ARTICLE

THE ORIGINAL MEANING OF TREATIES

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For nearly two centuries, all three branches of the federal government have thought that the original meaning of the Constitution's references to treaties and compacts was lost. This Article aims to recover those original meanings by looking to an under-examined source—the contemporary law of nations. In 1787, that body of law regarded compacts, rather than treaties, as the umbrella category for all international agreements. Treaties—defined as executory commitments among sovereigns only—were but one form of compact. Others included executed "conventions," agreements by "subsidiary powers," and unauthorized "sponsions." Each category had a specialized meaning—they were terms of art—in both the scholarly corpus that delimited the field and contemporary practice.

Although neither dictionaries nor the Framing materials explicitly invoke these definitions to assign constitutional meaning, there is extensive evidence in the constitutional text, intellectual history, and early U.S. practice for doing so. I identify support for a law of nations thesis in an array of previously ignored agreements, including those made by George Washington and Benedict Arnold. A law of nations thesis also helps explain why the United States concluded certain agreements as treaties and others as conventions in its earliest years.

This Article thus provides a new and historically rooted foundation for U.S. foreign relations law, with important implications for the scope and exclusivity of the

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Treaty power, the power to conclude "executive agreements," the doctrine of non-self-executing treaties, the ban on U.S. state treaty-making, and the Constitution's authorization of compacts with congressional consent.

INTRODUCTION

The Constitution uses the word "treaties" four times, infusing the President and Senate with power over their formation, denying that power to the states, assigning treaties the status of "supreme" law, and opening the door

for their adjudication.[1] The text also permits U.S. states to conclude "Compact[s]" and "Agreement[s]", but only with Congressional assent.[2] And yet as early as 1833, Joseph Story's *Commentaries on the Constitution* confessed an inability to understand the distinction between these types of agreement.[3] A century and a half later, in 1978, the Supreme Court concurred.[4] Writing that "[t]he Framers clearly perceived compacts and agreements as differing from treaties," and believing that these were "terms of art, for which no explanation was required," it concluded the definitions were "lost" to history.[5]

Over the following five decades, legal history has become central to the enterprise of constitutional interpretation. But the Court's hand-waving confession of ignorance is not just good law; it is a core tenet of foreign relations law.[6] For U.S. international agreements, this account is so conventional that almost no modern scholars have even bothered to *ask* what the Framers (or the public more generally) thought "treaties" were.[7]

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1 Article I, Section 10 denies to U.S. states the power to "enter into any Treaty, Alliance, or Confederation" while denying them "without the Consent of Congress," to conclude an "Agreement or Compact with another State, or with a foreign Power." U.S. CONST. art. I, § 10. Article II, Section 2 assigns the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2. Article III, Section 2 extends the judicial power to "all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made." U.S. CONST. art. III, § 2. And, finally, the Supremacy Clause directs that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI.

2 U.S. CONST. art. I, § 10.

3 *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1396 (Boston, Hilliard, Gray & Co. 1833) ("What precise distinction is here intended to be taken between *treaties*, and *agreements*, and *compacts* is nowhere explained . . . .").

4 U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460-63 (1978).

5 *Id.*

6 *See, e.g.*, CURTIS A. BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS 4 (2024) ("Congress and the executive branch have often framed their disagreements in terms of claims about the practice rather than about the text or original understandings."); Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 757-58 (2013) (noting hostility to originalism in Justice Jackson's *Youngstown* concurrence—"[t]he most influential legal framework for modern foreign affairs decisionmaking"); Ingrid Wuerth, *An Originalism for Foreign Affairs*, 53 ST. LOUIS U. L.J. 5, 9 n.19 (2008) (explaining that, in foreign affairs, originalism is "generally speaking, not the way courts or the Executive Branch and Congress actually interpret the Constitution").

7 *Cf.* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 184 (2nd ed. 1996) ("The Constitution speaks of 'treaties', without defining them . . . . Treaties need no definition today . . . ."). Two scholars stand out for bucking this trend. First, Michael Ramsey has written to differentiate treaties and compacts at the Founding, albeit without delving into the law of nations' typology I offer here. *See* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 179-81 (2007) (arguing that "treaty" historically had a narrower definition than "international agreement"); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 174-75 (1998) [hereinafter Ramsey, *Executive Agreements*] (highlighting the importance of contemporary evidence in assessing the original understanding of what the term "treaty" encompassed in its definition). Second, Abraham Weinfeld's influential treatment argued

Finding the original meaning of "treaties" to be lost, the Supreme Court and the political branches—along with the scholars who study them—have come to prioritize post-Founding practices (e.g., historical gloss, doctrine) to discern constitutional meaning.[8] Hence, treaties are now widely accepted to encompass *any* agreements the President ratifies following the Senate's supermajority assent.[9] The Court has similarly avoided definitional work on treaties for purposes of the ban on U.S. state behavior, even as it has constructed non-textual rules for both the requirement of congressional consent for compacts and when to adjudicate treaty questions.[10]

This Article's central premise is that there *is* a discernible and relatively detailed original meaning for the term "treaty" and alternative terms like "compact." These meanings are not easily found in the usual places originalists look, like the Framing materials or the dictionaries that drive much original public meaning research today. In fact, those sources are rather unhelpful in understanding treaties. Instead, I look to a different source—the contemporary (to 1787) law of nations. As articulated in the widely-read, influential treatises of the day, treaties (and other species of agreement like compacts, conventions, and sponsions) were prominent terms of art that had fixed meanings reflected in the practice of the time.

In 1787, the law of nations considered the treaty one of the broadest—but not exclusive—forms of international "compacts."[11] Treaties involved written executory commitments among sovereigns that received their obligatory character from natural law.[12] As commitments among sovereigns only, treaties differed from agreements among "subordinate powers" as well as unauthorized "sponsions" by sovereign agents.[13] The term treaty was also regularly reserved for "perpetual" commitments in the sense of creating

for relying on Emmerich de Vattel, author of *The Law of Nations*, but wrongly claimed other law of nations' sources had nothing to say on the matter. *See* Abraham Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 457-59 (1936) (contending that the Founders adopted Vattel's agreement-compact typology in the Constitution); *see also* David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 75-81 (1965) (discussing Vattel's importance to the proper original understanding of the term "treaty").

8 *See, e.g.*, BRADLEY, *supra* note 6, at 11-33 (discussing historical gloss as an interpretive tool for understanding constitutional meaning).

9 *See infra* note 29 and accompanying text.

10 *See, e.g.*, Ryan M. Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. 310, 365-71 (2023) (identifying policy considerations that guide when States need congressional assent before entering into compacts with foreign nations); Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 759-69 (2010) (tracing the evolution of the Court's interstate compact jurisprudence).

11 *See infra* subsection I.B.1.

12 *See infra* Section I.B.

13 *See infra* subsection I.B.2.a–b.

ongoing (i.e., executory) obligations versus those "conventions" where performance obligations were temporary or dispositive (i.e., executed).[14]

This law of nations typology aligns with the texts of the Articles of Confederation and the Constitution. Legal historians have, moreover, long recognized the weight accorded the law of nations by the Framers and public commentators alike, making it a key source for originalist research.[15] True, the Framing materials barely gave these meanings mention, and even then, only with some equivocation (a fact that may explain why the topic lay fallow for so long).[16] But actual agreement-making pre- and early post-ratification by the United States and its officers regularly reflected the meanings assigned under the law of nations.[17]

For the first time, this Article attaches constitutional salience to a suite of non-treaty agreements concluded by the likes of George Washington, Benedict Arnold, and the City of Alexandria, confirming an original understanding that not all agreements took treaty form. It also makes sense of the first fifty years of U.S. "treaties" and "conventions" practice, with these titles regularly signaling the agreement's executory or executed/temporary contents.

In short, this Article offers a way to recover a settled original meaning for "treaties"—and "compacts"—under the Constitution at the Founding. In so doing, it seeks to bring foreign relations law into alignment with the originalist enterprise that now governs most other areas of American constitutional law.[18] Applying this originalist understanding today could have dramatic consequences. Consider four possibilities flowing from the evidence I have just sketched:

1) All agreements originally qualifying as "treaties" could have to proceed under Article II and garner supermajority assent from the Senate. This would essentially end the widespread modern practice of concluding executory "executive agreements"—like the U.S.–Mexico–Canada Free Trade Agreement (USMCA)[19]—that derive domestic authority from federal legislation and/or Executive powers.

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14 *See infra* subsection I.B.3.

15 *See infra* subsection II.B.1.

16 *See infra* subsection II.B.2.

17 *See infra* subsection II.B.3.

18 Prior efforts to recognize a "normalization" of foreign affairs law have focused on an (alleged) convergence of functional, doctrinal, and methodological approaches to adjudication of domestic and foreign issues, but these have not sought to reorient foreign relations law around originalism specifically. *See generally* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

19 OFFICE OF THE U.S. TRADE REPRESENTATIVE, *United States-Mexico-Canada Agreement*, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-

2) At the same time, certain *other* executive agreements—like those involving U.S. agencies—could gain an originalist justification via the law of nations' recognition of subsidiary powers' agreement-making. That would create a new, constitutionally rooted, path to navigate between treaties and executive agreements, correcting for a status quo that, per Oona Hathaway, has "no identifiable rational basis."[20]

3) Since originalist treaties are executory, courts could enforce them directly, save those that explicitly contemplate intervening legislative implementation, unsettling much of the Court-created doctrine of non-self-executing treaties in the process.[21]

4) U.S. states could be prohibited from making any agreements falling within treaties' original meaning and would need Congressional consent for *all* non-treaty compacts. This would be a significant break from current practice where U.S. states conclude agreements with foreign powers in increasing numbers without any Congressional involvement whatsoever.[22]

In raising these possibilities, I do not mean to suggest they are constitutionally required, let alone that constitutional actors must prioritize original meaning. Even originalists still debate issues of intention, public meaning, methods, and (post-*Rahimi*) underlying principles to discern whether and when a term of art like "treaties" must form the basis for constitutional meaning.[23]

Non-originalist scholars, meanwhile, will surely invoke subsequent events as grounds for caution in constraining the treaty power to its Framing formulation. Transformative domestic events—e.g., Reconstruction, the 17th Amendment—as well as global shifts like the evolution of the naturalist law

agreement/agreement-between [https://perma.cc/8AAY-BXNJ] (last visited Mar. 16, 2025). For further discussion of this scenario, see *infra* notes 297–299 and accompanying text.

20 Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1239-40 (2008). For further discussion, see *infra* notes 300-308 and accompanying text.

21 Originally introduced by Chief Justice Marshall, the self-execution doctrine differentiates "self-executing" treaties that are judicially enforceable (because they operate of themselves "without the aid of any legislative provision") from those that are not (because they speak to the Congress not the Courts or otherwise require legislative implementation). Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); Medellin v. Texas, 552 U.S. 491, 504-05 (2008) ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."); *see also infra* notes 309–312 and accompanying text.

