portfolio. Furthermore, the foundational documents articulated an Enlightenment-inflected vision of an international order of “civilized nations,” among which commerce would balance power.

“Diplomacy” as used here has both a traditional and a more elastic meaning. The revolutionary portfolio, at once informational and petitionary, was intended to elicit formal relations and perhaps assistance; these were revolutionary means toward traditional diplomatic ends. More expansively, the portfolio embodied a transatlantic faith that people could take control of their political destiny and, drawing on political wisdom and experience, redesign their governments upon the new foundation of popular sovereignty. In this dimension, the portfolio embodied and contributed to what can be called the “Constitutional Enlightenment.” As a self-conscious, public, and highly publicized effort in political reconstruction, the American constitutional experiments seemed to prove what European political thinkers had long believed or hoped: people could (in the words of Alexander Hamilton ten years later) “establish[] good government from reflection and choice,” rather than being “forever destined to depend for their political constitutions on accident and force.”⁶

The Constitutional Enlightenment was not marked by a single set of ideas or mind; nor was it static. What makes it identifiable are the same characteristics that marked much Enlightenment activity: the perceived sense that people could treat human institutions scientifically and subject them to experimentation and redesign.⁷ The revolutionaries undertook a local project

5. See generally Mark Tushnet, *Constitution*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 217 (Michel Rosenfeld & András Sajó eds., 2012) (exploring whether constitutions autochthonous).

6. THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

7. See DAN EDELSTEIN, THE ENLIGHTENMENT: A GENEALOGY 1-3 (2010) (arguing self-consciously scientific approach to society as distinguishing feature of eighteenth-century Enlightenment). The classic interpretation of the Enlightenment posits a more unitary conception. See generally ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT (1951). It has also been argued that the Enlightenment should be viewed as plural enlightenments. See J. G. A. Pocock, *The Re-description of Enlightenment*, in 125 PROCEEDINGS OF THE BRITISH ACADEMY 101, 105 (P.J. Marshall ed., 2004) (“[Enlightenment] bears a richness and diversity of meanings that cannot be embraced within any single formula with the definite article prefixed to it.”); see also

that had, they argued, ramifications for the rest of the Atlantic World. The portfolio was then received in Europe as evidence of effective revolutionary government and as a practical test of leading Enlightenment ideas. Amidst the overlapping and competing empires of the Atlantic World in the late eighteenth century, and during the international conflict that was the American Revolution, it could not have been any other way.

The effort began at the outset of the American Revolution and lasted at least through the 1790s. In a recent article that we are developing into a book, David Golove and I argued the federal Constitution of 1787 was conceptualized, drafted, and put into operation for not only domestic, but also foreign audiences.⁸ Many Founders saw the federal Constitution as, in part, a promise to foreign nations that the United States would fulfill its international obligations as a member of what they saw as the “civilized world.” The new constitutional structures not only centralized power over foreign affairs away from the states, but also distributed those powers across the federal government and insulated some aspects of foreign relations from the relatively democratic House of Representatives. For example, the President received the power to carry out diplomacy in peace and war, and the President and Senate shared the treaty power. Further, it was important to foreign audiences that the newly created federal courts had jurisdiction over a host of cases involving international interests, such as when the parties were foreign governments or aliens, or when the substantive issues turned on treaty rights and the law of nations.⁹ Additionally, key terms in the document that had little meaning for lay persons—such as “commander in chief”; “ambassadors, public ministers, and consuls”; and “admiralty and maritime jurisdiction”—were derived from the early modern law of nations. The use of this terminology drew on international practices and a European literature of interpretation that the framers assumed would provide rules of decision in concrete cases and, more generally, supply an interpretive context for the Constitution.

This argument is premised on an account of the founding generation’s intellectual commitments that bestowed value on recognition and integration

J. G. A. POCOCK, 1 BARBARISM AND RELIGION, THE ENLIGHTENMENTS OF EDWARD GIBBON, 1737-1764, at 9 (1999) (criticizing unitary concept of Enlightenment).

8. See generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); see also DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 215-17 (2005) [hereinafter HULSEBOSCH, *CONSTITUTING EMPIRE*]; Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825 (2006) [hereinafter Hulsebosch, *A Discrete and Cosmopolitan Minority*].

9. See generally Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. OF HIST. & BIOGRAPHY 176 (1984); Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547 (1989); Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (1989).

into the Atlantic World of nations. Nations, like people, were presumed to be sociable; like individuals, nations had the duty, as well as right, to work in concert with others.¹⁰ Commerce was the primary means of sociability, and the ideal of this Enlightenment-infected conception of international relations was commercial integration.¹¹

The purpose of state-building in early America, therefore, was not to create a powerful fiscal-military state that could take by force whatever it could not obtain through negotiation backed by threats. Rather, it could be called a “fiscal-commercial state,” one that depended on cooperative as well as competitive structures in the law of nations. A war may have made the American states, but Americans did not make their states only, or even primarily, to make war.¹² Instead, American state-building depended on the formation of international commercial and financial markets, which the law of nations was supposed to encourage.¹³ Although the precise nature of the connections among nations, and even the definition of which polities counted as nations, was contested—indeed, revolutionary Americans contributed much to the reformulation of what it meant to be a nation—few doubted that there was an international community that was, or should be, governed by common legal principles.¹⁴ Leading members of the founding generation did not, therefore, view international obligations as trespasses upon sovereignty. Instead, duties under the law of nations correlated with rights. Together, these legal complements would prove independence.

Although the Philadelphia Convention marked a turning point in American ideas about how to structure government in order to facilitate a more liberal and

10. In a typical formulation, James Wilson wrote: “‘The general principle,’ says Burlamaqui, ‘of the law of nations, is nothing more than the general law of sociability, which obliges nations to the same duties as are prescribed to individuals.’” James Wilson, *The Works of the Honourable James Wilson, L.L.D.*, CONST. SOC., <http://www.constitution.org/jwilson/jwilson1.htm>.

11. See generally ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977); ISTVAN HONT, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE* (2005); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* (1999); WEALTH AND VIRTUE: *THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* (Istvan Hont & Michael Ignatieff eds., 1983), for more information regarding this strand of the Enlightenment.

12. Cf. Charles Tilly, *Reflections on the History of European State-Making*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 42 (Charles Tilly ed., 1975) (“War made the state, and the state made war”). See generally JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688-1783* (1989) (applying this model to eighteenth-century Britain); MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003) (applying model to early United States); CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES: AD 990-1992* (1992) (developing this conception of state-building).

13. See generally SEYMOUR MARTIN LIPSET, *THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE* (1979); RICHARD B. MORRIS, *THE EMERGING NATIONS AND THE AMERICAN REVOLUTION* (1970), for argument that the early United States can usefully be viewed as a developing nation, rather than an inchoate superpower.

14. See Golove & Hulsebosch, *supra* note 8, at Part I.D (discussing Federalist vision of American participation in Atlantic World).

effective policy toward foreign nations, the founding generation did not take international audiences into account only when drafting the federal Constitution. Instead, those audiences were present from the beginning. When placed in the context of the preceding decade, constitutional reform in the 1780s fits into an ongoing story of institutional trial-and-error that began with the earliest examples of American constitution-making, beginning in 1776.

At the outset of the American Revolution, the Continental Congress and the provincial assemblies collaborated to construct a portfolio of foundational documents that American diplomats carried across the Atlantic to seek European support. In the spring and summer of 1776, Congress drafted three of the documents: the Declaration of Independence, the Articles of Confederation, and the Plan of Treaties, also known as the Model Commercial Treaty, or simply, the Model Treaty.¹⁵ At exactly the same time, Congress recommended that the states draft a fourth type of document: state constitutions. Some revolutionaries even floated the idea that Congress should draft a model state constitution.¹⁶

“Portfolio” is not simply a heuristic. Leading revolutionaries like John Adams thought that the four documents fit together as legal complements and each was necessary for independence. The revolutionary portfolio contained the legal forms to achieve independence while also announcing it. The early state constitutions, along with the more explicitly international Declaration, Articles, and Model Treaty, conveyed the revolutionary argument that the colonies had become international states entitled to all the rights of statehood, including the right to make war and treaties. Each document was constitutional in a meaningful sense. The state constitutions and Articles of Confederation outlined government within and among the states; the Declaration of Independence announced their collective claim to international recognition; and the Model Treaty specified the terms on which the states sought to reintegrate into the Atlantic World.

The portfolio also signaled functional capacity. The states claimed the legitimate power to tax and spend, including spending on war, and to police political membership. The Articles of Confederation were designed to coordinate defense and foreign policy, and the Model Treaty communicated an Enlightenment vision of peaceful international relations built on reciprocal commercial exchange rather than suspicion and aggression. Together, these documents were designed to help persuade the European powers that the American Revolution was not just an insurrection or civil war that might end in reconciliation with the British Empire. Instead, the states were international polities joined together in a confederation that deserved international assistance. Recognition was not enough. Without trade and military aid, the

15. *See infra* 184-200 and accompanying text.

16. *See infra* notes 95-106 and accompanying text.

revolutionary project was doomed. Assistance did not come quickly. It required persuasion. The portfolio played a central role in the personal interactions and public-relations campaign that comprised revolutionary diplomacy.¹⁷ Benjamin Franklin and other revolutionary diplomats publicized the portfolio as evidence that Americans had created independent states on the cutting edge of political reform and deserved trade and aid.

Most framers did not draft the *content* of the state constitutions with European audiences immediately in mind. However, the very project of writing the state constitutions was motivated by the need to present the colonies as national states, as that term was understood in the contemporary law of nations. A “constitution is in fact nothing more than the establishment of the order in which a nation . . . [forms a] political society,” wrote Emer de Vattel in an eighteenth-century treatise on the law of nations, “and its first and most essential duty towards itself, is to choose the best constitution possible, and that most suitable to its circumstances.”¹⁸ The content of each nation’s constitution depended on “the disposition of the people and other circumstances,” and nations were not supposed to interfere in the “domestic concerns of another

17. See BILLIAS, *supra* note 4; AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY (George A. Billias ed., 1990). See CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert Rosenthal eds., 1990), for scholarly attempts to trace the influence of American constitutions on constitution-making and revolutions elsewhere after the founding. See BILLIAS, *supra* note 4, specifically, for an excellent recent example that identifies a *documentary constitutionalism*, including six documents that had international influence: the Declaration of Independence, the state constitutions, the Articles of Confederation, the federal Constitution, the *Federalist Papers*, and the Bill of Rights. Instead, this project seeks to examine the international dimensions of foundational American documents during the founding itself. See generally ELIGA H. GOULD, AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE (2012) (discussing American quest for “treaty-worthiness”); LEONARD J. SADOSKY, REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA (2010) (offering insightful analysis of federal constitution-making as designed to solve diplomatic problems, especially with Indian nations).

18. VATTEL, THE LAW OF NATIONS, bk. 1, §§ 27, 28. Many revolutionaries read this eighteenth-century treatise on the law of nations. Benjamin Franklin and other members of the Continental Congress, at least, read Vattel during the heady early days of the Revolution. See Letter from Benjamin Franklin to Charles-Guillaume-Frédéric Dumas (Dec. 9, 1775), available at <http://wwwFOUNDERS.archives.gov/documents/Franklin/01-22-02-0172>. In December 1775, Franklin thanked Dumas for sending three copies of his recent French edition of Vattel, which Dumas edited and had printed in Amsterdam, stating:

It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept, (after depositing one in our own public library here [in Philadelphia], and sending the other to the college of Massachusetts Bay, as you directed) has been continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author.

Id. (footnote omitted); see also Letter from Charles-Guillaume-Frédéric Dumas to Benjamin Franklin (June 30, 1775), available at <http://wwwFOUNDERS.archives.gov/documents/Franklin/01-22-02-0049>; Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395 (1913) (explaining Vattel’s influence).

nation.”¹⁹ Other nations, however, would consult that constitution to determine with whom to engage in diplomatic relations.²⁰

Vattel’s point was that nations came in a variety of forms, and the particular constitutional form of each nation was generally a domestic matter. There is no evidence that Vattel was prescribing written constitutions as a recipe for state-building. Instead, he was describing extant political organizations in Europe according to contemporary political theory as he understood it: each nation by definition had a constitution, and viewed horizontally, international states were legally equal. Viewed vertically, however, their structures varied substantially, though most fit into recognizable categories of monarchy, aristocracy, republic, or some hybrid.

Consistent with Vattel’s description, constitution-making at the state level during the American Revolution was largely a local affair. Political localism was central to the revolutionary fervor from the start, and flattening the new American states into a single form would have been politically impossible.²¹ However, almost all revolutionaries agreed it was important to latch onto written constitutions as a way to make a claim for nationhood. To act and to be seen as a nation, a polity had to have a constitution, and the brand-new revolutionary states seeking diplomatic relations could not easily make their case based on local scripts of customary or ancient constitutions.²² Custom had

19. VATTEL, *supra* note 18, at bk. 1, §§ 29, 37. In the fall of 1775, when Congress debated a resolution to guide South Carolina revolutionaries as they sought advice about organizing their government, John Adams “laboured afresh to expunge the Word Colony and Colonies, and insert the Words States and State, and the Word Dispute to make Way for that of War, and the Word Colonies for the Word America or States. But the Child was not yet weaned.” JOHN ADAMS, *Autobiography of John Adams*, in 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 358 (L.H. Butterfield et al. eds., 1961); cf. J. R. Pole, *The Politics of the Word ‘State’ and its Relation to American Sovereignty*, 8 PARLIAMENTS, EST. & REPRESENTATION 1, 8 (1988) (noting citizens’ loyalty to individual states prior to federal Constitution).

20. See VATTEL, *supra* note 18, at bk. 1, § 214 (“It is from the constitution of each state that we are to learn who are the persons, and what is the power, entitled to contract in the name of the state, to exercise the supreme authority, and to pronounce on what the public welfare requires.”).

21. See generally OSCAR HANDLIN & MARY HANDLIN, *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780* (1966) (setting forth classic study of local sources of state constitution-making).

The process of devising a new constitution for Massachusetts therefore partook of the nature of a dialogue between the representatives in Boston who framed the proposals and the citizens in their towns who gave or withheld their consent. The interchange provided the means for expressing shared assumptions about the polity of a free society.

Id. at 19. Much of the local debates about constitution-making in the states centered on representation: whether legislators should represent jurisdictions, like towns and counties, or individuals, and whether or to what extent there should be property qualifications for voters and officeholders. See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (2001); J. R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* (1966).

22. Cf. OSCAR HANDLIN & MARY HANDLIN, *THE DIMENSIONS OF LIBERTY* (1961) (distinguishing ancient and modern constitutionalism by contrasting mere institutional description with aspirational and constraining

been a leading discourse of colonial grievances within the British Empire and deeply influenced the form and practices of American government.²³ Several colonies also had received royal or corporate charters, which gave them experience with making claims on the basis of written documents.²⁴ Written documents, however, were especially useful when publicizing the revolutionary transformation. This international imperative, therefore, sheds light on why the revolutionaries produced stand-alone written constitutions amidst military crisis, sometimes, as in New York, while scrambling in retreat from advancing British troops.²⁵ The portability of written documents meant that they could be printed and distributed, near and far, as arguments that the revolutionaries possessed governments and were international states.²⁶ In addition, the state draftsmen were educated, provincial Britons who had experience with self-government within a European empire. Although they did not design the first state constitutions for the benefit of foreign interests, they built from a transatlantic stock of ideas that made the content of their constitutions (once translated) legible to European audiences. Writteness, along with access to high-volume printing, was intrinsic to constitutional advocacy at home and abroad.²⁷

The rest of the portfolio was international by design as well as function. The Confederation, as a form, expressed an enduring ideal of international cooperation amongst states, and the revolutionaries modeled the Articles of Confederation on ancient and modern confederacies like the Swiss and Dutch confederations.²⁸ Similarly, the Declaration of Independence was, in form and

prescription); CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1940) (outlining similar distinction).

23. See generally J. G. A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1987) (examining ancient constitution); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (2003) (discussing prominence of custom in American resistance).

24. See generally DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (1988) (emphasizing colonial tradition of governmental charters and written statements of rights).

25. Compare *id.*, and Benjamin F. Wright, Jr., *The Early History of Written Constitutions in America*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN* 344-71 (1936) (offering traditional interpretations linking “writteness” to colonial charters), with ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789*, at 158-59 (1924) (discussing New York’s “government on the run”).

26. See generally 1 *JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK, 1775-1776-1777* (1842). The states printed thousands of copies of their new constitution at home. For example, immediately upon adopting the state constitution in April 1777, the New York Provincial Convention ordered the printing of 3000 copies of the document and authorized its secretary to “give gratuities to the printer and his workmen, at his discretion, to obtain despatch [sic], and that the printer be directed to lay aside all other business.” *Id.* at 898.

27. See generally TRISH LOUGHRAN, *THE REPUBLIC IN PRINT: PRINT CULTURE IN THE AGE OF U.S. NATION BUILDING, 1770-1870* (2007); MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* (1992), for the importance of print culture in revolutionary America.

28. See DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* 47-48

function, an international declaration of war and conveyed the argument that the American Revolution was not a domestic rebellion.²⁹ Finally, the drafters of Congress's Model Treaty cut-and-pasted from European treaties renowned for their commercial liberality to construct what was literally a model treaty: exemplary of past diplomacy and a template for future relations.³⁰ More deeply, all the documents in the portfolio drew on strands of Enlightenment ideas about government in ways that were, if not persuasive to every audience, instantly recognizable.

There were, therefore, two dimensions of internationalism in the making of the portfolio. One was classically diplomatic: the documents were designed to persuade foreign states and their subjects to acknowledge American independence and treat the new states *as* states. Another was cultural and intellectual: the concepts and language with which the revolutionaries drafted their portfolio were part of a common transatlantic political culture. This second dimension was of course related to the first, in that legible governmental structures would help induce Europeans to see the American states as true states. Here, the transatlantic elements of the portfolio provided European audiences with a stylized description of government on the ground (at a time when events were moving fast and there were few independently verifiable news accounts of what was going on in the states) and an aspirational program for the new governments in progress. However, this cultural dimension was also autonomous from diplomacy in that it permitted Europeans to detach the revolutionary portfolio from the human events transpiring in North America and make it the object of transnational discussion about the optimal forms of institutional design that could be brought to bear on local politics within Europe. In this second dimension, the revolutionary portfolio helped galvanize the project of comparative constitutionalism.

The diplomatic motivations behind revolutionary constitution-making, therefore, ranged from the realist to the ideological and existential.³¹ To succeed, the revolutionaries needed to prove to the wider world that they could govern themselves. To sympathetic Britons, they wished to show that the thirteen provinces were already functionally separate—and that fighting the Americans was futile. To attract allies, they had to show that they could wage war and be trusted. Yet Americans also wanted to show them more: the

(2003) (describing Swiss and Dutch influence on Articles of Confederation); ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 105-31 (2010) (analyzing development of confederal conceptions of power in late colonial and revolutionary thought). John Adams invoked ancient and modern confederacies, including the Dutch and Swiss, as models as early as June 1775. *See* ADAMS, *supra* note 19, at 352 (invoking confederate model of government).

29. *See infra* note 155 and accompanying text (explaining treatment of Declaration of Independence as declaration of war).

30. *See infra* note 194-99 and accompanying text (describing drafting of Model Treaty).

31. *See* Golove & Hulsebosch, *supra* note 8, at 937-98, for the interplay among these interests.

revolutionaries were building states not only to wage war, but also to create political states that could make peace among themselves and also seek peaceful relations with the wider world. They were making governments that could be short-term allies, long-term commercial partners, and political models.

The very process of institutional reform and experimentation, as reflected in these key documents, was part of the American argument for recognition and support. Whether or not every contributor to, or ratifying voter of, the portfolio viewed his handiwork through a transatlantic perspective, revolutionary institution-building was performed on an international stage.³²

Legitimacy was not just a governmental interest. Individual revolutionaries were concerned about their own sense of legitimacy. Consistent with Common-Sense moral philosophy that largely equated reputation and identity, they wished to see themselves through the approving eyes of others.³³ The belief that reputation mattered drove some revolutionaries toward new institutional experiments, especially after the war, but it also inspired others to fantasize about escaping European judgment altogether.

European interest in the American Revolution, however, meant that escape was not possible. This article argues that the portfolio helped rally European support for the American Revolution, though the degree to which the documents affected European calculations remains open to debate. French assistance is often explained in realist terms, and the court of Louis XVI undoubtedly wished to harm its perennial enemy by helping the colonies. Nevertheless, many French supporters spoke of liberty and reform, and these motivations overflowed the diplomacy of revenge. Indeed, across Europe, the portfolio generated a new line of inquiry in an ongoing Enlightenment debate about the best forms of government and the nature of rights. European intellectuals, participating in the transnational-communications network known then as the republic of letters, invoked the revolutionary portfolio as evidence for and against leading theories of political science, alternately praising and criticizing Americans for furthering or deviating from the course of human progress. Because some of these intellectuals did have influence on decision-makers, even this abstract international debate about the portfolio contributed

32. See generally THE FEDERALIST, *supra* note 6 (discussing choices in constitution-making). As Alexander Hamilton said:

[I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

Id. at 3.

33. See Golove & Hulsebosch, *supra* note 8 (describing reputational mechanism behind constitutional innovation in 1780s).

to American independence.³⁴ Thus, the portfolio helped the states succeed in war and to gain freedom from the British Empire. It would take additional constitutional reform, however, for Americans to win the peace.

