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**A CONSTITUTION FIT FOR A NATION:  
THE INFLUENCE OF THE LAW OF NA-  
TIONS ON THE VIRGINIA PLAN AND  
JAMES MADISON'S CONSTITUTIONAL  
THOUGHT**

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## A CONSTITUTION FIT FOR A NATION

**INTRODUCTION**

The Constitutional Convention of 1787 forged a new nation, but it's only recently that the full picture of what nationhood meant to the founders has come into focus. The world of the founders was a far more interconnected and globalized one than had been generally realized—a world in which numerous global empires struggled diplomatically, economically and militarily for land, riches and influence. In European capitals and even in the American colonies, diplomats, generals and politicians widely believed that these interactions between nations were governed by a set of natural law principles called the Law of Nations and conflict could be best avoided precisely by observing its rules. This presents a new, international factor to consider in analyzing the motivations and compromises of the founders, a dimension that is only just starting to receive scholarly attention.

This paper aims to contribute to this emerging area of scholarship by first identifying which founders were the strongest adherents to the Law of Nations, what their understanding of its tenets were and how this shaped the Constitution. It achieves this in five sections. First, we'll conduct a brief survey of the emerging scholarship on the importance of geopolitics and the Law of Nations in the time of the founders. Second, we'll turn to searchable digital archives to quickly compare the frequency of each founder's use of the Law of Nations to attempt to identify which founders placed the most significance on international affairs and the Law of Nations. Third, the paper will trace the origins of these founders' interest in the Law of Nations prior to 1787. Fourth, we'll draw parallels between these target founders' actions and writings in the years leading up to 1787 with their contributions at the Convention to establish more fully what proposals at the Convention may have been inspired by the Law of Nations. Finally, we'll look at the drafting process of the final drafts of the Constitution to see if the Law of Nations may have played a role in shaping any of the features of the Constitution itself.

As this paper will show, James Madison and Edmund Randolph were the most prolific advocates of the Law of Nations and our most likely suspects for further investigation. A thorough search of primary sources in the years leading up the Constitution reveals that both Randolph and Madison had an intense interest in the Law of Nations even before 1781

and repeatedly turned to it for guidance navigating the growing and contentious disputes both among the states as well as with their powerful neighbors. There is strong evidence that the Law of Nations not only directly influenced the Virginia Plan, but that it also led Madison and Randolph to press for exclusive federal control or a “negative” over foreign affairs, likely gave birth to judicial review of state laws, and, perhaps most significantly, offers a compelling alternative explanation of why the Committee of Detail made so many concessions to southern interests. This infamous outcome of the Committee of Detail—strong federal powers over foreign affairs in exchange for concessions to the Deep South’s domestic interests—was written in the hand of none other than Edmund Randolph and is perfectly aligned with Madison’s and Randolph’s long-term project to (a) dissuade the states from making collective treaties the Deep South would ignore while (b) urging the Deep South to agree to national control over its reckless foreign policy.

## **I. THE INTERNATIONAL WORLD OF THE FOUNDERS AND THE SIGNIFICANCE OF THE LAW OF NATIONS**

The threshold question as to whether it is even worth examining what the founders thought of the Law of Nations is getting easier to answer, thanks to recent scholarship. In recent decades historians have increasingly recognized that the founding era was one in which geopolitics and international affairs strongly shaped the American colonies and later, the independent states. This realization supplements the extensive scholarship on the ways in which domestic pressures influenced the founders insofar as it suggests there was another variable in the mix.

Starting with Charles Beard in the early twentieth century, influential historians tended to highlight domestic and economic triggers as the reasons for the Constitutional Convention at the expense of other potential explanations for the sudden urge for constitutional reform.<sup>1</sup> For example, Gordon Wood in 1969 argued that even before the end of the American Revolution, many states “were beginning to entertain doubts

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<sup>1</sup> FREDERICK W. MARKS, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* xx (1997).

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about the capacity of their people to maintain extremely popular governments.”<sup>2</sup> Wood notes that some leaders had a growing counter-revolutionary bent and sought a way to ensure that the “[l]iberty of the people in the traditional mixed government ... be lessened.”<sup>3</sup> He argues that Shays’ Rebellion, that infamous domestic rebellion of farmers in western Massachusetts, was the trigger that made these counter-revolutionary impulses politically viable, as “[b]y early 1787 with the experience of Shays’s rebellion and its aftermath ... New England men ... had altered their thinking and reinterpreted their fears.”<sup>4</sup> Forty years after Wood, popular explanations of constitutional reform are still largely framed by domestic issues. David Stewart’s much-acclaimed, 2007 book, *The Summer of 1787: The Men Who Invented the Constitution*, shows the continued strength of the domestic explanation. Stewart devotes his entire opening chapter to Shays’ Rebellion and starts the story of constitutional reform there. He argues that “Shays and his neighbors provided a critical push in the effort to create a new American government.”<sup>5</sup> While Wood, Stewart, and their peers do engage with other sources of trouble plaguing the Confederation, domestic affairs take center stage.

Starting in the late 1980s, however, diplomatic historians made a convincing case that foreign affairs were of far greater significance in the founding era than was commonly recognized. According to them, the Confederation’s impotent handling of foreign affairs and its disastrous treaty negotiations caused far more widespread social ills than domestic policy failures and thus provided the strongest impetus for reform.<sup>6</sup> To

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<sup>2</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 431 (1969).

<sup>3</sup> *Id.* at 432.

<sup>4</sup> *Id.* at 465.

<sup>5</sup> DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 16 (2007).

<sup>6</sup> Jack Rakove neatly sums up how the states’ divergent interests caused them to fracture in the face of strong external pressure. For example, when “[w]ithin a year of the peace of 1783, Congress confronted three external challenges to the national welfare. ... The future of westward expansion was also implicated in the third major postwar problem of foreign policy. In April 1784, Spain closed New Orleans and the lower Mississippi River to American navigation, thus preventing future settlers living west of the mountain barrier from shipping their products to the Gulf of Mexico and thence to other markets. This action, coupled with abortive separatist movements in Kentucky and what would become Tennessee, threatened to deprive the United States of the generous territorial settlement accorded by the Treaty of Paris. Should the weakness of the Union force western settlers

scholars of foreign affairs, the obvious danger was that the “conflicting interests of jealous states willing to pursue local advantage at the expense of national needs made Europe’s expectations of a division of America into two or three or more units a reasonable deduction.”<sup>7</sup> These sectional divisions were exacerbated and fed by “diplomatic frustrations [that] also raised troubling questions about the organization of the American union under the Articles of Confederation. . . . [R]epresentatives became increasingly aware of distinct corporate and regional interests. Congress provided a forum for defining conflicting interests, but not reliable mechanisms for resolving them—or for promoting the national interest.”<sup>8</sup> The legitimacy of the Confederation was not undermined from within but without, as it was “struggling for survival and expansion in a hostile environment.”<sup>9</sup>

This renewed interest in the role of foreign affairs during the Founding Era was paralleled by a growing recognition among legal and constitutional scholars that the Law of Nations, the rootstock of modern international law, was also more influential than previously realized. The Law of Nations is the legal and intellectual forbearer of modern international law and dates to the sixteenth century, when it was born of efforts to use natural law principles to determine the set of rules and norms governing how sovereign states must interact.<sup>10</sup> The growing prominence of natural law during the Enlightenment in the eighteenth century elevated the Law of Nations to new heights of influence and power. By the mid-eighteenth century, it had come to “occupy a central place in the British imagination” and was commonly mentioned in plays and literature.<sup>11</sup> The first modern treatise on international law, *The Law of Nations*, written by

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to accommodate themselves to Spain, control of the regions lying between the Appalachian Mountains and the Mississippi would be lost to the United States. Furthermore, because the region below Ohio was commonly viewed as an outpost of southern expansion, acquiescence in the Spanish action threatened to exacerbate sectional tensions within Congress.” JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, at 27 (1996).

<sup>7</sup> LAWRENCE S. KAPLAN, COLONIES INTO NATION: AMERICAN DIPLOMACY, 1763-1801, at 146-46 (1972).

<sup>8</sup> PETER S. ONUF & NICHOLAS GREENWOOD ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 94 (1993).

<sup>9</sup> KAPLAN, *supra* note 7, at xii.

<sup>10</sup> STEPHEN C. NEFF, JUSTICE AMONG NATIONS 159 (2014).

<sup>11</sup> ELIGA H. GOULD, AMONG THE POWERS OF THE EARTH 25 (2012).

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the Swiss scholar Emer de Vattel and published in 1757, “rapidly became the handbook of choice for statesmen and judges ... in the New World colonies.”<sup>12</sup> Numerous founders, including John Adams and Benjamin Franklin, credited Vattel’s treatise, among others, for providing the framework of states’ rights and responsibilities they used to create the new nation.<sup>13</sup>

Chief among a nation’s responsibilities under the Law of Nations is *pacta sunt servanda*, or “pacts [treaties] must be observed,” and a violation of a treaty was thus synonymous with a violation of the Law of Nations.<sup>14</sup> This was seen not merely as a theoretical dictate but a law, the violations of which had real consequences, the violations of which were used to justify foreign invasions or the harsh treatment of an enemy. Conversely, compliance with the Law of Nations was an effective means of ensuring peace or, at least, relatively humane treatment.<sup>15</sup> As soon as the new nation’s signature was placed on the Peace of Paris, it accepted, both implicitly and explicitly, the obligations and expectations both to foreign nations and its own people, that it would follow national law and uphold its treaty obligations. Should it fail, the Law of Nations promised real, potentially dire consequences.<sup>16</sup>

In light of the significance of the Law of Nations, there’s a growing consensus that one of the primary goals of constitutional reform was to create a government that could follow the Law of Nations. Eliga Gould observes that something “we sometimes forget—though people at the time knew it—is that the United States could not become the nation that Americans imagined without the consent of other nations and people.”<sup>17</sup> Once we more fully consider the international dimension of the founding, it’s clear that “the drive to be accepted as a treaty-worthy nation in Europe played a role in the making of the American republic at least as important as the liberal and republican ideologies that have framed scholarship on

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<sup>12</sup> NEFF, *supra* note 7, at 194-95.