22 *See, e.g.*, Scoville, *supra* note 10, at 363-64 (demonstrating the prevalence of unapproved agreements by U.S. states); Hollis, *supra* note 10, at 750-59 (showing the growth of unapproved agreements by U.S. states); *see also infra* notes 313–317 and accompanying text.

23 *See infra* Part II. For a discussion of the addition of purposes under the banner of "history and tradition" to the originalism corpus, see generally United States v. Rahimi, 144 S. Ct. 1889 (2024), especially the majority opinion and concurrences by Justices Barrett, Gorsuch, Jackson, Kavanaugh, and Sotomayor.

of nations into a consent-based, positive "international law"—may support cries for changed circumstances. And from a prudential perspective, rising political polarization (including the Senate's current inability to muster a two-thirds majority vote for advising and consenting to treaties) suggest a need to expand—rather than contract—domestic authorities for executive agreements to ensure a functioning U.S. foreign policy.[24] In other words, the delta between the original meanings elaborated here and current practice/doctrine may be so wide as to counsel us to shut our eyes to the evidence at hand.

This would be an error. Since original meanings are *always* relevant to constitutional interpretation, they can—and should—be incorporated into future work.[25] Of course, the ascendancy of originalist methods among a majority of current Supreme Court Justices reinforces this call.[26] But even were the Court's composition to change, it is simply odd that we have been

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24 Compare, for example, treaties submitted for Article II Advice and Consent over the last five Administrations—Clinton (187); Bush II (97); Obama (38); Trump (5); and Biden (3, through 7/2024)—and the rate at which ratification followed: Clinton (94.7%); Bush II (95.9%); Obama (39.5%); Trump (60%); Biden (33%). *See, e.g.*, Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 632 (2020) (comparing the number of treaties submitted for consent between presidential administrations); Jeffrey S. Peake, *The Decline of Treaties? Obama, Trump, and the Politics of International Agreements* 40-41 tbls. 1-2 (Apr. 6, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3153840; *Treaties*, U.S. SENATE FOREIGN RELS. COMM., https://www.foreign.senate.gov/activities-and-reports/treaties [https://perma.cc/E9E6-D54V] (last visited Mar. 16, 2025).

25 *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 10 (2021) ("[F]ew nonoriginalists contend that original meaning—where it can be ascertained—should be entirely irrelevant to constitutional interpretation."); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) ("[W]e can all care about framers' intentions, ratifiers' understandings, and original public meaning without being originalists."); Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381, 1388 (2024) (discussing the current Court's embrace of originalism).

26 For significant—and controversial—examples of originalism at the Court, see, e.g., District of Columbia v. Heller, 554 U.S. 570, 576 (2008); Moore v. United States, 144 S. Ct. 1680, 1687 (2024). For cases that mix originalism with other historical analyses, see United States v. Rahimi, 144 S. Ct. 1889, 1897-98 (2024) ("A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances.") (internal quotation marks omitted); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (requiring a Founding-era historical analogue for modern gun regulations to be constitutional). The most recently appointed U.S. justices have affirmed the value of originalist methods; Justice Ketanji Brown Jackson, for example, indicated the importance of original meaning to her judicial philosophy in her confirmation hearing. *See* Randy E. Barnett, Opinion, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL ST. J. (Mar. 24, 2022, 6:38 PM), https://www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063 [https://perma.cc/KX58-VZSN]; Schuman, *supra* note 25, at 1387-88 (explaining that both Justices Barrett and Jackson have "emphasiz[ed] the importance of the Constitution's original meaning in their judicial philosophies").

living for decades thinking that the original constitutional meaning of the word treaties was an insoluble mystery. It is not.

The meanings I introduce in this Article for treaties and compacts mark a new starting point for foreign relations law analysis; a baseline to which some may demand fidelity, while others will marshal structural, doctrinal, or prudential criteria to vary their implications (or deny their salience entirely). In other words, *all* forms of constitutional interpretation require attention to something foreign relations law has yet to acknowledge—the meaning of "treaties" at the Founding.

Part I begins by exploring the meaning of treaties in the late eighteenth and early nineteenth centuries, both colloquially and as a term of art under the law of nations. It catalogs the law of nations' three criteria for treaties, namely specific parties (sovereigns), contents (perpetual or executory commitments), and basis of obligation (natural law), while unpacking three alternative categories of commitment: conventions, subsidiary powers' agreements, and sponsions. With this pedigree in hand, Part II examines the case for transposing the law of nations' concepts into the Constitution as an original matter. It reviews evidence for—and against—this move in the Articles of Confederation, the Constitution, the Framers' reliance on the law of nations, the Founding materials, and early U.S. practice. This Article concludes with a call for foreign relations scholars—and the Court—to recognize and accommodate treaties' original meaning as a baseline for future analysis. Whatever governmental actors or scholars do with these meanings, they provide a long-lost perspective for assessing modern U.S. efforts to cooperate and engage in a complicated and globalized world.

I. TREATIES' MEANING AT THE FRAMING

Today, international lawyers understand "treaties" to encompass *all* agreements governed by international law without regard to forms or formalities.[27] In contrast, in the United States, form dominates the current

27 *See, e.g.*, ORGANIZATION OF AMERICAN STATES, GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON BINDING AND NON-BINDING AGREEMENTS Guideline 1.2 (2020) [hereinafter *IAJC Guidelines*] (defining "Treaty" as "[a] binding international agreement concluded between States, State institutions, or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation, registration, or the domestic legal procedures States employ to consent to be bound by it"); *see also* Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] ("'[T]reaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."); JEREMY HILL, AUST'S MODERN TREATY LAW & PRACTICE 17-18 (4th ed., 2023) (defining "treaty" broadly); Duncan B. Hollis, *Defining Treaties*, *in* THE OXFORD GUIDE TO TREATIES 32, 35-37 (Duncan B. Hollis ed., 2nd ed. 2020) (advancing a functional definition of treaties).

definition. Here, the "treaty" label only applies to U.S. international agreements made in accordance with Article II.[28] *Any* agreements that the President ratifies following Senate advice and consent are regarded as "treaties" in a constitutional sense.[29]

The U.S. can make other treaties in the international law sense, but historical practice has devised different labels—and practices—for doing so: (1) "congressional-executive" agreements where a federal statute comporting with Congress' Article I powers provides *ex ante* or *ex post* authority; (2) "sole executive agreements" made pursuant to those powers possessed exclusively by the Executive (e.g., as Commander in Chief); and (3) "treaty-based executive agreements" that receive their authority from an existing Article II Treaty.[30] There is, however, almost no definitional criteria for differentiating among these types, save the domestic procedures employed, even as executive agreements have come to almost entirely displace the Article II Treaty form.[31]

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28 U.S. CONST. art. II, § 2, cl. 2.

29 As the Court explained in *Weinberger v. Rossi*,

> The word "treaty" has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force . . . . Under [Article II, § 2 cl. 2 of] the United States Constitution, of course, the word 'treaty' has a far more restrictive meaning.

456 U.S. 25, 29-30 (1982); *accord* RESTATEMENT (FOURTH) FOREIGN RELS. L. OF THE U.S. §301 cmt. a (AM. L. INST. 2018) ("Under U.S. law . . . the term 'treaties' is generally used to refer only to 'Article II treaties'—that is, international agreements entered into by the United States pursuant to the senatorial advice-and-consent process specified in Article II of the Constitution."); CONG. RSCH. SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 1 (Comm. Print 2001) [hereinafter SFRC STUDY] ("In the United States, the word treaty is reserved for an agreement that is made 'by and with the Advice and Consent of the Senate.'").

30 For the validity of congressional-executive agreements, see Weinberger v. Rossi, 456 U.S. 25, 31 (1982) (construing the word "treaty" in an 1891 jurisdictional statute to include "international agreements concluded by the President under congressional authorization," noting that "[i]f not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act.") (quoting B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912)). For judicial endorsement of sole-executive agreements, see Dames & Moore v. Regan, 453 U.S. 654, 679 (1981); United States v. Pink, 315 U.S. 203, 223 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937); SFRC STUDY, *supra* note 29, at 4-5; BRADLEY, *supra* note 6, at 84-90 (listing the sources of power for sole-executive agreements); Hathaway, *supra* note 20, at 1239 (noting that sole-executive agreements are "on the rise"); and HENKIN, *supra* note 7, at 219-24 (tracing historical developments regarding sole-executive agreements). The judiciary (and others) have given executive agreements authorized by Article II treaties much less attention. For a comprehensive review of the (lengthy) debates over the interchangeability of these categories, see Hathaway, *supra* note 20, Section I.A.

31 *See* Hathaway, Bradley & Goldsmith, *supra* note 24, at 719 ("Today, the United States makes binding international commitments almost entirely through the practice of executive agreements."). Congressional efforts in the 1970s to make Article II exclusive failed. *See, e.g.*, *Congressional Oversight*

While endorsing the validity of executive agreements, the courts have treated issues surrounding the scope and exclusivity of Article II as political questions.[32] Nor has Article I's ban on State treaty-making done anything to elaborate on what treaties mean, while a court-created exception for congressional consent to compacts has left U.S. states' international agreements almost entirely unsupervised.[33] As such, questions about how the Constitution defines treaties (and compacts) are largely dormant.

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of Executive Agreements—1975: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 94th Cong. 1-7 (1975) (statement of Sen. James Abourezk) ("The purpose of this inquiry is to examine closely the use of executive agreements, and to explore those remedial measures which might be employed to redress the usurpation of power by the executive branch which has occurred in this area of foreign policy."); *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92nd Cong. 1-9 (1972) (statement of Sen. Sam J. Ervin) ("The use of executive agreements as a substitute for treaties has spiraled in recent years . . . .").

32 *See, e.g.*, Made in the U.S.A. Found. v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001) (concluding that whether NAFTA is a "treaty" requiring Senate ratification is a "nonjusticiable political question"). In contrast, scholars have extensively debated these questions (albeit with little attention to treaties' original meaning). *See* Hathaway, *supra* note 20, at 1244-48 (tracing disagreement over the interchangeability of treatise and executive agreements). For those arguing that Article II is the mandatory process for at least some U.S. international agreements, see David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 27-32 (David Gray Adler & Larry N. George eds., 1996); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1272-76 (1995); RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 140-56 (1974); Edwin M. Borchard, *American Government and Politics: Treaties and Executive Agreements*, 40 AM. POL. SCI. REV. 729, 729 (1946); Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 627-629 (1945); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 677-80 (1944). For arguments favoring the ability of congressional-executive agreements to substitute for Article II treaties, see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 907-16 (1995); HENKIN, *supra* note 7, at 217; Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 185-88 (1945); EDWARD S. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 31-54 (1944); WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES 32 (1941).