I. JOHN ADAMS AND THE REVOLUTIONARY PORTFOLIO: CONCEPTION AND SEQUENCE

In mid-May 1775, a month after hostilities broke out in Massachusetts, its provincial convention requested that the Continental Congress

favour them with explicit Advice respecting the taking up and exercising the Powers of civil Government, and declar[ed] their readiness to submit to such a general Plan as the Congress may direct for the Colonies, or make it their great Study to establish such a form of Government there, as shall not only promote their Advantage but the Union and Interest of all America.³⁵

The convention was raising an army to defend against “the Butcheries and devastations of their implacable Enemies.”³⁶ Fighting had begun on land in April, and the revolutionary convention started issuing letters of marque and reprisal to extend the hostilities to the seas.³⁷ It had to raise money—to tax—and it needed legitimacy. When Massachusetts’s letter was read in Congress, John Adams and a handful of other radicals were already certain of the necessary course of action. War could not be waged without government: “[A]nd as I supposed no Man would think of consolidating this vast Continent under one national Government,” Adams recalled saying in Congress, “[w]e should probably after the Example of the Greeks, the Dutch and the Swiss, form a Confederacy of States, each of which must have a separate Government.”³⁸ He suggested that each province establish its own government, and then band together in a confederation. Moderate delegates were not, however, prepared to go so far, and the question was tabled.

A week later, another petition reached the floor from Massachusetts seeking advice about whether the provincial convention was justified in disobeying recent parliamentary legislation, part of the so-called “intolerable acts” that revolutionized the colonies’ government.³⁹ Yes, was the answer. With this, John Adams thought Congress had shuffled forward where before it had

34. See *infra* note 192, for a discussion of the Bowood Circle around Lord Shelburne, the British prime minister who negotiated the Treaty of Peace in 1782.

35. ADAMS, *supra* note 19, at 351.

36. *Id.*

37. See 2 ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 266-73 (1982).

38. ADAMS, *supra* note 19, at 352.

39. See generally BERNHARD KNOLLENBERG, *GROWTH OF THE AMERICAN REVOLUTION, 1766-1775* (1975), for a discussion of the Massachusetts Government and Boston Port Acts of 1774.

refused to step, “for it was a Precedent of Advice to the separate States to institute Governments.”⁴⁰ The future was becoming clear to him and a few other delegates, like John Rutledge of South Carolina and John Sullivan of New Hampshire. “Mr. Rutledge asked me my Opinion of a proper form of Government for a State[,]” Adams recalled in his autobiography.⁴¹

I answered him that any form, that our People would consent to institute would be better than none. Even if they placed all Power in a House of Representatives, and they should appoint Governors and Judges: but I hoped they would be wiser, and preserve the English Constitution in its Spirit and Substance, as far as the Circumstances of this Country required or would Admit. That no hereditary Powers ever had existed in America, nor would they or ought they to be introduced or proposed. But that I hoped the three Branches of a Legislature would be preserved, an Executive, independent of the Senate or Council and the House and above all things the Independence of the Judges.⁴²

Fighting had just begun and already Adams imagined the outlines of the new state governments.

Anxious inquiries from the revolutionary assemblies kept coming. Soon after King George proclaimed the colonies were out of his peace and protection in August 1775 (a declaration of martial law), New Hampshire requested guidance from the Continental Congress about “a Method for our Administering Justice, and regulating our civil Police.”⁴³ South Carolina did the same. The revolutionaries had cobbled together extralegal institutions: assemblies and committees in the colonies, and on top of them, the Continental Congress, to which those local bodies sent delegates.⁴⁴ The situation was

40. ADAMS, *supra* note 19, at 353-54.

41. *Id.* at 354.

42. *Id.*

But what Plan of a Government, would you advise? A Plan as nearly resembling the Governments under which We were born and have lived as the Circumstances of the Country will admit. Kings We never had among Us, Nobles We never had. Nothing hereditary ever existed in the Country: Nor will the Country require or admit of any such Thing: but Governors, and Councils We have always had as Well as Representatives. A Legislature in three Branches ought to be preserved, and independent Judges.

Id. at 356.

43. *Id.* at 354.

44. See HULSEBOSCH, CONSTITUTING EMPIRE, *supra* note 8, at 148-55 (discussing committee government in early Revolution); RICHARD R. BEEMAN, OUR LIVES, OUR FORTUNES AND OUR SACRED HONOR: THE FORGING OF AMERICAN INDEPENDENCE, 1774-1776, at 282-85 (2013) (examining requests of New Hampshire and South Carolina). See generally, PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776 (1973) (explicating legitimatization of extra-legal committee government).

untenable in practice and as a matter of self-conception. Practically, it was hard to run a war effort on the fly, relying on voluntary taxation and impressment of goods to support a war effort by nominal governments that had little official basis other than their own claims to represent the people and liberty. British North Americans probably had the highest literacy rate in the Atlantic World at the time, and a substantial percentage of leading revolutionaries were educated in academies and colleges.⁴⁵ In a revolution against illegitimate authority, they had to legitimize their own authority. They needed to believe it themselves; they needed the residents in their colonies to believe it; they needed the British to believe it; and they wanted the rest of the world to acknowledge their rightful claim to power. They also needed outside help, as they were facing the strongest empire on the earth at that time.

National status under the law of nations offered measurable benefits. The laws of war distinguished three categories of organized violence: rebellion, civil war, and war between independent states.⁴⁶ Insurrection was a *municipal* law matter, which in the early modern framework meant local or national, as opposed to *international*. The English common law and British statutes gave the crown broad discretion to suppress insurrection, and the King's August 1775 proclamation activated the harsh municipal law of treason.⁴⁷ In contrast, under the law of nations, the laws of war regulated, at least at the margins, international and civil wars; they set forth what circumstances could justify aggression and how war could be fought.⁴⁸ For example, in war, both sides deserved the rights of belligerents under the laws of war, which provided that soldiers deserved prisoner-of-war status if captured, and each side could arm privateers as an auxiliary navy.⁴⁹ There was not much guidance, however, on how to determine whether a particular struggle fit into one category or another.

45. See David D. Hall, *Learned Culture in the Eighteenth Century*, in 1 A HISTORY OF THE BOOK IN AMERICA: THE COLONIAL BOOK IN THE ATLANTIC WORLD 418 (Hugh Amory & David D. Hall eds., 1999), for a discussion of colonial literacy.

46. Vattel, *supra* note 18, at bk. 3, § 294 (distinguishing between insurrection and civil war). “[I]t is very evident that the common laws of war,—those maxims of humanity, moderation, and honour, which we have already detailed in the course of this work,—ought to be observed by both parties in every civil war.” *Id.*

[W]hen the bands of the political society are broken, or at least suspended, between the sovereign and his people, the contending parties may then be considered as two distinct powers; and, since they are both equally independent of all foreign authority, nobody has a right to judge them. Either may be in the right; and each of those who grant their assistance may imagine that he is acting in support of the better cause. It follows, then in virtue of the voluntary law of nations, that the two parties may act as having an equal right, and behave to each other accordingly till the decision of the affair.

Vattel, *supra* note 18, at bk. 2, § 56.

47. See generally BRADLEY CHAPIN, THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS (1964).

48. See generally STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY (2005), for a broad overview.

49. See *id.* at 114-15, 193.

In particular, there was not a coherent understanding about how, or when, a civil war became an international war.

Civil wars were generally zero-sum: one side would conquer the other. The American Revolution, however, was different: it was not designed to supplant the British Empire entirely, just on part or all of North America. It was supposed to create multiple states where before, in the eyes of international law, there had been only subsidiary parts of one greater state. Perhaps the only good precedent was the Dutch Revolt against the Spanish Empire in the late sixteenth century. However, even that was an ambiguous legal precedent for the American revolutionaries to rely upon; for despite *de facto* Dutch independence by the end of that century, Spain, and much of the rest of Europe, did not formally recognize the independence of the United Provinces of the Netherlands until 1648.⁵⁰

Britain accepted the underlying legal scheme, but classified the American struggle as an insurrection rather than a war. As Lord Stormont, the British Ambassador to France, made clear to French ministers in early 1777, Britain had repeatedly told the revolutionaries that although “you call yourselves an independent State, . . . you are not so; when Great-Britain has *acknowledged* that Independency, then we will treat with you, but not before, at present, you are at War with your Sovereign who by no means admits the Independency you assume.”⁵¹ Accordingly, Britain categorized colonial soldiers as rebels and their privateers as pirates, terms that Stormont used repeatedly at Versailles.⁵²

50. See WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW 183-97* (Michael Byers trans., 2000). Spain signed an armistice with the United Provinces in 1609, but did not formally recognize independence until a treaty in 1648. See *id.* at 183-85.

51. *Letter from Lord Stormont to Lord Weymouth* (Apr. 10, 1777), in 15 B.F. STEVENS’S *FACSIMILES OF MANUSCRIPTS IN EUROPEAN ARCHIVES RELATING TO AMERICA, 1773-1783*, at 387 (1892).

52. See *id.* at 523-30 (referring to American pirates). As late as January 1781, Congress continued to complain about the asymmetrical treatment of prisoners, “a conduct so contrary to the law of nations,” observing that:

[N]otwithstanding every effort of Congress to obtain for our people, prisoners in the hands of the enemy, that treatment which humanity alone should have dictated, the British commanders, unmindful of the tenderness exercised towards their men, prisoners in our hands, and regardless of the practice of civilized nations, have persisted in treating our people, prisoners to them, with every species of insult, outrage and cruelty.

19 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 27 (Gaillard Hunt, Library of Cong. 1912); see LARRY G. BOWMAN, *CAPTIVE AMERICANS: PRISONERS DURING THE AMERICAN REVOLUTION 1-6* (1976) (describing treatment of Americans in British prisons); EDWIN G. BURROWS, *FORGOTTEN PATRIOTS: THE UNTOLD STORY OF AMERICAN PRISONERS DURING THE REVOLUTIONARY WAR 55-57* (2008) (exploring treatment of Americans captured and held on floating hulks off New York City); SHELDON S. COHEN, *YANKEE SAILORS IN BRITISH GAOLS: PRISONERS OF WAR AT FORTON AND MILL, 1777-1783*, at 55-65 (1995) (detailing treatment in British prisons of about 3000 sailors captured on American privateers); GOULD, *supra* note 17, at 114-18 (describing soldiers as rebels); JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 21-23* (2012) (explaining how British viewed captured soldiers as traitors).

Neither deserved prisoner-of-war status.⁵³ Proving that the facts of the American Revolution fit the model of war became a matter of advocacy, as the revolutionaries sought to move their actions from the first category all the way to the third.

There was, however, no internationally prescribed mode for gaining recognition as an independent state. John Adams argued in the summer of 1776 that France could recognize the United States because “a bare Acknowledgement of our Independence after We had asserted it, was not by the Law of Nations an Act of Hostility, which would be a legitimate cause of War.”⁵⁴ Contemporary European authorities were more cautious. The conventional view was that a breakaway state could not receive full de jure international recognition until the original parent country acknowledged independence.⁵⁵ Third parties, like France, might recognize the de facto independence of the claimant-state, but they ran the risk of reprisal from the empire that refused to consent to the independence of its colony.⁵⁶ There was no clear legal roadmap.⁵⁷

53. See Benjamin Franklin & Silas Deane, *The American Commissioners to the Committee of Secret Correspondence* (Mar. 12-Apr. 9, 1777), available at <http://founders.archives.gov/?q=%22commissioners%20to%20the%20committee%20of%20secret%20correspondence%22&s=1111311111&sa=&r=7&sr=> (requesting exchange of American for British prisoners and then referring to ambassador’s “insolent answer”). When Franklin asked the British Ambassador to France to exchange prisoners in early 1777, the ambassador responded: “*the King’s Ministers received no Applications from Rebels, unless when they came to implore his Majesty’s Clemency.*” Letter from Benjamin Franklin to David Hartley (Feb. 16, 1782), available at <http://founders.archives.gov/?q=benjamin%20franklin%20to%20david%20hartley&s=1111311111&sa=&r=140&sr=>; see Letter from The American Commissioners to Lord Stormont (Feb. 23, 1777), available at <http://www.founders.archives.gov/?q=%22The%20American%20Commissioners%20to%20Lord%20Stormont%22%20&s=1111311111&sa=&r=1&sr=>.

54. ADAMS, *supra* note 19, at 338.

55. See C.H. Alexandrowicz, *The Theory of Recognition* In Fieri, 34 BRIT. Y.B. INT’L L. 176, 183 (1958) (discussing need for parent state recognition); see also MIKULAS FABRY, *RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776*, at 25-26 (2010).

Though state recognition was not a well-defined practice at the time [i.e., the late eighteenth century]—one had to reach for precedents all the way back to the acknowledgment of the Dutch Republic, Switzerland, and Portugal in the mid-seventeenth century—there was a distinct sense it would be against the existing state rights to acknowledge sovereignty of a country’s territory prior to that country’s renunciation thereof.

FABRY, *supra*, at 25-26 (footnote omitted).

56. See Alexandrowicz, *supra* note 55, at 183 (quoting JOHANN CHRISTIAN WILHELM VON STECK, *VERSUCHE ÜBER VERSCHIEDENE MATERIEEN POLITISCHER UND RECHTLICHER KENNTNISSE* (1783)) (“One can hardly think of a more serious offence than that of declaring a people which abandons its mother State and tears itself away from it as absolved of its obligations and of recognising [sic] such a people free and independent.”). Soon afterwards, there was a modest liberalization of these rules amongst some law-of-nations writers. See *id.* at 184-85 (discussing Martens, Kluber, and Wheaton, and newer theories of “defacto” and “constitutive” recognition).

57. The Netherlands example—defiance for decades, de facto sovereignty, and commercial relations with other nations before Spain’s recognition—might have offered a precedent, but the revolutionaries rarely invoked it. See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 43-47 (2007)

The Americans had to blaze a new trail. Adams thought the way to achieve recognition was to produce a series of written documents and present them as evidence of international statehood to people in the colonies, in Britain, and across the world. When New Hampshire's request was read in Congress in October 1775, Adams again proposed that Congress recommend the revolutionary assemblies make new governments. As he recalled thirty years later in his autobiography, "I embraced with Joy the opportunity of harranguing on the Subject at large, and of urging Congress to resolve on a general recommendation to all the States to call Conventions and institute regular Governments."⁵⁸

(noting dissimilarity and few references to Dutch independence in early years of American Revolution). John Adams invoked the precedent when asking the Netherlands for a loan sometime between the years 1781-1782, but not apparently before that time. See John Adams, *Memorial to the States General* (Apr. 19, 1781), available at <http://www.founders.archives.gov/?q=%22Memorial%20to%20the%20States%20General%22&s=1111311111&sa=&r=5&sr=>.

The Originals of the two Republicks are so much alike, that the History of one seems but a Transcript from that of the other: so that every Dutchman, instructed in the Subject, must pronounce the American Revolution just and necessary, or pass a Censure upon the greatest Actions of his immortal Ancestors; Actions which have been approved and applauded by Mankind, and justified by the Decision of Heaven.

Id. The French, on the other hand, did raise the Dutch precedent when justifying its treaties with the United States to Britain. See *infra* note 317 and accompanying text.

58. ADAMS, *supra* note 19, at 355.

1. The danger of the Morals of the People, from the present loose State of Things and general relaxation of Laws and Government through the Union. 2. The danger of Insurrections in some of the most disaffected parts of the Colonies, in favour of the Enemy or as they called them, the Mother Country, an expression that I thought it high time to erase out of our Language. 3. Communications and Intercourse with the Ennemy [sic], from various parts of the Continent could not be wholly prevented, while any of the Powers of Government remained, in the hands of the Kings servants. 4. It could not well be considered as a Crime to communicate Intelligence, or to Act as Spies or Guides to the Ennemy [sic], without assuming all the Powers of Government. 5. The People of America, would never consider our Union as compleat [sic], but our Friends would always suspect divisions among Us, and our Ennemies [sic] who were scattered in larger or smaller Numbers not only in every State and City, but in every Village through the whole Union, would forever represent Congress as divided, and ready to break to pieces, and in this Way would intimidate and discourage multitudes of our People who wished Us well. 6. The Absurdity of carrying on War, against a King, When so many Persons were daily taking Oaths and Affirmations of Allegiance [sic] to him. 7. We could not expect that our Friends in Great Britain would believe Us United and in earnest, or exert themselves very strenuously in our favour, while We acted such a wavering hesitating Part. 8. Foreign Nations particularly France and Spain would not think Us worthy of their Attention, while We appeared to be deceived by such fallacious hopes of redress of Grievances, of pardon for our Offences, and of Reconciliation with our Enemies. 9. We could not command the natural Resources of our own Country; We could not establish Manufactories of Arms, Cannon, Salt Petre, Powder, Ships &c. Without the Powers of Government, and all these and many other preparations ought to be going on in every State or Colony, if you will, in the Country.

Id.

Adams's nine reasons why Congress should instruct the revolutionary assemblies to make new governments fit into three categories.⁵⁹ First was the imperative of internal police.⁶⁰ This concern ranged from matters of law and order to the need to increase the efficiency of military supply.⁶¹ The latter was especially important because the Continental Congress was a mere convention of delegates and had no power to tax or to condemn property for the war effort—and it would never gain such power. In contrast, fully sovereign governments could tax, spend, and supply the resources necessary to fight a war.⁶²

The second category covered the problems of political membership.⁶³ Provincial governments needed to develop the capacity to police the line between revolutionaries and British loyalists, and then enforce this power through the law of treason. In the years before the American Revolution, controversial parliamentary statutes had extended the jurisdiction of the English Royal Court of King's Bench to acts of treason committed overseas in the colonies, when the defendants could be brought physically to Westminster.⁶⁴ Colonial protests against this legislation began as claims of exclusive, local, criminal jurisdiction, and then, after 1776, developed into a rejection of British subjecthood: Britain could not prosecute North Americans who rejected British rule for treason. The revolutionaries did not, however, reject the law of treason. Quite the contrary, when they did institute governments, each state prosecuted native-born or long-domiciled residents who remained loyal to the Empire as traitors. Treason prosecutions, by judicial verdict and statutory attainder, also became an important source of revenue for the states.⁶⁵ Other penalties included jail, loss of the franchise and other civil rights, exile, as well as confiscation of property. The constitutions thus gave the new governments the power to determine political membership and to divide the local world into Patriot and Tory. Taking over and enforcing the English law of treason against those loyal to the king was itself a significant claim to sovereignty.⁶⁶

59. See ADAMS, *supra* note 19, at 355 (setting forth John Adams' reasons).

60. See *id.*

61. See *id.*

62. See HULSEBOSCH, *CONSTITUTING EMPIRE*, *supra* note 8, at 148-55, on the functional imperative behind state constitution-making.

63. See ADAMS, *supra* note 19, at 355.

64. See generally Neil L. York, *Imperial Impotence: Treason in 1774 Massachusetts*, 29 *LAW & HIST. REV.* 657 (2011).

65. See Anne M. Ousterhout, *Pennsylvania Land Confiscations During the Revolution*, 102 *PENN MAG. HIST. & BIOGRAPHY* 328, 334-35 (1978) (stating proceeds from confiscation used to reduce taxes, fund endowments, and compensate soldiers); see also JOHN P. KAMINSKI, *GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC* 78 (1993) (stating wartime economy pushed legislature to sell Tory property); ERNEST WILDER SPAULDING, *HIS EXCELLENCY GEORGE CLINTON: CRITIC OF THE CONSTITUTION* 123 (1938) (noting loyalist land sales provided funds for state). See generally HARRY B. YOSHPE, *THE DISPOSITION OF LOYALIST ESTATES IN THE SOUTHERN DISTRICT OF THE STATE OF NEW YORK* (1939).

66. See John Phillip Reid, *Review of "The American Law of Treason: Revolutionary and Early National*

Finally, and crucially, the establishment of new governments based upon popular sovereignty would demonstrate the revolutionaries' resolve and capacity to pursue independence to foreign audiences.⁶⁷ Adams specifically mentioned two audiences: sympathetic Britons and European nations.⁶⁸ Constitutions would provide sympathetic Britons with more evidence that the revolutionaries intended to fight until independent and supply British critics of the war with ammunition to make the case that the states were already operating outside the British Empire.⁶⁹ The second audience was on the European continent—France and Spain—in hopes of attracting their assistance. In sum, constitutions would create functional, legitimate governments that would help define membership across the American colonies and publicize the revolutionary cause abroad.

Moderates in Congress were not ready for a complete separation from Britain, but instead held out hope for a negotiated peace that would reunite them within the British Empire. Congress, therefore, offered the weak advice that New Hampshire should “establish such a form of government, as . . . will best produce the happiness of the people . . . during the continuance of the present dispute between G[reat] Britain and the Colonies.”⁷⁰ With these mixed signals, the New Hampshire correspondents might have concluded that a majority in Congress still believed the rebellion was not a war of independence but rather, a civil war leading to reunion. Thus, they drafted what is sometimes called the first state constitution, but what they referred to at the time as an “act of civil government”—a 600-word outline of a bicameral legislature that had the power to tax and to appoint all officers of government.⁷¹

John Adams and other radicals waited as momentum built for independence. A galvanizing moment was the publication of Thomas Paine's *Common Sense* in January 1776.⁷² The next month, Adams penned a memo in his diary on measures that should be taken by Congress as soon as possible.⁷³ Again, he had to wait a few months, but eventually every item on his list reached Congress's agenda.⁷⁴ The first was to draft the Articles of Confederation.⁷⁵

Origins,” by Bradley Chapin, 1965 WASH. U. L. 152, 154 (1965) (“Prosecution for treason . . . may constitute the ultimate legal claim to sovereignty.”).

67. See ADAMS, *supra* note 19, at 355.

68. See *id.*

69. See generally JAMES E. BRADLEY, *POPULAR POLITICS AND THE AMERICAN REVOLUTION IN ENGLAND: PETITIONS, THE CROWN, AND PUBLIC OPINION* (1986); DORA MAE CLARK, *BRITISH OPINION AND THE AMERICAN REVOLUTION* (1966); KATHLEEN WILSON, *THE SENSE OF THE PEOPLE: POLITICS, CULTURE, AND IMPERIALISM IN ENGLAND, 1715-1785*, at 237-84 (1998), for a discussion of opposition in Britain.