<sup>13</sup> Letter from Benjamin Franklin to Charles-Guillaume-Frédéric Dumas (Dec. 9 1775), in 22 THE PAPERS OF BENJAMIN FRANKLIN, 287-91 (William B. Wilcox ed., 2014); Letter to John Adams from James Lovel (Jan. 1, 1778), in 5 THE ADAMS PAPERS, 379-81 (Robert J. Taylor ed., 2006).

<sup>14</sup> NEFF, *supra* note 7, at 167-69.

<sup>15</sup> GOULD, *supra* note 11, at 10-24.

<sup>16</sup> ONUF & ONUF, *supra* note 8, at 113.

<sup>17</sup> GOULD, *supra* note 11, at 2.

the American Revolution since the Second World War.”<sup>18</sup> David Golove and Daniel Hulsebosch have also made tremendous contributions to establishing the importance of international recognition, and they argue “that a *core purpose* of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states governed by the Law of Nations.”<sup>19</sup> According to them, the growing scholarly consensus around the:

[C]entrality of [international] recognition to the Founding permits another—and from the perspective of constitutional theory, a more important—insight: The founders’ quest for recognition forced leading framers to confront the tension between two fundamental goals of the Revolution, international legitimacy and popular sovereignty, and to develop a systematic constitutional solution for reconciling the two.<sup>20</sup>

Thus, the Law of Nations wasn’t merely a driving political, ideological and legal force in international relations in the eighteenth century; it also must have formed a key part of the legal framework governing the constitution-making in Philadelphia in 1787.

Despite the potential significance of the Law of Nations in the founders’ international world, there’s been comparatively little research into the original understanding of the Law of Nations’ key principles and how that may have shaped the U.S. Constitution. Legal scholars on both sides of a raging debate over the role of international law in modern Constitutional interpretation agree the role of international law in the Constitution is understudied, yet it remains fertile ground for further inquiry. For example, when legal scholar John Yoo explored the role of the Law of Nations on the Constitutional treaty-making power in his widely-cited<sup>21</sup>

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<sup>18</sup> *Id.* at 10.

<sup>19</sup> 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, 935 (2010) (emphasis added).

<sup>20</sup> *Id.* at 939.

<sup>21</sup> This paper has been cited 396 times as of March 26, 2019. *Google Scholar* [Accessed on March 26, 2019 from

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*Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, he provocatively claimed that no one had truly reviewed the founding-era sources closely enough to evaluate the importance of the Law of Nations. While arguably controversial in its conclusions, Yoo's paper elicited broad agreement on some key conclusions—primarily that the Law of Nations and foreign affairs were both far more important than commonly recognized, yet still woefully understudied.<sup>22</sup>

The paper is not the first to explore the significance of the Law of Nations, as in recent years, some notable work has been done on the subject, and, moreover, in the early twentieth century, there was a much greater interest in the subject as it was apparently “obvious” to many scholars that the Founding Fathers were well-versed in and guided by the Law of Nations, but this prominence was fleeting.<sup>23</sup> A previous, brief

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[https://scholar.google.com/scholar?cites=13144400358941337034&as\\_sdt=5,33&sci-odt=0,33&hl=en](https://scholar.google.com/scholar?cites=13144400358941337034&as_sdt=5,33&sci-odt=0,33&hl=en).

<sup>22</sup> Yoo argued in part that scholars had not reviewed the founding-era sources closely enough to understand “the original understanding of the place of treaties within the American legal system ... [particularly,] the interaction of the Treaty Clause, the Supremacy Clause, and Article I, Section 8 [of the U.S. Constitution].” John C. Yoo *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1960 (1999). He set out to remedy the problem with a “comprehensive approach to historical sources and their use”, ultimately concluding that the “developing academic consensus”, *id.* at 1959, put forward by what he called “internationalist” legal scholars had generally “neglected both to review the Framing-era sources carefully enough and to utilize a systematic methodology.” *Id.* at 1961. The internationalist scholars Yoo criticized did concede that there was more historical scholarship to be done and substantial potential value in the undertaking. For example, Beth Stephens agreed that the role of the treaties and the Law of Nations is the “subject of minimal scholarly controversy,” yet could be “central to a hotly debated constitutional issue: the federal government’s authority, pursuant to the foreign affairs power, to regulate areas traditionally governed by the states.” Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish...Offenses Against the Law of Nations”*, 42 WM. & MARY L. REV. 447, 454 (2000). Andrew Kent, who questioned the possibility of ever finding a single, original meaning in the Constitution’s treatment of foreign affairs law, agreed that “now, even after all the modern developments, many important foreign affairs law questions are still contested, difficult, and uncertain.” Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 772 (2013). Even Martin S. Flaherty, who vigorously protested “provocative scholars” like Yoo, agreed that “the Constitution and foreign affairs ... remains comparatively understudied.” Martin Flaherty, *Are We to be a Nation?: Federal Powers vs “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1310 (1999).

<sup>23</sup> Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT’L L. 547, 548 (2012).

period of interest in the Law of Nations from progressive scholars in the early twentieth century did explore the general significance of the Law of Nations, however, and even examined its significance to certain founders.<sup>24</sup> More recent scholarship sparked by the modern debate over the role of international law in Constitutional interpretation has once again turned to consider the role of the Law of Nations in the founding era, but it has generally focused more on reestablishing the significance of the subject generally and has generally not engaged with the Confederation Period.<sup>25</sup> The role of the Law of Nations in the period between the July 4, 1776 and the start of the Convention in 1787 remains largely unexplored, however. Ironically, as the research behind this project has revealed, this might have been the period in which the doctrine played one of its most important roles.

## II. EMPIRICAL ANALYSIS OF “LAW OF NATIONS” MENTIONS AMONG THE FOUNDERS

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<sup>24</sup> For example, Louis Martin Sears' *Jefferson and the Law of Nations* follows the influence of the doctrine on Jefferson, but mostly in the context of his foreign policy efforts after the new Constitution was signed. Louis Martin Sears, *Jefferson and the Law of Nations*, 13 AM. POL. SCI. R. 379-399 (1919). Edwin D. Dickinson's *The Law of Nations as Part of the National Law of the United States* addressed the Law of Nations' influence on the structure the Constitution, but not its role in framing the purpose and stakes of the Convention. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. R. 26-56 (1952). Charles G. Fenwick's *The Authority of Vattel* explored the validity of a famous treatise by that author, but only mentions its applicability to United States law and American Constitutional thought in passing. Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. R. 395-410 (1913).

<sup>25</sup> More recently, David Armitage's *The Declaration of Independence and International Law* addressed the role of the Law of Nations in the framing of the Declaration of Independence. David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY L. Q. 39 (2002). Tara Helfman's *The Law of Nations in the Federalist Papers* explores some of the influences of the Law of Nations on the eponymous papers, but does not trace the doctrine's substantive influence before the Constitutional Convention. Tara Helfman, *The Law of Nations in the Federalist Papers*, 23 J. LEGAL HIST. 107 (2007). Other recent works, such as Paul R. Dubinsky's *International Law in the Legal System of the United States* and Harold Koh's *International Law as Part of Our Law*, focus more on the incorporation of the Law of Nations into early-American jurisprudence and its subsequent death and rebirth in the late twentieth century. Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455 (2010); Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004).

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The Constitutional Convention of 1787 is the most obvious place to try to identify how the Law of Nations may have shaped the Constitution, but this will merely be the starting point of this project. As we've seen, this paper is not the first to survey the records of the Convention for the use of the Law of Nations. It may be the first, however, to use the mentions of the Law of Nations at the Convention as a starting point to identify which founders embraced the Law of Nation, and to use this to conduct a thorough study of these founders' earlier careers and how and why the Law of Nations may have shaped their actions, their thoughts and their political calculations. Only then we will return to the Convention to attempt to understand what significance, if any, these key founders' motives had on the Constitution. Thanks to the benefit of modern digital archives, it's possible to quickly search the debate records from the Convention as well as the entire archives of some of the most significant founders to try to identify quantitatively which founders most often discussed the subject.

Max Farrand's seminal *The Records of the Federal Convention of 1787* permits us to conclude that James Madison and Edmund Randolph introduced and championed the Law of Nations at the Constitutional Convention. The two leading members of the Virginia delegation after Washington, they were the first to address the importance of the Law of Nations and returned to it at length, far more often than any other delegates. Their role in the Convention is clear from the notes of the debates. A search of Farrand's *Records* for uses of the "Law of Nations," a very specific and technical phrase, yields a list of six delegates who mentioned it:

**Table 1: Total Mentions of the Law of Nations at the Convention by Delegate (In Chronological Order, Earliest to Latest)<sup>26</sup>**

Delegate	Total Uses of the Law of Nations
Edmund Randolph	1
James Madison	5
Oliver Ellsworth	2

<sup>26</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

James Wilson	1
Gouverneur Morris	1
Alexander Hamilton	1

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Edmund Randolph was the first to use the phrase when he introduced the Virginia Plan at the start of the convention. James Madison was the second and addressed the subject most frequently, referring to it explicitly on five separate, substantively different occasions. A handful of other delegates, including three members of the Committee of Detail and Alexander Hamilton, also addressed the subject, though more in passing and far less substantively.<sup>27</sup> Let's not forget, however, that the records we have of the Convention, while generally considered accurate, are not transcriptions and are primarily the work of Madison.<sup>28</sup> This could introduce a pro-Madison bias. Madison was able to record his own prepared speeches in greater detail than those of his colleagues, and this would result in a greater likelihood of finding any given word or phrase in the written records of *his* speeches. This analysis is just a starting point, however.

A search of digitized correspondence from the Founding Era confirms the leading proponent of the Law of Nations was Madison, whose frequent usage of the doctrine during his career was almost matched by Randolph's. Using the National Archives' *Founders Online* digital collec-

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<sup>27</sup> Edmund Randolph "cited many examples" of the "defects" of the Confederation, "whi[ch] tended to shew [*sic*], that they could not cause infractions of treaties or of the Law of Nations, to be punished." 1 *id.* at 19. Madison spoke at length several times in connection with the Law of Nations; for example, he strongly opposed Paterson's NJ plan, in part for its inability to "prevent those violations of the Law of Nations & of Treaties which if not prevented must involve us in the calamities of foreign wars," *Id.* at 315-16, and returned to the subject at length to support a strong Federal "negative" on state laws that violated treaties or the Law of Nations, pointing out lessons from history supporting his contention that small states would be safer as part of a stronger, sovereign nation than as weak, independent nations governed by the Law of Nations, *Id.* at 448-49. By comparison, the comments and contributions from Oliver Ellsworth, 1 *id.* at 74; 2 *id.* at 316., Alexander Hamilton, 1 *id.* at 479, Gouverneur Morris and James Wilson 2 *id.* at 614-15, were relatively minor comments or proposals that simply referenced the Law of Nations in passing.