33 *See, e.g.*, Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 472 U.S 159, 175-76 (1985) (holding that reciprocal state banking laws did not violate the Compact Clause where they did not constitute an agreement or compact encroaching upon federal sovereignty); Virginia v. Tennessee, 148 U.S. 503, 520 (1893) (holding that only inter-state agreements or compacts that increase states' political power in a way that could encroach on federal supremacy require Congressional approval under the Compact Clause); United States v. California, 444 F. Supp. 3d 1181, 1193, 1198 (E.D. Cal. 2020) (holding that a cap-and-trade agreement between California and Quebec—allowing businesses in either jurisdiction to use the other's emission allowances—did not violate the Compact Clause or the ban on state treaty making). Ryan Scoville's work has, however, recently sought to revive the requirement of Congressional consent vis-à-vis foreign compacts. *See* Scoville, *supra* note 10, at 363-69 (examining state commitments appearing to implicate the Compact Clause that did not receive congressional approval); *see also* Hollis, *supra* note 10, at 742 (questioning the constitutionality of a Kansas–Cuba pact to which Congress did not assent).

But there is no good reason to forgo examining these questions any longer. The digital age affords new avenues for accessing old records to interrogate original meanings. For starters, we can relatively easily plumb dictionaries to identify treaties' received public meaning in 1787, i.e., what the term meant to laypeople across Europe and the New World. That method does not, however, tell us much; the treaty concept had multiple—and nonspecific—public meanings. More progress comes by switching methods and asking what treaties meant to those who made them. Here, the law of nations comes to the fore as *the* reference point, revealing treaties and several alternatives to be well-developed terms of art to which sovereigns and their agents regularly referred in theory and practice.

A. *Treaties' Original Public Meaning*

In the eighteenth century, the term "treaty" had multiple—and quite different—meanings from its current international and U.S. iterations. Consider, first, the colloquial dictionary meanings of that time. I have looked at the ten general dictionaries that legal historians identify as the Founding's favored texts.[34] In those texts, a "treaty" referred *either* to a negotiation or an agreement among nations on public affairs. Noting its derivation from the French *traité*, Samuel Johnson's influential *Dictionary of the English Language* defined treaty, first, as "[n]egotiation; act of treating."[35] Such usage remained prominent throughout the eighteenth century; for example, references to a

34 *See* John Mikhail, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL. U. L. REV. 631, 656 (2019) (listing "Johnson, Bailey, Dyche & Pardon, Ash, and Entick" as "dictionaries that the founding generation actually possessed and used regularly"); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 382-90 (2014) (listing the Ash, Bailey, Barclay, Dyche & Pardon, Johnson, Perry, Sheridan, Walker, and Webster dictionaries); *see also* Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1523 n.227 (2022) (citing Mikhail's and Magg's lists of popular Founding-era dictionaries). For a chart collecting these dictionaries' definitions of treaty, see Appendix I.

35 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 3d ed. 1765). James Barclay also focused on the agreement aspect, defining the treaty as "a covenant between two or more nations; or the several articles and conditions stipulated and agreed upon between foreign powers." JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (London, John Rivington & Sons 1782); *see also* NATHAN BAILEY, ENGLISH DICTIONARY (Theodore Arnold trans., Leipzig 1736) ("Treaty, *traité, accord, convention* . . . ."). The French *traité* emerged in the Middle Ages as a derivation of the Latin *tractātus*, a noun referring to the act of handling, managing, or dealing with a problem, subject or treatment. *See* A. BRACHET, AN ETYMOLOGICAL DICTIONARY OF THE FRENCH LANGUAGE 359 (G.W. Kitchin trans., London, Macmillan & Co. 1873); *Tractātus*, OXFORD LATIN DICTIONARY 1955 (1968).

"treaty" frequently described the negotiations—rather than their outcome—with Native American tribes.[36]

Johnson's second definition bears a closer parallel to modern iterations—"[a] compact of accommodation relating to publick affairs."[37] Sheridan's dictionary (the 1789 version published in Philadelphia) combines the two: "[t]reaty, . . . negociation, act of treating; a compact of accommodation relating to publick affairs."[38] John Ash's dictionary does likewise with more variations: "treaty . . . [t]he act of treating, a negociation, a compact relating to public offices; an intreaty, a supplication."[39] Thomas Dyche and William Pardon focused their dictionary's definition on dispute settlement and authors: "the consultation or agreement made between publick nations, or private people, in relation to any matters in dispute between them."[40] Webster's dictionary—albeit not published until 1828—features a more detailed definition: "An agreement, league or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state."[41]

It is true that in this second sense, contemporary definitions suggest treaties were a particular type of compact, namely one that was public, among nations, and/or involving some accommodation. And in some sources, treaties appear synonymous with contracts, conventions, and agreements. But these dictionaries' limited detail raises as many questions as answers. If treaties are a form of compact, for example, what does it mean for the Constitution to prohibit a U.S. state from making treaties in Article I but not an "Agreement

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36 *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES 24-25 (1994) (explaining an early American meaning of treaty as "the 'act of negotiating,' the discussion aimed at adjustment of difference or the reaching of an agreement").

37 JOHNSON, *supra* note 35. Johnson offered a third meaning of treaty—"[f]or entreaty: supplication; petition; solicitation." *Id.* Walker's 1791 dictionary noted this last meaning had fallen into desuetude. JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE (London, G. G. J. & J. Robinson & T. Cadell 1791) (defining treaty as "[n]egotiation, act of treating; a compact of accommodation relating to publick affairs; for entreaty, supplication, petition. In this last sense not in use").

38 THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (John Andrews ed., Philadelphia, W. Young 3d ed. 1789); *cf.* JOHN ENTICK, THE NEW SPELLING DICTIONARY 391 (William Crakelt ed., London, Charles Dilly 1785) ("[t]reaty . . . a negotiation, contract, supplication"); WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (Worcester, Isaiah Thomas 1788) ("treaty, . . . negotiation, supplication").

39 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly & R. Baldwin 1775).

40 THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, Catherine &. Richard Ware 11th ed. 1760).

41 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 97 (New York, S. Converse 1828). Webster's dictionary also included an alternative definition of treaties as negotiations. *Id.*

or Compact"?[42] English common law understandings offer no further illumination. Jacob's widely used *New Law Dictionary* has no entry for treaty.[43] Nor did other prominent English legal dictionaries of the time.[44]

B. *Treaties as a Term of Art Under the Law of Nations*

Even as contemporary legal dictionaries add little to our understanding of the word,[45] as a matter of contemporary international practice, the treaty—or *traité*—was certainly among the most prominent titles employed in agreements. 1787 witnessed, for example, the conclusion of the Treaty of Commerce and Navigation between France and Russia,[46] the Treaty of Alliance between Great Britain and Hesse-Cassel,[47] and the Treaty of Commerce between Portugal and Russia.[48] Yet, nation-states also regularly concluded agreements with titles, like "convention" and "armistice." Looking to 1787 again, for example, we find the 1787 Convention between Great Britain and France and the Convention between Mecklenburg-Scherin and Prussia, while in 1788, the King of Sweden concluded two "Armistices" and a "Convention" with Prince Charles de Hesse.[49]

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42 U.S. CONST. art. I, § 10.

43 *See* GILES JACOB, A NEW LAW-DICTIONARY (London, E. & R. Nutt & R. Gosling 2d ed. 1733); Maggs, *supra* note 34, at 391 (describing Jacob's work as "very successful").

44 *See* Maggs, *supra* note 34, at 390-93 (listing Potts, Burn and Burn, and Cunningham as authors of prominent legal dictionaries from the Founding era); THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY 586 (London, T. Ostell 1803); 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 391-92 (London, A. Strahan & W. Woodfall 1792); 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (Dublin, Sar. Cotter, Hen. Saunders & Jam. Williams 1764); *see also* JAMES WHISHAW, A NEW LAW DICTIONARY 320 (London, J. & W. T. Clarke 1829).

45 *Accord* Ramsey, *Executive Agreements*, *supra* note 7, at 165 (noting Bailey's 1729 dictionary definition of treaty could be read as "'[all] agreements between nations [*including, for example, those*] concerning Peace, Commerce Navigation, etc.' But he also might have meant '[*certain kinds of*] agreements between nations [*such as those*] concerning Peace, Commerce, Navigation, etc.' Bailey's 'etc.' is fatally ambiguous . . . .").

46 *Traité de Navigation & de Commerce entre 1787 Sa Majesté le Roi de France & Sa Majesté l'Impératrice de toutes les Russies, conclu à St. Pétersbourg*, *in* GEORG F. MARTENS, 3 RECUEIL DES PRINCIPAUX TRAITES D'ALLIANCE, DE PAIX, DE TREVE, DE NEUTRALITE, DE COMMERCE, DE LIMITES, D'ECHANGE, ETC. 1 (Gottingen, Johann Christian Dieterich 1791) [hereinafter MARTENS' RECUEIL].

47 Treaty of Alliance between the King of Great Britain and the Landgrave of Hesse-Cassel, done at Cassel, Sept. 28, 1787, *in* 3 MARTENS' RECUEIL, *supra* note 46, at 95.

48 *Traité de Commerce entre S. Maj. la Reine de Portugal & S.M. l'Impératrice de Toutes les Russies, Signé à St. Pétersbourg*, Dec. 9, 1787, *in* 3 MARTENS' *RECUEIL, supra* note 46, at 105.

49 *See Convention Between His Britannic Majesty, and the Most Christian King, Signed at Versailles,* Aug. 31, 1787, *in* 3 MARTENS' *RECUEIL*, *supra* note 46, at 72 ("Convention"); *Convention entre le Roi de Prusse & le Duc de Meklenbourg-Schwerin, Pour la Restitution des 4 Baillages Situés dan le Meklenbourg*, *signée à Berlin le 13 Mars 1787*, *in* 3 MARTENS' *RECUEIL*, *supra* note 46, at 63 ("Convention"); *Armistice entre le Roi de Suéde & le Prince Charles de Hesse, Commandant en Chef des Troupes Auxiliares de*

What does this practice signify? Well, it seems obvious that people living in 1787—or at least those who concluded agreements between nations—had in mind different things when they used the term "treaties" or "*traité*" in lieu of "Convention" or "Armistice." Treaties had a particular, specialized, meaning: exactly as Story and the Court thought, it was a term of art.[50] The question is: what was that meaning?

To answer that question, I turn to the law of nations, the contents of which were widely understood to reside in a corpus of treatises by preeminent experts including Grotius, Pufendorf, Vattel, Blackstone, Burlamaqui, Wolff, Dumont, Martens, and Wheaton.[51] It turns out that these treatises evince a relatively consistent definition. It is, moreover, a definition consistent with the available evidence of international agreements concluded among nations.

Taken together, these materials suggest four common threads for defining treaties. Under the contemporaneous law of nations: (1) treaties were a species of a broader category of "compacts" (which some also referred to under the heading "conventions"); (2) only sovereigns could make treaties; (3) treaties implicated executory (viz. executed) commitments; and (4) treaties acquired binding force via the natural law on which the law of nations rested.[52]

1. Treaties as a Species, Not Genus, of International Agreements

In the late-eighteenth (and early-nineteenth) century, the treaty was a species of a broader genus captured under headings like compact, agreement, or convention.[53] As Emmerich de Vattel—author of the first standard textbook on the law of nations, *Le Droit des Gens*, first published in 1758—explained: "A treaty, in Latin *Foedus*, is a pact made with a view to the public

Danemarc; Concludous la Médiation de Mr. Elliot, Ministre Britannique, Signé le 9 Oct. 1788, *in* 3 MARTENS' RECUEIL, *supra* note 46, at 151 ("Armistice").