70. 3 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, *supra* note 52, at 319 (alteration in original).

71. See N.H. CONST. of 1776.

72. See generally EDWARD LARKIN, *THOMAS PAINE AND THE LITERATURE OF REVOLUTION* (2005).

73. See JOHN ADAMS, *Diary of John Adams*, in 2 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 231 (L.H. Butterfield et al. eds., 1961).

74. See *id.*

The second was to form an alliance with France and Spain, along with ambassadorial representation in their courts.⁷⁶ “Government to be assumed in every Colony” was the third item.⁷⁷ Adams then ran through several military measures: troops to defend the St. Lawrence and Hudson River valleys (the main attack route from Canada); naval and military stores; and financing.⁷⁸ Finally, the states needed a declaration of independence and commercial treaties with friendly nations.⁷⁹

In this memo in the winter of 1776, Adams outlined what became the portfolio: state constitutions, the Articles of Confederation, the Declaration of Independence, and the Model Treaty.⁸⁰ He believed they should be drafted in that sequence. In early May, just as Congress reached a consensus on independence, Adams wrote a friend:

Many previous steps are necessary. The Colonies should all assume the Powers of Government in all its Branches first. They should confederate with each other, and define the Powers of Congress next. They should then, endeavour to form an Alliance with some foreign State. When this is done, a public Declaration might be made. Such a Declaration may be necessary, in order to obtain a foreign Alliance—and it should be made for that End.⁸¹

Only New Hampshire, South Carolina, and Virginia formed constitutions before Congress declared independence in July of 1776, followed soon after by New Jersey. Most colonies awaited direction from the Continental Congress and then took months, and in some cases (including in Massachusetts) years, to ratify constitutions. What Hannah Arendt called “a spontaneous outbreak of constitution-making” certainly did represent a pent-up desire to establish self-

75. *See id.*

76. *See id.*

77. *See ADAMS, supra* note 73, at 231.

78. *See id.*

79. *See id.*

80. *See id.*

81. Letter from John Adams to John Winthrop (May 12, 1776), available at <http://www.founders.archives.gov/?q=to%20John%20Winthrop%20from%20John%20Adams%20may%201776&s=1111311111&sa=&r=17&sr=> (footnote omitted). Here, Adams acknowledged the necessity of military alliances, not just treaties of amity and commerce. *See id.* At other times, he resisted any “Political Connection” and “Military Connection” with France, preferring instead “Only a Commercial Connection.” ADAMS, *supra* note 73, at 236; *see also* ADAMS, *supra* note 19, at 338 (recalling he resisted insertion of “Articles of entangling Alliance” in Model Treaty). The ideal of restricting international relations to commercial interaction was present from the outset of the Revolution, and Adams embraced it. *See* JONATHAN R. DULL, A DIPLOMATIC HISTORY OF THE AMERICAN REVOLUTION 53 (1985) (“America’s unrealistic expectation that the mere offer of a commercial alliance would be sufficient to secure from France open assistance and an acknowledgment of American independence.”). It was an aspiration that would have to wait; though on occasion, Adams expressed discontent with the need for an alliance and, two decades later, chalked up the termination of that alliance as his greatest achievement as president.

government (witness Massachusetts's and New Hampshire's urgent inquiries to Congress months earlier), but the process was largely orchestrated in Philadelphia.⁸²

In mid-May of 1776, Congress finally resolved to instruct the colonial assemblies to institute new forms of government: to write constitutions.⁸³ Adams drafted the preamble, which declared that the assemblies should suppress imperial government and instead exercise authority under the people.⁸⁴ Everyone knew this was the point of no return—"an Epoque, a decisive Event," Adams recorded.⁸⁵ Within a month, Congress established three committees to draft three different documents: the Declaration of Independence, the Articles of Confederation, and the Model Treaty.⁸⁶ "What do you think must be my sensations," a gleeful Adams wrote a member of the Massachusetts Provincial Congress, "when I see the Congress now daily passing Resolutions, which I most earnestly pressed for against Wind and Tide, Twelve Months ago?—and which I have not omitted to labour for, a Month together from that Time to this?"⁸⁷ John Dickinson, a leading moderate who had resisted independence, was finally

confessing the Falsehood of all his Prophecies, and the Truth of mine, and confessing himself, now for instituting Governments, forming a Continental Constitution, making Alliances, with foreigners, opening Ports and all that and confessing that the Defence of the Colonies—and Preparations for defence have been neglected, in Consequence of fond delusive hopes and deceitfull Expectations[.]⁸⁸

A month later, Adams repeated his ideal sequence, telling a friend that he

82. HANNAH ARENDT, *ON REVOLUTION* 141 (1963).

83. See 4 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, *supra* note 52, at 342.

84. See *id.* The May 10 resolution recommended that the assemblies "adopt such government as shall . . . best conduce to the happiness and safety of their constituents in particular, and America in general." *Id.* at 339-40. The preamble followed five days later. See *id.* at 342, 357-58. "Undoubtedly JA played an important role in securing the passage of the resolution on independent governments, but no evidence other than a somewhat confused autobiographical statement supports the claim that he wrote it. He did, however, write the preamble . . ." 4 *PAPERS OF JOHN ADAMS* 11 n.1 (Robert J. Taylor et al. eds., 1979); see ADAMS, *supra* note 21, at 57-60.

85. ADAMS, *supra* note 19, at 383.

86. After resolving to declare independence on June 10th, Congress created a committee to draft the Declaration of Independence the next day. That same day it formed two other committees: one "to prepare and digest the form of a confederation" and another "to prepare a plan of treaties to be proposed to foreign powers." 5 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, *supra* note 52, at 428-29, 431.

87. Letter from John Adams to James Warren (May 20, 1776), available at <http://www.founders.archives.gov/?q=%22john%20adams%22%20and%20%22james%20warren%22%20and%201776%20Author%3A%22Adams%2C%20John%22%20Recipient%3A%22Warren%2C%20James%22&s=1111311111&sa=&r=24&sr=>

88. *Id.*

could not leave Philadelphia until work on all the documents was underway.⁸⁹

Every Colony must be induced to institute a perfect Government. All the Colonies must confederate together, in some solemn Compact. The Colonies must be declared free and independent states, and Embassadors, must be Sent abroad to foreign Courts, to solicit their Acknowledgment of Us, as Sovereign States, and to form with them, at least with some of them commercial Treaties of Friendship and Alliance. When these Things shall be once well finished, or in a Way of being so, I shall think that I have answered the End of my Creation⁹⁰

This was the methodical plan of a careful lawyer. Patrick Henry agreed that the states needed to draft constitutions before they could confederate.⁹¹ Only then could they, together, declare independence and make alliances.⁹²

From the perspective of early modern legal theory, that sequence made sense. The states needed legitimacy, and then they could form a confederacy to wage war and conduct foreign policy. However, events outran careful formalism. It was enough that each element was taking shape, and less important which came first. In response to Henry's version of the sequence, Adams wrote:

It has ever appeared to me that the natural Course and order of Things, was this—for every Colony to institute a Government—for all the Colonies to confederate, and define the Limits of the Continental Constitution—then to declare the Colonies a sovereign State, or a Number of confederated Sovereign States—and last of all to form Treaties with foreign Powers. But I fear We cannot proceed systematically, and that We Shall be obliged to declare ourselves independant [sic] States before We confederate, and indeed before all the Colonies have established their Governments.⁹³

It was all happening fast, and the good news was that “all these Measures will follow one another in a rapid Succession,” so that “it may not perhaps be

89. See Letter from John Adams to William Cushing (June 9, 1776), available at <http://founders.archives.gov/?q=from%20John%20Adams%20to%20William%20Cushing%20Author%3A%22Adams%2C%20John%22%20Recipient%3A%22Cushing%2C%20William%22&s=1111311111&sa=&r=1&sr=>.

90. *Id.* (footnote omitted).

91. See Letter from Patrick Henry to John Adams (May 20, 1776), available at <http://founders.archives.gov/?q=%20Author%3A%22Henry%2C%20Patrick%22%20Recipient%3A%22Adams%2C%20John%22&s=1111312111&sa=Henr&r=1&sr=>.

92. See *id.*

93. Letter from John Adams to Patrick Henry (June 3, 1776), available at <http://founders.archives.gov/?q=%20Author%3A%22Adams%2C%20John%22%20Recipient%3A%22Henry%2C%20Patrick%22&s=1111312111&sa=adams%2C%20John&r=1&sr=Henry> (footnote omitted).

of much Importance, which is done first.”⁹⁴ John Adams was a brilliant as well as careful lawyer. He knew fulfilling all the requisites mattered more than the precise order in which they were met.

Congress refrained from drafting a model state constitution. The idea had circulated for a year before the Declaration of Independence.⁹⁵ Some delegates thought that the state politicians simply were not up to the task of writing constitutions.⁹⁶ Adams (of all people) had more faith in the state committee men than he did in some of his fellow congressional delegates whom he thought “had at that time no Idea of any other Government but a Contemptible Legislature in one assembly, with Committees for Executive Magistrates and Judges.”⁹⁷ On the other hand, he thought state drafters would reflexively reproduce, as closely as possible, their provincial governments, except without the king and royal officials.⁹⁸ Writing Adams in June, fellow Massachusettsan, James Warren, seemed to agree:

Whether it is best there should be a perfect simularity [sic] in the form, and Spirit of the several Governments in the Colonies, provided they are all Independant [sic] of Britain, is a question I am not determined in. For some reasons it may be best for us there should be A difference.⁹⁹

In addition, deep forces of localism probably precluded the possibility that Congress would draft a model state constitution. Political localism was a

94. *Id.*

95. See ADAMS, *supra* note 21, at 53-54. In his autobiography, Adams recalled that when New Hampshire and South Carolina requested guidance about how to structure their revolutionary governments in October and November of 1775, he wanted to recommend Congress draft a model state constitution:

If there is any doubt of that, the Convention may send out their Project of a Constitution, to the People in their several Towns, Counties or districts, and the People may make the Acceptance of it their own Act. But the People know nothing about Constitutions. I believe you are much mistaken in that Supposition: if you are not, they will not oppose a Plan prepared by their own chosen Friends: but I believe that in every considerable portion of the People, there will be found some Men, who will understand the Subject as well as their representatives, and these will assist in enlightening the rest But what Plan of a Government, would you advise? A Plan as nearly resembling the Governments under which We were born and have lived as the Circumstances of the Country will admit.

ADAMS, *supra* note 19, at 356 (footnote omitted) (alteration in original); see also *id.* at 358 (stating Adams’s belief Congress should appoint committee to draft and recommend form of state government).

96. See ADAMS, *supra* note 19, at 355.

97. *Id.* at 358.

98. See *id.* at 356.

99. Letter from James Warren to John Adams (June 2, 1776), available at <http://founders.archives.gov/?q=%20Author%3A%22Warren%2C%20James%22%20Recipient%3A%22Adams%2C%20John%22&s=1111312111&sa=warren&r=35&sr=>. Warren was probably referring to differences in political tone and relative appetite for democracy, thinking perhaps of Virginia.

driving force behind the American Revolution—even unsuspecting state leaders might have blanched at the idea that a committee of Congress would send them a template for governance. In a powerful coincidence, on the same day Congress resolved that the states should form new governments, the Virginia assembly agreed to instruct its delegates in Philadelphia to propose a declaration of independence and to pursue foreign alliances. Simultaneously, it resolved that “the power of forming Government for, and the regulations of the internal concerns of each Colony, be left to the respective Colonial Legislatures.”¹⁰⁰ It was not the last time that Virginians positioned themselves at the head of the collective effort while retaining a desire for local control over their own state’s affairs. With radical ideas circulating through the provinces, such as abolishing the transatlantic slave trade and even slavery itself, perhaps Virginians wished to keep their state’s constitution to themselves.¹⁰¹ But each province had local concerns and jealousies. The resolution in Virginia thus captured a central tension in North American political culture between local control and collective identification that preceded and endured the Revolution.¹⁰² Indeed, one month earlier, North Carolina’s Provincial

100. *Virginia Convention, May, 1776*, in 6 PETER FORCE, AMERICAN ARCHIVES: CONSISTING OF A COLLECTION OF AUTHENTICK RECORDS, STATE PAPERS, DEBATES, AND LETTERS AND OTHER NOTICES OF PUBLIC AFFAIRS 1524 (1846). The Virginia Resolution of May 15:

Resolved, unanimously, That the Delegates appointed to represent this Colony in General Congress be instructed to propose to that respectable body to declare the United Colonies free and independent States, absolved from all allegiance to, or dependance [sic] upon, the Crown or Parliament of *Great Britain*; and that they give the assent of this Colony to such declaration, and to whatever measures may be thought proper and necessary by the Congress for forming foreign alliances, and a Confederation of the Colonies, at such time and in the manner as to them shall seem best: *Provided*, That the power of forming Government for, and the regulations of the internal concerns of each Colony, be left to the respective Colonial Legislatures.

Id. A key drafter was Meriwether Smith. See WILLIAM WIRT HENRY, 1 PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 397 (1891). Local imperatives, including the fear of slave insurrection, drove Virginia’s revolutionaries. See WOODY HOLTON, FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA 191-205 (1999) (discussing influential role of Virginia farmers).

101. See 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 52, at 77. On October 20, 1774, the First Continental Congress resolved that the importation of slaves should be banned and resolved against American participation in the slave trade. *Id.* The Virginia Association agreed and ordered an end to the importation of slave labor. Later, in 1776, the Second Continental Congress resolved that “no slaves be imported into any of the thirteen United Colonies.” 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 53, at 258. See generally DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION: 1770-1823 (1975) (discussing early circulation of these ideas and their intensification during American Revolution).

102. See generally SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM (1993); JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788 (1986); HULSEBOSCH, CONSTITUTING EMPIRE, *supra* note 8; ALISON LACROIX, THE IDEOLOGICAL ORIGINS OF FEDERALISM (2010), on the deep roots and enduring importance of governmental pluralism in North America.

Congress had similarly instructed its delegates to “concur with the delegates of the other Colonies in declaring Independency, and forming foreign alliances, reserving to this Colony the sole and exclusive right of forming a Constitution and laws for this Colony.”¹⁰³ Rhode Island also simply declared itself independent in early April.¹⁰⁴ Nevertheless, it was the resolution from Virginia—one of the most important colonies—that made it to the floor of Congress.

Despite this, even some Virginians were disappointed by their provincial convention’s assertion of the power to make its own new government.¹⁰⁵ “Perhaps the proviso which reserves to this Colony the power of forming its own Government may be questionable as to its fitness,” Richard Lee complained to John Adams. “Would not a Uniform plan of Government prepared for America by the Congress and approved by the Colonies be a surer foundation of Unceasing Harmony to the whole[?]”¹⁰⁶ Lee’s premise that the states were building new governments primarily so that they could work together on the common project of war and independence was obvious at the time, but is now largely forgotten.

Although Adams believed the states would reproduce colonial government, minus the crown and its officials, other revolutionaries entertained more radical ideas. Thomas Paine, in *Common Sense*, suggested that in governments based on popular sovereignty, all power should reside in a unicameral legislature.¹⁰⁷ This single-house legislature should also control executive power and appoint all officials, including judges.¹⁰⁸ This was the democratic end of the republican spectrum, and it was adopted in Pennsylvania’s first constitution of September 1776.¹⁰⁹

Adams was distressed by Paine’s outline for state government, and generally by Paine.¹¹⁰ He admired Paine’s argument against reconciliation, but criticized his notions of government, concluding “this Writer has a better Hand at pulling

103. BEEMAN, *supra* note 44, at 355-56.

104. *See id.* at 356-57. Pauline Maier counted about ninety documents from provincial and local legislatures written before July 1776 that she terms the “The ‘Other’ Declarations of Independence.” PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 47-96 (1997).

105. *See* Letter from Richard Lee to John Adams (May 18, 1776), *available at* <http://founders.archives.gov/?q=Richard%20Lee%20Recipient%3A%22Adams%2C%20John%22%20Author%3A%22Lee%2C%20Richard%22&s=1111312111&sa=Lee&r=1&sr=>.

106. *Id.*

107. *See* THOMAS PAINE, *COMMON SENSE* 19-20 (Infomotions Inc. 2001) (suggesting structure for government).

108. *See id.* (elaborating on powers of legislature).

109. *See* PA. CONST. of 1776.

110. *See* Letter from John Adams to Benjamin Waterhouse (Oct. 29, 1805), in *STATESMAN AND FRIEND: CORRESPONDENCE OF JOHN ADAMS WITH BENJAMIN WATERHOUSE, 1784-1822*, at 32, *microformed on* LAC No. 11370 (Library Res., Inc.). He later quipped that his fate was to have lived not so much through the age of reason as “the Age of Paine.” *Id.*

down than building.”¹¹¹ Many thought that Adams had written the pamphlet.¹¹² He confessed to his wife that he “could not have written any Thing in so manly and striking a style.”¹¹³ However, he would

have made a more respectable Figure as an Architect, if I had undertaken such a Work. This Writer seems to have very inadequate Ideas of what is proper and necessary to be done, in order to form Constitutions for single Colonies, as well as a great Model of Union for the whole.¹¹⁴

Paine’s single-house legislature violated the principles of bicameralism and the separation of powers.¹¹⁵ In March of 1776, Adams responded by writing a flurry of letters to fellow Congressional delegates who, he thought, would soon return home and write constitutions.¹¹⁶ He then cut and pasted those letters into a short pamphlet entitled, *Thoughts on Government*.¹¹⁷ Adams made the conventional case for bicameralism, separated powers, and a strong executive with shared appointment power and a veto—the first of his many defenses of these ideas.¹¹⁸ Adams waged his letter campaign and published his pamphlet

111. Letter from John Adams to Abigail Adams (Mar. 19, 1776), available at <http://founders.archives.gov/?q=%20Author%3A%22Adams%2C%20John%22%20Recipient%3A%22Adams%2C%20Abigail%22%20Period%3A%22Revolutionary%20War%22%20Dates-From%3A1776-03-19%20Dates-To%3A1776-07-08&s=1111312111&sa=adams%2C%20John&r=1&sr=>.

112. See *id.* (acknowledging rumors he wrote *Common Sense*).

113. *Id.*

114. *Id.*

115. See ADAMS, *supra* note 19, at 330-33 (recalling thoughts on Paine’s proposed government and decision to write his own pamphlet).

116. ADAMS, *supra* note 21, at 86-93.

117. See *id.*

118. See Letter from John Adams to William Hooper (Mar. 27, 1776), available at <http://founders.archives.gov/?q=%20Recipient%3A%22Hooper%2C%20William%22%20Author%3A%22Adams%2C%20John%22&s=1111312111&sa=&r=1&sr=hooper>.

Therefore I lay it down as a Maxim that the judicial Power should be distinct both from the Legislative and Executive. Now if you have your Legislative in one Assembly, and Executive in another, and the judicial Power leans to either, it will naturally join with that, and overballance, overbear, and overturn the other.

The Legislature, therefore, should consist of more than one Assembly. . . .

. . . .

. . . . There should be . . . a Governor whom I would invest with a Negative upon the other Branches of the Legislature and also with the whole Executive Power, after divesting it of most of those Badges of Domination call’d Prerogatives. I know that giving the Executive Power a Negative upon the Legislative, is liable to Objections, but it seems to be attended with more Advantages than Dangers, especially if you make this Officer elective annually, and more especially if you establish a Rotation by which no Man shall be Governor for more than three years.

Id. See also ADAMS, *supra* note 21, at 86-93; POLE, *supra* note 21, at 214-226 (discussing evolution of Adams’s ideas about bicameralism); Letter from John Adams to John Penn (Mar. 27, 1776), available at <http://founders.archives.gov/?q=Author%3A%22Adams%2C%20John%22%20Recipient%3A%22Penn%2C%20John%22&s=1111312111&sa=Adams%2C%20John&r=1&sr=>

because he believed that the early constitutions would become templates for later ones, and he hoped his *Thoughts on Government* would influence the first drafters.¹¹⁹

Many of his ideas were within the mainstream, so it would be wrong to argue that Adams directly influenced early state constitutions. His pamphlet, however, might have affected some leading state framers. Patrick Henry, for example, lamented that he could not have John Adams, along with his cousin Samuel Adams, on hand to help draft Virginia's state constitution and resist the more conservative planter elite.¹²⁰ Some of those men, like Carter Braxton, espoused republican versions of the English constitution and wanted the governor to have tenure based on good behavior and the upper house to serve for life (in contrast to heritable tenure in the English system), rather than model the state constitutions on colonial government.¹²¹ In other cases, Adams's *Thoughts on Government* probably confirmed the respectability of bicameralism and independence among the branches. Familiarity, rather than originality, made his *Thoughts on Government* important. It was an able defense of ideas that many framers already endorsed.¹²²

20John%22&s=1111312111&sa=&r=1&sr=penn.

119. See ADAMS, *supra* note 19, at 358. Adams recalled that Congress almost discussed a model state constitution, however, he feared it would favor a unicameral legislature. See *id.* Thus, he "answered by Sporting off hand, a variety of short Sketches of Plans, which might be adopted by the Conventions." *Id.*

120. See Letter from Patrick Henry to John Adams (May 20, 1776), available at <http://founders.archives.gov/?q=%20Author%3A%22Henry%2C%20Patrick%22%20Recipient%3A%22Adams%2C%20John%22&s=1111312111&sa=henr&r=1&sr=>.

Our Convention is now employed in the great Work of forming a Constitution. My most esteem'd republican Form has many and powerfull Enemys. A silly Thing published in Philadelphia by a native of Virginia has just made its appearance here, strongly recommended 'tis said by one of our delegates now with you, B[raxton]. His Reasonings upon and Distinction between private and public Virtue are weak shallow evasive, and the whole performance an Affront and Disgrace to this Country and by one Expression I suspect his Whiggism. Our Session will be very long. During which I cannot count upon one Coadjutor of Talents equal to the Task. Would to God you and your Sam Adams were here. It shall be my incessant study to so form our portrait of Government that a Kindred with New England may be discern'd in it. And if all your Excellencys cannot be preserved, yet I hope to retain so much of the Likeness, that posterity shall pronounce us descended from the same stock. I shall think perfection is obtain'd if we have your Approbation.