<sup>28</sup> Max Farrand asserts that "all other records [of the Convention] paled into insignificance" compared to Madison's notes on the Convention. 1 *id.* at xv.

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tion—a comprehensive and searchable collection of the papers of Washington, Madison, Adams, and Jefferson, among others—it’s possible to compare in how many documents a given founder mentioned the “Law of Nations.” The results of this search mirror the results previously observed in Farrand’s *Records*. Of the twenty-five Founders who mentioned the doctrine the most over their careers, Madison was the most prolific:

**Table 2: Total Mentions of the “Law of Nations” in the Digitized Papers of each Founder (top 25 only)<sup>29</sup>**

Founder	Total Mentions	Percent of Total
1) James Madison	168	19.44%
2) John Adams	161	18.63%
3) Thomas Jefferson	147	17.01%
4) Alexander Hamilton	88	10.19%
5) George Washington	40	4.63%
6) Benjamin Franklin	38	4.40%
7) Edmund Randolph	32	3.70%
8) John Quincy Adams	19	2.20%
9) James Monroe	17	1.97%
* Remaining top 25 (#s 10 – 25)	154	17.82%

Narrowing this list to only delegates at the Constitutional Convention, the delegates who most regularly mentioned the Law of Nations in their writing were, from most frequent to least, James Madison, Alexander Hamilton, George Washington, Benjamin Franklin, and Edmund Randolph:

**Table 3: Mentions of the “Law of Nations” by Delegates at the Constitutional Convention.<sup>30</sup>**

<sup>29</sup> *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/>.

<sup>30</sup> *Id.*

Founder	Total Mentions
James Madison	168
Alexander Hamilton	88
George Washington	40
Benjamin Franklin	38
Edmund Randolph	32
Charles Pinckney	13
Rufus King	7
Gouverneur Morris	7

Not all the delegates were active participants, however, and their fondness for the Law of Nations wouldn't necessarily give birth to meaningful constitutional provisions. For example, George Washington rarely engaged in debate.<sup>31</sup> Benjamin Franklin was the elder statesman and participated infrequently.<sup>32</sup> Likewise, Hamilton was frequently absent and had only a minor role at the Convention.<sup>33</sup> Thus, of the most active delegates, the Law of Nations appears to have been most significant to the careers and writings of James Madison and Edmund Randolph.

### III. A CURIOUS COMMAND OF THE LAW OF NATIONS

Identifying that Madison was one of the chief advocates of the Law of Nations at the Convention makes the task of identifying the doctrine's influence on the Constitution somewhat easier. Madison's own influence on the document is legendary, and one of his biographers even went so far as to claim that "for better or worse, as we consider 'the framer's intent,' we are, preeminently, examining Madison's intent."<sup>34</sup> While this doesn't reveal anything about the specific impact of the Law of Nations at the Convention, it does invite further investigation into why Madison and Randolph were such fierce advocates, and, more importantly, what they hoped to achieve in Philadelphia. As we'll see, their

<sup>31</sup> JAMES LINCOLN COLLIER & CHRISTOPHER COLLIER, DECISION IN PHILADELPHIA 108 (1986).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 77.

<sup>34</sup> ix (Preface to the Paperback edition)

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careers shared some striking similarities, notably years spent struggling to solve international disputes presented by Virginia's expansive territorial claims and shared borders with global empires. They quickly recognized that the parties involved appealed regularly to the Law of Nations and looked to it for some framework to resolve otherwise intractable disputes. They both came to recognize its significance as the lingua franca of treaty-making and diplomacy and, perhaps more significantly to the present task of analyzing how the doctrine shaped our governing documents, they came to see the rules and norms set forth in the Law of Nations as the absolute minimum obligations the states needed to fulfill to earn the label of a "nation."

Randolph and Madison's immersion in the Law of Nations dates to at least 1780, when they became intimately involved in two of the first and most intractable international disputes facing the independent states. Both stemmed from the Americans' desire to profit from the former colonies' vast but poorly-demarcated frontier lands. The first such dispute was the states' ongoing quarrel over who should now own those lands—the states or Congress? Virginia had the largest land claims and some states refused to join the Confederation unless Virginia accepted the Confederation's right to arbitrate conflicting claims.<sup>35</sup> The second, related dispute was the long struggle to convince Spain to recognize the Americans' rights to navigate the Mississippi River.<sup>36</sup> These two issues were intimately linked. Resolving the overlapping land claims was a necessary but not sufficient condition to profit from the western lands. If the Americans failed to secure water access to this land—most of which lay over the mountains, along the Mississippi—its value would decline substantially or perhaps be lost entirely.<sup>37</sup>

The land disputes predated the Revolution and, after independence, nearly prevented the formation of the Confederation as the states bitterly contested one another's claims using the Law of Nations. Some states, like Virginia, had immense claims while others, like New Jersey,

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<sup>35</sup> MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 150-51 (1970).

<sup>36</sup> CHRISTOPHER COLLIER, *supra* note 31, at 214-5.

<sup>37</sup> 31 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 586 (John C. Fitzpatrick ed., 1785).

Maryland, Delaware, Pennsylvania, and Rhode Island, had their boundaries firmly defined, with little or no land in the west.<sup>38</sup> Citizens in these landless states formed land companies—such as the Indiana Company—to purchase western land from the Indians within Virginia’s claims and resell it to speculators.<sup>39</sup> Virginia tried to stop these sales, and, in response, the land companies argued that the Law of Nations held that the Confederation and not Virginia had the right to judge their claims.<sup>40</sup> The Indiana Company, for example, argued that under the Law of Nations “the United States as Succesors [*sic*] to the Sovereignty [of the king] are the only Judges [of its claim].”<sup>41</sup> The Virginians, for their part, labored to ensure that Articles of Confederation explicitly preserved their power over their western lands and in this they succeeded, at least on paper, with the inclusion of language in Article 9 section 2 providing that “no State shall be deprived of territory for the benefit of the United States.”<sup>42</sup> Dissatisfied with this result, Maryland refused to join the Confederation until Virginia finally ceded most of its western territory voluntarily to Congress in January of 1781.<sup>43</sup>

Madison and Randolph served together in Virginia’s delegation to Congress during the height of the land disputes, an occasion that afforded ample opportunity for firsthand experience trying to resolve interstate (and international) disputes using only the Law of Nations. Madison initially hoped that all parties would voluntarily put the needs of the Union over abstract legal claims. Initially, he saw the land claims as “the only obstacle with Maryland . . . [entering] into the Confederation . . . [Virginia] will see the necessity of closing the Union, in too strong a light to

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<sup>38</sup> JENSEN, *supra* note 35, at 150-1.

<sup>39</sup> Merrill Jensen, *The Creation of the National Domain, 1781-1784*, 26 MISS. VALLEY HIST. REV. 323, 323-27 (1939).

<sup>40</sup> *Id.* at 327.

<sup>41</sup> George Morgan, *The Memorial of the Proprietors of a Tract of Land Called Indiana*, in 6 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 30 (1886).

<sup>42</sup> ARTICLES OF CONFEDERATION art. IX. (U.S. 1781). For further background on the origins of this language and the efforts of the Virginian delegation, see Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 33 (1936).

<sup>43</sup> Robert F. Berkhofer, Jr., *Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System*, 29 WM & MARY Q. 231, 234-35 (1972); Jensen, *supra* note 42, at 36.

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oppose the only expedient that can accomplish it.”<sup>44</sup> This impulse—to prioritize the collective good over sectional or State interests—is one Madison would exhibit throughout the seven-year period prior to 1787. Unfortunately, the land companies and the other states’ delegations did not share his zeal. They often used whatever methods they could to advocate for their interests. For instance, in October of 1781, the Virginia delegation, then composed of Madison, Randolph, and Joseph Jones, was called to again justify Virginia’s title to its remaining western lands.<sup>45</sup> Even though Virginia had previously secured protections for her land claims in Article 9 section 2 of the Articles of Confederation, its opponents now challenged those claims under another provision.<sup>46</sup> Article 9 section 2 also made Congress the last resort on appeal of “all disputes and differences . . . concerning boundary.”<sup>47</sup> Madison drafted the delegation’s response and, rather than argue the merits of Virginia’s claims, refused to submit to Congress’ authority for lack of proper form and notice.<sup>48</sup> One wonders if Madison would think back to this moment in the years to come and remember just how far a determined party would try push unclear or conflicting constitutional language from its original intent. One of the reasons Article 9 section 2 of the Articles even contained a prohibition on depriving a state’s “territory for the benefit of the United States” was to protect Virginia’s land.<sup>49</sup>

Around the same time, Congress gave Madison an opportunity to shape the Confederation’s negotiations with Spain using the Law of Nations. The Spanish controlled the Mississippi River at the time, and they were reluctant to give the American states the same rights to use the river that they had given to the British colonies. In response, Congress sent

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<sup>44</sup> From James Madison to Edmund Pendleton (Sept. 12, 1780), in 2 THE PAPERS OF JAMES MADISON 80-83 (William T. Hutchinson & William M. E. Rachal eds., 1962).

<sup>45</sup> JOHN J. REARDON, EDMUND RANDOLPH 48 (1975).

<sup>46</sup> The response of Virginia’s delegation took an eminently lawyerly approach by responding all possible arguments against their State’s claims. Their response includes a counterargument to “an opinion that Congress may exercise jurisdiction in territorial controversies between individual States,” showing this provision of Article 9 section 2 was or could be invoked in the dispute. Protest of Virginia Delegates (Oct. 10, 1781), in 3 PAPERS OF JAMES MADISON, *supra* note 44, at 284-86.

<sup>47</sup> ARTICLES OF CONFEDERATION art. IX. (U.S. 1781)

<sup>48</sup> 3 PAPERS OF JAMES MADISON, *supra* note 44, at 284-86.