50 *Accord* Ramsey, *Executive Agreements, supra* note 7, at 164, 166.

51 Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547, 549 (1909) ("[W]riters from Grotius to Vattel so molded the law of nations that they may be said to have changed it from a body of rules, which ought to govern states, to a body of rules actually governing them.").

52 Ramsey similarly argues for reading the Constitution in light of the law of nations. But instead of using the law of nations categories I detail here, he infers differences between treaties and other agreements based on their "prospective effect" and, to a lesser extent, importance, while emphasizing that Executive Power rather than the law of nations functioned as authority for U.S. executive agreements. *See* Ramsey, *Executive Agreements, supra* note 7, at 194-216.

53 Although the terms "pact," "compact," and "convention" had multiple definitions that diverged from each other in key respects, they also shared a common denominator: the existence of an agreement or bargain. *See, e.g.*, JOHNSON, *supra* note 35 ("compact . . . [a] contract, an accord; an agreement . . ."; "convention . . . a contract; an agreement for a time, previous to a definitive treaty"; and "pact . . . [a] contract; a bargain; a covenant"); SHERIDAN, *supra* note 38 ("compact . . . [a] contract, an accord; an agreement"; "convention . . . coalition; [a]n assembly . . . [a] contract, an agreement for a time"; and "pact . . . [a] contract; a bargain; a covenant").

welfare by the superior power, either for perpetuity, or for a considerable time. The pacts with a view to transitory affairs are called agreements, conventions, and pactions."[54] This typology tracked that offered by Vattel's predecessor Christian Wolff.[55]

Likewise, Blackstone used "compacts" as an umbrella term that included—but was not limited to—treaties. He emphasized how the law of nations "depends entirely upon the rules of natural law, or upon *mutual compacts, treaties, leagues, and agreements* between these several communities: in the construction also of *which compacts* we have no other rule to resort to, but the law of nature."[56]

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54 M. DE VATTEL, THE LAW OF NATIONS, bk. 2, ch. XII §§ 152–53 (trans., Dublin, Luke White 1787) (1758) [hereinafter 1787 VATTEL]. I have used the 1787 English language version (which is a translation of Vattel's first 1758 edition) as my default reference because of its publication date and widespread U.S. distribution. *See infra* notes 181–186, and accompanying text. Vattel's original 1758 text read: "*Un Traité, en Latin Foedus, est un Pacte fait en vue du bien public par les Puissances supérieures, soit à perpétuité, soit pour un temps considerable. Les Pactes qui ont pour objet des affaires transitoires, s'appellent Accords, Conventions, Pactions*." M. DE VATTEL, LE DROIT DES GENS, bk. 2, ch. XII §§ 152–53 (London, 1758).

Early English translations of Vattel almost always translated "*Pacte*" as "pact" while those in the nineteenth and twentieth century used "compact." These later translations also generally translate the second, 1773, posthumous edition of *Droit des Gens*, although that edition retained the original French text quoted above. *Compare* M. DE VATTEL, THE LAW OF NATIONS 257 (New York, Samuel Campbell 1796) ("pact"); M. DE VATTEL, THE LAW OF NATIONS 178 (London, G.G. & J. Robinson, 1797) ("pact") [hereinafter ROBINSON'S VATTEL]; M. D. VATTEL, THE LAW OF NATIONS 257 (Northampton, Thomas M. Pomroy 1805) ("pact"); *with* MONSIEUR DE VATTEL, THE LAW OF NATIONS 192 (Joseph Chitty ed., London, S. Sweet, 1834) ("compact") [hereinafter CHITTY'S VATTEL]; 3 E. DE VATTEL, THE LAW OF NATIONS 160 (Charles G. Fenwick trans., Washington, Carnegie Inst. of Wash. 1916) ("compact"); and EMER. DE VATTEL, THE LAW OF NATIONS 219 (Béla Kapossy & Richard Whitmore eds., Liberty Fund, 2008) ("compact"). For more on Vattel's significant impact on the construction of international law, see Emmanuelle Jouannet, *Emer de Vattel*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1118, 1121 (Bardo Fassbender & Anne Peters eds., 2012); EMMANUELLE JOUANNET, EMER DE VATTEL ET L'ÉMERGENCE DOCTRINALE DU DROIT INTERNATIONAL CLASSIQUE 321 (1998).

55 CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Joseph H. Drake trans., 1934) (1764), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 191 (James Brown Scott ed., 1995) ("A treaty is defined as a stipulation entered into reciprocally by supreme powers for the public good, to last for ever or at least for a considerable time. But stipulations, which contain temporary promises or those not to be repeated, retain the name of compacts."). Vattel credited Wolff's work as a major source for his efforts. 1787 VATTEL, *supra* note 54, at xvi ("Those who have read [Wolff's] treatises of the Law of Nature, and the Law of Nations, will see what advantage I have made of them. Had I every-where pointed out what I have borrowed, my pages would have been crowded with citations . . . . It is better to acknowledge here, once for all, the obligations I am under to this great master.").

56 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *43 (Chicago, Callaghan & Cockcroft 1871) (1765) (emphasis added). To read the second mention of "compacts" as only referencing the first would suggest the law of nature only constructs "mutual compacts" and not treaties, leagues or agreements. But that law was universally recognized to give treaties their binding force, suggesting the broader reference is more accurate. *See infra* subsection I.B.4.

In lieu of "pacts" or "compacts," Barbeyrac's (famed) translation of Hugo Grotius' magisterial *De Juri Belli ac Pacis* employed the term "conventions" in both the original French (and subsequent English translations) as the general category: "Now these publick Conventions, which the Greeks call συνθήας, Conventions or Accommodations, we may divide into Leagues, Sponsions, or publick Engagements, and other Agreements."[57] While Barbeyrac translated Grotius's use of foedera into "Leagues," later translators emphasized its alternative meaning—treaties.[58] He did the same in his translation of Pufendorf, characterizing "Leagues" (aka treaties) again as a "species of publick Compact."[59] More importantly, Pufendorf himself organized his treatise to delimit treaties as but one type of international commitment; he devoted separate chapters to (a) "Treaties," (b) "Pacts Relating to War," and (c) "Pacts Which Restore Peace."[60]

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57 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, IN THREE BOOKS 337 (J. Barbeyrac trans., 1724, London, W. Innys & R. Manby, J. & P. Knapton, D. Brown, T. Osborn & E. Wicksteed 1738) (1646) [hereinafter BARBEYRAC'S GROTIUS]. Long known as the "father of the law of nations," Grotius tremendously influenced later political thinkers. *See* DAVID J. BEDERMAN, CLASSICAL CANONS 113 (2001); Knud Haakonssen, *Hugo Grotius and the History of Political Thought*, 13 POL. THEORY 239, 239 (1985). On the significance of Barbeyrac's translation (and occasional liberties with his source material), see Meri Päivärinne, *Enlightened Translations: Knowledge Mediation and Jean Barbeyrac*, *in* TRANSLATION & THE (TRANS)FORMATION OF IDENTITIES 6, 9 (Dries de Crom ed., 2009) (quoting a claim that, in 1867, "the French audience had not read any of Grotius' ideas but only Barbeyrac's interpretation of them"); Peter Haggenmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 149 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990) ("Barbeyrac, though not a very faithful translator of Grotius since he deliberately valued elegance above accuracy, was most scrupulous as an editor . . . .").

58 *Compare* HUGONIS GROTII, DE JURE BELLI AC PACIS 413 (Joann Frid. Gronovii ed., Amsterdam, Ex Officina Wetsteniana 1712) (1646) ("*Publicas has conventiones, quas Graeci συνθήας vocant, dividere possumus in* federa*, sponsiones, padiones alias*.") (emphasis added), *with* HUGO GROTIUS, THE LAW OF WAR AND PEACE 391 (Francis W. Kelsey trans., 1925) (1646) ("We can divide these public conventions, which the Greeks call *συνθήας* (articles of agreement), into *treaties*, sponsions, and other agreements.") (emphasis added). Ramsey suggests the terminology traces to Roman-era terms like (i) *foedus*, formal undertakings of the Roman polity, (ii) *sponsio* undertaken by Roman officers within the officer's authorities, subject to ratification—or rejection—by the sovereign, and (iii) *alias pactiones*, a catch-all category. Ramsey, *Executive Agreements, supra* note 7, at 166.

59 *Compare* SAMUELIS PUFENDORFII, DE JURE NATURAE ET GENTIUM 904 (J.B. Scott ed., 1934) (1688) ("*Vldendum deinceps est de illa pactorum publicorum specie, quae peculiariter* foederum *nomine veniut*.") (emphasis added), *with* SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS, bk. VIII, ch. IX (Barbeyrac trans., Amsterdam 1712, Basil Kennet eng. trans., London, 1717) [hereinafter BARBEYRAC'S PUFENDORF] ("I shall in the next place consider that species of Public Compacts, which are usually called Leagues."); 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 1329 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., 1934) (1688) [hereinafter SCOTT'S PUFENDORF] ("We must now turn to the consideration of that species of public pacts which passes under the special name of treaty.").

60 *See* SCOTT'S PUFENDORF, *supra* note 59, bk. VIII, chs. VII ("On Pacts Relating to War"); VIII ("On Pacts Which Restore Peace"); IX ("On Treaties"). Barbeyrac's *Pufendorf* is similar with the exception of using the aforementioned "Leagues" in lieu of "Treaties." BARBEYRAC'S

Burlamaqui followed Pufendorf's approach, identifying a broad category of "conventions in general" with separate chapters on (i) "compacts made with an enemy," (ii) "compacts made during the war, by subordinate powers, as generals of armies, or other commanders," and (iii) "public treaties."[61] Whether the general category was framed as compacts or conventions, however, it was clear that treaties was a sub-category, not a synonym for all international agreements.

Alongside these scholarly works, the eighteenth century saw the first of many efforts to collect (European-related) international agreements.[62] These projects all emphasized their collection of treaties. But they regularly acknowledged—and included—other forms of international agreement. The (very lengthy) title of Jean Dumont's magisterial collection published between 1726–1731 thus referenced its inclusion of various treaty types (e.g., treaties on alliances, peace, neutrality, commerce) *and* "all conventions, transactions, pacts, concordats, and other contracts."[63] His successor, Rousset, followed a similar course.[64] Georg Friedrich von Martens's (successful) effort

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PUFENDORF, *supra* note 59, bk. VIII, chs. VII–IX ("Of Compacts that relate to War"; "Of Compacts that restore Peace"; "Of Leagues").