Id. (footnote omitted) (alteration in original).

121. See Carter Braxton, *A Native of this Colony: An Address to the Convention of the Colony and Ancient Dominion of Virginia on the Subject of Government in General, and Recommending a Particular Form to Their Attention*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 328-39 (Charles S. Hyneman & Donald Lutz eds., 1983). Carter Braxton, who represented Virginia in Congress, invoked English constitutional history and the praise of Montesquieu when he recommended that the colonies "shake off the authority of arbitrary British dictators," but nevertheless "adopt and perfect that system, which England has suffered to be grossly abused, and the experience of ages has taught us to venerate." *Id.* at 333.

122. See generally Stephen G. Kurtz, *The Political Science of John Adams, A Guide to His Statecraft*, 25 WM. & MARY Q. 605 (1968). Kurtz observed that Adams's brilliance lay not in originality of mind, but in his lawyerly ability to deploy precedents and craft powerful arguments in new, difficult situations that left others disoriented. *Id.*

Adams replayed this debate with Paine a decade later in an exchange with the recently deceased French *philosophe* Anne-Robert-Jacques Turgot.¹²³ Turgot had actually been in conversation with British moral philosopher Richard Price as part of a cross-channel debate about the merits of the American constitutions.¹²⁴ This colloquy about political fundamentals between two men whose nations were then at war exemplified the contemporary ideal of the transnational republic of letters.¹²⁵ Both men saw themselves as participating in a discussion of political reform that can be called the Constitutional Enlightenment. They disagreed, however, about what this meant when it came to designing political institutions. In this debate, as in others across Europe, the American Revolution offered an opportunity to sharpen ideas about political form. For these purposes, the new American governments were not exceptional experiments; they were just temporally prior to those imagined for Europe.

Turgot had responded to Price's *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America*, which criticized the British government for pursuing war against the colonies, while simultaneously praising the English constitution.¹²⁶ In a letter to the Price in March 1778, Turgot was more critical of the English constitution and of the new American state constitutions, which he believed followed the English model.¹²⁷ Turgot had been fighting a losing battle in France against hereditary political privileges, which remained one of the key fronts in the war for political reform.¹²⁸ Therefore, he saw an upper house as a redoubt for aristocracy and a symbol of inefficient government. The American

The point [Adams] was trying to make in his repeated defenses of the system of balances was not that it was original or that he had anything new to observe about it, but that it was the product of long experience, an organic growth, and the finest edifice thrown up by medieval England.

Id. at 613.

123. See 1 R. R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800*, at 269 (1959).

124. See *id.* at 267-75 (recounting colloquy); see also BILLIAS, *supra* note 4, at 75-78 (providing overview of Turgot); Paul Giles, *Enlightenment Historiography and Cultural Civil Wars*, in *THE ATLANTIC ENLIGHTENMENT* 31-34 (Susan Manning & Francis D. Cogliano eds., 2008) (discussing Price and Enlightenment).

125. See DENA GOODMAN, *THE REPUBLIC OF LETTERS: A CULTURAL HISTORY OF THE FRENCH ENLIGHTENMENT* (1994); ANTHONY GRAFTON, *WORLDS MADE BY WORDS: SCHOLARSHIP AND COMMUNITY IN THE MODERN WEST* 9-34 (2009), for a discussion of the early-modern republic of letters.

126. See PALMER, *supra* note 123, at 268-69 (discussing Turgot's response). See generally RICHARD PRICE, *OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA* (1776).

127. See PALMER, *supra* note 123, at 268-69 (discussing Turgot's response).

128. See *id.* at 268, 450-53; see also PATRICE HIGONNET, *SISTER REPUBLICS: THE ORIGINS OF FRENCH AND AMERICAN REPUBLICANISM* 48-80, 146-47, 155-57, 220 (1988) (discussing Turgot and corporatist structure of *Ancien Régime*).

constitutions, with their bicameral houses and structural separations, were inelegant, inefficient, and premised on the decadent idea of different social estates.¹²⁹ Just a few decades earlier in *The Spirit of the Laws*, Montesquieu had celebrated just this sort of structural complexity and identified the mixed form of the English constitution as his favorite example.¹³⁰ However, ideas of efficiency and broad-based representation were on the rise in France, and in this regard the American constitutions received low marks from leading liberal thinkers in Europe. In Rousseau's *Social Contract*, published in the 1760s, he wrote: "The Sovereign, having no force other than the Legislative Power, acts only in accordance with the law. And since laws are nothing but the authentic acts of the general will, the sovereign cannot act save when the People are assembled."¹³¹ Turgot publicized his critique in an open letter addressed not to the Americans, but rather to a liberal British thinker—Richard Price—who was within Lord Shelburne's liberal circle, supported the American cause, and favored free trade.¹³² The letter began by thanking Price for sending a copy of his latest book via Benjamin Franklin, and its main message was to scold Britain for unnaturally trying to hold onto the American colonies.¹³³ It was unnatural because it served an illiberal "system of monopoly and exclusion which has been recommended by all your writers on Commerce, (except Mr. Adam Smith and Dean Tucker); a system which has been the true source of your separation from your Colonies."¹³⁴ After the British defeat at Saratoga in

129. See From A. Turgot (Mar. 22, 1778), in 2 THE CORRESPONDENCE OF RICHARD PRICE, MARCH 1778-FEBRUARY 1786, at 13 (D. O. Thomas ed., 1991).

I confess that I am not satisfied with the Constitutions which have hitherto been formed by the different States of America. . . . Instead of collecting all authority into one center, that of the nation, they have established different bodies; a body of representatives, a council, and a Governour [sic], because there is in England a House of Commons, a House of Lords, and a King.—They endeavour to balance these different powers, as if this equilibrium, which in *England* may be a necessary check to the enormous influence of royalty, could be of any use in Republics founded upon the equality of all the Citizens; and as if establishing different orders of men, was not a source of divisions and disputes. In attempting to prevent imaginary dangers they create real ones

Id. The French reformers were frustrated with the American state constitutions, yet embraced them nonetheless. See JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 241 (1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 236 (1969). See generally Jacob T. Levy, *Beyond Publius: Montesquieu, Liberal Republicanism, and the Small-Republic Thesis*, 27 HIST. OF POL. THOUGHT 50 (2006).

130. See generally CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler, et al. eds., 1989).

131. Jean-Jacques Rousseau, *The Social Contract*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 167, 255 (1980).

132. See From A. Turgot (Mar. 22, 1778), *supra* note 129, at 3-19. See generally AN ENLIGHTENMENT STATESMAN IN WHIG BRITAIN: LORD SHELBURNE IN CONTEXT, 1737-1805 (Nigel Aston & Clarissa Campbell Orr eds., 2011).

133. See From A. Turgot (Mar. 22, 1778), *supra* note 129, at 11.

134. *Id.* (footnotes omitted).

the fall of 1777 (what Turgot called “the affair of Burgoyne”), the system was impossible to reestablish.¹³⁵ Turgot wrote the letter about six weeks after the Franco-American treaties were signed in early 1778, and he was already thinking about the structure of the independent states.¹³⁶ He believed that centralized, but limited government—limited in its interference with trade as well as religion and other dimensions of social life—was consistent with those Enlightenment principles.¹³⁷ Others disagreed. It was a lively debate in France, between conservative reformers, known as *monarchiens* or *anglomanes*, and those seeking more radical changes, known as *constitutionnels* or *americanistes* (perhaps more properly, *pennsylvanistes*).¹³⁸ It was also transatlantic. The new states and their constitutions had made it also something more than a matter of theory.

When Turgot died, Price appended his 1778 letter to his own pamphlet, *Observations on the Importance of the American Revolution, and the Means of Making it a Benefit to the World*, which praised the “liberality” of the state constitutions and celebrated the United States as an asylum for liberty.¹³⁹ Price did not comment on bicameralism, but he did criticize some of the constitutions on the score of rights.¹⁴⁰ He noted that the constitutions did not abolish slavery, for example, and some protected religious establishments.¹⁴¹ This was an early instance of comparative constitutionalism in which renowned intellectuals acknowledged the American states for their bold experiments (albeit, experiments with seemingly old ideas), held them up dispassionately for analysis, and rendered rather stern judgments. Along the way there was little mention of the actual ideological struggle, let alone the real human suffering, taking place on the ground.

Adams tried to insert himself into this public discussion. The attempt itself implied a claim to equal status, as an American, in the European republic of letters.¹⁴² *A Defence of the Constitutions of Government of the United States of America* consisted largely of long quotations of leading European thinkers, such as Montesquieu, promoting bicameralism and the classical idea of

135. *Id.* (footnote omitted).

136. *See id.* at 3-19.

137. *See From A. Turgot (Mar. 22, 1778)*, *supra* note 129, at 3-19.

138. *See generally* C. Bradley Thompson, *The American Founding and the French Revolution*, in *THE LEGACY OF THE FRENCH REVOLUTION* 109 (Ralph C. Hancock and L. Gary Lambert eds., 1996).

139. *See generally* RICHARD PRICE, *OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION, AND THE MEANS OF MAKING IT A BENEFIT TO THE WORLD* (1785).

140. *See generally id.*

141. *See id.* at 35. “Thanks be to God, the new American States are at present strangers to such establishments[.]” Price observed about the religious toleration in the state constitutions, which sometimes existed alongside state support for a denomination, which he criticized. *Id.* “In this respect, as well as many others, they have shewn, in framing their *constitutions* a degree of wisdom and liberality which is above all praise.” *Id.*

142. *See generally* Caroline Winterer, *Where is America in the Republic of Letters?*, 9 *MOD. INTELL. HIST.* 597 (2012) (inquiring into America’s participation in republic of letters).

representation for the separate social estates.¹⁴³ It was an American variant on a venerable pedagogical tool: an annotated bibliography posing as argument. The lack of originality was part of its message. Montesquieu and others like him had said it all, and the Americans had put wisdom into practice.¹⁴⁴

Debates over the merits of unicameral versus bicameral legislatures, the separation of powers, judicial independence, and the content of rights flourished in the new American states and among spectating intellectuals in Western Europe throughout the 1770s and 1780s. These remain central, contested ideas in constitutionalism today. Stepping back from the merits of this particular episode, it becomes clear that many participants experienced the transatlantic debate as taking place *within* the Enlightenment. It was a debate between radicals and moderates in the vanguard of political theory, and it was carried out through the familiar media of the European republic of letters—periodicals and books published in nations with relatively free presses, like the Netherlands and Switzerland, and then sold across Europe.¹⁴⁵

Disagreements aside, the state constitutions looked like laboratories of experimentation for Enlightenment ideas. European intellectuals were enchanted by the prospect: finally, people were testing leading theories of political organization. That is why, as historian Peter Gay remarked, the *philosophes* viewed the revolutionary states as the Enlightenment's "program in practice."¹⁴⁶ The reality, however, was more complicated. Most of the early states' constitutions, as Adams expected, reproduced the structure of their colonial governments, minus the imperial agents and British supervision. More radical notions rarely got institutionalized. Pennsylvania's consolidated government was the major and temporary exception (the state revised its constitution in 1790 along Adamsonian lines). Similarly, no state followed the hereditary features of the English constitution, despite the urgings of Virginia's conservatives.¹⁴⁷ In short, although Congress and the state assemblies decided to write constitutions as part of the effort to internationalize the conflict, the content of each constitution depended largely on local political experience as filtered through shared colonial understandings of British constitutionalism.¹⁴⁸

143. See generally JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787).

144. See generally *id.*

145. See ROBERT DARNTON, THE BUSINESS OF ENLIGHTENMENT: A PUBLISHING HISTORY OF THE *ENCYCLOPÉDIE*, 1775-1800 (1979); GOODMAN, *supra* note 125; THE TRANSMISSION OF CULTURE IN EARLY MODERN EUROPE (Anthony Grafton & Ann Blair eds., 1990), on the distribution networks of the republic of letters.

146. See 1 PETER GAY, THE ENLIGHTENMENT: THE SCIENCE OF FREEDOM 555-568 (1969); cf. PALMER, *supra* note 123, at 239 (1959) ("There were many in Europe, as there were in America, who saw in the American Revolution a lesson and an encouragement for mankind. It proved that the liberal ideas of the Enlightenment might be put into practice.").

147. See *supra* notes 120-25 and accompanying text (discussing Virginian conservatives' beliefs).

148. See HULSEBOSCH, CONSTITUTING EMPIRE, *supra* note 8, at 170-202. See generally ADAMS, *supra*

As Bernard Bailyn observed fifty years ago, the genius of the Revolution was that the founders re-conceptualized their provincial governments, with which they were largely satisfied, in Enlightenment terms.¹⁴⁹ The founders already enjoyed the freest and most representative governments in the Atlantic World. The exigencies of the American Revolution impelled them to theorize about that practical truth; European political theory provided the language to do so. While all this seems true, it is not inconsistent with the simultaneous belief that their new governments were actually on the vanguard of European political thought. The new states, as projections of British imperialism and led by men who were provincial Europeans in thought and education, were plausibly so. At least that was how French intellectuals and the court of Louis XVI viewed the states: America represented the future here-and-now, though at a comfortable distance from Paris.

II. THE STATES TOGETHER, AND IN THE WORLD

The other documents in the revolutionary portfolio targeted foreign audiences even more directly than the state constitutions and were modeled, to one degree or another, on precedents within the law of nations.¹⁵⁰ David Armitage has reminded Americans that the purpose of the Declaration of Independence was to notify external audiences that the states had, collectively, decided to seek independent existence outside the British Empire and claim the rights of belligerent nations under the law of nations.¹⁵¹ It says as much.¹⁵² Historians have identified various generic precedents for the Declaration—such as a grievance petition, an indictment, a bill of particulars, or a bill in equity.¹⁵³

note 21; LUTZ, *supra* note 24; Benjamin F. Wright, Jr., *The Origins of the Separation of Powers in America*, 13 *ECONOMICA* 169 (1933).

149. See generally Bernard Bailyn, *Political Experience and Enlightenment Ideas in Eighteenth-Century America*, 67 *AM. HIST. REV.* 339 (1962).

150. See ARMITAGE, *supra* note 57, at 35. David Armitage similarly notes that the Second Continental Congress created three committees simultaneously: one to draft a Declaration of Independence; one to draft a Model Treaty of Alliance with European nations, particularly France; and one to draft what became the Articles of Confederation. *Id.* “Each of these documents was designed to be an expression of state sovereignty under the contemporary law of nations.” *Id.*; cf. SADOSKY, *supra* note 17, at 84 (“[T]he Plan of Treaties is of a piece with the Declaration of Independence—they were mutually interlocking foreign policy documents.”).

151. See ARMITAGE, *supra* note 57, at 35. Previous historians of American diplomacy had recognized the immediate foreign policy dimension of the Declaration of Independence. See DULL, *supra* note 81, at 52 (“The Declaration of Independence was largely a foreign-policy statement; without it America hardly could appeal for foreign assistance against the great army gathering to attack New York and the navy blockading its ports.”); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 *U. PA. L. REV.* 26, 34 (1952) (noting independence brought ability to engage in diplomacy with foreign nations on its own behalf); Peter S. Onuf, *A Declaration of Independence for Diplomatic Historians*, 22 *DIPLOMATIC HIST.* 71, 71 (1998) (observing American independence allowed formation of independent alliances with foreign countries).

152. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

153. Cf. CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 6 (1966) (identifying Declaration of Independence as indictment); PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 72-73 (1990) (characterizing Declaration of

All of these forms no doubt contributed, but the Declaration also mapped closely onto an international form well known to eighteenth-century British Americans: a declaration of war.¹⁵⁴ The colonists had read many declarations of war over the eighteenth century. Declarations of war publicized a list of grievances perpetrated by the enemy (as just wars were supposed to be defensive wars), recounted the travails and patience of the declaring state, and notified the rest of the world of the change of the state's status from peaceful neutral to active belligerent.¹⁵⁵ As such, the Declaration of Independence was also a direct retort to the King's Proclamation of Rebellion of August 1775, which accused the colonists of "traitorous conspiracies" in violation of civil law.¹⁵⁶ In response to George III's characterization of the conflict as a domestic insurrection that activated martial law, Congress declared it to be an international conflict—thus activating the laws of war and neutrality.

"[A] decent respect to the opinions of mankind," read the first sentence in

Independence as bill in equity); MAIER, *supra* note 104, at 48 (viewing Declaration of Independence as bill of particulars).

154. See BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 52-56 (1998) (stating Declaration of Independence was declaration of war); *cf.* NEFF, *supra* note 48, at 250-75 (discussing legal understandings of transition from rebellion to war).

155. Compare, for example, *King George II of Great Britain, His Majesty's Declaration of War against the French King*, at para. 1 (1756), available at https://archive.org/details/cihm_60938, for Britain's declaration of war with France in 1756, which was published broadly in colonial newspapers. It begins:

The unwarrantable Proceedings of the *French* in the *West Indies*, and *North America* . . . and the Usurpations and Encroachments made by them upon Our Territories, and the Settlements of Our Subjects in those Parts . . . have been so notorious, and so frequent, that they cannot but be looked upon as a sufficient Evidence of a formed Design and Resolution in that Court, to pursue invariable such Measures, as should most effectually promote their ambitious Views, without any Regard to the most solemn Treaties and Engagements. We have not been wanting on Our Part, to make, from time to time, the most serious Representations to the *French King*, upon these repeated Acts of Violence, and to endeavour to obtain Redress and Satisfaction for the Injuries done to Our Subjects, and to prevent the like Causes of Complaint for the future . . .

Id.

156. Compare THE DECLARATION OF INDEPENDENCE (U.S. 1776), with *King George III of Great Britain, By the King, a Proclamation, for Suppressing Rebellion and Sedition*, at para. 1 (1775), available at <http://www.archives.gov/historical-docs/todays-doc/?dod-date=823>.

Whereas many of Our Subjects in divers [sic] Parts of Our Colonies and Plantations in *North America*, misled by dangerous and ill-designing Men, and forgetting the Allegiance which they owe to the Power that has protected and sustained them, after various disorderly Acts committed in Disturbance of the Public Peace, to the Obstruction of lawful Commerce, and to the Oppression of Our loyal Subjects carrying on the same, have at length proceeded to an open and avowed Rebellion, by arraying themselves in hostile Manner to withstand the Execution of the Law, and traitorously preparing, ordering, and levying War against Us.

King George III of Great Britain, supra, at para. 1.; *cf.* Andrew Jackson O'Shaughnessy, "If Others Will Not Be Active, I Must Drive": *George III and the American Revolution*, 2 EARLY AM. STUD. 1, 1-46 (2004) (discussing King George III's personal role in formulating harsh response).

the Declaration, “requires that they should declare the causes which impel them to the separation.”¹⁵⁷ It ended with the claim “that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”¹⁵⁸ It explained the reasons why the colonies had transformed a rebellion into a civil war and requested recognition, along with assistance, from European powers.¹⁵⁹ Of course it was a special kind of declaration of war, declaring that a civil war was now an international war. The Declaration thereby inaugurated, as Armitage has observed, a new genre within the law of nations and became a template for future colonial revolutionaries.¹⁶⁰

The Declaration of Independence was nonetheless supposed to function like a traditional declaration of war. A published declaration of war was necessary, Vattel counseled in the middle of the eighteenth century, for the benefit of humanity and for a belligerent’s own subjects, not least because it signaled to the enemy one last chance for peace in hopes that it could be brought to reason.¹⁶¹ Declarations activated the laws of war and neutrality, and they might

157. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

158. *Id.* at para. 6.

159. *See id.* at para. 2-3.

160. *See* ARMITAGE, *supra* note 57, at 14 (characterizing Declaration of Independence as combination of assertions of independence, rights, and manifesto). Contemporaries recognized the dual domestic and international purposes of the Declaration. *See* Letter from Zabdiel Adams to John Adams (June 9, 1776), available at <http://founders.archives.gov/?q=%20Author%3A%22Adams%2C%20Zabdiel%22%20Recipient%3A%22Adams%2C%20John%22&s=1111312111&sa=adams%2C%20z&r=1&sr=>; Letter from Samuel Cooper to John Adams (July 15, 1776), available at <http://founders.archives.gov/?q=%20Author%3A%22Cooper%2C%20Samuel%22%20Recipient%3A%22Adams%2C%20John%22&s=1111312111&sa=cooper%2C%20S&r=7&sr=>. For example, Zabdiel Adams wrote:

Whilst in our present unsettled state with respect to Government we Lye exposed to a thousand dangers. Persons of enterprizing and disaffectedd [sic] minds have too good an opportunity of forming parties, creating disunion and carrying into execution their evil designs. It is therefore, on this account, greatly to be wished that the Congress would declare us independant [sic] of Great Britain, and that one general form of Government might be soon instituted over the whole of the united Colonies. And if, as we hear, forreign [sic] assistance cannot be obtained till a declaration of independency is made, methinks this is another cogent reason why it should be made immediately.

Letter from Zabdiel Adams to John Adams (June 9, 1776), *supra*. Similarly, Samuel Cooper wrote:

I congratulate you on the Declaration of Independence with so much Unanimity. The Declaration is admir’d, diffuses Joy, and will have great Effect. It will be follow’d I trust with Alliances &c. France must make a Deversion [sic] in our Favor. It is her Interest, and upon that Ground we may expect it if we take proper Measures.

Letter from Samuel Cooper to John Adams (July 15, 1776), *supra*.