<sup>49</sup> Jensen, *supra* note 42, at 33.

John Jay to Madrid to negotiate. The Virginian delegation, however, was afraid that Jay might trade away some of the land claims their State had given to the Confederation and insisted that certain limits be placed upon Jay's authority.<sup>50</sup> Madison was appointed to head the committee charged with justifying these limits, limits which required that Jay "insist on the navigation of the Mississippi for the citizens of the United States."<sup>51</sup>

The multipage text of this Committee's 1780 instructions to Jay, written in Madison's own hand, relied heavily on the Law of Nations.<sup>52</sup> The report mirrors in many ways Madison's much later and celebrated "Vices of the Political System of the United States" and is arguably one of the first documents reflecting his thoughts on flaws of the Articles, particularly in the conduct of foreign affairs. Meant as a template to convince the Spanish—ostensibly American allies—to accept American access to the Mississippi, the report presented not just legal arguments in favor of the Americans' claims but also a series of pragmatic reasons why the United States would be a much stronger ally if Spain simply conceded. The report was the product of a three-man committee and cannot be solely attributed to Madison, but it was written in his hand and reflects the concerns he would fixate on over the next six years, suggesting he was the primary author.<sup>53</sup> First, it conceded that some land east of the Mississippi might belong to Spain by right, but, practically, the growing number of American settlers and "their great distance [from the American government] would render it difficult [for the American government] to restrain [them]."<sup>54</sup> Second, even if Spain had a valid legal claim to any of the disputed land in the region, some states saw the same land "as no less their property than any other territory within their limits, Congress could not relinquish it without exciting discussions between themselves and those States"<sup>55</sup> Third, the "territory in question contains a number of inhabitants who . . . at present . . . have sworn allegiance to [the United

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<sup>50</sup> Motion on Instructions to John Jay (Dec. 8, 1780), in 2 PAPERS OF JAMES MADISON, *supra* note 44, at 231-32.

<sup>51</sup> 18 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 37, at 935.

<sup>52</sup> Draft of Letter to John Jay, Explaining His Instructions (Oct. 17, 1780), in 2 PAPERS OF JAMES MADISON, *supra* note 44, at 127-136..

<sup>53</sup> *Id.* (editorial note).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

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States].”<sup>56</sup> Finally, the disputed territory represented “so much value to the United States . . .” and was “one of the material funds on which they rely for pursuing the war.”<sup>57</sup>

Madison’s instructions reflect a clear understanding the Confederation lacked the practical ability to control its borders, an issue that could lead to an unwanted conflict with Spain where the border regions demanded policies the rest of the Confederation could not or would not support. The Americans needed the disputed border land to pay for the war, and Spain’s refusal to yield would only create further tension between the states that didn’t need river access and those most desperate to capture the value of the western frontier. Aggressive frontiersmen who claimed allegiance to the United States were essentially so attached to the land they were uncontrollable, whatever Spain’s legal rights might be. Finally, discord between the states and the Confederation was the likely outcome if Spain did not voluntarily comply with the Americans’ demands; there was no mention of what the Americans might do collectively to change the Spaniards’ minds. In short, the committee predicted this one issue could destabilize the entire Confederation, even drag it into a conflict with Spain that it was neither prepared for nor in favor of. Its instructions tacitly accepted that Spain could use the issue of the Mississippi to divide and weaken the Confederation.

Edmund Randolph’s early career mirrored Madison’s in several important ways, overlapping in time, place, and an appreciation for the importance of the Law of Nations, particularly as it applied to the western lands and foreign affairs. Madison first met Randolph at the Virginia Convention of May 1776, and the pair later developed a close, personal relationship during their time serving together in Congress in 1781.<sup>58</sup> Randolph’s second committee assignment in May of that year paired him directly with Madison. They were both assigned to craft an amendment to the Articles to give the Confederation the power to carry out lawful resolutions within states that refused to comply voluntarily.<sup>59</sup> Randolph also worked with Madison on western land issues, work that included

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> REARDON, *supra* note 45, at 43.

<sup>59</sup> *Id.* at 45.

spirited defenses of Virginia's western land claims.<sup>60</sup> Seated on a committee that reviewed one of the land companies' petitions, Randolph crafted a response so "belligerent" that Congress ordered it stricken from the Congressional record.<sup>61</sup> Mirroring Madison's assignment to the committee to justify limitations on Jay's negotiating power, Randolph was assigned to a committee tasked with justifying instructions to the peace commissioners to insist on the Americans' fishing rights off Newfoundland.<sup>62</sup> This was a major issue, as significant to the eastern states as the Mississippi was to the western settlers and the South. It was what Hamilton would later call one of the "great" rights of the Union, along with navigation rights on the Mississippi and the western land claims.<sup>63</sup>

The two Virginians corresponded frequently, often discussing the interplay between international affairs and the Law of Nations. In 1783, Madison wrote to discuss Jay's ongoing negotiations with Spain. He was particularly concerned with the requirement of the Law of Nations that all states obey the Confederation's treaties. As he noted to Randolph, certain states had interests that ran completely counter to the provisions Spain was demanding. It was more than likely they would ignore treaties unfavorable to them as the union appeared to lack a sufficient deterrent to the "strong temptation to [take] measures . . . which may first involve the whole confederacy in controversies with foreign nations."<sup>64</sup> Randolph, likewise, often sought Madison's advice. For example, in early 1784 he was serving as Virginia's Attorney General and relied heavily on the Law of Nations to determine how to respond to an interstate dispute the Articles had not properly addressed.<sup>65</sup> Madison was only too happy to respond to Randolph's request for advice, giving his own, lengthy views on what the Law of Nations required.<sup>66</sup>

By 1784, both Randolph and Madison, seated at the center of Virginian and American politics, started to recognize serious and repeated

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<sup>60</sup> *Id.* at 48.

<sup>61</sup> *Id.* at 47-48.

<sup>62</sup> *Id.* at 53.

<sup>63</sup> THE FEDERALIST NO. 11 (Alexander Hamilton).

<sup>64</sup> From James Madison to Edmund Randolph (May 20, 1783), in 7 PAPERS OF JAMES MADISON 58-64 (William T. Hutchinson & William M. E. Rachal, eds., 19XX).

<sup>65</sup> See 7 *id.* at 415-18 (editors' note).

<sup>66</sup> From James Madison to Edmund Randolph (Mar. 10, 1784) in 8 PAPERS OF JAMES MADISON 3-6 (Robert A. Rutland & William M. E. Rachal eds. 1973).

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violations of the Law of Nations among the states, the significance of which appeared to be largely trivialized or unrecognized by the worst offenders. This led them to conclude the Confederation lacked the power to enforce its treaty obligations, and, worse still, many of the states lacked the will to restrain some of their more restive, populist elements living on their frontiers. Frontier settlers and state governments began to gross restless and push the boundaries, figuratively and literally, they were entitled to under the Law of Nations. The two Virginians recognized the growing peril this presented under the Law of Nations as it gave powerful, European empires along their borders an excuse to repudiate their treaty obligations or to invade. This looming crisis apparently pushed Madison to a key realization that subsequently shaped his views of how a federal government had to operate. Madison realized that, under the Law of Nations, the most likely treatment of the Confederation was as a group of sovereign states rather than a single sovereign. This meant that each state had a shared legal responsibility for the treaty violations of its fellows—a sort of joint or several liability. Weak or restive states could push the boundaries of acceptable behavior without bearing the full cost. Even if the Confederation fractured, all of its former members would likely be responsible for the transgressions of their former co-members. For wealthy states like Virginia, with a lot to lose, this was particularly troubling as some of the poorest and weakest states, namely the deep south, pressed relentlessly farther westward, challenging the Spanish Empire, numerous Indian nations and even one another to stop them. As we'll see, this strongly shaped Madison's thinking that a new Union had to have strong limits on states' ability to violate the Law of Nations and the states most likely to break the law were the ones that most needed to accept these limits.

Between 1784 and 1786, Madison developed close personal and political ties to the western settlers and came to understand their relentless drive west made it highly unlikely they could be restrained from east of the mountains. In December 1784, many of Kentucky's leading men gathered on their own authority to discuss their grievances with their distant government in Richmond and to consider secession from Virginia.<sup>67</sup>

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<sup>67</sup> Thomas P. Abernethy, *Journal of the First Kentucky Convention Dec. 27, 1784-Jan. 5, 1785*, 1 J. SOUTHERN HIST. 67 (1935).

Madison learned of this convention and shared its existence with Randolph in a March 1785 letter.<sup>68</sup> He viewed it positively to the extent its aim was to form a new state within the Confederation, and he thought the exercise could serve as a test case for future territories becoming states.<sup>69</sup> He would become intimately involved in furthering this end as an advocate for the westerners' interests in Virginia's legislature, a role that included advising its leaders on writing a state constitution and serving as the chairman of the committee that crafted Virginia's response to Kentucky's subsequent petition for secession in December of 1785.<sup>70</sup>

The nature of western secession and expansion took on a more sinister tone, however, as frustration mounted over the closure of the Mississippi. Simultaneously, the willingness of states like Georgia to deal directly with both border separatists and the Spanish made it increasingly likely the situation in the west could escalate into armed conflict. Jay's negotiations with Spain stalled and the Mississippi was closed to American traffic in April of 1784. Not long after, the Virginia House of Delegates was inundated with reports of border unrest fueled by frustration over the closure of the river.<sup>71</sup> As usual, Madison was at the forefront of reminding his colleagues of their obligations under the Law of Nations. He grumbled to Monroe that there was no "due sense of those duties which spring from our relation to foreign nations. . . . [W]e are every day threaten'd by the eagourness of our disorderly Citizens [on the border] for Spanish plunder & Spanish blood."<sup>72</sup> Further troubling signs suggested it wasn't only disorderly citizens that might neglect their duties to foreign nations but *other*

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<sup>68</sup> From James Madison to Edmund Randolph (Mar. 10, 1785), in 8 THE PAPERS OF JAMES MADISON, *supra* note 66, at 243-45.

<sup>69</sup> Madison wrote to Monroe that these new states, "[i]f they pursue their object [statehood] through this channel [Congressional petitions], they will not only accomplish it without difficulty, but set a useful example to other Western Settlements which may chuse to be lopped off from other States." From James Madison to James Monroe (May 29, 1785), in 8 THE PAPERS OF JAMES MADISON, *supra* note 66, at 285-87.