61 *See* 1 J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, chs. IX-XI (Nugent trans., Boston, Joseph Bumstead 4th ed. 1792) (1763); *id.* at 390 (extending principles for "the validity of conventions in general . . . to public treaties"); *id.* at 395 (identifying the "causes which put an end to public treaties" by attending to "the rule of conventions in general"). Bynkershoek did not reference treaties (*foedera*) at all in his work, addressing the generic *pactiones* instead. *See* CORNELIUS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO 251-59 (1737), *reprinted in* THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1930); Ramsey, *Executive Agreements, supra* note 7, at 169 n.155.

62 Having replaced Latin as the dominant language, French-language sources like those cited here were central to eighteenth-century diplomacy and are thus crucial to understanding the contemporary law of nations, whether or not they have any import for constitutional meaning.

63 J. DUMONT, CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS; CONTENANT UN RECUEIL DES TRAITEZ D'ALLIANCE, DE PAIX, DE TREVE, DE NEUTRALITE, DE COMMERCE, D'ÉCHANGE, DE PROTECTION ET DE GUARANTIE, DE TOUTES LES CONVENTIONS, TRANSACTIONS, PACTES, CONCORDATS, ET AUTRES CONTRACTS . . . (Amsterdam, 1731) (author's translation (emphasis added): "[u]niversal diplomatic corpus of the law of nations; containing a collection of treaties of alliance, peace, truce, neutrality, commerce, exchange of protection and guarantee, of *all conventions, transactions, pacts,* concordats, and other contracts . . ."). Martens described Dumont's as the largest and best-known collection of its kind. 1 SUPPLEMENT AU MARTENS' *RECUEIL*, *supra* note 46, at lxiii-iv ("*Le nombre des recueils de traités publics s'est tellement accru, qu'il y a peut-être peu de bibliotheques qui peuvent se vanter de les reunir tous . . . même à côté de la collection la plus vaste et la plus connue de ce genre*, le Corps universel diplomatique *de Mr. DU MONT*"); *accord* Clive Parry, *Consolidated Treaty Series (1648–1918),* 18 INT'L & COMPAR. L. Q., 1003, 1004 (1969) (explaining that Dumont's work was "readily available at the turn of the eighteenth century").

64 *See generally* JEAN ROUSSET, SUPPLEMENT AU CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS: CONTENANT UN RECUEIL DES TRAITEZ D'ALLIANCE, DE PAIX, DE TREVE, DE NEUTRALITE, DE COMMERCE, D'ÉCHANGE, DE PROTECTION & DE GARANTIE, DE TOUTES LES CONVENTIONS, TRANSACTIONS, PACTES, CONCORDATS, & AUTRES CONTRACTS, CAPITULATIONS IMPERIALES . . . QUI ONT ECHAPE AUX PREMIERES RECHERCHES DE MR. DU MONT / CONTINUE JUSQU'A PRESENT PAR MR. ROUSSET (1739) [author's translation:

to continue the tradition tracked Dumont's title, but used "etc." after listing various treaty types.[65] Martens emphasized, however, that his work's scope went beyond "formal treaties."[66]

Such distinctions accord with Martens's own 1795 treatise on the law of nations. There, he highlighted the "very important difference between *transitory covenants* and *treaties*."[67] Wheaton, whose impact on international law in the nineteenth century was equivalent to Vattel's on the eighteenth,[68] employed the same distinction: "General compacts between nations may be divided into what are called *transitory conventions*, and *treaties properly so termed*."[69] Both Martens and Wheaton, however, also used treaties as the generic term, a pattern reflecting the term's expanding scope.[70] By the 1830s, the term treaties was increasingly employed as *the* concept for all international agreements, replacing compacts/conventions' claim to that status.[71] Before

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"Supplement to the universal diplomatic corpus of the law of nations: containing a collection of treaties of alliance, peace, truce, neutrality, commerce, exchange, protection & guarantee, all *conventions, transactions, pacts, concordats, & other contracts* and imperial capitulations . . . which escaped Mr. Du Mont's initial research / continued until now by Mr. Rousset" (emphasis added)].

65 *See* 1 SUPPLEMENT AU MARTENS' *RECUEIL*, *supra* note 46 ("*Recueil des principaux traites d'Alliance, de Paix, de Tréve, de Neutralitée, de commerce, de limites, d'échange, etc.*") (emphasis added); Parry, *supra* note 63, at 1004 (describing Martens's work as an "eminently worthy unofficial forerunner" to his own series).

66 1 SUPPLEMENT AU MARTENS' *RECUEIL*, *supra* note 46, at lxiii-iv ("*Tandisque d'après le vaste plan de cette collection on ne s'est pas borné aux traités formels, mais qu'on a voulu donner un corps de droit des gens, ainsi que le titre l'annonce . . .*" [author's translation: "While according to the vast plan of this collection we did not limit ourselves to the treaties formal, but that we wanted to give a body of rights of people, as the title announces . . . ."]).

67 GEORG FRIEDRICH MARTENS, SUMMARY OF THE LAW OF NATIONS 55 (William Cobbett trans., Philadelphia, Thomas Bradford 1795).

68 *See* Lydia H. Liu, *Henry Wheaton (1785–1848)*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 54, at 1132 ("Wheaton's impact on the 19th century is often said to be comparable to that of Emer de Vattel in the 18th century or that of Hugo Grotius in the 17th century.").

69 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 189 (Philadelphia, Carey, Lea & Blanchard 1836) (emphasis added following "treaties").

70 I do not mean to suggest that treaties were never invoked in a broader sense prior to 1830. Even some continental treatises did so. *See, e.g.*, 1787 VATTEL, *supra* note 54, at 318-19 (§ 192) ("The treaties that have no relation to repeated oaths, but to transitory acts, and that are suddenly concluded; *these treaties, if it is not proper to call them by another name (see § 153); these conventions, these pacts*, which are accomplished once for all, and not by successive acts, are no sooner executed, then they are completed and perfected." (emphasis added)); HUGUES GROTIUS, LE DROIT DE LA GUERRE ET DE LA PAIX 473 (Jean Barbeyrac trans., Amsterdam, Pierre de Coup 1724) (1646). This might suggest a different—more messy and less impactful—typology than the one I ascribe to the law of nations here. But, while I think it important to acknowledge that reading, I find the frequency and similarities in the law of nations' treatments counsel in favor of treating treaties as a term of art alongside other forms of international agreement.

71 Hence, where Wheaton emphasizes prior understandings of treaties, he uses the term "treaties, properly so called" while otherwise using "treaties" as a general term. *See* WHEATON, *supra* note 69, at 189, 191.

this shift, however, treaties were recognized as one among several types of international agreement, not the all-encompassing umbrella category it is today.

If treaties were one of several types of compacts/conventions, how were the categories differentiated? Two features stand out: (i) the agreements' authors and (ii) the executory (viz. executed) character of the commitments assumed.[72] First, the law of nations recognized treaties as the exclusive province of sovereigns qua sovereigns. Compacts, by contrast, could be concluded by sovereigns, but also by their generals, ministers, and other "minor authorities" operating within the scope of their commissions even if they had no specific instructions. As a result, many war-time capitulations, cartels, agreements, and truces qualified as compacts rather than treaties. A third category—"sponsions"—was employed when agents acted outside of their commissions and without instruction.

Second, treaties and conventions could be differentiated by the kinds of commitments assumed. Conventions involved "transitory" commitments, whether in temporal terms (of short/provisional duration) or the dispositive character of the commitment assumed (commitments could be "executed" with specific acts of full performance). Treaties operated on longer timelines (if not in perpetuity) with non-dispositive commitments (performance expectations were ongoing or "executory"). The next subsections address these distinctions in turn.

2. The Treaties' Authors

During the Middle Ages, the term treaties often referenced agreements made among princes and monarchs that bound them in their personal capacities.[73] Beginning in the sixteenth century, as Grotius, Pufendorf, and Burlamaqui later recounted, alongside these "personal" treaties, the practice

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72 An additional qualifier—that I do not explore in detail here—would be the suggestion that treaties must address "public affairs," a view that several framers, but chiefly Madison, adopted in suggesting that the Article II treaty power could only apply to matters of international concern. *See, e.g.*, THE FEDERALIST NO. 42, at 213-14 (James Madison) (Ian Shapiro ed., 2009).

73 Randall Lesaffer, *Peace Treaties and the Formation of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 54, at 81. Monarchs could also contract with private individuals, including their own subjects, but these were not treaties. WOLFF, *supra* note 55, at 193 (§ 373: "if the sovereign power agrees with some private foreign person, this stipulation is not a treaty."); *id.* (notes accompanying § 373: "It is required for a treaty, of course, both that the parties should be sovereign powers, and that the subject-matter concerning which the stipulation is made, should affect the public good."). Thus, although sovereign contracts and treaties raised similar issues, I have not focused on the former here. *See id.* at 246-47 ("Of a stipulation by the ruler of a state with private individuals for the sake of the state."); SCOTT'S PUFENDORF, *supra* note 59, at 1345-47 ("Yet that power to obligate a state is not unrestricted, but extends only so far as the king may have some good reason for contracting the debt.").

shifted so monarchs could also make "real" treaties binding the entire nation-state.[74] Distinguishing the two categories under the law of nations became a point of extensive discourse, complicated by how the Monarch's name could be deployed to conclude either one.[75] Democracies, however, did not produce such questions; concluded by a "free [p]eople," their treaties always garnered the "[r]eal" label.[76]

a. *Only Sovereigns Consent to Treaties*

Whether personal or real, the law of nations ascribed treaty-making exclusively to sovereigns. Per Vattel, "[p]ublic treaties can only be executed by superior powers, by sovereigns who contract in the name of the State."[77] Of course, who (or what) constituted the sovereign would vary by government type. Hence, Wolff emphasized that "[s]ince a treaty is made by the sovereign powers, consequently by those who have supreme sovereignty . . . [i]n a democratic state treaties can be made only by the people, in a monarchy by the monarch, in an aristocracy by the aristocrats . . . ."[78]

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74 Lesaffer, *supra* note 73, at 81-83; SCOTT'S PUFENDORF *supra* note 59, at 1336-37 (real treaties "are entered into not so much with relation to the king himself, or the heads of the state, as to the kingdom itself and . . . persist when the heads of the state . . . have passed away"); BARBEYRAC'S GROTIUS, *supra* note 57, at 360; BURLAMAQUI, *supra* note 61, at 393; MARTENS, *supra* note 67, at 54 (§ 5).

75 *See* SCOTT'S PUFENDORF, *supra* note 59, at 1337 ("[A] person is inserted in a pact, not in order to make the pact personal, but in order to have a record of the agency by which the pact was made."); *see also* 1787 VATTEL, *supra* note 54, at 314-17 (§§ 183–190).