161. VATTEL, *supra* note 18, at bk. 3, §§ 51, 56, 64 (explaining function of declaration of war). Vattel noted that *defensive* wars did not require a declaration but that “[i]n modern times . . . the sovereign who is attacked, seldom omits to declare war in his turn, whether from an idea of dignity, or for the direction of his subjects.” *Id.* at bk. 3, § 57.

call into play preexisting treaty guarantees.¹⁶² In a declared war, some neutral trade (commerce in contraband or running a blockade for example) could be seized by the belligerents. Also, some forms of assistance to one side, like permitting naval or privateering ships to fit out in a neutral port, arguably amounted to imperfect neutrality and ran the risk of expanding the war. Similarly, a neutral might decide to ally with one side and become a belligerent.¹⁶³ Thus, a declaration of war presented all these options to neighboring nations, which is what the Continental Congress meant to do in the summer of 1776.¹⁶⁴ Congress quickly sent a copy to its secret agent in France, Silas Deane, and instructed him to present it to Louis XVI and “the other Courts of Europe,” and to publish a French translation in the newspapers.¹⁶⁵

There was no constituted power, however, that could negotiate a treaty on behalf of the revolutionary states as a group. Like the revolutionary conventions, assemblies, and committees, the Continental Congress lacked a legitimate foundation or defined powers.¹⁶⁶ If the colonies had to institute formal governments, so did the Congress. Hence, there was a need for a formal confederacy, or what Thomas Paine called: “a CONTINENTAL CHARTER, Or Charter of the United Colonies . . . (Always remembering, that our strength is continental, not provincial.)”¹⁶⁷ Congress established a committee to draft the Articles of Confederation on the same day that it appointed committees to draft the Declaration and the Model Treaty. It began debating the draft Articles of Confederation in the late summer of 1776 and, after more than a year of debate, sent the final version to the states in the fall of 1777 for ratification, emphasizing in its circular:

More than any other consideration, it will confound our foreign enemies, defeat the flagitious practices of the disaffected, strengthen and confirm our friends, support our public credit, restore the value of our money, enable us to maintain our fleets and armies, and add weight and respect to our councils at home, and to our treaties abroad.¹⁶⁸

162. *Id.* at bk. 3, §§ 64, 111 (listing notification of neutral powers as one purpose of declaration of war).

163. See PHILIP C. JESSUP & FRANCIS DEAK, 1 NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (1976); NEFF, *supra* note 48, for a history of the laws of war and neutrality.

164. See ARTICLES OF CONFEDERATION art. VI (incorporating requirement of declarations of war); U.S. CONST. art. I, § 8 (granting Congress power to declare war).

165. Letter from Benjamin Franklin & Robert Morris to Silas Deane (July 8, 1776), *available at* <http://founders.archives.gov/documents/Franklin/01-22-02-0298>.

166. See MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781, at 109-25 (1940); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 133-58 (1979), for the political history of the Confederation.

167. PAINE, *supra* note 107, at 20.

168. 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 52, at 933-35.

Because, like all confederacies, it was in the form of a multilateral treaty, it required ratification—unanimous ratification under its own terms.¹⁶⁹ Most states approved the Articles of Confederation during the following year; however, Maryland held out for three and a half years, until March 1781.¹⁷⁰ Consequently, for most of the war there was no formal confederation among the states, only the informal Continental Congress. Once again, however, practice outran formalism, as Congress functioned as the designated representative of the thirteen states.

In early modern political thought, the theory behind a confederation was that it facilitated relations among the confederated states and conducted foreign relations, or what John Locke called the “federative power[s],” for all of them.¹⁷¹ Constituent states delegated specified foreign affairs powers to the confederation government, but they remained otherwise independent and sovereign.¹⁷² The precise delegations varied, and each arrangement contained ambiguities that often ripened into disagreements. But the basic form was familiar: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.”¹⁷³ Though the Continental Congress had some legislative powers, some executive power, and even some judicial power, it was not precisely an executive, legislative, or judicial body.¹⁷⁴ Rather, it was a federative body, with all the ambiguity that this entailed.

Americans, therefore, consciously built on a European tradition of designing interstate confederations to coordinate commerce and collective security. The tradition’s literature, if not every political project carried out in its name, was premised on the vision of perpetual peace.¹⁷⁵ Americans riffled through

169. See ARTICLES OF CONFEDERATION art. XIII.

170. See *infra* notes 343-52 and accompanying text.

171. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 12, §§ 146-47 (Infomotions, Inc. 2001) (“This therefore contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth, and may be called federative, if any one pleases. So the thing be understood, I am indifferent as to the name.”).

172. See MASS. CONST. of 1780 pt. I, art. IV; PA. CONST. of 1776, pmbl. The Massachusetts Constitution embraced the ambiguous formula of confederation, declaring that the state was “a free, sovereign, and independent state; and [could] do . . . exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America, in Congress.” MASS. CONST. OF 1780 pt. I, art. IV. Similarly, the Pennsylvania Constitution of 1776 stated that the colonies were now “free and independent States, and that just, permanent, and proper forms of government exist in every part of them, derived from and founded on the authority of the people only, agreeable to the directions of the honourable American Congress.” PA. CONST. of 1776, pmbl.

173. ARTICLES OF CONFEDERATION art. 2.

174. Cf. JERRILYN GREENE MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-1776, at 299-303 (1987) (arguing Continental Congress assumed crown’s executive power).

175. See HENDRICKSON, *supra* note 28, at 257 (citing English influence in American quest for peace); PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN THE AGE OF REVOLUTIONS, 1776-1814, at 93-94 (1993) (referencing confederation as structure for promoting peace).

literature that was central to eighteenth-century European political thought and believed they were adding to it. Their self-described “league of friendship” was predominantly, though not simply, a practical tool for their own coordination; it also offered an example from which Europeans might learn, which is precisely how many Europeans read the confederation.¹⁷⁶ Richard Price trumpeted the American Confederation as an example for the world, especially for Europe. Americans had made progress, Price wrote as the war ended, in showing that a governmental body could arbitrate disputes between “any number of confederate States.”¹⁷⁷ They had waged a war successfully, but more important to Price, they had established a structure that seemed to ensure that no war would break out among themselves.¹⁷⁸ The Confederation therefore offered an example of how “*universal* peace may be produced, and all war excluded from the world.”¹⁷⁹ The form was crucial because the Confederation evoked the European dream of overcoming war on their own continent.¹⁸⁰

Similarly, Congress designed the Model Treaty as a template for liberal commercial relations with European nations.¹⁸¹ Liberal, at the time, did not mean free trade, but rather, freer trade than was allowed by the jealous regulations of the European empires. These regulations ranged from discriminatory tariffs and tonnage rates to navigation acts restricting the right to carry goods into a nation’s ports in the metropole and its colonies, as well as outright trade prohibitions. One mechanism for driving down trade restrictions was the most favored nation clause, which was increasingly included in commercial treaties. The Americans put one in the Model Treaty.¹⁸² In addition to liberalizing peacetime trade, the Model Treaty also protected neutral shipping as much as possible during war.¹⁸³ Here, the key idea was incorporated into the Model Treaty by the *free ships, free goods* clause: In

176. See HENDRICKSON, *supra* note 28, at 133-34; PRICE, *supra* note 139, at 1-2.

177. PRICE, *supra* note 139, at 15.

178. *See id.*

179. *Id.*

180. See HENDRICKSON, *supra* note 28, at 259; ONUF & ONUF, *supra* note 175, at 93-94.

181. See FELIX GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 48-57 (1961) (outlining writing of Model Treaty); GOULD, *supra* note 17, at 1-4 (explaining importance of Model Treaty to America’s founding). James Hutson disputes Gilbert’s claim that the European *philosophes*’ notion that commerce facilitated peace had much of an impact on British North Americans. See generally JAMES H. HUTSON, JOHN ADAMS AND THE DIPLOMACY OF THE AMERICAN REVOLUTION (1980). His evidence is that few Americans read the continental *philosophes*, and that many colonists lamented the tendency of commerce to breed luxury, which in turn corrupted virtue. See generally *id.* There were however many pro-commercial theories available to the colonists in the literature of the Scottish Common Sense school and the continental law of nations. Compare HIRSCHMAN, *supra* note 11, on the former, with HONT, *supra* note 11, WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT, *supra* note 11, and TUCK, *supra* note 11, on the latter.

182. See 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 53, at 768-79.

183. *Id.*

times of war, carriers hailing from neutral nations could ship anyone's goods anywhere, except through actual (rather than paper) blockades, and also excepting trade in contraband, which the Model Treaty defined strictly.¹⁸⁴ The goal was to reduce trade monopolies in peace and limit impediments to commerce during war.¹⁸⁵

These liberal treaty provisions signaled the growing belief, or at least the aspirational ideal, that reciprocal trade could be the source of national wealth and power rather than a zero-sum game that threatened to weaken the nation. In other words, there could be mutual rather than unilateral gains from trade. Free trade and the doctrine of neutrality in wartime were not just ideologies of weak states such as the Netherlands and the struggling United States, despite the fact that weaker states might gravitate more naturally to such positions. Instead, free trade and the doctrine of neutrality were ideals that attracted adherents across Europe.¹⁸⁶ Nations were separate and independent—sovereign—and each had its own interests. Yet they also benefitted from mutual trade. Again, this was an Enlightenment conception that incorporated realist notions of balanced powers, mutual dependence, and comparative advantage with an idealist conception of a peaceful community of civilized nations.

Few revolutionary Americans were familiar with treaty-making or any kind of diplomacy. They had debated constitutions for decades. Many had read about ancient and modern confederations in school. Declarations of war were published in colonial newspapers. In contrast, colonists rarely parsed treaties. The closest experiences for colonial Americans were intra-imperial lobbying and Indian diplomacy.¹⁸⁷ Thus, the Continental Congress's first choices for overseas service and assistance in drafting the Model Treaty were former colonial agents and transatlantic merchants. For example, Benjamin Franklin was an easy choice for membership on the committee that drafted the Model Treaty because he had lived for fifteen years in London—representing the colonial assemblies of Pennsylvania, New Jersey, Massachusetts, and

184. *See id.* at 775.

[I]t is hereby Stipulated that free Ships shall also give a Freedom to Goods, and that every Thing shall be deemed to be free and exempt, which shall be found on board the Ships, . . . although the whole Lading or any Part thereof, should appertain to the Enemies of Either, Contraband Goods being always excepted.

Id. (defining contraband); *cf.* NEFF, *supra* note 48, at 154-55 (describing *free ships, free goods* treaties).

185. *See id.* at 768-79.

186. *See generally* HONT, *supra* note 11. For example, Koen Stapelbroek argues that the Dutch support for neutral rights in the eighteenth century cannot be reduced to the protestations of a state experiencing declining relative international power. *See generally* Koen Stapelbroek, *Dutch Decline as a European Phenomenon*, 36 *HIST. OF EUR. IDEAS* 139 (2010).

187. Although some provincials had experience with Indian treaties, many of those who did were connected to the Indian service and remained loyal to the King.

Georgia—and also had attended the Albany Congress of 1754, where the northern colonies attempted to create a confederation and negotiated with the Iroquois Indians.¹⁸⁸

The committee that drafted the Model Treaty collected compilations of European treaties. Although the conscientious John Adams did most of the drafting, Benjamin Franklin obtained the best single source: the Anglo-French Treaty of Utrecht of 1713. The Anglo-French Treaty of Utrecht was the leading example of liberal treaties designed to promote European peace by fostering relatively unfettered trade in peace and war.¹⁸⁹

The Anglo-French Treaty was part of a skein of bilateral treaties at Utrecht that ended the War of Spanish Succession. Charles II of Spain had named his grandson, the future Philip V, as his successor. Philip was also the grandson of Louis XIV of France, which raised the possibility that France and Spain might someday unify to create a continental behemoth. The War of Spanish Succession prevented this from happening.¹⁹⁰ The ensuing Utrecht treaties, including the Anglo-French Treaty, were supposed to create a balance of power across Europe to prevent any one monarch from dominating continental affairs.¹⁹¹ Most realized that preventing the union of the French and Spanish crowns was only a partial, perhaps temporary, solution. According to the

188. See generally MICHAEL G. KAMMEN, *A ROPE OF SAND: THE COLONIAL AGENTS, BRITISH POLITICS, AND THE AMERICAN REVOLUTION* (1968); TIMOTHY J. SHANNON, *INDIANS AND COLONISTS AT THE CROSSROADS OF EMPIRE: THE ALBANY CONGRESS OF 1754* (2002).

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

190. *Supra* note 189.

191. The Anglo-French Treaty of Utrecht and the general notion of balance that emerged from the Utrecht treaties was well received. See generally WILLIAM ROBERTSON, *THE HISTORY OF THE REIGN OF THE EMPEROR CHARLES V. WITH A VIEW OF THE PROGRESS OF SOCIETY IN EUROPE, FROM THE SUBVERSION OF THE ROMAN EMPIRE, TO THE BEGINNING OF THE SIXTEENTH CENTURY (1762)* (celebrating balance of power and progress of commerce). William Robertson's book could be found in the libraries of leading revolutionaries. Vattel also celebrated the balance of power as a blueprint for European peace and integration. See VATTEL, *supra* note 18, at bk. 3, § 47. Vattel maintained that:

Europe forms a political system, an integral body, closely connected by the relations and different interests of the nations inhabiting this part of the world. It is not, as formerly, a confused heap of detached pieces, each of which though herself very little concerned in the fate of the others, and seldom regarded things which did not immediately concern her. The continual attention of sovereigns to every occurrence, the constant residence of ministers, and the perpetual negotiations, make of modern Europe a kind of republic, of which the members—each independent, but all linked together by the ties of common interest—unite for the maintenance of order and liberty. Hence arose that famous scheme of the political balance, or the equilibrium of power; by which is understood such a disposition of things, as that no one potentate be able absolutely to predominate, and prescribe laws to the others.

Id.

leading ideas of the early eighteenth century, the way to reduce the proclivity toward war was not only to balance power but also to generate lasting commercial ties. Balance was only a starting point. Commercial reciprocity would draw all powers together. That the Utrecht treaties did not actually prevent war throughout the rest of the century did not undermine their attractiveness.¹⁹² Thus, Americans educated themselves on the balance of power and reciprocity principles embodied in the Utrecht treaties.

Perhaps the greatest example that the Utrecht treaties provided was the peacemakers' separation of military and political questions—armistice and borders—from those regarding peacetime commercial relations.¹⁹³ This separation presumed that questions of war could, and should, be isolated from those of peace, and that treaties of commerce ought to flourish outside their usual origins—namely during negotiations ending war. Untainted by the war, the commercial treaty expressed the hope for a new era of peaceful coexistence. It was a nice image, and although it did not last on the ground, it persisted in the dreams of the Enlightenment. Revolutionary Americans codified that vision of peace in the Model Treaty.¹⁹⁴

Adams and Franklin drew directly on the precedent of the Utrecht treaties when they constructed the Model Treaty. Franklin's copy of *A Compleat Collection of All the Articles and Clauses which Relate to the Marine, in the Several Treaties Now Subsisting Between Great Britain, and Other Kingdoms and States* contains the "X" marks he scratched in the margins next to provisions that he thought Adams should include in the draft treaty.¹⁹⁵ Adams included some of those provisions and added a dozen others that he found while perusing Franklin's volume.¹⁹⁶ A classic cut-and-paste exercise, the Americans selected what they thought were the most liberal provisions in celebrated European treaties.

This was Adams's initiation into international diplomacy. In his autobiography, he recalled that Jeremiah Gridley (his mentor when he

192. See Edmond Dziembowski, *Lord Shelburne's Constitutional Views in 1782-3*, in AN ENLIGHTENMENT STATESMAN IN WHIG BRITAIN: LORD SHELBURNE IN CONTEXT, 1737-1805, *supra* note 132, at 215, 220-21 (noting Shelburne's dream of trade liberalization between European powers); Richard Whatmore, *Shelburne and Perpetual Peace: Small States, Commerce, and International Relations within the Bowood Circle*, in AN ENLIGHTENMENT STATESMAN IN WHIG BRITAIN: LORD SHELBURNE IN CONTEXT, 1737-1805, *supra* note 132, at 249, 262-65 (observing establishment of international community dedicated to freedom of trade as priority of Bowood Circle). See generally HIRSCHMAN, *supra* note 11.

193. See GILBERT, *supra* note 181, at 46 (recognizing Utrecht treaties as first occurrence of separation of political and commercial treaties).

194. See 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 53, at 768-779.

195. See generally A COMPLEAT COLLECTION OF ALL THE ARTICLES AND CLAUSES WHICH RELATE TO THE MARINE, IN THE SEVERAL TREATIES NOW SUBSISTING BETWEEN GREAT BRITAIN, AND OTHER KINGDOMS AND STATES (Henry Edmunds & William Harris eds., 1760) (on file with Houghton Library, Harvard University).

196. See generally Gregg L. Lint, *John Adams on the Drafting of the Treaty Plan of 1776*, 2 DIPLOMATIC HIST. 313 (1978) (explaining this process). Franklin identified twelve useful provisions; Adams selected five of those and a dozen others. See generally *id.*

apprenticed law in the 1750s) told him to read some books on the law of nations to learn about statesmanship and ethics.¹⁹⁷ The subject arose in their first meeting.¹⁹⁸ Adams had just come from a two-year clerkship with James Putnam, and Gridley asked Adams whether he had yet read the law of nature and nations.¹⁹⁹ Young Adams replied that he had read Burlamaqui, Heineccius, and Turnbull on moral philosophy.²⁰⁰ Gridley then asked whether he had read Grotius and Pufendorf.²⁰¹ “I cannot say I have Sir,” Adams responded,

Mr. Putnam read them, when I was with him, and as his Book lay on the Desk in the office for the most part when he had it not in his hand, I had generally followed him in a cursory manner, so that I had some very imperfect Idea of their Contents: but it was my intention to read them both as soon as possible. You will do well to do so [instructed Gridley]: they are great Writers. Indeed a Lawyer through his whole Life ought to have some Book on Ethicks or the Law of Nations always on his Table. They are all Treatises of individual or national Morality and ought to be the Study of our whole Lives.²⁰²

In 1760, Adams still had yet to read Pufendorf.²⁰³ However, by the time of the Stamp Act debates, he had read Pufendorf and continued to cite Grotius, Pufendorf, and Vattel to support colonial claims of autonomy against the Crown and Parliamentary regulation.²⁰⁴ Like all hard working law students, Adams noted his mentor’s advice, but focused on what seemed most immediately important to his prospective practice in Massachusetts during the late 1750s, as in most times and places: the law of debtor and creditor. Twenty years later, as a forty-year-old man entrusted with crafting the template for the revolutionary states’ relationship with the rest of the world, he scrambled to obtain books to learn more about the law of nations and treaties. He continued

197. See ADAMS, *supra* note 19, at 271-72.

198. See *id.* at 270-71.

199. See *id.* at 271.

200. See *id.* Adams also told Gridley that he had read Vinius’s edition of Justinian, but two years later, in a contemporary diary entry, he admitted that he had not. Compare *id.* (recounting conversation with Gridley), with JOHN ADAMS, *Autobiography of John Adams*, in 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 174 (1961) (“In the Civil Law, there are Hoppius, and Vinnius, Commentators on Justinian, Domat, &c. besides Institutes of Cannon and feudal Law, that I have to read.”).

201. See ADAMS, *supra* note 19, at 271.

202. *Id.* at 271-72.

203. See ADAMS, *supra* note 200, at 174.

204. Compare ADAMS, *supra* note 200, at 286-87, 315-30, 331-45 (noting another colonist’s argument, supported with citation to Grotius), with 2 ADAMS, *supra* note 84, at 291 (citing Grotius, Pufendorf, Barbeyrac, Locke and others to support right of revolution). Adams wrote, citing Grotius, “that shutting up the Courts is an Abdication of the Throne, a Discharge of the Subjects from their Allegiance, and a total Dissolution of Government and Reduction of all Men to a state of Nature.” ADAMS, *supra* note 200, at 286-87. It was “unlikely that Adams had ever had occasion to investigate the complexities of treaty composition” before the summer of 1776. Lint, *supra* note 196, at 314-15 & n. 7.

to consult those books every time he faced a question of first impression about diplomacy and international commerce. It was a decade of continuing education in the law of nations, which was repeated for the next generation in the 1790s and continually after that. For generations American lawyers instructed their clerks to read the law of nations.²⁰⁵ Nevertheless, many did not study it closely until faced with real problems. Then, amidst war, they learned under the pressure of experience.²⁰⁶

III. PUBLICIZING THE PORTFOLIO: BENJAMIN FRANKLIN'S CONSTITUTIONAL ADVOCACY

In the fall of 1776, after manufacturing a Declaration of Independence, a Model Treaty, and a draft of the Articles of Confederation, and having recommended that the states write constitutions, the Continental Congress turned to diplomacy.²⁰⁷ France was the key audience.²⁰⁸ Congress had to persuade the French that the new states were reliable partners in a war against Britain.²⁰⁹ In the spring of 1776, it had already sent over a covert agent, Silas Deane, to purchase arms, uniforms, and supplies for the Indian trade, all to support the war effort.²¹⁰ In addition, it had instructed Deane to ask French Foreign Minister Vergennes “whether if the Colonies should form themselves into an Independent State, France would probably acknowledge them as such, receive their Ambassadors, enter into any Treaty or Alliance with them, for Commerce or defence [sic], or both?”²¹¹ At first demurring on recognition and

205. See William Smith, *Course of Study for Law Students: “Some Directions Relating to the Law,”* reprinted in PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK 197-200* (1939), for a colonial example. See Ben Lyons, *The Law of Nations in John Jay’s Mission to Spain: 1780-82*, Remarks at the Society for the Historians of American Foreign Relations (June 2013) (on file with author), for a study of the Moral Philosophy course at King’s College and its influence.