<sup>70</sup> For more information on Madison's committee assignment and his roles therein, see 8 *id.* at 450-53 (editorial note). For more context on Madison's role in Kentucky's efforts for statehood, see also LOWELL H. HARRISON, KENTUCKY'S ROAD TO STATEHOOD 19-47 (1992). For James Madison's advice to Kentucky's leading men on how to write a Constitution, see From James Madison to Caleb Wallace (Aug. 23, 1785), in 8 THE PAPERS OF JAMES MADISON, *supra* note 66, at 350-58.

<sup>71</sup> See 8 *id.* at 124-25 (editorial note).

<sup>72</sup> 8 *id.* at 156-59.

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*states*. Multiple sources informed Madison that Georgia had sent two Commissioners down the Mississippi to demand the Spanish government settle its boundary with them. He was outraged that a “State could be guilty either of so flagrant an outrage on the foederal Constitution, or of so imprudent a mode of pursuing their claims against a foreign Nation.”<sup>73</sup> Georgia had in fact appointed these commissioners, and it would not shy away from even riskier tactics to secure the Mississippi or further its territorial claims. After a breakaway state called the State of Franklin formed in the western part of North Carolina in 1784, Georgia was only too happy to entertain its overtures in June of 1785 to ally against Indians on their shared border.<sup>74</sup>

The strength of Madison’s conviction that the Mississippi was *the* issue that could undermine the entire Confederation is clear from the lengths he went to stop Jay’s renewed efforts to secure a treaty with Spain at the expense of the river. Madison had planned to meet James Monroe in New York around June of 1786 to travel to upstate New York.<sup>75</sup> This plan had been in the works since at least February.<sup>76</sup> After Madison set off for New York, however, he received a letter from Monroe warning him of Jay’s renewed effort to secure a treaty with Spain.<sup>77</sup> Jay had been frustrated by the dogged insistence of Spain’s negotiator, Diego de Gardoqui, that Spain would never allow the Americans to use the Mississippi. Determined to secure *something*, he was convinced a deal could be reached if Congress temporarily gave up river access.<sup>78</sup> Jay petitioned Congress in May to authorize a three-man committee to review his instructions, apparently hoping Madison’s 1780 limits would be removed.<sup>79</sup> Unfortunately for Jay, the committee included James Monroe, who immediately warned Madison that Jay had alluded to “difficulties” in the negotiations. Monroe speculated that Jay’s request was meant as “cover”

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<sup>73</sup> 8 *id.* at 306-09.

<sup>74</sup> THOMAS MARSHALL GREEN, *THE SPANISH CONSPIRACY. A REVIEW OF EARLY SPANISH MOVEMENTS IN THE SOUTHWEST* 74-79 (1967); Samuel Cole Williams, *HISTORY OF THE LOST STATE OF FRANKLIN* 78 (1974).

<sup>75</sup> From James Madison to James Monroe (Mar. 19, 1786), in 8 *THE PAPERS OF JAMES MADISON*, *supra* note 66, at 504-06.

<sup>76</sup> 8 *id.* at 490-91.

<sup>77</sup> 9 *id.* at 68-73.

<sup>78</sup> *Id.* (editorial note).

<sup>79</sup> *Id.*.

to allow him to give up the river permanently.<sup>80</sup> Madison wrote back that he planned to discuss the subject in person and arrived in New York in mid-July, a few weeks before Congress took up Jay's request.<sup>81</sup> Rather than proceed North as he had planned, Madison stayed in New York for a few weeks, finally departing for Virginia just a few days after the issue was referred to the Committee of the Whole on August 1.<sup>82</sup> Writing shortly to Jefferson after he left New York, Madison remarked that Jay's actions led him to "despair" of having any success at the Annapolis Convention.<sup>83</sup> He feared the resulting controversy would spark a "separation of interest and affection between the western and eastern settlements and . . . foment the jealousy between the eastern & southern States."<sup>84</sup>

The Virginia delegation's response to Jay's proposal was almost certainly crafted with Madison's assistance, and it neatly condenses the troubling defect in the Articles Madison had wrestled with for several years, namely that the Confederation in theory had treaty-making authority but lacked useful enforcement mechanisms. First, we know Madison assisted because Monroe had in fact explicitly asked for aid.<sup>85</sup> Though Madison's precise contributions cannot be easily determined, the response the Virginian delegation ultimately submitted to Congress on August 29 bore the signs of Madison's familiarity with the Law of Nations. It heavily cited Vattel's treatise, arguing that Jay's treaty could not legally compel individual states to cede navigation rights on the Mississippi. The Law of Nations required that "when a limited power [e.g. a negotiator] is

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<sup>80</sup> *Id.*

<sup>81</sup> For Madison's response to Monroe, see From James Madison to James Monroe, (June 21, 1786), in 9 THE PAPERS OF JAMES MADISON 82-85 (Robert A. Rutland & William M. E. Rachal, eds., 1975). Madison likely arrived in mid-July as Monroe's mid-July letter expected his imminent arrival as Madison had reached Philadelphia a few weeks earlier. See 9 *id.* at 88-89.

<sup>82</sup> Madison wrote from Philadelphia on August 12th that he had left New York "a few days before." He must have departed after August 7th as he wrote another letter from New York on that day. 9 *id.* at 89-91. For further information about the timing of the debate in Congress, see 9 *id.* at 68-73 (editorial note).

<sup>83</sup> 9 *id.* at 93-100.

<sup>84</sup> *Id.*

<sup>85</sup> Writing to Madison in July, Monroe told him he "shod. be happy you cod. give us as much of yr. time as possible here for reasons more self-interested. Of these we shall confer when we meet." Given their preceding correspondence had been on Jay's treaty, it's a reasonable conclusion he was asking for Madison's assistance in responding to Jay. 9 *id.* at 88-89.

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authorized to make peace ... it must be required that the treaty of peace be approved by the nation or the power which can make good the condition.”<sup>86</sup> This principle interacted with the Article 2 in a troubling way, as:

[E]ach state retains its sovereignty, freedom and independence ... [t]his is a fundamental law of the nation and the powers granted in the ninth article to make treaties must be construed in subordination to it. No treaty of peace entered into by the United States ... extending to a cession or suspension of the rights of *any of the states without their consent* can therefore be valid.<sup>87</sup>

This passage very closely parallels the concerns Madison had expressed to Randolph earlier in his May 1783 letter on the very same negotiations, when he had questioned to what extent “permanent engagements entered into by the Confederacy with foreign powers . . . by the States in their foederal character are binding on each of them separately.”<sup>88</sup> The Virginian delegation now offered up their best response. The Law of Nations empowered each state to unilaterally refuse to give up their share of a right shared by all states. And yet Jay could negotiate a treaty that stated otherwise; the Confederation could ratify it; and the Law of Nations would demand it be upheld. Individual holdout states could violate it, however, no matter the cost to the whole Confederation.

Randolph was elected governor of Virginia in November of 1786, just as Madison’s worst fears about the consequences of Jay’s treaty on the border were coming true.<sup>89</sup> The same month Randolph took office, George Rogers Clark, a former Congressional Indian Commissioner and Revolutionary War Brigadier General, joined a group of separatists in Indiana whose stated goal was to right the wrongs threatened by Jay’s proposed treaty, a “cruel, oppressive and unjust” work of both “the Spaniards

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<sup>86</sup> 31 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 37, at 589.

<sup>87</sup> *Id.* (emphasis added).

<sup>88</sup> From James Madison to Edmund Randolph (May 20, 1783), in 7 THE PAPERS OF JAMES MADISON 58-64 (William T. Hutchinson & William M. E. Rachal eds. 1971).

<sup>89</sup> REARDON, *supra* note 45, at 87.

and *Congress*.<sup>90</sup> The group, led in part by Thomas Green, one of the commissioners Georgia had sent years earlier to negotiate with the Spanish, threatened to invade Spanish lands, confiscate Spanish goods, and foment war with the Indians “in retaliation for their [the Spaniards’] many offenses.”<sup>91</sup> George Muter and Caleb Wallace, two of Madison’s acquaintances in Kentucky, intercepted a letter written by Green to Georgia’s Governor, asking him for his guidance, and, apparently, permission to conduct negotiations directly with the Spanish and the local Indians.<sup>92</sup> Muter and Wallace, together with a group of Kentucky’s most prominent leading men, forwarded this troubling letter to Randolph on 22 December 1786.<sup>93</sup> They also forwarded a circular Green had taken “great pain ... to circulate copies” of, dated 4 December 1786.<sup>94</sup> It claimed that:

[P]oliticks, which a few months ago were scarcely thought of are now sounded aloud in this part of the world . . . [due to the] late Commercial Treaty with Spain, in shutting up, as it is said, the navigation of the Mississippi . . . . Do you think to prevent the emigration from a barren Country loaded with Taxes and impoverished with debts to the most luxurious and fertile Soil in the world? . . . We can raise twenty thousand troops this side the Alleghany and Apalachian [*sic*] Mountains and the annual increase of them by emigration, from other parts, is from two to four thousand. . . . Preparations are now making here (if necessary) to drive the Spaniards from their settlements, at the mouth of the Mississippi.<sup>95</sup>

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<sup>90</sup> 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 194-95 (Roscoe R. Hill ed., 1936) (emphasis added).

<sup>91</sup> For more on Green’s background, see From James Madison to James Monroe (June 21, 1785), in 8 THE PAPERS OF JAMES MADISON, *supra* note 66, at 306-09.

For Green’s threats, see 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 195.

<sup>92</sup> For background of how the Kentucky Founding Fathers came across Green’s letters, see GREEN, *supra* note 74, at 76. For the letter to Georgia’s Governor, see *id.* at 385.

<sup>93</sup> *Id.* at 76-78.

<sup>94</sup> For the precise sequence of correspondence, see *id.* at 75. For the text of the circular, see 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 197.

<sup>95</sup> 32 *id.* at 197-99.