76 *See, e.g.*, BARBEYRAC'S GROTIUS, *supra* note 57, at 360 ("When we act with a free People, no doubt of it the Contract made with them is in its own Nature Real . . . ."); SCOTT'S PUFENDORF, *supra* note 59, at 1336 ("[A]ll treaties made with any free people are by their nature real, and continue up to the time expressed in that treaty, even though the magistrates who were the instruments in drawing it up may be dead or out of office."); 1787 VATTEL, *supra* note 54, at 314 (§ 185) ("Every alliance made by a republic is in its own nature real . . . ."); MARTENS, *supra* note 67, at 54 (§ 5) ("Consequently all treaties between republics must be real.").

77 1787 VATTEL, *supra* note 54, at 296 (§ 154); BURLAMAQUI, *supra* note 61, at 389-90 ("By public treaties, we mean such agreements as can be made only by public authority, or those which sovereigns, considered as such, make with each other . . . ."); SCOTT'S PUFENDORF, *supra* note 59, at 1336 ("[T]reaties are entered into by those who enjoy the supreme sovereignty . . . ."); *accord* WOLFF, *supra* note 55, at 191 ("[A] treaty is made by the sovereign powers, consequently by those who have supreme sovereignty . . . ."); BARBEYRAC'S GROTIUS, *supra* note 57, at 337 ("Leagues are such as are made by the Command of the Sovereign Power . . . ."); WHEATON, *supra* note 69, at 185 ("The power of negotiating and contracting public treaties between nation and nation exists in full vigour in every sovereign state . . . .").

78 WOLFF, *supra* note 55, at 191-92 (§ 370). Treaties with non-Christian nations were also possible (although not without controversy). *See, e.g.*, *id.* at 224-25 (§ 429) ("It is allowable to enter into a treaty with a nation devoted to any other religion."); BARBEYRAC'S GROTIUS, *supra* note 57, at 342, 346 ("Nor must we conclude, that it is unlawful to make Treaties and Alliances with Pagans and Infidels . . . ."); 1787 VATTEL, *supra* note 54, at 300 (§ 162) ("The law of nature alone regulates the treaties of nations: the difference of religion is a thing absolutely foreign to them.").

At the same time, the law of nations accommodated the delegation of the sovereign power to make treaties via fundamental laws or other means.[79] Thus, a sovereign could obviously treat with other sovereigns directly (e.g., monarch-to-monarch),[80] but the law of nations recognized sovereigns might delegate their treaty powers either to (a) other entities over which they exercised sovereignty, or (b) proxies (i.e., plenipotentiaries) authorized to conclude treaties on their behalf.[81]

Drawing on examples like Germany's free cities and Swiss cantons, Vattel noted that sovereigns might concede to princes or communities a right to make treaties by "concession of the sovereign, or by the fundamental laws of the State, by reservation or by custom."[82] As for proxies: "None but the sovereign can make alliances and treaties, either by himself, or by his ministers. Treaties concluded by ministers, oblige the sovereign and the state, only when the ministers have been duly authorized to make them, and have done nothing contrary to their orders and instructions."[83] Where plenipotentiaries reached agreement consistent with their instructions, the law of nations viewed the ensuing "treaty" as binding the sovereign, even as the emergence of ratification practices raised issues about a government's obligation to ratify compacts concluded within instructions and the legal consequences for failing to do so.[84]

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79 1787 VATTEL, *supra* note 54, at 296 (§ 154).

80 *See, e.g.*, *id.* ("The sovereign who possesses the full and absolute authority has, doubtless, a right to treat in the name of the State he represents, his engagements are binding with respect to the whole nation.").

81 WOLFF, *supra* note 55, at 192 (§ 372) ("[H]e has a mandate to make a treaty to whom the sovereign power has entrusted it to be done in his name, they can make treaties who have a mandate from the sovereign power."); 1787 VATTEL, *supra* note 54, at 297-98 (§ 156) ("Sovereigns treat with each other by their proxies who are invested with sufficient power . . . . [T]he rights of the proxy are expressed in the instructions that are given him . . . .").

82 1787 VATTEL, *supra* note 54, at 297 (§ 154); *accord* WHEATON, *supra* note 69, at 185 ("Semi-sovereign or dependent states have, in general, only a limited faculty of contracting in this manner; and even sovereign and independent states may restrain or modify this faculty by treaties of alliance or confederation with others. Thus the several states of the North American Union are expressly prohibited from entering into any treaty with foreign powers, or with each other, without the consent of the congress; whilst the sovereign members of the Germanic Confederation retain the power of concluding treaties of alliance and commerce [consistent with fundamental laws of the confederation].").

83 *See* BURLAMAQUI, *supra* note 61, at 395-96 ("*[F]oedus*, a *public compact*, or *solemn agreement*, signified a treaty made by order of the sovereign power, or that had been afterwards ratified . . . .").

84 *See* 1787 VATTEL, *supra* note 54, at 297-98 (§ 156) ("[E]very thing [the proxy] promises within the terms of his commission, and the extent of his powers, bind his constituent. At present, . . . princes reserve to themselves the ratification of what has been concluded upon in their name by their ministers . . . . Every thing that their ministers have concluded remaining without force, till the prince's ratification, there is less danger in giving him a full power. But to refuse with honour to ratify what has been concluded on by virtue of a full power, it is necessary that the sovereign should have strong and solid reasons, and that he should shew in particular that his minister has deviated

b. *Compacts/Conventions by Subordinate Authorities*

Even as nation-state sovereigns held the "superior power," the law of nations recognized the existence of "subsidiary powers."[85] According to Vattel, "inferior or subordinate powers" included those "public persons, who exercise some part of the government, in the name and under the authority of the sovereign: such are magistrates established for the administration of justice, generals of armies, and ministers of state."[86] Where subordinate powers concluded an agreement on sovereign instructions (or the sovereign ratified an agreement made without instructions), a treaty resulted.[87] For example, the aforementioned 1787 Treaty of Alliance between Great Britain and Hesse-Cassel granted full powers for the negotiation of that treaty to Sir William Fawcett for Great Britain and Barons Schliessen and Malsbourg for Hesse-Cassel, with the resulting text subject to sovereign ratification.[88]

But, alongside their power to make treaties at the sovereign's behest, subordinate powers also possessed authority to conclude compacts on their own.[89] Wolff emphasized the difference between such "stipulations":

> Stipulations are made either by the sovereign powers or by subordinate powers, either on the mandate of the sovereign powers, or within the limits of their authority, in so far forsooth as the nature of the business over which they have been placed allows it. *For nations and their rulers can enter into stipulations which are distinguishable from treaties.* This can be done by their orders, as when the envoy of one, in the name of the one sending him, enters

from his instructions."); *see also* BLACKSTONE, *supra* note 56, at *252 ("Thus the King may make a treaty with a foreign state which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.").

85 *See* 1787 VATTEL, *supra* note 54, at 332 (§§ 206–07) ("[T]here are public conventions made by inferior powers . . . .").

86 *Id.* at 332; *see also* WOLFF, *supra* note 55, at 191 (differentiating sovereign and minor authorities, where "sovereign authorities are rulers of a state, who have supreme sovereignty . . . Those persons are called minor authorities who exercise a certain part of the sovereignty, dependent upon a sovereign authority and acting in its name, as magistrates, and leaders in war . . . .").

87 1787 VATTEL, *supra* note 54, at 332 (§ 207); see also BURLAMAQUI, *supra* note 61, at 395-96 ("None but the sovereign can make alliances and treaties, either by himself, or by his ministers. Treaties concluded by ministers, oblige the sovereign and the state, only when the ministers have been duly authorized to make them, and have done nothing contrary to their orders and instructions . . . . or that had been afterwards ratified . . . ."); BARBEYRAC'S GROTIUS, *supra* note 57, at 727 (explaining when contracted engagements, even without direct participation of the sovereign, can be binding).

88 3 MARTENS' RECUEIL, *supra* note 46, at 95-96, 102 (Preface & art. XV).

89 *See, e.g.*, WHEATON, *supra* note 69, at 185-86; BURLAMAQUI, *supra* note 61, at 409-10; WOLFF, *supra* note 55, at 240-41 (§ 464); 1787 VATTEL, *supra* note 54, at 332 (§ 207); SCOTT'S PUFENDORF, *supra* note 59, bk. VIII, chs. VII-VIII; BARBEYRAC'S GROTIUS, *supra* note 57, at 726-27.

> into a stipulation with the ministers of the one to whom he is sent. And then the stipulation is said to have been made by the sovereign powers. *But minor powers, such as magistrates and leaders in war, are also able to make stipulations in regard to public matters, by right of the one by whom they have been placed over some public business* . . . . it follows that they can make [stipulations], especially in the case when the consent of the sovereign cannot be asked for, as when a leader in war agrees with an enemy concerning the surrender of a besieged city.[90]

In other words, rather than relying only on sovereign instructions—or later ratification—as in the case of treaty-making, the power granted to the office dictated the scope of its compact-making. As Vattel explained:

> But public persons, in virtue of their office, or the commission given them, have also *themselves* the power of making conventions on public affairs, exercising in this, the right and authority of the superior power that has established them. This power they receive two ways; it is either ascribed to them in express terms by the sovereign, or it flows naturally from their commission itself; the nature of the affairs with which these persons are entrusted requiring that they should have the power of making such conventions, especially in cases where they cannot stay for the orders of the sovereign.[91]

For Grotius, however, this power was "not so much by Virtue of [sovereign] Authority, as from the Custom of each Nation."[92] Either way, the law of nations recognized that generals could conclude compacts on the conduct of a war and governors could conclude conventions with respect to their territories including terms of capitulation/surrender.[93] Necessity

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90 WOLFF, *supra* note 55, at 240-41 (§ 464) (emphasis added).

91 1787 VATTEL, *supra* note 54, at 332 (§ 207) (emphasis added); *accord* WHEATON, *supra* note 69, at 185 ("There are certain compacts between nations which are concluded, not in virtue of any special authority, but in the exercise of a general implied power confided to certain public agents as incidental to their official stations."); BARBEYRAC'S GROTIUS, *supra* note 57, at 352, 726-27 (noting that "[i]nferior [c]ommanders" can form agreements concerning their own private affairs and may bind the sovereign by acting through their office or by special order); BURLAMAQUI, *supra* note 61, at 408.