206. See, e.g., John Adams, *Autobiography of John Adams*, in 4 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 145-46 (1961) (describing typical self-teaching moment during diplomatic service in France in 1778). Adams recalled that “all America at this time was compleatly [sic] uninformed . . . [about] the Negotiations and Dispatches of Ambassadors.” *Id.* at 145-46. He had read “Grotius, Puffendorf [sic], [and] Vattel [sic] . . . before in America,” as well as treaty collections, but formal learning about negotiation was hard to find. *Id.* at 146. “The Powers of Europe in general have kept the Letters and Memorials of their Ambassadors locked up in the Cabinetts [sic] of their Courts: very few of them have ever been collected and published.” *Id.* France, however, was different. *Id.* “There are extant more Publications of their negotiations, than of all the rest of Europe.” *Id.* Adams thus purchased several books, including *Noilles’s Diplomatic Dictionary*, *The Principles of Negotiation: or, an Introduction to the Public Law of Europe Founded on Treaties* by Abbé de Mably, as well as “all other Books I could find relative to the office of an Ambassador as Wickefort &c.” *Id.*

207. See 3 *LETTERS TO DELEGATES TO CONGRESS, 1774-1789*, at 321-23 (Paul H. Smith ed., 1976-2000) (authorizing Silas Deane to conduct a diplomatic mission to France).

208. See *id.*

209. See *id.*

210. See *id.*

211. 3 *LETTERS TO DELEGATES TO CONGRESS, 1774-1789*, *supra* note 207, at 321-23 (footnote omitted); see James Scott Brown, *Introduction to THE TREATIES OF 1778 AND ALLIED DOCUMENTS* v, ix-xi (Gilbert Chinard ed., 1928).

a treaty, Vergennes jumped at the chance to irritate France's historical enemy and organized a secret program to send military supplies indirectly to the Americans.²¹²

Deane was supposed to get supplies while offering a future shipment of tobacco as payment.²¹³ Because a gift or direct trade might have sparked war with Britain, the ministry enlisted an unfortunate courtier to establish a shell trading corporation that was supposedly private, but was actually funded by the crown.²¹⁴ Pierre-Augustin Caron de Beaumarchais, a music teacher and playwright remembered today for *The Barber of Seville* and *The Marriage of Figaro*, was at the time notorious for his scandalous life, which even before gun-running was more interesting than his fictions.²¹⁵ Among other offenses, he ran up unpayable debts, bribed a judge, and had an affair with a duke's mistress.²¹⁶ Stripped of his civil rights, Beaumarchais could have languished in jail. Instead, he went to Spain and set up a front corporation, Rodrigue Hortalez and Company, which in a nice coincidence received its charter of incorporation on July 4, 1776.²¹⁷ Like many of his compatriots, Beaumarchais embraced the American cause with passion and celebrated its principles.²¹⁸ For him it became a moral crusade, all the more passionately pursued because his freedom also depended on it.²¹⁹

Six months later, Congress commissioned its most seasoned transatlantic operator, Franklin, along with Deane and Arthur Lee, to negotiate a "true and sincere friendship, and a firm, inviolable, and universal peace, for the defence [sic], protection, and safety of the navigation and mutual commerce of the subjects of his most Christian majesty and the people of the United States."²²⁰

212. See DULL, *supra* note 81, at 57-65. Separating the colonies from Britain was an unofficial French policy since the Peace of Paris, and in the mid-1760s France sent secret agents to cultivate American friends, including Franklin. See *id.* at 9; see also JEREMY J. WHITEMAN, REFORM, REVOLUTION AND FRENCH GLOBAL POLICY, 1787-1791, at 16-23 (2003) (arguing Vergennes sought both to contain British Empire and expand French global trade).

213. See DULL, *supra* note 81, at 61-62.

214. See *id.*

215. See generally MAURICE LEVER, BEAUMARCHAIS: A BIOGRAPHY (Susan Emanuel trans., 2009).

216. See generally *id.*

217. See generally *id.*; STACY SCHIFF, A GREAT IMPROVISATION: FRANKLIN, FRANCE, AND THE BIRTH OF AMERICA (2006).

218. See BRIAN N. MORTON & DONALD C. SPINELLI, BEAUMARCHAIS AND THE AMERICAN REVOLUTION 327 (2003)

219. See *id.*

Beaumarchais became involved in the American Revolution for three main reasons. The first was to provide a service to the French court and, thereby, regain the civil rights he had lost as a result of the Goëzman affair in 1774. Secondly, there was the possibility of making money. Thirdly, Beaumarchais fervently believed in the ideals of the American Revolution, indeed more fervently than many Americans.

Id.

220. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 52, at 833. Congress originally

Upon arriving in France in late November 1776, Franklin immediately used the portfolio in his negotiations. All the documents were publicized as proof of the viability, and even enviability, of the revolutionary states.²²¹ The French were least interested in the Declaration.²²² Although the broad statement of equality and inalienable rights attracted admiration, the bald claim of independence was not persuasive. The question was not whether the American provinces claimed independence; any group could say that. The question was whether they could prove it. To do that, Congress thus turned to one of America's greatest salesmen.

Immediately Franklin informed the French ministry that the American people had "call'd loudly upon the Congress to declare an Independence."²²³ It did so, and:

the several Colonies have since approv'd and confirm'd that Declaration, and have accordingly form'd their separate Constitutions as independant [sic] States: A general Confederation is also plann'd by the Congress, whereby, for general Purposes and the common Defence [sic], the Power of the whole is united in that Body. A Copy of that Instrument of Confederation is hereunto annexed.²²⁴

In retrospect, it all seems factual. In early January 1777, however, most colonists had not approved the Declaration of Independence, although the revolutionary assemblies had. Furthermore, most colonies did not yet have state constitutions. The copy of the Articles of Confederation that Franklin packed in his luggage in October 1776, marked "secret" (indeed, it was first published in Paris, not North America), was revised before Congress approved

appointed Thomas Jefferson as the third commissioner, but he declined and was replaced by Arthur Lee. See SCHIFF, *supra* note 217, at 29 (describing Jefferson's inability to get to France). Despite having never gotten along with Franklin, Arthur Lee was a natural replacement as he was educated at Eton, Edinburgh and the Inner Temple, had succeeded Franklin as Massachusetts's agent, and was still in London in 1776. *Id.*

221. See Robert R. Palmer, *The Impact of the American Revolution Abroad*, in *THE IMPACT OF THE AMERICAN REVOLUTION ABROAD* 5, 12 (Library of Congress ed., 1976).

222. See *id.* at 13 ("Contemporaries in Europe seldom mentioned the Declaration of Independence It was the state constitutions with their accompanying declarations of rights that captured attention. . . . Especially in France the constitutions had an overwhelming relevancy in the last years before the French Revolution."); cf. Elise Marienstras & Naomi Wulf, *French Translations and Reception of the Declaration of Independence*, 85 J. AM. HIST. 1299, 1302 (1999) ("Between 1777 and 1786, the state constitutions and bills of rights were published in France at least five times. We can, however, infer from allusions made at the National Assembly that the declaration, although often confused with the Virginia Bill of Rights, was constantly on the minds of the delegates.").

223. Benjamin Franklin, *Memoir on the State of the Former Colonies, [before 5 January 1777]*, FOUNDERS ONLINE, <http://founders.archives.gov/?q=memoir%20on%20the%20state%20of%20the%20former%20colonies%20Author%3A%22Franklin%2C%20Benjamin%22&s=1511311111&r=14>.

224. *Id.* (footnote omitted).

it the following year.²²⁵ Even then, the Articles were not ratified until 1781.²²⁶ When translated and published in Europe, however, it appeared as though Congress had approved the Articles in October 1776.²²⁷ The preface to its publication in London claimed that the Articles had “at length been resolved and signed by all the Delegates” and that “it is not yet doubted [that] they will be approved and generally received” by the states.²²⁸ In Franklin’s telling, the Revolution sounded more promising than it was.

By many accounts Franklin was not America’s best diplomat.²²⁹ He had little interest in international commerce and abhorred his naval duties, the magnitude of which he and possibly everyone else had not anticipated. He did not seem especially interested in the law of nations, except when a brilliant idealist, who was also wrongly convicted (he maintained) of murder, showed up at his doorstep outside Paris brandishing a plan for international government.²³⁰ Franklin failed to discover that his secretary was actually a British spy (Americans supported open agreements openly arrived at from the beginning).²³¹ He felt he had little left to prove, which is rarely a good trait in an advocate, and talked of retiring to a country house in France, never to see America again. The most perceptive analysts of his reserved posture as a diplomat refer to Franklin’s “strategy of humility” and stress his self-description as a “courted virgin.”²³²

225. See Durand Echeverria, *French Publications of the Declaration of Independence and the American Constitutions, 1776-1783*, 47 THE PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 313, 325-26 (1953). Congress published eighty copies of an early draft of the Articles in August of 1776; they were distributed solely to delegates of Congress, who pledged to keep the text secret. See *id.* at 325. That draft was not published in the states. See *id.* The first place it was published for wide readership was in France, where it was described wrongly as already ratified. See *id.* In fact, twelve of thirteen states ratified the Articles over the course of 1777, but Maryland waited until early 1781. It is evident that Franklin and the French translators used other sources in addition to the documents Franklin packed in his luggage. See Gilbert Chinard, *Notes on the French Translations of the “Forms of Government or Constitutions of the Several United States,” 1778 and 1783*, Y.B. AM. PHIL. SOC’Y, 1943, 98-105. A curious example is the serial printing of the *draft* version of Virginia’s Declaration of Rights, which included two articles not confirmed in the final version of June 12, 1776. *Id.* at 98-100. That draft was published in London and the London periodical found its way to Paris. *Id.* at 102.

226. See Echeverria, *supra* note 225, at 47.

227. See *id.*

228. 3 THE REMEMBRANCER OR, IMPARTIAL REPOSITORY OF PUBLIC EVENTS 240 (1777).

229. See generally JONATHAN R. DULL, FRANKLIN THE DIPLOMAT: THE FRENCH MISSION (1982). But see generally GORDON S. WOOD, THE AMERICANIZATION OF BENJAMIN FRANKLIN (2004) (recognizing Franklin as greatest American diplomat because of efforts to preserve alliance with France).

230. See GERALD STOURZH, BENJAMIN FRANKLIN AND AMERICAN FOREIGN POLICY 218-32 (1954) (describing Franklin’s encounter with Pierre-André Gargaz).

231. See generally THOMAS J. SCHAEFER, EDWARD BANCROFT: SCIENTIST, AUTHOR, SPY (2011). Indeed, Franklin claimed to welcome spying, for he claimed that he was involved “in no Affairs that I should blush to have made public [sic]; and to do nothing but what Spies may see and welcome.” Letter from Benjamin Franklin to Juliana Ritchie (Jan. 19, 1777), available at <http://founders.archives.gov/?q=%20Author%3A%22Franklin%2C%20Benjamin%22%20Recipient%3A%22Ritchie%2C%20Juliana%22&s=1111312111&sa=Franklin&r=1&sr=ritchie>.

232. See generally PAUL W. CONNER, POOR RICHARD’S POLITICKS: BENJAMIN FRANKLIN AND HIS NEW

Beneath the apparent casualness, however, lay a profound confidence in North America's future that rested on a geopolitical vision of continental expansion and transatlantic commercial integration that he had developed decades earlier as an entrepreneur, land speculator, and colonial agent.²³³ The peopling of America, he had long thought, would generate new and astonishing markets for Europe, and also create a political equal on the western side of the Atlantic.²³⁴ Indeed, the center of gravity of European civilization would eventually cross the Atlantic. Confident that American and European interests overlapped, Franklin felt he need not connive too much.²³⁵

France's national interest, as perceived by its leading statesmen and especially Foreign Minister Vergennes, mattered most.²³⁶ French national pride had not recovered from the stunning defeat in the Seven Years' War and the cession of most of their North American empire to Britain.²³⁷ The French delighted at the chance to get revenge by helping to carve off a large chunk of Britain's empire while taking some of its trade as well.²³⁸ "America had hardly declared its independence," observed the Marquis de Condorcet, "when [French] political leaders clearly understood that this happy revolution would necessarily result in the ruin of England and the prosperity of France."²³⁹ This progenitor of public choice theory accurately assessed the diplomats's sense of the stakes, though, as with most ex-ante predictions about multilateral relations, he miscalculated the outcome's costs and benefits (and his own endgame played out in a Jacobin prison).²⁴⁰ Revenge was not France's only interest: an

AMERICAN ORDER (1965); DULL, *supra* note 229. "I have never yet changed the Opinion I gave in Congress," Franklin wrote fellow commissioner Lee a few months after arriving in Paris, "that a Virgin State should preserve the Virgin Character, and not go about suitering for Alliances, but wait with decent Dignity for the applications of others." Letter from Benjamin Franklin to Arthur Lee (Mar. 21, 1777), *available at* <http://founders.archives.gov/?q=%20Author%3A%22Franklin%2C%20Benjamin%22%20Recipient%3A%22Lee%2C%20Arthur%22&s=1111312111&sa=franklin&r=16&sr=lee>.

233. See STOURZH, *supra* note 230, at 59-60.

234. See *id.* at 58-59.

235. See *id.* at 33-82 (discussing Franklin's geopolitical vision). See generally BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, &C. (1755).

236. See ORVILLE T. MURPHY, CHARLES GRAVIER, COMTE DE VERGENNES: FRENCH DIPLOMACY IN THE AGE OF REVOLUTIONS, 1719-1787, at 252-55 (1982). Jonathan Dull argues that Vergennes's aim was not simply to weaken Britain for its own sake, but also to gain relative power and leverage to face down Russia and Austria in the competition for the eastern Mediterranean trade with the Ottoman Empire. See JONATHAN R. DULL, THE FRENCH NAVY AND AMERICAN INDEPENDENCE: A STUDY OF ARMS AND DIPLOMACY, 1774-1787, at 8-11 (1975); see also DULL, *supra* note 81, at 91-96.

237. See DULL, *supra* note 236, at 9-10.

238. See *id.* at 11.

239. Marienstras & Wulf, *supra* note 222, at 1302 (alteration in original) (translating quote from Condorcet).

240. See MURPHY, *supra* note 236, at 252-55. Condorcet's friend Turgot, however, predicted that French participation in another British war would be financially ruinous to the crown without domestic financial reform, which never came. See *id.* at 253-54. The Seven Years' War had devastated the nation's finances. See generally JAMES C. RILEY, THE SEVEN YEARS WAR AND THE OLD REGIME IN FRANCE: THE ECONOMIC AND FINANCIAL TOLL (1986).

independent confederation of American states might also allow the French to restore their American trading networks.²⁴¹

Pride and economic interest might suffice to explain assistance, but the French were most interested in a *viable* threat to the British Empire.²⁴² Fueling a mere rebellion would threaten to ensnare France in a global war that, in 1776, it did not have the navy to fight, let alone win.²⁴³ “[I]t would not be in keeping with the dignity of the King, nor in his interest, to make a pact with the insurgents,” thought Vergennes in early 1776, before the Declaration of Independence.²⁴⁴ “This pact, in fact, would only be worthwhile insofar as they make themselves independent and do not find it in their interest to break it, [and if] the system does not change into an administration both mobile and necessarily unstable.”²⁴⁵ Even if the Americans proved constant, they had an enormous fight on their hands. Victory would also require other allies, like Spain, with money and ships.²⁴⁶ In the short run, assistance would have to be covert, though in the eighteenth century, covert aid was often an open secret.²⁴⁷ Therefore, even French decision-makers, focusing on only national interest, wanted assurance that the American colonies would not reconcile voluntarily or by force with the British Empire.²⁴⁸

The portfolio conveyed American assurances. The commissioners made sure that the entire portfolio was translated and published in French and other languages. The new American governments—state and confederate—soon became leading topics in the salons of Paris.²⁴⁹ Capitalizing on the cult of his own personality, Franklin in particular made them so. Franklin’s unadorned head, which was memorialized in etchings, paintings, cameos, busts, and figurines, circulated with the states’ transparent constitutions through Parisian salons and across Europe.²⁵⁰ They were images of wisdom borne of experimentation. The intellectuals, at least, wanted war in favor of such ideas, as well as to humble the British.²⁵¹ “The Age of Revolutions had begun,” observed historian Durand Echeverria, “and the literary symbol of America

241. See DULL, *supra* note 236, at 8-11.

242. See *id.* at 8-9.

243. See *id.* at 11-15 (focusing on naval question); see also Brown, *supra* note 211, at vii.

244. Comte de Vergennes, *Considerations on the Affairs of the English Colonies in America*, reprinted in DOCUMENTS OF THE EMERGING NATION: U.S. FOREIGN RELATIONS 1775-1789, at 18, 23 (Mary A. Giunta ed., 1998).

245. *Id.*

246. See generally MURPHY, *supra* note 236. France never expected to send land forces to assist the states, believing instead, as American diplomats informed Vergennes, that they could fight the ground war themselves, which proved incorrect. See generally *id.*

247. See *id.* at 259 (discussing France’s official stance).

248. See *id.* at 260.

249. See DURAND ECHEVERRIA, MIRAGE IN THE WEST: A HISTORY OF THE FRENCH IMAGE OF AMERICAN SOCIETY TO 1815, at 39-40 (1968).

250. See *id.* at 46 (noting replicas of Franklin’s likeness).

251. See *id.* at 42 (recognizing French intellectuals’ identification with American struggle).

fashioned by the Physiocrats and *Philosophes* was transformed almost overnight into a popular enthusiasm which fired all of France.”²⁵²

Different segments of French society viewed the American cause in different ways.²⁵³ Courtiers could see the revolutionaries as first-class irritants to a perennial enemy.²⁵⁴ The intellectuals, in turn, viewed the states as laboratories of experimentation, testing old theories and trying out institutions they might hope to establish someday at home.²⁵⁵ “[T]o a great extent,” argued Echeverria, “the American example was used as an excuse to express ideas which otherwise could not have been voiced.”²⁵⁶ The broader literate public, and those not fully literate but able to take in Franklin’s multimedia performance, saw an assault on stifling privilege: a rebuke to the *Ancien Régime* everywhere.²⁵⁷ “[I]t is not enough that the rights of man be written in the books of philosophers and inscribed in the hearts of virtuous men,” Condorcet wrote before the end of the war, “the weak and ignorant must be able to read them in the example of a great people. America has given us that example.”²⁵⁸ Presenting this image of America to France was one of Franklin’s greatest achievements. As John Adams recalled:

His name was familiar to government and people, to kings, courtiers, nobility, clergy, and philosophers, as well as plebeians, to such a degree that there was scarcely a peasant or a citizen, a *valet de chambre*, coachman or footman, a lady’s chambermaid or a scullion in a kitchen, who was not familiar with it, and who did not consider him as a friend to human kind.²⁵⁹

Proving that an action is actually in the national interest is often difficult. Strategic decisions that include the risk of war depend on so many variables and independent actors that they retain a substantial degree of uncertainty. At the very least, as historian Quentin Skinner has argued, it is usually necessary to show that some action is not only consistent with one’s interests, but also consistent with one’s principles.²⁶⁰ Contrary to the behavioral premise of

252. *Id.* at 39. “America was no longer a mere parable for philosophers,” Echeverria continues, “it had become a popular movement spreading down into the lower classes and out to those members of the bourgeoisie who were usually little interested in the polemics of the Physiocrats and *Philosophes*.” *Id.* at 41; see WOOD, *supra* note 229, at 171-83.

253. See ECHEVERRIA, *supra* note 249, at 79-81. (discussing French reactions to American events).

254. See *id.* at 81 (noting enthusiasm for revenge).

255. See *id.*

256. *Id.* at 42.

257. See ECHEVERRIA, *supra* note 249, at 42.

258. MARQUIS DE CONDORCET, L’INFLUENCE DE LA RÉVOLUTION DE L’AMÉRIQUE SUR LES OPINIONS ET LA LÉGISLATION DE L’EUROPE (1786) (translated by author).

259. JOHN ADAMS, 1 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 660 (1856).

260. See 1 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT xii-xiii (1978).

realism, sometimes the formula is reversed, as decision-makers with strong ideas assure their colleagues that their projects are in everyone's interest.²⁶¹ The French could calculate their interests on their own. Thus, the American commissioners needed to show that their states were not only functionally independent, but also ideologically attractive.

This was not a straightforward case. As the American drama moved from rebellion to revolution, the main and symbolic culprit was the British King, and almost no one proposed replacing him with a new monarch or an aristocracy. Ideologically, the states were deeply republican, which intrigued many *philosophes*, who identified with the fight against autocracy.²⁶² The program drew pause, however, from Louis XVI and his leading ministers, many of whom were titled aristocrats. As much as they all enjoyed the *schadenfreude* of the situation, some also criticized Paine's *Common Sense* for blaming King George III for problems that should, in fact, have been laid at the feet of the British people and their overreaching Parliament. One commentator, writing from inside the French Foreign Ministry, even tried to distinguish unlimited monarchy from absolute government by praising the former because a king, who embodied law, could modify that law in the interests of his subjects. In the latter, the law was king, meaning that everyone was at the mercy of a demagogic mob.²⁶³ Paine, therefore, was mistaken: it was a revolution *against* representative government.²⁶⁴

In addition to ideological ambivalence, the French ministry did not want to wage war without Spanish assistance.²⁶⁵ However, the Spanish court was

[T]he problem facing an agent who wishes to legitimate what he is doing at the same time as gaining what he wants cannot simply be the instrumental problem of tailoring his normative language in order to fit his projects. It must in part be the problem of tailoring his projects in order to fit the available normative language.

Id. See generally Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969).

261. See generally JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1967), for a criticism of foreign policy gambits that are not actually in the national interest by the founders of modern realism in international relations.

262. See ECHEVERRIA, *supra* note 249, at 42.

263. See generally Gilbert Chinard, *Adventures in a Library*, 8 NEWBERRY LIBR. BULL. 225 (1952). "Louis XVI was not at all happy to have his monarchy encouraging republican rebels against another king," Gordon S. Wood observed, "Queen Marie-Antoinette was especially opposed to aiding the Americans, and some members of the ministry agreed with her." WOOD, *supra* note 229, at 184; see also C. H. Van Tyne, *French Aid Before the Alliance of 1778*, 31 AM. HIST. REV. 20, 32 (1925) ("Vergennes was aware that the spirit of revolt, wherever it breaks out, is always a troublesome example, a moral malady which might become contagious.").