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Lest its readers overestimate the westerners' loyalty to the United States, the circular reminded them that in "case we are not countenanced and succoured by the United States (if we need it) our allegiance will be thrown off, and some other power applied to. Great Britain stands ready with open arms to receive and support us."<sup>96</sup> Madison, in turn, received a separate "dismal" account of Clark's exploits, describing his actions as "playing hell," and he dutifully relayed these to Randolph.<sup>97</sup>

The Virginians' attempts to apologize to the Spanish for Clark's conduct only confirmed their fears that Spain hoped to exploit such flagrant violations of the Law of Nations. On March 15, 1787, Randolph instructed Madison to inform Diego de Gardouqui that Virginia had disavowed General Clark's seizure of Spanish property and initiated legal proceedings against him and his men.<sup>98</sup> In response, Gardouqui remarked that the practical "result of what was said was, that Congress could enter into no treaty at all."<sup>99</sup> The envoy then "intimated, with a jocular air, the possibility of the Western people becoming Spanish subjects; and, with a serious one, that such an idea had been brought forward to the King of Spain by some persons connected with the Western Country."<sup>100</sup> At the same time, other, unnamed sources "hinted" to Madison "that British partisans are already feeling the pulse of some of the West settlements. . . . The eye of France also can not fail to watch over the western prospects."<sup>101</sup> The Confederation had no practical control over its borders or dissenting factions, creating an opportunity for Spain and, presumably, other opportunistic European powers. Madison knew this, Randolph knew it, and Spain knew it.

Madison and Randolph worked together to ensure that Congress understood the seriousness of the situation, particularly the growing number of people and governments in the border regions claiming to act on behalf of the Confederation. In March 1787, Randolph sent Madison a

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<sup>96</sup> 32 *id.* at 199.

<sup>97</sup> From James Madison to Edmund Randolph (Feb. 18, 1787), in 9 THE PAPERS OF JAMES MADISON 271-74 (Robert A. Rutland & William M. E. Rachal eds., 1975).

<sup>98</sup> 9 *id.* at 313.

<sup>99</sup> 9 *id.* at 337-40.

<sup>100</sup> *Id.*

<sup>101</sup> 9 *id.* at 317-22.

long dossier to lay before Congress containing evidence of (1) the various illegal actions taken by Clark against the Spanish, (2) the growth of the secessionist movements on the border, and (3) the related involvement of the governments of Virginia, Georgia, and North Carolina.<sup>102</sup> These documents were delivered to John Jay, the Secretary of Foreign Affairs, who then presented them to Congress on April 15, 1787.<sup>103</sup> In response to Virginia's evidence of the instability on the border, Jay had a dramatic change of heart and told Congress that, however the body might want to proceed, the Confederation lacked the legal and practical ability to carry its wishes out.

John Jay's stark reversal on the Mississippi issue immediately after reviewing the Virginians' evidence strongly suggests that it was the instability on the border and the attendant consequences under the Law of Nations, more than anything else, that convinced skeptics the Confederation urgently needed some mechanism to prevent the encroachment of states and wayward settlers on the conduct of foreign affairs. Jay had opposed Madison's repeated appeals to avoid this sensitive issue for almost seven years. Now, instilled with some of the knowledge of border politics Madison had, Jay agreed that, from "the Temper visible in some of the Papers sent from the Western Country . . . the period is not distant when the United States must decide either to wage War with Spain, or settle all differences with her by Treaty."<sup>104</sup> Unfortunately, Jay admitted, the present impotence of Congress made both choices—war or a treaty—seem destined for failure as:

A Treaty disagreeable to one half of the Nation had better not be made, for it would be violated, and that a War disliked by the other half, would promise but little success, especially under a Government so greatly influenced and affected by popular Opinion.<sup>105</sup>

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<sup>102</sup> The Virginian delegates discussed Randolph's instructions in 9 *id.* at 324-26. For the contents of the dossier they delivered see 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 189-204. Finally, according to Thomas Marshall Green, Madison was the Virginian delegate to Congress who ultimately delivered the documents to Congress, see GREEN, *supra* note 74, at 79.

<sup>103</sup> 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 90, at 189.

<sup>104</sup> *Id.* at 192-93.

<sup>105</sup> *Id.* at 203-04.

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Even Jay now concurred that the Confederation possessed no mechanism to require all its members to pursue a unified foreign policy.

#### IV. THE LAW OF NATIONS AND MADISON'S PROPOSED CONSTITUTIONAL FRAMEWORK

With this understanding of how formative a role the Law of Nations had in forming Madison's conviction the Confederation could not continue to function, it's suddenly obvious that his preparation for the Convention was not a stroke of genius or frenzied effort so much as a seamless extension of his years-long effort to get the states to adhere to the Law of Nations. For example, his much-celebrated "Vices of the Political Constitution of the United States," written in April of 1787, clearly reflects his desire to give the central government a meaningful monopoly over foreign affairs.<sup>106</sup> While "Vices" is often cited as evidence that Madison began his preparations for the Virginia plan in the early winter of 1787, it is more appropriately seen as the culmination and synthesis of the six years he spent struggling to get the Confederation to behave in accordance with the Law of Nations. His criticisms read much like a summary of the crises he had fought in Congress and in Virginia's House of Delegates. First, it lamented the obvious "[f]ailure of the States to comply with the Constitutional requirements."<sup>107</sup> Second, it noted the "[e]ncroachments by the States on the federal authority," including the example of "the wars and Treaties of Georgia with the Indians."<sup>108</sup> Third, it pointed out the persistent "[v]iolations of the Law of Nations and of treaties" by individual states.<sup>109</sup> Finally, "Vices" ended with a powerful warning that Madison echoed repeatedly in private correspondence and, later, at the Convention:

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<sup>106</sup> Vices of the Political System of the United States, April 1787, in 9 THE PAPERS OF JAMES MADISON 345-58 (Robert A. Rutland & William M. E. Rachal eds. 19XX) (editorial notes).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

As yet foreign powers have not been rigorous in animadverting on [paying attention to] us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. [sic] those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.<sup>110</sup>

Thus, Madison's first attempt to outline the *raison d'être* for a new Constitution is substantially dedicated to the interplay between foreign policy, the Articles, and the Law of Nations. The significance of foreign affairs, in particular, is further underscored by the timing of Madison's work. As he was preparing "Vices," he and the Virginia Congressional delegation were preparing for Congress the dossier detailing the states' numerous violations of the Law of Nations, violations so serious that even John Jay, the Secretary of *Foreign Affairs*, apparently no longer believed the Confederation could predictably control its own foreign affairs.

Madison's efforts to solicit feedback on the emerging elements of his Virginia Plan also reflect the singular importance to him of stopping violations of the Law of Nations. Writing to Washington that same April he wrote "Vices," arguably his most prominent concern was that the states would continue to violate the Law of Nations when it suited their individual interests. Madison thought that the:

[I]ndividual independence of the States is utterly irreconcilable [sic] with their aggregate sovereignty; . . . I would propose next that in addition to the present federal powers, the national Government should be armed with positive and compleat [sic] authority in all cases which require uniformity [such as complying with treaties]. . . . Over and above this positive power, a negative in all cases whatsoever on the legislative acts of the States . . . appears to me to be absolutely necessary. . . . Without this defensive power, every positive power that can be given on paper will be evaded &

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<sup>110</sup> *Id.*

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defeated. The States will continue to invade the national jurisdiction, *to violate treaties and the law of nations* [emphasis added] & to *27arass* [*sic*] each other with rival and spiteful measures dictated by mistaken views of interest.<sup>111</sup>

He fixated on the “business with Spain ... [which was] becoming extremely delicate, and the information from the Western settlements truly alarming.”<sup>112</sup>

Like Madison, Randolph saw the Convention as an opportunity to craft a governing compact that could balance the uniform demands of the Law of Nations with the states’ inevitable desire to satisfy divergent, domestic interests. He certainly shared Madison’s broader concerns that the westerners would likely trigger a war.<sup>113</sup> He famously opened the proceedings of the Convention on May 29, 1787 by presenting Madison’s Virginia Plan, preceded only by his own diagnosis that the major flaw of the Confederation was, “[i]f a State acts against a foreign power contrary to the laws of nations or violates a treaty, it [the Confederation] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending state to the operations of the offended power. It therefore cannot prevent a war.”<sup>114</sup> The Confederation’s inability to enforce the Law of Nations was only made worse by the selfish and divergent actions of “thirteen legislatures, viewing commerce under different relations, and fancying themselves, discharged from every obligation to concede the smallest of their commercial advantages for the benefit of the whole.”<sup>115</sup>

Both Rudolph’s and Madison’s desired mechanism to exclude the states from foreign affairs was an absolute veto to prevent states from violating treaties and the Law of Nations, a project whose roots go back

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<sup>111</sup> From James Madison to George Washington (Apr. 16, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 97, at 382-87.

<sup>112</sup> *Id.*

<sup>113</sup> Writing on March 1<sup>st</sup>. 1787, he remarked that the reports he had received on the border issues “prove the truth of your suspicion, that the occlusion [closure] of the Missi. to Virginia, would throw the western settlers into an immediate state of hostility with Spain.” To James Madison from Edmund Randolph (Mar. 1, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 97, at 301-02.

<sup>114</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 24-25.

<sup>115</sup> 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 265 (John P Kaminski et al. eds., 19XX).

some five years. Madison would refer to this veto as a “negative” at the Convention. It appears both men favored this solution as early as 1781, as it echoes the spirit of a Congressional Committee they served on that year.<sup>116</sup> That committee was tasked with amending the Articles to give Congress the power to compel states to comply with its lawful resolutions. In private correspondence, Madison claimed the committee’s goal was to give Congress “coercive powers” to “compel obedience” from the states.<sup>117</sup> The committee’s draft amendment to the Articles stated that it was written pursuant to:

[A] general and implied power is vested in the United States in Congress assembled to enforce and carry into effect all the Articles of the said Confederation against any of the States which shall refuse or neglect to abide by such their determinations, or shall otherwise violate any of the said Articles.<sup>118</sup>

When Randolph introduced the Virginia Plan five years later, it also included a coercive right of the national legislature to:

Negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. [sic] any member of the Union failing to fulfill its duty under the articles thereof.<sup>119</sup>

The similarities in the descriptions are remarkable and betray the shared lineage of both men’s thinking about the need for Constitutional reform. Certainly Madison wrote the plan, but Randolph introduced it and, moreover, his comments to the delegates before introducing the plan indicate he agreed with Madison that the Confederation suffered because:

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<sup>116</sup> REARDON, *supra* note 45, at 45.