92 BARBEYRAC'S GROTIUS, *supra* note 57, at 729.

93 *Id.* at 727; 1787 VATTEL, *supra* note 54, at 332 (§ 207) ("Thus the governor of a place, and the general who lays siege to it, have the power of agreeing about the capitulation: and everything they thus conclude within the terms of their commission, is obligatory to the state or the sovereign who has committed to them the power."); WHEATON, *supra* note 69, at 185-86 (listing categories of non-treaty "conventions" to include "the official acts of generals and admirals, suspending or limiting the exercises of hostilities . . . special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms or capitulations for the surrender of a fortress, city, or province").

allowed for even lower-level officials to conclude truces and others "things within the extent of their commission."[94]

For example, in 1784, in what is now Angola, a commander of French forces, Bernard de Marigny, concluded an agreement on the capitulation of Fort Cabinda with Portugal's Lieutenant Colonel Condito Cordario.[95] More controversially, the generals commanding British and French armies in Portugal concluded a "Convention" for the evacuation of French forces from Cintra in 1808—an event that stirred domestic controversy once word of it reached England, though the British generals would later be cleared of wrongdoing via official inquiry.[96]

As the Cintra affair suggests, a subordinate power's capacity to make compacts was not unlimited. Even as the law of nations accommodated generals' capacities to form compacts or conventions relative to their troops, the ongoing war, or temporary truces, it denied them power to conclude peace or enter long-standing truces.[97] Nor could they dispose of lands or territories on their own.[98]

Where, however, a compact fell within the power of the office of its maker, the law of nations generally recognized that it bound the sovereign (and thus the nation-state) *even if* the sovereign was not a party akin to its status vis-à-vis treaties.[99] Per Burlamaqui, "[t]he sovereign may also be obliged to execute

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94 BURLAMAQUI, *supra* note 61, at 409-10. Burlamaqui concluded that inferior commander compacts bound their commander-in-chief. *See id*. ("[N]o other officer, whether equal or superior, can break the agreement, without indirectly wounding the authority of the sovereign."). Grotius likewise acknowledged that inferior commanders could produce compacts, but questioned if they bound superiors, even as Barbeyrac's notes suggest his own view that they did. BARBEYRAC'S GROTIUS, *supra* note 57, at 726-27, 729 n.2.

95 *Capitulation du fort de Cabinde sur la côte d'Angole* (July 11, 1784), *in* 4 MARTENS' *RECUEIL*, *supra* note 46, at 97.

96 For the full agreement made between the British and French generals, see *George Murray Kellerman*, *Definitive Convention for the Evacuation of Portugal by the French Army* (Aug. 30, 1808), *in* 4 GEN. REPOSITORY HISTORY, POL. & SCI. (1806–1810) 37 (Philadelphia, C. & A. Conrad & Co. 1809). Wordsworth memorialized the event in sonnet and prose. William Wordsworth, *Concerning the Convention of Cintra 1809, in* 1 PROSE WORKS OF WILLIAM WORDSWORTH 37 (London, Edward Moxon, Son, & Co. 1876).

97 *See* 1787 VATTEL, *supra* note 54, at 333-35 (§§ 208–11)("A general of the army might very well, in virtue of his commission, make use of the power of forming particular conventions in the cases that presented themselves, of pacts relative to himself, to his troops, or to the occurrences of the war; but not that of concluding a peace . . . . [H]e could not bind the state beyond the terms of his commission."); BURLAMAQUI, *supra* note 61, at 409 (denying that "generals [may] grant truces for a considerable space of time"); *accord* BARBEYRAC'S GROTIUS, *supra* note 57, at 728 ("It is not in the Power of Generals to make a Peace.").

98 *See* BURLAMAQUI, *supra* note 61, at 410 (pt. VI); BARBEYRAC'S GROTIUS, *supra* note 57, at 729 ("It is not in the Power of Generals to release Persons or dispose of Sovereignties, or Lands gained in a War . . . .").

99 *Accord* Ramsey, *Executive Agreements, supra* note 7, at 190 (noting that Vattel, Wolff, and Grotius did not distinguish between "treaties" and "other agreements" based on "their binding effect"; rather, "*all* of the international agreements they discussed were of a binding nature").

the engagements contracted by his ministers without his orders . . . unless the laws and customs of the country have regulated it otherwise, and these be sufficiently known to the persons with whom the agreement is made."[100] The functions these agreements served thus made them important—if not co-equal to treaties—under the eighteenth and early-nineteenth century law of nations. As noted, Pufendorf and Burlamaqui devoted *more* chapters to these compacts than to treaties themselves.[101] Meanwhile, other prominent treatises from Grotius to Wheaton provided contemporary support for non-treaty categories and their implications as well.[102]

c. *Sponsions Differed from Both Treaties and Compacts*

Government ministers and agents could thus conclude treaties pursuant to the instructions of the sovereign *or* compacts consistent with the powers of their office. In some cases, however, officials concluded agreements without either authority or in ways inconsistent with their assigned authorities. The law of nations labeled these agreements "sponsions."[103] Sponsions covered many of the same subjects as treaties and compacts.[104] Unlike treaties and compacts, however, sponsions did not bind the sovereign *unless* the sovereign decided to ratify them subsequently—in which case the sponsion was converted into a treaty.[105] Although state practice with ratifications would

100 BURLAMAQUI, *supra* note 61, at 408-09; *accord* WHEATON, *supra* note 69, at 186 ("These *conventions* do not, in general, require the ratification of the supreme power of the State, unless such a ratification be expressly reserved in the act itself."); BARBEYRAC'S GROTIUS, *supra* note 57, at 726 ("[Sovereigns] are obliged by those whom we depute to be Ministers of our Wills, whether that Will be specially expressed, or gathered from the Nature of their Commission.").

101 *See supra* notes 60–61 and accompanying text.

102 *See, e.g.*, 1787 VATTEL, *supra* note 54, at 331 (§ 206) ("Treaties, conventions, and agreements, are all public engagements, in regard to which there is but one, and the same right, and the same rules."); BARBEYRAC'S GROTIUS, *supra* note 57, at 726-27 (noting that agreements, engagements, and contracts may bind a sovereign); WOLFF, *supra* note 55, at 240-41 (§ 464) (distinguishing treaties and stipulations); WHEATON, *supra* note 69, at 185-86 (distinguishing types of compacts and conventions).

103 BARBEYRAC'S GROTIUS, *supra* note 57, at 338 (defining sponsions as when someone "who not being impowered by the People, do yet undertake for that which directly concerns them"); WOLFF, *supra* note 55, at 241 (§ 465) ("A sponsion is a stipulation made concerning the state without the mandate of the sovereign power, and not within the limits of its authorization."); 1787 VATTEL, *supra* note 54, at 333 (§ 209); BURLAMAQUI, *supra* note 61, at 396 (pt. XIX). For the Roman origins of sponsions, see note 58, *supra*.

104 BARBEYRAC'S GROTIUS, *supra* note 57, at 349 ("There may be as many Sorts and Subjects of Sponsions, as there are of Leagues. For these differ only in the Capacities and Power of the Persons who make them."); WOLFF, *supra* note 55, at 242 (§ 467) ("The subject-matter of sponsions can be as varied as that of treaties.").

105 WOLFF, *supra* note 55, at 242 (§ 468) ("A sponsion does not bind a sovereign power, unless it should ratify the same . . . . If indeed the sovereign power ratifies it, that is, declares that it wishes to perform what the sponsor has promised . . . the sponsion is transformed into a treaty."); *accord*

evolve after the American and French revolutions to necessitate an express act, in the eighteenth century ratifications could be tacit via acts that took advantage of promises made. Silence, however, was insufficient to constitute treaty ratification.[106] By 1836, Wheaton's treatise considered ratification a requirement, whether because it was expressly provided for in a treaty's text or as an implied condition of states who required legislative involvement in treaty-making.[107]

Even without ratification, a sponsion still bound the authoring official. But the exact scope of the sponsion commitment assumed remained a matter of debate; Grotius viewed it as an obligation of effort focused on seeking the sovereign's ratification.[108] Failing that, he claimed that the sponsion's author had an obligation to indemnify the other party to the agreement or to seek a return to the *status quo*.[109] The agreement's specific wording mattered as well, hinging damages or interest owed on whether it included a promise to confirm and ratify its contents.[110]

In the eighteenth century, therefore, the law of nations understood treaties as the product of agreement among sovereigns or a product of their instructions or ratifications. Treaties were, moreover, distinguishable from agreements concluded directly among sovereign agents or ministers. When done by a sovereign's agents under sovereign authority (whether express instructions or within the authorities associated with the office), such agreements qualified as compacts or conventions, while those done without authority were sponsions.

3. Treaties' Executory Character

Linking agreements to sovereign instructions or ratifications may have been an important criterion for identifying treaties in the eighteenth century.

1787 VATTEL, *supra* note 54, at 333 (§ 208); BURLAMAQUI, *supra* note 61, at 395-96 (pt. XIX); BARBEYRAC'S GROTIUS, *supra* note 57, at 349.

106 WOLFF, *supra* note 55, at 242 (§ 468) (explaining that ratification can be done "either expressly or tacitly, by doing, after the sponsion has become known to it, that which cannot with probability be referred to another cause"); WHEATON, *supra* note 69, at 186 ("Mere silence is not sufficient to infer a ratification by either party . . . .").

107 WHEATON, *supra* note 69, at 187. Whether this shift may account for the eventual demise of the law of nations' agreement typology is a question that warrants further study. For more on the idea of ratifications becoming obligatory, see Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 265-66 (2012).

108 BARBEYRAC'S GROTIUS, *supra* note 57, at 349; *see also* SCOTT'S PUFENDORF, *supra* note 59, bk. VIII, ch. IX, at 1340-41 n.12 (discussing the obligation of effort by a sponsion's author); 1787 VATTEL, *supra* note 54, at 337 (§ 211) (same); MARTENS, *supra* note 67, at 49 (noting that a sponsion "only obliges the person who promises, to use his endeavours to procure its ratification").

109 BARBEYRAC'S GROTIUS, *supra* note 57, at 349.

110 *See id.* at 350-51.

But it was not outcome determinative. The ability to conclude conventions or other compacts was not limited to sub-state actors; sovereigns could conclude other forms of international agreement besides treaties as well. Per Vattel, these "public pacts called conventions, articles of agreement, &c. when they are made between sovereigns, differ from treaties only in their object."[111]

What were their different objects? On the one hand, according to Vattel, treaties rested on two conditions besides sovereign parties: (a) an agreement relating to the public welfare that (b) lasted "for perpetuity, or for a considerable time."[112] For Vattel, the peace treaty offered a quintessential example.[113]

On the other hand, Vattel explained: "The pacts with a view to transitory affairs are called agreements, conventions, and pactions. They are accomplished by one single act, and not by irritated oaths. These pacts are perfected in their execution once for all: treaties receive a successive execution, the duration of which equals that of the treaty."[114] At first glance, the contrast between "perpetuity" for treaties and "transitory affairs" for conventions suggests a simple temporal measuring stick for differentiating them. And certainly, conventions or compacts included agreements operating on short time-horizons. Wolff, for example, cited a truce made after a battle for burying the dead as a paradigmatic example of a "compact."[115]

In the eighteenth century, however, neither "perpetuity" nor "transitory" had an exclusively temporal meaning; they could alternatively signal the character of the commitments assumed. In this sense, the "perpetual" character of treaties served not to mark their duration so much as to provide that the commitments treaties contained persisted; to ensure that causes of earlier wars could not be revived but remained settled even if new conditions brought the parties back into conflict.[116] In contrast, as Wolff explained, "stipulations, which contain temporary promises *or those not to be repeated*, retain the name of compacts."[117]

Thus, the "transitory" quality of conventions/compacts lay as much in the obligations assumed as in their duration. Treaties involved a commitment to successive acts; keeping the peace for a day, week or month did not constitute full performance; obligations to avoid conflict (like those granting

111 1787 VATTEL, *supra* note 54, at 331 (§ 206).