264. For a modern argument along these lines, see ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* (2014).

265. See SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* 41-57 (1957) (discussing Spanish predicament).

reluctant to support colonial rebellion in the Americas because it might set a dangerous precedent for its own empire.²⁶⁶ Viewed as an anti-monarchical and anti-colonial effort, the American Revolution was not an easy sell in European courts.

The Comte de Vergennes felt this ideological tension, but in the end, or rather, practically from the beginning, he decided that harming Britain was more important than preserving monarchy in North America.²⁶⁷ He knew that others in the corridors of influence would need greater persuasion.²⁶⁸ Thus, when Franklin arrived, Vergennes met him only in secret.²⁶⁹ An open reception would have been too inflammatory and Vergennes had doubts about the states' intentions and capacity. He continued supporting Beaumarchais' supply effort, which took months to organize, but he and the rest of the ministry did not allow Franklin to run privateering operations out of French ports. Similarly, he tried to stop the enlistment of Frenchmen into the Continental Army, a delicate problem that rose to a high-level diplomatic concern when Silas Deane promised the Marquis de Lafayette a commission as major-general in that army.²⁷⁰ Covert supply was quite different from welcoming armed American ships hauling in British prizes captured in European waters and sending aristocratic youth over to American battlefields. Besides the practical difference between covert aid and flagrant aggression, there was a legal difference: since the Anglo-French Treaty of Utrecht, France and Britain had agreed that neither side would allow enemies of the other to fit out privateers in their ports, nor would they permit enemies to bring in and sell prizes captured from the other.²⁷¹ In other words, using the legal language of the day, each would strive to remain *perfectly* neutral while the other was engaged in war, and that pledge was backed by treaty. When Franklin began issuing privateering commissions, and American ships started hauling British prizes into French ports, the ministry demanded that the ships leave and not return.²⁷² French merchants, of course, were willing to purchase the goods at a discount, and American captains sabotaged their own boats to avoid immediate

266. See DULL, *supra* note 236, at 183-86 (discussing Spanish position).

267. See *id.* at 8-11.

268. See *id.*

269. See *Letter from Lord Stormont to Lord Weymouth (April 10, 1777)*, *supra* note 51, at 385-91 (noting Stormont struggled in vain to confirm rumors Vergennes met secretly with Americans).

270. See LOUIS GOTTSCHALK, *LAFAYETTE COMES TO AMERICA* 66-123 (1935) (detailing Lafayette's agreement with Deane, familial and official rebukes, and escape from France to America).

271. See *Letter from the King to the American Commissioners (Jan. 13, 1777)*, available at <http://founders.archives.gov/?q=the%20king%27s%20answer%20to%20the%20american%20commissioners%20Dates-From%3A1777-01-01&s=1111311111&r=1> (detailing ministry's objections, based on treaty commitments). The Commissioners agreed to comply, though in practice American privateers continued to skirt the laws of neutrality. See *Letter from the American Commissioners to Gérard (Jan. 14, 1777)*, available at <http://founders.archives.gov/documents/Franklin/01-23-02-0102>.

272. See DULL, *supra* note 81, at 80.

expulsion. However, the French position hampered American efforts, frustrating Franklin (and setting the stage for an ironic role reversal fifteen years later).²⁷³

While Vergennes refused to recognize Franklin as an accredited diplomat, he granted him access to the crown's underground publishing machinery. Franklin drew upon his past career as a printer (from which he retired almost three decades earlier) to organize a publicity campaign for the United States centering on its foundational documents. The ministry financed and actually published many translations in Paris, though the title pages claimed that they were printed in Antwerp (outside France) to avoid official censors and not risk diplomatic incident by exposing royal support. One branch of government winked at another. Plausible deniability is all that kept Lord Stormont, the fuming British ambassador to Versailles, from breaking off official relations.²⁷⁴

Central to the publicity campaign was Franklin's discreet relationship with Edmé Jacques Genet, head of the Department of Interpretation in the Foreign Ministry, a similar position to undersecretary of state. Among other tasks, Genet directed the ministry's propaganda arm, the centerpiece of which—beginning in 1776—was a periodical entitled *Affaires de l'Angleterre et de l'Amerique (Affaires)*.²⁷⁵ Putatively edited by “a London banker,” the main purpose of the *Affaires* was to identify embarrassments to Britain in its North American empire and publicize them across Europe. Tit for tat: the British government published the francophone *Courier de l'Europe* in Holland, for sale in the Lowlands and France.²⁷⁶ The “banker” was likely the Duc de La Rochefoucauld, and Franklin handed him and Genet all the documents in the portfolio.²⁷⁷

273. See *id.* at 82-88 (examining American privateering in France). See generally WILLIAM BELL CLARK, BEN FRANKLIN'S PRIVATEERS: A NAVAL EPIC OF THE AMERICAN REVOLUTION (1956); WILLIAM BELL CLARK, LAMBERT WICKES, SEA RAIDER AND DIPLOMAT: THE STORY OF A NAVAL CAPTAIN OF THE REVOLUTION (1932). The British protested on two grounds. First, the American states were in rebellion, but were not independent nations with the power to issue letters of marque under the law of nations, so their privateers were actually pirates. Second, the British and French had a treaty of amity that prevented them from allowing prizes taken by either party's enemy to enter the other's ports. See DULL, *supra* note 81, at 80. Indeed, this was one of the liberal, commerce-friendly provisions that Adams and Franklin had included in the Model Treaty; it was also included in the Franco-American Treaty of Commerce and Amity the following year. Franklin denied the first claim, invoking the Declaration of Independence, and, as a matter of confession and avoidance of the second, he asked the French to break their preexisting treaty of amity and become active belligerents against Britain. Before that happened, Franklin's privateers put France in an untenable diplomatic position, edging the kingdom closer to war. See *id.* at 80-82.

274. See generally Echeverria, *supra* note 225; Chinard, *supra* note 263; Chinard, *supra* note 225.

275. See generally AFFAIRES DE L'ANGLETERRE ET DE L'AMERIQUE (1776).

276. See Chinard, *supra* note 263, at 227.

277. Franklin's papers illuminate his close working relationship with Rochefoucauld and Genet. See Letter from Benjamin Franklin to the Duc de La Rochefoucauld (after June 7, 1777), available at <http://founders.archives.gov/?q=%20Author%3A%22Franklin%2C%20Benjamin%22%20Recipient%3A%22La%20Rochefoucauld%2C%20Louis-Alexandre%2C%20duc%20de%20La%20Roche-Guyon%20et%20de%22&s=1111312111&a=Franklin&r=2&sr=la>. (setting forth friendly correspondence); Letter from Edme-Jacques Genet to Benjamin

Effectively the publisher of Franklin's compilations, Genet enlisted other translators as well. One was his young son, Edmond-Charles, who became the revolutionary French Republic's envoy to the United States fifteen years later and appealed over the head of President George Washington for American support of France in its war against Britain.²⁷⁸ He recalled at that time that "it was I who had the privilege of helping to spread the spirit of 1776 and 1777 among the French, by translating into our tongue, under the direction of my father, then head of the bureau, the greater part of your laws and the writings of your politicians."²⁷⁹ By the "greater part of your laws," Genet meant the state

Franklin (June 5, 1778), available at <http://founders.archives.gov/?q=%20Recipient%3A%22Franklin%2C%20Benjamin%22%20Author%3A%22Genet%2C%20Edme-Jacques%22&s=1111312111&sa=genet&r=4&sr=> ("You won't be surpris'd at my offer for the translation of any article or Essay you may want to be publish'd and at my readiness to print them in the Pamphlet of *affaires de l'angleterre et de l'amerique*."). One nice example is a letter enclosed with a marked-up copy of the translated Articles (which has not survived), in which Franklin added corrections to Rochefoucauld's French to make the translation more accurate, and asked his partner to amend any egregious errors. See Letter from Benjamin Franklin to the Duc de La Rochefoucauld (after June 7, 1777), *supra*. Franklin described how he had "attempted to make some Corrections [to the translations]; but not well understanding French, probably I have not done them well; they are in Crayon, which you can rub out." *Id.* Several other correspondences between Franklin and La Rochefoucauld show this close relationship; for example, La Rochefoucauld asked Franklin to edit his translation of Delaware's Constitution and for information about whether the states had ratified or changed the Articles of Confederation, indicating that the *Remembrancer* was a key source, and also promising to return all your books soon – "je vous rendrai tous vos livres." Letter from Le Duc de La Rochefoucauld to Benjamin Franklin (Mar. 26, 1777), available at <http://founders.archives.gov/?q=%20Author%3A%22La%20Rochefoucauld%2C%20Louis-Alexandre%2C%20duc%20de%20La%20Roche-Guyon%20et%20de%22%20Recipient%3A%22Franklin%2C%20Benjamin%22&s=1111312111&sa=la%20roche&r=6&sr=>; see Letter from Le Duc de La Rochefoucauld to Benjamin Franklin (Apr. 21, 1777), available at <http://founders.archives.gov/?q=%20Author%3A%22La%20Rochefoucauld%2C%20Louis-Alexandre%2C%20duc%20de%20La%20Roche-Guyon%20et%20de%22%20Recipient%3A%22Franklin%2C%20Benjamin%22&s=1111312111&sa=la%20roche&r=7&sr=> (referencing Maryland and Virginia constitutions); Letter from Le Duc de La Rochefoucauld to Benjamin Franklin and Silas Deane (Jan. 20, 1777), available at <http://founders.archives.gov/?q=%20Author%3A%22La%20Rochefoucauld%2C%20Louis-Alexandre%2C%20duc%20de%20La%20Roche-Guyon%20et%20de%22%20Recipient%3A%22Deane%2C%20Silas%22&s=1111312111&sa=la%20roche&r=1&sr=> (footnote omitted) ("[S]end them 50. Exemplars of the American Confederation translated: this traduction will be published in the Journal *Des Affaires de l'Amérique*, but these 50. have been separately tied for being offered to the two honourable Gentlemen."); Letter from Le Duc de La Rochefoucauld to Benjamin Franklin (Mar. 24, 1783), THE PAPERS OF BENJAMIN FRANKLIN, <http://franklinpapers.org/franklin/framedVolumes.jsp> (follow second "unpub. 1783" hyperlink, then follow "From Duc de La Rochefoucauld (unpublished)" hyperlink) (noticing publication of collected constitutions); Letter from Le Duc de La Rochefoucauld (Apr. 23, 1783), THE PAPERS OF BENJAMIN FRANKLIN, <http://franklinpapers.org/franklin/framedVolumes.jsp> (follow first "unpub. 1783" hyperlink, then follow "From Duc de La Rochefoucauld (unpublished)" hyperlink) (waiting to publish American treaties with France and Netherlands).

278. See Letter from Edmond Charles Genet to Thomas Jefferson (Sept. 18, 1793), available at <http://founders.archives.gov/?q=%20Author%3A%22Genet%2C%20Edmond%20Charles%22%20Recipient%3A%22Jefferson%2C%20Thomas%22&s=1111312111&sa=genet&r=32&sr=>. Genet wrote this after being notified that the Washington Administration had requested Paris to recall and replace him. See *id.*; see also STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 330-54 (1993) (discussing Genet Affair).

279. Letter from Edmond Charles Genet to Thomas Jefferson (Sept. 18, 1793), *supra* note 278 (translated by author) ("c'est moi qui ai eu l'avantage de contribuer a pénétrer les Français de l'esprit de 1776. et de 1777. En traduisant dans notre langue sous la direction de mon Pere, alors chef de Bureau, la plupart de vos loix et

constitutions, the Articles, the Declaration, and the treaties.²⁸⁰ After this youthful experience collaborating with Franklin to irritate the British, Genet *filis* never lost his belief in a transatlantic front in favor of progress.²⁸¹

In addition to periodical publication, Franklin produced a stand-alone version of the portfolio, first published in 1778 and subsequently republished.²⁸² Along with the draft of the Articles of Confederation from October 1776, Franklin added the constitutions of six of the states that had written constitutions by the time he had sailed for France: Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and South Carolina.²⁸³ He also included Adams's Congressional Resolution of May 15, 1776, recommending that the states institute new governments, the Congressional Act of April 1776, opening American ports to all trade except with Britain (a declaration of independence from the imperial navigation acts), and Harvard's honorary doctorate for General Washington.²⁸⁴ Finally, he included a census of the colonies, totaling more than three million inhabitants, as part of his ongoing argument that the center of civilization was bound to shift across the Atlantic.²⁸⁵ According to the imprint, it was published in Philadelphia, though sold in Paris.²⁸⁶ This obvious falsehood, along with a dedication to Franklin, was a telltale sign that the American commissioner was involved.²⁸⁷

The dedication drove home the claim that the portfolio represented a historic achievement.²⁸⁸ "The laws I have assembled form one of the most beautiful monuments to human wisdom," exclaimed the editor, and they have created "the most pure democracy that has ever existed."²⁸⁹ In short, although the portfolio had local and practical significance, it was also a landmark achievement in human progress. Both locally and philosophically, the portfolio embodied the Constitutional Enlightenment.

Conscious redesigning of government was not solely, or even originally, an American idea. French *philosophes* had increasingly defined the Enlightenment as political reform. To them, the American Revolution marked

des ecrits de vos politiques.”).

280. *Id.*

281. See ELKINS & MCKITRICK, *supra* note 278, at 330-54.

282. Chinard, *supra* note 225, at 89-106.

283. See *id.* at 96-98. The only one missing is New Hampshire's brief "constitution" of January 1776, sometimes called America's first. See *id.*

284. See generally RECUEIL DES LOIS CONSTITUTIVES DES COLONIES ANGLAISES, CONFÉDÉRÉES SOUS LA DENOMINATION D'ÉTATS-UNIS DE L'AMÉRIQUE-SEPTENTRIONALE (1778).

285. See generally *id.*

286. See generally *id.*

287. See generally *id.*

288. See generally RECUEIL DES LOIS CONSTITUTIVES DES COLONIES ANGLAISES, CONFÉDÉRÉES SOUS LA DENOMINATION D'ÉTATS-UNIS DE L'AMÉRIQUE-SEPTENTRIONALE, *supra* note 284.

289. See *id.* at Preface Epitre a Monsieur Le Docteur Franklin (translated by author) ("Les Loix qu j'ai rassemble'es m'ont paru un des plus beaux monumens de la sagesse humaine; elles constituent la De'mocratie la plus pure qui ait encore existe.")

only the beginning of a transformation that would spread across the civilized world. “The independence of the Anglo-Americans is exactly the right event to accelerate the revolution that must spread happiness on earth[,]” wrote the Abbé Genty in the 1780s in response to an essay contest asking, “[h]as the discovery of America been useful or harmful to the human race?”²⁹⁰ “In the bosom of this nascent republic lie,” he continued, “the true treasures that will enrich the world.”²⁹¹ From the perspective of Paris, the American Revolution was a world revolution and, in the words of Abbé Raynal, “transported us into a new century.”²⁹²

Franklin did more than orchestrate the translation and publication of this bound copy of the portfolio. He, perhaps with the help of the other commissioners, added dozens of explanatory footnotes.²⁹³ Most notes range from annotated keywords that were central to Anglo-American legal and political culture, but were difficult to translate conceptually into French, such as *attainder*, corruption of blood, equity, freeman, impeachment, and indictment.²⁹⁴ Other notes explained brand new rights. One long footnote, for example, elaborated on constitutional protections for the freedom of religious worship.²⁹⁵ Franklin appended the note to Article II of Pennsylvania’s Declaration of Rights, which declared that “[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.”²⁹⁶ In the note he postulated that “[l]a liberté de la Religion est de droit naturel dans la grande République des Nations”: freedom of religion is a natural right in the great republic of nations.²⁹⁷ He went on to note that the doctrine of freedom of worship had long protected the Quakers in

290. KEITH MICHAEL BAKER, *INVENTING THE FRENCH REVOLUTION: ESSAYS ON FRENCH POLITICAL CULTURE IN THE EIGHTEENTH CENTURY* 215 (1990) (quoting Abbé Genty).

291. *Id.* (quoting Abbé Genty).

292. *Id.* (quoting Abbé Raynal). On the eve of the French Revolution, Thomas Jefferson reported from Paris that although “celebrated writers of this and other countries had already sketched good principles on the subject of government, yet the American war seems first to have awakened the thinking part of this nation in general from the sleep of despotism in which they were sunk.” Letter from Thomas Jefferson to Richard Price (Jan. 8, 1789), available at <http://founders.archives.gov/?q=%20Author%3A%22Jefferson%2C%20Thomas%22%20Recipient%3A%22Price%2C%20Richard%22&s=1111311111&sa=Jefferson&r=4&sr=Price>. See generally GEORG JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS: A CONTRIBUTION TO MODERN CONSTITUTIONAL HISTORY* (Max Farrand trans., 2009) (presenting classic argument of revolutionary American documents influencing reformers in France); Joyce Appleby, *America as a Model for the Radical French Reformers of 1789*, 38 WM. & MARY Q. 267 (1971) (same).

293. See generally RECUEIL DES LOIS CONSTITUTIVES DES COLONIES ANGLAISES, CONFÉDÉRÉES SOUS LA DENOMINATION D’ÉTATS-UNIS DE L’AMÉRIQUE-SEPTENTRIONALE, *supra* note 284.

294. See generally *id.*

295. See *id.*, at 62-63 n.1.

296. PA. CONST. art. I, § 3; see RECUEIL DES LOIS CONSTITUTIVES DES COLONIES ANGLAISES, CONFÉDÉRÉES SOUS LA DENOMINATION D’ÉTATS-UNIS DE L’AMÉRIQUE-SEPTENTRIONALE, *supra* note 284, at 62-63 n.1.

297. RECUEIL DES LOIS CONSTITUTIVES DES COLONIES ANGLAISES, CONFÉDÉRÉES SOUS LA DENOMINATION D’ÉTATS-UNIS DE L’AMÉRIQUE-SEPTENTRIONALE, *supra* note 284, at 62 n.1; see Pa. Const. art. I, § 3.

Pennsylvania. Now, the doctrine was made permanent and universal, for all sects.²⁹⁸ Franklin did not note the fact that some states, like Virginia, had preserved tax support for a single denomination at the same time that they declared that “all men are equally entitled to the free exercise of religion.”²⁹⁹ However, he did drop a note criticizing the article of New Jersey’s Constitution that provided that “there shall be no establishment of any one religious sect” and that “no Protestant . . . shall be denied the enjoyment of any civil right, merely on account of his religious principles.”³⁰⁰ The previous section of the New Jersey Constitution guaranteed the freedom of worship, without mentioning Protestantism or even Christianity, and it also prohibited the establishment (or tax support) of any denomination.³⁰¹ The next article then distinguished between the civil rights of Protestants and non-Protestants.³⁰² As Franklin noted, the article left Catholics vulnerable to discrimination in their civil and political rights.³⁰³ He concluded that “[I]a Constitution de Pensylvanie a été plus juste & plus impartiale.”³⁰⁴

A campaign organized with the help of a duke and an undersecretary of state would not emphasize the anti-monarchical and anti-colonial aspects of the American project. Instead, a revolution in the rights of man and government, inspired by and furthering Enlightenment principles, made for a more attractive case than one against all kings and for the sole benefit of the American people.³⁰⁵ Franklin immediately went to work to show the French that the states were not simply republican and rebellious, but also civilized and modern. They were on the vanguard of European political culture, but still very much within it. Rights, therefore, figured large in his presentation, as did the experiments with governmental structure—both within the states and among them in the Confederation. The state constitutions were published more frequently and with greater notice than the Declaration of Independence; the Articles of Confederation were popular too. Presenting the turbulent events as evidence of civilization’s progress was a good match of character and role. The French already thought of Franklin as one of nature’s noblemen: learned, inventive, and self-made. A man who began life as a printer’s apprentice and

298. See RECUEIL DES LOIS CONSTITUTIVES DES COLONIES ANGLAISES, CONFÉDÉRÉES SOUS LA DENOMINATION D’ÉTATS-UNIS DE L’AMÉRIQUE-SEPTENTRIONALE, *supra* note 284, at 62-63 n.1.

299. VA CONST. art. I, § 16.

300. N.J. CONST. of 1776 art. XIX; see Recueil des Lois Constitutives des Colonies Anglaises, Confédérées sous la Denomination D’Etats-Unis de l’Amérique-Septentrionale, *supra* note 284, at 146 n.1.

301. See N.J. CONST. of 1776 art. XVIII.

302. See *id.* at art. XIX.

303. See RECUEIL DES LOIS CONSTITUTIVES DES COLONIES ANGLAISES, CONFÉDÉRÉES SOUS LA DENOMINATION D’ÉTATS-UNIS DE L’AMÉRIQUE-SEPTENTRIONALE, *supra* note 284, at 146 n.1.

304. *Id.* (“[T]he Constitution of Pennsylvania was more just and more impartial.”).