<sup>117</sup> *Id.*

<sup>118</sup> Proposed Amendment of Articles of Confederation (Mar. 12, 1781), 3 THE PAPERS OF JAMES MADISON 17-20 (William T. Hutchinson & William M. E. Rachal eds., 1963).

<sup>119</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26.

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It does not provide against foreign invasion. If a State acts against a foreign power contrary to the laws of nations or violates a treaty, it cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war. ... A State may encroach on foreign possessions in its neighbourhood and Congress cannot prevent it.<sup>120</sup>

Though officially proposed by Randolph, the negative was clearly of utmost importance to Madison, who urged the delegates that “an indefinite power to negative legislative acts of the States [w]as absolutely necessary to a perfect system.”<sup>121</sup> The negative’s relationship to foreign affairs is clear from Madison’s comments that, without it, there was a “constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other.”<sup>122</sup> The close relationship between the negative and violations of the Law of Nations in the Virginia Plan is evident in the similarities between Madison’s warning in “Vices” about the consequences of continued violations of the Law of Nations and the justifications he gave for the negative on the Convention floor. In “Vices,” he warned of “the power of any part of the Community to bring [reprisals] on the whole” by continued transgressions against foreign powers.<sup>123</sup> At the Convention, he insisted it was *the negative* that could prevent a “small proportion of the Community in a compact situation, acting on the defensive, and at one of its extremities might at any time bid defiance to the National authority.”<sup>124</sup> The similarities in language and purpose are unmistakable.

## V. THE RESURRECTION OF MADISON’S FEDERAL “NEGATIVE”

It’s clear at this point that Madison thought the Law of Nations was important and that the Constitution would need to compel the states

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<sup>120</sup> *Id.* at 24-25.

<sup>121</sup> *Id.* at 164.

<sup>122</sup> *Id.*

<sup>123</sup> Vices of the Political System of the United States, April 1787, 9 THE PAPERS OF JAMES MADISON, *supra* note 97, at 245-58.

<sup>124</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 164.

to uphold its tenets. We can even say with some certainty that the Virginia Plan and “Vices” were both written with an eye towards ensuring compliance with the Law of Nations. What specific features of the resulting Constitution, however, can we point to as direct results of the Law of Nations? We know Madison wanted a strong federal power to halt any state violations of the Law of Nations or the nation’s treaties. The mechanism he believed the Law of Nations required—the negative—was ultimately defeated at the Convention, however. Somehow, in the process of drafting the first drafts of the Constitution, a purportedly equivalent judicial power to review state laws and violations of the Law of Nations appears, written in the hands of Edmund Randolph. Potentially, this is a direct response to both men’s conviction that it was not an option to leave Philadelphia without a means to prevent states from violating treaties and the Law of Nations.

Madison’s reaction to the failure of the negative further underscores its importance, as he left Philadelphia convinced its omission threatened the entire Constitution. He had first hinted to Jefferson in September his “opinion . . . that the plan . . . will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst [sic] the state governments.”<sup>125</sup> Expounding on this point in a later, lengthy October 24, 1787 letter, Madison argued that the only workable solution to “the due partition of power, between the General & local Governments, was . . . a check on the States [that] appear[ed] to me necessary.”<sup>126</sup> Even though it was:

[S]aid that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; . . . a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience

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<sup>125</sup> From James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 THE PAPERS OF JAMES MADISON 163-65 (Robert A. Rutland, et al., ed., 1977).

<sup>126</sup> 10 *id.* at 205-20.

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would be necessary, is an evil which the new Constitution meant to exclude as far as possible.<sup>127</sup>

Interestingly, the letter notes that it was “said” that an enlarged Judicial authority took the place of the negative and would “keep the States within their proper limits.” Who said this, and how did it get it into the Constitution?

The person who likely introduced this enlarged Judicial authority is none other than Edmund Randolph in his capacity as a member of the Committee of Detail. It’s hard to prove this conclusively, however, as the inner workings of the Committee of Detail were shrouded in secrecy. From July 26, 1787 to August 6, 1787, the Convention adjourned while the Committee of Detail prepared the first draft of the Constitution, working from the collection of short resolutions passed to date.<sup>128</sup> Analyses of the Committee’s work generally consider it to have weakened the central government in favor of giving the states more domestic power.<sup>129</sup> Some go so far as to consider it a “hijacking” of the convention in favor of states’ rights, particularly the Deep South’s.<sup>130</sup> Recently, however, William Ewald revisited the original manuscripts of these drafts to better reconstruct the precise sequence of the drafting of these documents and to better identify their principle authors. Ewald’s work suggests a larger role for Edmund Randolph and the Law of Nations. The Committee of Detail document that Farrand labelled “Document IV” is likely the first full draft of the Constitution and was written entirely in Randolph’s hand.<sup>131</sup> Henceforth referred to as “Randolph’s Draft,” it introduced numerous substantive provisions into the Constitution. Among its innovations, it provides the first complete framework for the jurisdiction of the federal courts. In this regard, Ewald argues it is “a clear expansion of the federal judicial power,

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<sup>127</sup> *Id.*

<sup>128</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 130-76.

<sup>129</sup> John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 *Yale L.J.* 765, 766 (1990).

<sup>130</sup> DAVID O. STEWARD, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 163-75 (2007).

<sup>131</sup> William Ewald, *The Committee of Detail*, 28 *CONSTITUTIONAL COMMENT.* 197, 220 (2012).

going well beyond what Madison's Notes relate as having been discussed in Convention."<sup>132</sup> In other words, the very provisions Madison considered to be intended as a replacement for the negative—a feature he thought was “absolutely necessary to a perfect system”—appear to have been in some part the work of the like-minded Edmund Randolph.<sup>133</sup> At the same time the states' domestic powers were expanded, there was a novel and notable desire to explicitly grant the Federal government greater power over foreign affairs. This is too extraordinary to be a mere coincidence.

Randolph's Draft also added specific, well-defined powers to coerce states to obey treaties and follow the Law of Nations, the very issue Randolph and Madison were so concerned about at the start of the Convention. First, it explicitly gave the Senate the power to “make treaties of commerce . . . [and] make treaties of peace or alliance.”<sup>134</sup> According to Ewald, the “addition of the powers over foreign affairs is new and *appears to be Randolph's own interpolation.*”<sup>135</sup> Another major innovation introduced by Randolph's Draft was the specific enumeration of the powers of the national legislature. Again, many historians see the mere act of enumeration as evidence the Committee of Detail meant to weaken the central government given that the Convention had resolved for a general grant of power.<sup>136</sup> Namely, the Convention had resolved the national legislature should have the power:

[T]o legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.<sup>137</sup>

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<sup>132</sup> *Id.* at 236.

<sup>133</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 164.

<sup>134</sup> 2 *id.* at 143-44.

<sup>135</sup> Ewald, *supra* note 131, at 228 (emphasis added).

<sup>136</sup> See interpretation in Hueston, *supra* note 129, at 771.

<sup>137</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 131-32.

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The changes introduced by the Committee of Detail strengthened the states' domestic powers in exchange for inserting greater federal control over foreign affairs. A careful look at the Committee of Detail's enumeration shows it was consistent with a key element of the Virginia Plan's negative. The provisions in Randolph's handwriting explicitly granted the legislature the power reign in states' abilities to start conflicts, as only the national legislature would have the power "to *provide tribunals for offenses against the laws of nations* [emphasis added]; . . . to declare the law of treason; [and] to regulate the state militias."<sup>138</sup> John Rutledge added in the power to regulate Indian affairs and the power to enforce treaties.<sup>139</sup> This enumeration gives the legislature explicit power to stop the states' interference in foreign affairs. By contrast, it's not at all clear that the Convention's general grant of the power to legislate in all cases "in which the Harmony of the United States may be interrupted" would apply in similar circumstances. The mere fact that Randolph's Draft added these provisions is not sufficient to attribute them purely to Randolph nor to demonstrate they were added as part of any larger plan. Given Randolph's clear agreement with Madison on the need for coercive power over foreign affairs, however, it strongly suggests that the Virginians' understanding of the requirements the Law of Nations imposed on the new Constitution was incorporated into the Committee of Detail's work and the final Constitution.

These new mechanisms to control the states' incursions into foreign affairs required one additional thing, however; the states needed to *willingly* accept the new Constitution rather than pursue an alternative such as independence or forming separate Confederations. Certainly, Randolph and Madison felt this was the only benign outcome of the Convention. Madison believed that the alternative, disunion, was the most dangerous outcome for some time, even more dangerous than a flawed Confederation. As early as 1783, he conveyed to Randolph his concern that groups of states:

[M]ight be forming other confederacys . . . [and] [u]nless some amicable & adequate arrangements be speedily taken

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<sup>138</sup> *Id.* at 143-44; Ewald, *supra* note 131, at 229.

<sup>139</sup> Ewald, *supra* note 131, at 229.

. . . a dissolution of the union will be inevitable. . . . The consequence of such a situation would probably be that at alliances would be soug[h]t first by the weaker and then by the stronger party and this country be made subservi[ent] to the wars and politics of Europe.”<sup>140</sup>

Four years later, at the Convention, Madison still believed that “the greatest danger is that of disunion of the States.”<sup>141</sup> Randolph agreed that as “dreadful as the total dissolution of the union” was, he “entertain[ed] no less horror at the thought of partial confederacies.”<sup>142</sup> Writing to Virginia’s House of Delegates, he explained that if any states refused to join the new government:

Let it not be forgotten, that *nations, which can inforce [sic] their rights, have large claims against the United States, and that the creditor may insist on payment from any one of them [emphasis added]*. Which of them would probably be the victim? The most productive and the most exposed.<sup>143</sup>

In no uncertain terms, he told his fellow Virginians that the changes needed in their union “cannot be interwoven in the confederation without a change of its very essence; or in other words, that the confederation must be thrown aside.”<sup>144</sup> The Virginians clearly recognized the dangers of their present situation but saw the emergence of multiple successor states to the Confederation as an even greater danger. Why?