305. See generally LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007), for an argument that the late eighteenth-century political culture, notwithstanding all its exclusions, witnessed an impulse toward the abstraction of rights as natural, equal, and universal.

now claimed a spot at Versailles was playing a role in a tale almost everyone wanted to believe.³⁰⁶

Franklin regaled his hosts with descriptions of the new American institutions. He also presented the portfolio to foreign ministers and envoys from across Europe as part of the American Commissioners' credentials.³⁰⁷ The documents themselves were the first reliable reports of governmental behavior in the revolutionary states (stylized reports of course) and ones that even Franklin and the rest of the commissioners could not elaborate much upon because they too had limited information about what was transpiring at home.³⁰⁸ News took at least five or six weeks to reach Paris from America. Consequently, the portfolio was, for a while, the only source of information for European observers. During his fourth month in Paris, Franklin reported the following to the Continental Congress:

All Europe is for us. Our Articles of Confederation being by our means translated and published here, have given an appearance of consistence and firmness to the American States and Government that begins to make them considerable. The separate constitutions of the several States are also translating and publishing here, which afford abundance of speculation to the politicians of Europe, and it is a very general opinion that if we succeed in establishing our liberties, we shall, as soon as peace is restored, receive an immense addition of numbers and wealth from Europe, by the families who will come over to participate in our privileges, and bring their estates with them. Tyranny is so generally established in the rest of the world, that the prospect of an asylum in America for those who love liberty, gives general joy, and our cause is esteemed the cause of all mankind. Slaves naturally become base, as well as wretched. We are fighting for the dignity and happiness of human nature. Glorious is it for the Americans to be called by Providence to this post of honor. Cursed and detested will every one be that deserts or betrays

306. See generally SCHIFF, *supra* note 217.

307. See Letter from the American Commissioners to Baron de Schulenburg (Feb. 14, 1777), available at <http://founders.archives.gov/documents/Franklin/01-23-02-0205> (presenting Declaration of Independence, Articles of Confederation, and Model Treaty to envoy of Frederick the Great of Prussia).

We have the honor of inclosing the Declaration of the Independancy of the United States of North America, with the Articles of their Confederation; which we desire you to take the earliest Opportunity of laying before his Majesty, the King of Prussia; At the same time We wish he may be assured of the earnest desire of the United States to obtain his Friendship; and by a free Commerce, to establish an intercourse between their distant Countries, which they are Confident must be mutually beneficial.

Id.

308. See 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 283 (Francis Wharton ed., 1889) ("Our total ignorance of the truth or falsehood of facts, when questions are asked of us concerning them, makes us appear small in the eyes of the people here, and is prejudicial to our negotiations.").

it.³⁰⁹

Soon after, in a letter to Samuel Cooper in May 1777, Franklin emphasized:

[T]hey read the Translations of our separate Colony Constitutions with Rapture, and there are such Numbers every where who talk of Removing to America Hence 'Tis a Common Observation here that our Cause *is the Cause of all Mankind*; and that we are fighting for their Liberty in defending our own.³¹⁰

Franklin laid it on, but there was something behind it all. A Swiss translator gushed that he proposed “to publicize these beautiful laws, not only to my country, but also to Germany and Italy, the translation for the latter country will be done before my eyes, and I will do the German translation myself; no one would be able to do so with more attention and zeal.”³¹¹

Franklin also contributed some original essays to the *Affaires*. One example is a narrative of a Hessian prisoner of war in Pennsylvania, who paradoxically celebrated his newfound freedom behind American lines. According to the narrative, he became a self-supporting farmer. Another piece compared what passed for trade statistics at the time and forecast the decline of British commerce and concomitant rise of the states’. The message was plain: America was the better bet.³¹² Franklin developed the theme as the war ended and reports of American state defaults and abuses of foreign-creditors’ rights reached Europe. Despite the new stream of negative news, he maintained his belief that Europeans should, and would, seek refuge in the free air of America. In his *Information to Those Who Would Remove to America*, Franklin extolled the climate of opportunity in the states, maintaining that “people do not enquire concerning a Stranger, *What is he?* but *What can he do?*”³¹³ The self-made Franklin believed this, and French intellectuals critical of the *Ancien Régime* wanted to believe that such a place existed too. These aspirations related to the

309. *Id.* at 287-88. The strange syntax suggests that Franklin was trying not to give unwanted readers, if the letter were captured in transit, information about French assistance.

310. Letter from Benjamin Franklin to Samuel Cooper (May 1, 1777), available at <http://founders.archives.gov/?q=%20Author%3A%22Franklin%2C%20Benjamin%22%20Recipient%3A%22Cooper%2C%20Samuel%22&s=1111312111&sa=franklin%2C%20&r=14&sr=cooper> (footnote omitted).

311. See Letter from Johann Rudolph Tschiffely to Benjamin Franklin from Johann Rudolph Tschiffely (Aug. 1, 1778), available at <http://founders.archives.gov/?q=%20Author%3A%22Tschiffel%3BF%2C%20Johann%20Rudolph%22&s=1111312111&sa=ts&r=1&sr=> (“Je me propose de faire connoitre incessamment ces belles Loix, non seulement a ma patrie mais a l’Allemagne et a l’Italie; la traduction pour ce dernier Paÿs se fera sous mes yeux, et l’allemande sera de ma main; Persone ne la feroit avec plus d’attention et plus de zèle.”).

312. Chinard, *supra* note 263, at 233-34; Peter M. Ascoli, *American Propaganda in the French Language Press During the American Revolution*, in *LA RÉVOLUTION AMÉRICAINNE ET L’EUROPE* 291-307 (1979).

313. Benjamin Franklin, *Information to Those Who Would Remove to America*, in *THE WORKS OF THE LATE DR. BENJAMIN FRANKLIN; CONSISTING OF HIS LIFE, WRITTEN BY HIMSELF* 247, 249 (1815).

project of Constitutional Enlightenment—breaking down civil and political privileges and redesigning government—but they also pointed in an even more radical direction. In France and elsewhere in Europe, Franklin’s stylized picture of American politics and social structure raised the question of loyalty to the *Ancien Régime*. He counseled exit. Many disgruntled Frenchmen would respond instead with their voices, and eventually with more than that.³¹⁴

Recognition came in fact, if not in law, with the signing of the two Franco-American treaties in early February 1778: the Treaty of Alliance and the Treaty of Amity and Commerce.³¹⁵ American success at the Battle of Saratoga played a role, as did France’s gradual preparation for war.³¹⁶ Despite Britain’s claim that the revolutionaries remained rebels, France’s legal argument was that the states had proved they possessed sovereignty.³¹⁷ Britain treated the recognition as essentially a declaration of war by France, which in practice it was.³¹⁸ In response to Britain’s accusation that France was interfering with an internal dispute and violating its navigation acts (by the Treaty of Commerce), the French invoked an example from the three-generation struggle for Dutch independence from Spain: Britain itself had made a treaty with the Netherlands in 1585, before Spanish recognition.³¹⁹ In addition, France claimed that the states were effectively independent by 1778—not by mere declaration, but as a matter of fact—and it noted that prisoner exchanges between Britain and the states indicated that Britain had begun to observe the laws of war, thus signaling its own recognition that it was involved in an international, and not a municipal, conflict.³²⁰ War between Britain and France was inevitable.

After signing the treaties and becoming an accredited diplomat, Franklin

314. Compare ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970), for these different strategies members can use when confronting a distressed organization, including a political state. Franklin’s promotion and others like it did encourage some in France to purchase American land. See generally SIMON DESJARDINS & PIERRE PHAROUX, *CASTORLAND JOURNAL: AN ACCOUNT OF THE EXPLORATION AND SETTLEMENT OF NORTHERN NEW YORK STATE BY FRENCH ÉMIGRÉS IN THE YEARS 1793 TO 1797* (John A. Gallucci ed. & trans., 2010).

315. See FABRY, *supra* note 56, at 26-36.

316. See *id.* at 29-30 (providing summary of competing interpretations of timing of France’s decision).

317. See *id.* at 29.

318. See *id.* at 34-35.

To sum up so far, the United States became widely recognized and thus admitted into international society only after it had become acknowledged as independent by its parent country. To treat it as a sovereign state before this acknowledgment was considered by most states to be a hostile act violating the rights of the British crown. Such act was expected to engender the gravest of consequences, including a declaration of war by the injured state, and recognition was therefore regarded as a matter of utmost sensitivity.

Id.

319. See FABRY, *supra* note 56, at 31 (describing recognition of Netherlands).

320. See GREWE, *supra* note 50, at 343-48 (explaining theory of recognition); HENRY WHEATON, *HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA; FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON, 1842*, at 290-95 (1845) (discussing problem of recognition during American Revolution).

stopped working with the underground press to publicize the American cause.³²¹ Now he focused on formal diplomacy and the salons.³²² The American publicity effort, however, did not end with the signing of the treaties. In Britain and on the continent, the British countered American efforts with their own publicity in which they trumpeted American duplicity and ineffectiveness, and most insidiously, spread rumors that the states were about to make peace and reconcile with the Empire.³²³ British propaganda so dismayed John Adams—then in Paris as one of the commissioners—that he was left to wonder whether it was because “[the Art of political Lying] is better understood in England than in [any other Country, or] whether it is more practiced there than [elsewhere, or whether it] is accidental that they have more Success [in making their Fictions] gain Credit in the World.”³²⁴ In any case, Adams came to appreciate the importance of counter-intelligence and renewed the American connection with Genet to publish articles detailing American naval and diplomatic successes. When Adams went to the Netherlands to negotiate a loan in 1780, he kept the effort going there, publishing pro-American stories in Dutch periodicals that circulated throughout Europe.³²⁵

Even as the war turned in the American direction, British propaganda did not relent. If anything, stories of American political inefficacy increased. To counter the growing belief that the states were failing as republican governments, Franklin produced a 540-page compilation of the portfolio in 1783. The template for this volume came from Congress itself. During the winter of 1780-1781—the darkest period of the Revolution, as battles were lost, funds dried up, and Continental paper money inflated—Congress printed 200 copies of the portfolio.³²⁶ This volume included the thirteen state constitutions, the final version of the Articles of Confederation, the Declaration of Independence, and, instead of the Model Treaty, the Franco-American treaties of alliance and amity.³²⁷ The purpose evidently was to rally support at home,

321. See Ascoli, *supra* note 312, at 303-04 (noting Franklin’s inactivity).

322. See *id.* at 304 (describing Franklin as diplomat).

323. See generally *id.*

324. Letter from John Adams to Edmé Jacques Genet (Feb. 18, 1780), available at <http://founders.archives.gov/?q=%20Author%3A%22Adams%2C%20John%22%20Recipient%3A%22Genet%2C%20Edm%3%A9%20Jacques%22&s=1111312111&sa=adams%2C%20j&r=12&sr=genet> (alterations in original).

325. See Ascoli, *supra* note 312, at 296-302, on Adams’s promotional efforts in France and the Netherlands. In the Netherlands, Adams worked closely with C. W. F. Dumas, “the first American diplomat.” J. W. Schulte Nordholt, *Dumas, The First American Diplomat*, 35-36 *NEW EDINBURGH REV.* 17 (1976). The pan-European Dumas (he was German-born with French parents and was raised largely in Switzerland) embraced the Revolution from the outset and worked for fifteen years as an American diplomat at the Hague, vindicating American interests in Europe with no obvious benefit to himself other than his own sense of being on the right side of history. *Id.* at 18-19.

326. See 18 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, *supra* note 52, at 1217.

327. See *id.*

Resolved, That a committee of three be appointed to collect and cause to be published 200 correct

because Congress said nothing about sending volumes overseas or translating it abroad.

When Franklin received a copy, he took it upon himself to translate it into French at his own expense, though he later requested reimbursement. This was the most challenging period of his diplomatic career, as he continually sought new funds and military aid without the ability to repay what Congress already owed. The force of his personality, however, was no small part of the reason why Louis XVI and Vergennes remained committed to the alliance.³²⁸ Franklin republished the volume in whole and added the recent Dutch (1782) and Swedish (1783) treaties of commerce.³²⁹ As in his last compilation, he added footnotes explaining keywords and concepts possibly unfamiliar to European readers.³³⁰ A nice example of a new note was his explanation of the articles in New York's Constitution (1777) that adopted "such parts of the common law of England, and of the statute law of England and Great Britain . . . as together did form the law of the said colony" at the outbreak of the Revolution.³³¹ For readers unfamiliar with English common law and statute, he explained that the term "common law" corresponded to the "*Droit Coutumier*" in French law, and "statutes" were the law made by the legislature after that body had been regularized.³³² Probably of greater interest to his French audience was the first footnote in the new volume, which explained that a "convention" was a special gathering of the people's representatives, separate from the ordinary legislature.³³³ This idea was of increasing importance within the states and attractive to people in France skeptical of their *Parlement*.³³⁴

copies of the declaration of independence, the articles of confederation and perpetual union, the alliances between these United States and his Most Christian Majesty, with the constitutions or forms of government of the several states, to be bound together in boards.

Id.; see THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION BETWEEN THE SAID STATES; AND THE TREATIES BETWEEN HIS MOST CHRISTIAN MAJESTY AND THE UNITED STATES OF AMERICA (Philadelphia, 1781). The entry for Connecticut is a descriptive "account of the constitution of Connecticut," while that of Rhode Island is a reprint of its colonial charter of 1663. The volume was reprinted several times in the 1780s. See THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION BETWEEN THE SAID STATES; AND THE TREATIES BETWEEN HIS MOST CHRISTIAN MAJESTY AND THE UNITED STATES OF AMERICA, *supra*, at 46, 50.

328. See WOOD, *supra* note 229, at 196-200.

329. See generally CONSTITUTIONS DES TREIZE ÉTATS-UNIS DE L'AMÉRIQUE (1783).

330. See generally *id.*

331. N.Y. CONST. OF 1777 art. XXXV; see CONSTITUTIONS DES TREIZE ÉTATS-UNIS DE L'AMÉRIQUE, *supra* note 329, at 159 n.3.

332. See CONSTITUTIONS DES TREIZE ÉTATS-UNIS DE L'AMÉRIQUE, *supra* note 329, at 159 n.3 ("On appelle *Loi commune* en Angleterre, le Corps de Loix qui a été rédigé d'après des usages anciennement établis, ce qui répond au *Droit Coutumier* de France" and "[I]a *Loi des Statuts*, est le Corps des Loix faites par la puissance législative depuis qu'elle a pris une forme régulière.")

333. See *id.* at 3 n.1.

334. Compare WOOD, *supra* note 129, at 306-43 (1969) (examining centrality of conventions in American constitution-making), with BAKER, *supra* note 290, at 296-98 (discussing conventions in French revolutionary

By the time of its publication, Franklin was negotiating the Treaty of Peace. The battle over the meaning of the American experiment, however, was far from over. British reports of misgovernment were damaging the states' reputation—a cold war had begun—and Congress's inability to meet periodic payments on its foreign debt was dampening commercial negotiations with the rest of Europe.³³⁵ As Franklin reported to the president of the Continental Congress in late 1783:

The extravagant Misrepresentations of our Political State, in foreign Countries, made it appear necessary to give them better Information, which I thought could not be more effectually and authentically done than by publishing a Translation into French, now the most general Language in Europe, of the Book of Constitutions which had been printed by Order of Congress.³³⁶

He gave two copies to every ambassador in Paris: one for each minister and another, bound more elegantly, for their sovereign. Now the portfolio was no longer just a weapon of direct diplomacy to gain alliance and assistance. It had become a form of news reporting intended to counter other intelligence flowing across Europe. One purpose was to facilitate treaties with "Foreign Courts, who could not before know what kind of Government and People they had to treat with."³³⁷ Another was Franklin's decades old obsession with the peopling of North America: the portfolio itself would "promote the Emigration to our Country of substantial People from all Parts of Europe."³³⁸ While requesting reimbursement for publication costs, he added that the book "has been well taken, and has afforded Matter of Surprise to many, who had conceived mean Ideas of the State of Civilization in America, and could not have expected so much political Knowledge and Sagacity had existed in our Wilderness."³³⁹

The new volume became the talk of many salons. What made it "particularly a Matter of Wonder," reported Franklin, was that "in the Midst of a cruel War raging in the Bowels of our Country, our Sages should have the firmness of Mind to sit down calmly and form such compleat [sic] Plans of Government. They add considerably to the Reputation of the United States."³⁴⁰

political culture).

335. See Daniel Hulsebosch, Presentation at New York University School of Law Legal History Colloquium: Being Seen Like a State: The Constitution and Its International Audiences at the Founding (Sept. 13, 2011), on the problem of debt due to friends and enemies in the critical period.

336. Letter from Benjamin Franklin to Thomas Mifflin (Dec. 25, 1783), available at <http://franklinpapers.org/franklin/framedVolumes.jsp> (follow "unpub. 1783-1784" hyperlink, then follow "To Thomas Mifflin (unpublished)" hyperlink).

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* Within a year, Thomas Jefferson arrived in Paris and added his own accounts of the state constitutions, focusing on Virginia's. See generally THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA

That was the portfolio's effect, if not its entire purpose.

Before peace, though, the war had to be won. Here, the Articles of Confederation—the document itself—proved crucial. Long after the other twelve states had ratified the Articles, Maryland held out. It was afraid Congress would not be able to persuade all the states to release their western land claims deriving from their overlapping colonial charters. There was tension between land-rich states like Massachusetts, Connecticut, and Virginia, and land-poor states, whose original charters gave them no claim to the west. Speculators from those other states had, however, purchased land rights directly from the Indians or from those who had done so. Vindicating those Indian-title claims required, first, disproving the preemptive claims of other state governments. Maryland was land-poor and speculator-rich; some of those speculators sat in the state's legislature. They did not want to ratify the Articles of Confederation until they were sure that the land-rich states would cede their claims. That would not guarantee their own titles, but it would knock off competitors' claims based on state patents.

What made Maryland finally come around in early 1781? The Chevalier de la Luzerne, French minister-plenipotentiary to America, personally pleaded with an active land speculator and member of the Maryland Assembly to ratify the Articles of Confederation in order to give France the confidence it needed at a critical moment in what had become an unexpectedly long war.³⁴¹ France had requested that the treaties of alliance and commerce of 1778 be made between itself and all of the thirteen states, not Congress, which was not yet invested with the formal powers of a confederation.³⁴² Three years later, that was still true. By then, France had committed ground troops to the effort, and, in one last bold attempt to win the American war, was planning to sail its navy up the Chesapeake Bay (inland waters surrounded mostly by the independent state of Maryland), while marching troops down from the north. But was Maryland really part of the collective effort? French scruples on the point reflect a degree of legal formalism: the law of nations required consent before

(Infomotions, Inc., 2001). His account was more critical, but fitted in tone with the mix of criticism and appreciation circulating through the salons. *See generally id.* (responding to query thirteen on the state constitutions).

341. *See* George L. Sioussat, *The Chevalier de la Luzerne and the Ratification of the Articles of Confederation by Maryland, 1780-1781: With Accompanying Documents*, 60 PA. MAG. HIST. & BIOGRAPHY 391, 394 (1936).

342. *See* Treaty of Amity and Commerce U.S.-Fr., Feb. 6, 1778, 8 Stat. 12. The 1778 Treaty of Amity was made between "[t]he most Christian King and the thirteen United States of North America, to wit, New Hampshire, Massachusetts Bay Rhode-island, Connecticut, New York, New Jersey, Pennsylvania Delaware, Maryland, Virginia North-Carolina, South Carolina & Georgia." *Id.* The American Model Treaty, on the other hand, anticipated a treaty "between A. and B.," not between A. and thirteen separate states. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 52, at 768. Congress nonetheless ratified the treaties itself, rather than sending them to the states for thirteen ratifications. *See* Treaty of Amity and Commerce, *supra*.

one sovereign nation moved its military through the territory of another.³⁴³ Some Marylanders also pointed to the confidence that ratification would give Europeans who were deciding whether to lend the states more money for supplies.

It was amidst this fraught scenario that Luzerne persuaded the speculator, who on principle refused to vote for ratification, to withdraw quite publicly from the state's legislative session, thereby signaling to his allies that a favorable vote would not be held against them. With the opposition's ringleader absent, Maryland ratified, new loans came, and the French navy sailed up the Chesapeake, cutting off supplies to Lord Cornwallis, who was thereby forced to surrender at the battle of Yorktown in October 1781. The British army was not crushed. It was stranded, with supplies dwindling and no way to escape to the sea. Not only had the war turned. Suddenly it was all but over.

CONCLUSION

From the beginning, American constitution-making was enmeshed in diplomacy. The four foundational documents in the revolutionary portfolio were written at least in part (recall Adams's list of nine reasons why the colonies should institute new governments), and publicized abroad almost entirely, to persuade Europeans to support, trade with, lend money to, emigrate to, and even fight for the United States.³⁴⁴ The portfolio also expressed a vision of interstate relations, both locally and internationally, that drew on Enlightenment ideas about how to promote peace through governmental structure. The portfolio was hardly sufficient cause for that support. However, it was a necessary part of the case that was made—and the audience responded. At least, influential French decision-makers were impressed.

Most influential Britons, however, were less impressed. The United States's success during the Revolution and their liberal constitutions did bolster Lord Shelburne's opposition party, which won power in early 1782 and ended the war, believing all the while in the long-term complementarity of American and British interests.³⁴⁵ However, the failed implementation of the Treaty of Peace in the 1780s revealed the portfolio's limitations. In the rush of revolutionary events, there was little thought about how to guarantee that the new states would perform all the international duties that went along with independence. The state constitutions, for example, did not commit the states structurally to

343. See Vattel, *supra* note 18, at bk. 3, § 120 ("To enter [with troops through a neutral's] territory without his consent, is a violation of his rights of sovereignty and supreme dominion, by virtue which, that country is not to be disposed of for any use whatever, without his express or tacit permission.").

344. See *supra* notes 60-71 and accompanying text.

345. See Stephen Conway, *The British Isles and the War of American Independence* 315-45 (2000). See generally Jerome R. Reich, *British Friends of the American Revolution* (1998).

enforce treaties, and the Confederation Congress similarly lacked independent power to implement treaties. These failings persuaded many Britons that the political systems of the states were full of vice. Indeed, British complaints were a central resource for the so-called “critical period” diagnosis of American politics in the 1780s. The significant innovation of the federal Constitution of 1787 was the drafters’ realization that they had to structure internal American governance, at the federal and state level, in ways that would induce and even force both governments to adhere to treaties and comply with core principles of the law of nations.³⁴⁶ Nevertheless, the desire to join the wider world and to use constitutions as diplomatic instruments to facilitate integration was there from the beginning.

346. See Golove & Hulsebosch, *supra* note 8, at 961.