The Law of Nations succinctly describes why the secession of individual states or the formation of multiple Confederations would have been an even more dangerous path forward; in either case, all of the successor states to the Confederation would still be bound by its treaties in some capacity yet would lack any shared, political mechanism to ensure compliance. Vattel’s *The Law of Nations* sets out a very clear rule—

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<sup>140</sup> From James Madison to Edmund Randolph (Feb. 25, 1783), in 6 THE PAPERS OF JAMES MADISON 285-88 (William T. Hutchinson & William M. E. Rachal eds. 1969).

<sup>141</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 388.

<sup>142</sup> 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 115, at 269.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 267.

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that the treaty obligations of the Confederation would absolutely pass to all its successor states in some form. Even if “changes are made in the form of the government . . . the treaty concluded with the nation, remains in force as long as the nation exists.” Where multiple successor states emerge from a single state:

[P]ublic treaties . . . are . . . made to subsist independently . . . and the obligation imposed on the state *passes successively to all its conductors* [emphasis added], in proportion as they assume the public authority. It is the same with respect to the rights acquired by these treaties; they are acquired for the state, and successively pass to its conductors.<sup>145</sup>

Thus, whatever the outcome in Philadelphia, the states’ obligations remained unchanged. The only way to stop treaty violations, then, was a new, stronger government accepted by *all* the existing members of the Confederation.

If the Committee of Detail, or at least part of its membership, agreed with this diagnosis, it certainly would have recognized the overriding need to ensure all states would be *willing* to ratify the Constitution. This implication of the Law of Nations offers a novel explanation for one of the most enduring mysteries of the Convention, namely why the final Constitution appears so pro-Southern. Many scholars have been hard-pressed to explain this using only domestic issues and the domestic balance of power. Even the most ardent Southerners believed the South depended on the North far more than the other way around.<sup>146</sup> Under the Law of Nations, however, states that refused to join the new union, particularly those most prone to violating the Confederation’s treaties, would

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<sup>145</sup> EMER DE Vattel, *THE LAW OF NATIONS* 184 (1760).

<sup>146</sup> George Washington, perhaps the pre-eminent American, military expert and a Virginian, felt, with regards to his own State, that “in point of strength, it is comparatively, weak.” From George Washington to Bushrod Washington, (Nov. 9, 1787), in 5 *THE PAPERS OF GEORGE WASHINGTON* 420-25 (W. W. Abbot ed. 1997). Likewise, General Pinckney of South Carolina, known for his strongly pro-Southern stances, agreed that it was in “the interest [of] the weak South[er]n States” to be “united with the strong Eastern States.” 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 26, at 499.

have *more* bargaining power, not less. Holdout states or states that seceded from a rump Confederation could risk treaty violations for their sole benefit while all the other successor states of the Confederation bore the liability for the consequences. This strongly suggests that it would have been in the interest of the better-behaved states to ensure *all* states would accept the new Constitution, particularly those most likely to encroach on foreign affairs. The states most likely to involve the others in a war and most vocal about demanding certain nonnegotiable provisions in exchange for their membership in the new union were none other than those of the Deep South.<sup>147</sup> These were the same states Madison and Randolph had so feared would trigger a confrontation with Spain since 1780, and there was certainly abundant evidence that they or their western settlers had and would pursue their own interests whatever the consequences to the other states. Could it be that the domestic concessions to the Deep South represent the price to ensure it willingly acquiesced to the new union and its monopoly over foreign affairs and the Law of Nations?

Further changes introduced by Randolph's Draft are consistent with this hypothesis. In addition to providing expanded judicial authority and enumerated powers over foreign affairs, the draft also added the now-infamous domestic concessions to the Deep South. Randolph's Draft is the first time the South's desired prohibition on export taxes appears, in Randolph's handwriting no less. Randolph also added a further provision to require a supermajority to pass any navigation acts—a bugaboo of the Southern States. Finally, it proposed a complete prohibition on banning the importation of slaves; it was Randolph who first wrote “no prohibitions on Importations of inhabitants. no duties by way of such prohibition.”<sup>148</sup> The fact that these changes were introduced simultaneously with provisions to control foreign policy does strongly suggest some connection between them. This is only further bolstered by the connection

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<sup>147</sup> On July 23, 1787, General Pinckney reminded “the Convention that if [it] . . . should fail to insert some security to the Southern States agst. [sic] an emancipation of slaves, and taxes on exports, he shd. [sic] be bound by duty to his State to vote agst.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 95. A few weeks later, on August 22, John Rutledge echoed Pinckney's sentiment that, if “the Convention thinks that N.C.; S.C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain.” 2 *id.* at 373. These three States' strong opinions on these subjects has been covered countless times by other scholars.

<sup>148</sup> Ewald, *supra* note 131, at 232.

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already demonstrated between the growing crisis on the Southern border, involving both western settlers and the states of the *Deep South*, and the monopoly over foreign affairs that Madison and Randolph sought for the new government. The Committee worked in part from the Virginia Plan, whose monopoly over foreign affairs was motivated by the turmoil along the Southern borders and the Southerners' responses to the Mississippi crisis. It's a reasonable conclusion that the Committee of Detail's decision to bolster the federal government's powers over foreign affairs shared similar inspirations, namely a concern over the actions of certain Southern states. Considering the numerous comments from the Southern delegates that they would reject the Constitution unless it provided for certain domestic policy protections, it's plausible these were added to ensure that states the Confederation most needed a monopoly over in foreign affairs ultimately accepted that monopoly. There's not enough evidence from the Committee's work to establish this conclusively, but the broader strokes of Madison's and Randolph's motivations, combined with the simultaneous insertion *by Randolph* of a foreign affairs monopoly *and* the inducements for the states the Virginians' most wanted such a monopoly over, strongly suggest a connection here. If true, these Deep South provisions, reviled as everything from "Southern craft and gall" to a "hijacking" of the Constitution, are better seen as a calculated bargain to enhance the domestic powers of the states—even to the point of granting certain sectional interests explicit protections—enough to entice universal assent to the new Constitution and ensure that one or two members of the original Confederation could not continue to threaten the "whole" with their irresponsible conduct. This compromise may be the capstone of Randolph's and Madison's efforts.

**CONCLUSION**

Were we trying Madison and Randolph for conspiracy to incorporate their interpretations of the Law of Nations into the Constitution, it would be malpractice not to point to Federal Rule of Evidence 406, which states that evidence of a "person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or

organization acted in accordance with the habit or routine practice.”<sup>149</sup> The Law of Nations, aside from providing a clear, consistent motive and narrative for Madison’s actions in the years before his rise to fame at the Convention, permits us to connect the dots in a pattern of behavior and coordination between both Madison and Randolph. It offers a tantalizing hint of what exactly happened in the Committee of Detail.

First, *why* was James Madison so prepared for the Convention? His preparation is legendary but he was not alone in preparing for the Convention or even in preparing his own plan of government. Certainly, his reputation as a hard-working and brilliant scholar provides some explanation, but some of that reputation, with all due respect to Madison, is undermined by circular reasoning. Madison’s reputation for brilliance is due in part to his success in Philadelphia and his success is seen as a product of his brilliance. Madison’s career prior to 1787, however, when viewed in the context of the Law of Nations, is a years-long, determined march to find a way to get the states to obey the Law of Nations, an effort that directly influenced and shaped the Virginia Plan. Not only does this offer a compelling explanation for why Madison was so prepared, but it also underscores just how prepared he was. He arrived with the benefit of more than five years spent trying and failing to fix the flaws underlying the Confederation and was utterly convinced of what needed to be done in Philadelphia. The Virginia Plan and “Vices” are both more appropriately seen as the culmination of that struggle, and, in this respect, we can say that the Law of Nations is not just relevant to our understanding of the Constitution, but that at least some of its principles also formed the bedrock of Madison’s constitutional thinking.

Second, why was Randolph chosen to present the Virginia plan? A common explanation is that Randolph was given the job because he was the governor and thus the most significant member of the Virginian delegation. The Law of Nations again offers a competing explanation. Madison, the man whose preparation is legendary, didn’t leave the presentation of his plan to chance or mere formality, but instead turned to a long-time collaborator and ally in Randolph. No doubt Randolph’s position as governor was part of Madison’s calculus, but Randolph was perhaps the person most likely to agree with Madison’s prescriptions for

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<sup>149</sup> Fed R. Evid. 406.

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the Constitution. Most importantly, Randolph was someone whom Madison knew supported his most cherished provision—a federal negative over state laws that violated treaties—precisely because he and Randolph had *already* fought for this power.

Finally, the Law of Nations provides us with the *pièce de résistance*—a possible new explanation for why the South received so many concessions to its domestic interests in the final Constitution. The pattern of behavior exhibited by Randolph and Madison—particularly their agreement on the need for the federal power to effectively restrain the states' violations of treaties—suggests a natural compromise that fits the facts we do know about the Committee of Detail's work. Madison supported limiting the Confederation's *formal authority* to make treaties that it could not get the states to obey, as is very evident from his comments during the controversy over Jay's treaty. Also, both Randolph and Madison had already tried to give the Confederation the *actual power* to enforce the treaties it did make, as the Law of Nations required. The fact that Randolph's Draft, arguably the first full draft of the Constitution, explicitly expanded the federal government's actual enforcement powers over treaties, foreign affairs and the Law of Nations, in exchange for limiting the federal government's formal authority to encroach on sensitive domestic interests—particularly those sacred cows Madison and Randolph might expect Southern settlers would almost certainly defend regardless of what any treaty said—suggests that the tenets of the Law of Nations, and both men's interpretation of it, played a key role in brokering these now-infamous concessions to Southern interests.

Many of our long-held beliefs about our Constitution may be both further enriched and, perhaps, overturned by further study of the influence of the Law of Nations on the actions of the Founders and the compromises of the Founding Era. Based on the evidence considered above, there is no question that the role of treaties and the tenets of the Law of Nations were key to the bargains struck at the Convention. Rather than viewing the Law of Nations as a neglected vein of history most significant perhaps to questions of international law today, it might be more appropriately viewed as a subject that helps explain the very heart of what the federal system was intended to do and why the states were able to overcome their sectional differences in adopting that system. There's a strong argument to be made that an implicit part of the bargain that gave the

federal government exclusive control over foreign affairs was that the states expected strong limits on the federal power over their domestic affairs in return. Madison and Randolph knew from experience that some issues were effectively beyond the control of the central government, whatever formal authority it might have over the matter.