112 *Id.* at 296 (§ 152); *accord* WOLFF, *supra* note 55, at 191 (§ 369).

113 *See* 1787 VATTEL, *supra* note 54, at 653 (§ 35) (describing the peace treaty as "undoubtedly a public . . . [and] real treaty").

114 *Id.* at 296 (§ 153).

115 WOLFF, *supra* note 55, at 191 (§ 369). Wolff also suggested a compact resulted from an agreement to grant another nation permission to purchase grain in its territory. *Id.*

116 Lesaffer, *supra* note 73, at 83-85.

117 WOLFF, *supra* note 55, at 191 (§ 369) (emphasis added).

commercial privileges, or maritime rights) continued successively while the treaty remained in force. In today's parlance, treaties constituted executory commitments.

Convention commitments, in contrast, were often dispositive; they could be fully executed by a specific act(s) like the exchange of prisoners of war, capitulating to a foreign military force, or paying a set sum.[118] In this sense, conventions had a fixed, if not perpetual, character of their own. As Martens explained:

> [O]nce a transitory covenant has been fulfilled, and has been continued on afterwards without being renewed, or its future duration has been defined by the contracting parties, it still continues in force. No changes that may take place afterwards as to the person of the sovereign, the form of government, or the sovereignty of the state, can in the least impair the validity of the covenant, while it is observed on the other side. If a war even should break out between the contracting parties, the covenant does not, on that account, merely become entirely nul, although the effects of it may be suspended during the war.[119]

The continuing obligation of a convention contrasted with treaties since treaties, even if written to last forever, could be voided by the onset of war or the disappearance of the other state party.[120] Moreover, unlike conventions, at least some treaties remained personal (rather than real), meaning their obligations did not pass on to the sovereign's successor. In contrast, any rights transferred by a convention were ceded by its very conclusion.[121]

Contrary to the temporal adjective used to describe them, therefore, treaties were in some ways less "perpetual" than conventions in the current meaning of that term.[122] Hence, it makes more sense to use the modern

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118 1787 VATTEL, *supra* note 54, at 319 (§ 192). A convention's dispositive quality could also be tied to the conclusion of a treaty. *See* JOHNSON, *supra* note 35 (defining "convention" to include "an agreement for a time, previous to a definitive treaty").

119 MARTENS, *supra* note 67, at 56; WHEATON, *supra* note 69, at 189 ("General compacts between nations may be divided into what are called *transitory conventions*, and *treaties* properly so termed. The first are perpetual in their nature, so that being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases, be suspended during war, they revive on the return of peace without any express stipulation.").

120 MARTENS, *supra* note 67, at 56 (Sec. 8).

121 1787 VATTEL, *supra* note 54, at 319 (§ 192) ("[I]f the treaty contains engagements with respect to successive and repeated oaths, it will be always proper to examine . . . whether it be in this respect real or personal . . . . In the same manner, as soon as a right is transferred by a lawful *convention*, it no longer belongs to the State that has ceded it." (emphasis added)).

122 WHEATON, *supra* note 69, at 191 ("*Treaties*, properly so called, or foedera, are those of friendship and alliance, commerce and navigation, which even if perpetual in terms, expire of course: 1. In case either of the contracting parties loses its existence as an independent state. 2. Where the

executory/executed distinction to explain how treaties differed from compacts and conventions in the eighteenth century.

Of course, an agreement could contain both executory and executed provisions, complicating efforts to identify the agreement type.[123] Meanwhile, the temporal criterion not only remained, but became more central to characterizing these categories over time.[124] By the turn of the nineteenth century, discussions had turned from the legal consequences of these categorizations to the formalism of the distinctions themselves.[125] As a result, the door opened to the use of the treaty label more ubiquitously and in desuetude for concepts like "transitory conventions."[126]

4. Natural Law Obligated Sovereigns to Comply with their Agreements

Unlike the positivism of modern international law, the eighteenth-century law of nations rested first and foremost on a higher, natural law.[127] Per Vattel,

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internal constitution of government of either state is so changed as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.").

123 MARTENS, *supra* note 67, at 53; WHEATON, *supra* note 69, at 191-92 ("Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between [them] . . . .").

124 Hence, later editions of Vattel began to translate the word *transitoires* as "temporary" while earlier translations used "transitory." *Compare, e.g.*, 1787 VATTEL, *supra* note 54, at 296; ROBINSON'S VATTEL, *supra* note 54, at 178 ("transitory"); *with* CHITTY'S VATTEL, *supra* note 54, at 192 ("temporary").

125 MARTENS, *supra* note 67, at 53 ("There are some treaties that are fulfilled at once, as for instance, treaties of boundary, of exchange, &c. and others which can be fulfilled successively only, as the occasion presents itself, such as treaties of commerce, alliances, &c. these latter are called *treaties* in a more particular sense (*foedera*), in opposition to transitory covenants (*pacta transitoria*)."); *accord* 1787 VATTEL, *supra* note 54, at 319 (§ 192).

126 For example, in 1836, Wheaton used the term "treaty" to encompass transitory conventions as well as treaties "properly so termed." WHEATON, *supra* note 69, at 189.

127 *See* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1078 (1985) (noting the "higher" law backdrop to the American Revolution). The term "international law," first coined by Jeremy Bentham, accompanied the rise of positivism as the primary method for international law which reached its height with the famous (or infamous) *Lotus* decision. *See* The Case of the S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."). The twentieth century, particularly the human rights revolution, has generated competing methodologies for identifying international law, although the positivist core remains. *See generally* Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005). Today, the consent (real or constructed) of nation-states provides the basis for most rules of "international law"—treaties only bind consenting states while customary international law results from a uniform and general practice of states that they accept as binding (*opinio juris*). VCLT, *supra* note 27, art. 26; Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, U.N. Doc. A/CN.4/L.908, at Conclusion 2 (2018). Even international law's "general principles"

"the *law of nations* is originally no more than the *law of nature applied* to nations."[128] It relied on a set of immutable and universal rules deduced from humans' nature and their interactions, adjusted to accommodate a system of independent but equal sovereigns.[129] Hence, Vattel divided the law of nations into four categories: (1) the necessary, (2) the voluntary, (3) the customary; and (4) the conventional.[130]

The necessary law of nations involved the direct application of the law of nature to nations, binding on the "conscience" of states *internally* (meaning, for practical purposes, it was unenforceable among nations inter-se).[131] The voluntary law of nations was not voluntary in any modern sense; it involved those laws of nature that *externally* governed states' behavior consistent with the principle of "[n]ations being free, independent and equal."[132] Unlike the necessary law, the voluntary law of nations was enforceable by states, including by resort to force.[133] In Vattel's third category—the customary law of nations—we find the closest approximation to today's customary international law—"maxims, and customs consecrated by long use, and observed by nations between each other as a kind of law . . . ."[134]

Treaties fell within Vattel's final category—the conventional law of nations. Three features are noteworthy for current purposes. The very category—conventional—reinforces the point made above; conventions comprised the general category of which treaties were a species. As Vattel explained, the conventional law resulted from states acquiring "rights, and contract obligations by express engagements, *by pacts and treaties*."[135]

Second, the necessary natural law provided the initial basis for assigning binding force to treaties and other pacts. Given its immutable character, states

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may depend on being "recognized by the community of nations." Int'l Law Comm'n, Report of the International Law Commission: Seventy-fourth Session, UN Doc. A/78/10, Ch. IV, Draft Conclusion 2 (2023).

128 1787 VATTEL, *supra* note 54, at 3.

129 *See id.* at 2-5; William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559, 1569 (2018).

130 1787 VATTEL, *supra* note 54, at 11-12. Brian Richardson has questioned just how much this particular Vattelian framework influenced the Framers given its absence in other contemporary works. *See generally* Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547 (2012).

131 1787 VATTEL, *supra* note 54, at 3-5.

132 *Id.* at 9-12.

133 *See id.*; *see also id.* at 568-69.

134 *Id.* at 11.

135 *Id.* at xxii (emphasis added). Elsewhere, Vattel suggested this could be called the "law of treaties." *Id.* at 11 ("The several engagements into which nations may enter, produce a new kind of the law of nations called *conventional* or *of treaties*."). This later reference might suggest Vattel treated conventions and treaties as synonymous. Given Vattel's detailed catalog of various forms of international agreement, however, I am reluctant to accept this conclusion, reading Vattel's alternative label to reflect the prominence of treaties within the typology.

could not change the necessary law "by their conventions," and it "distinguish[ed] lawful conventions or treaties, from those that are not lawful."[136] Others similarly divided treaties between those that codified the existing law of nature and those that added something new to inter-state relations "over and above the duties of natural law."[137] Treaties in this second, discretionary category could be equal or unequal.[138]

Whether equal or unequal, the law of nature directed parties to conform to their terms.[139] For Vattel, the inviolability of treaties is "as necessary, as it is natural and indubitable between the nations that live together in a state of nature."[140] Grotius put it starkly: treaties "are such as are made by the Command of the Sovereign Power, whereby the whole Nation is exposed to the Wrath of the Gods, if they violate it."[141] Both scholars, moreover, recognized the same necessary law as the source for the binding force of other international agreement forms as well.[142]

Third, conventional law delimited grounds for interpreting and applying treaties, including conditions where cessation of performance was lawful. Thus, unless parties agreed otherwise, one party's breach would free the other(s) from a treaty's commitments.[143] Other grounds for treaty exit

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136 *Id.* at 4; BURLAMAQUI, *supra* note 61, at 399 ("[I]t is not in the power of nations to establish things on another footing, and that they cannot justly deviate from the rules which the law of nature prescribes . . . .").

137 SCOTT'S PUFENDORF, *supra* note 59, at 1329-31; BARBEYRAC'S GROTIUS, *supra* note 57, at 339 (noting two kinds of "Leagues" or treaties; those "agreeable to the Law of Nature, or those that add something more to it"); MARTENS, *supra* note 67, at bk. II, ch. 1, §1.

138 *See, e.g.*, SCOTT'S PUFENDORF, *supra* note 59, at 1331; BARBEYRAC'S GROTIUS, *supra* note 57, at 340; 1787 VATTEL, *supra* note 54, at 305-07; BURLAMAQUI, *supra* note 61, at 391; MARTENS, *supra* note 67, at 53-54.

139 WOLFF, *supra* note 55, at 194 (§ 376) ("Nations and their rulers are bound to observe treaties and promises, and are bound by nature not to violate a promise given."); WHEATON, *supra* note 69, at 186 ("Treaties and conventions thus negotiated and signed are, by the law of nature, binding upon the state in whose name they are concluded . . . .").

140 1787 VATTEL, *supra* note 54, at 301; *see also* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 32-33 (1952) (noting that in the eighteenth century, "[t]hat treaties were binding in a legal sense was a premise universally accepted").

141 BARBEYRAC'S GROTIUS, *supra* note 57, at 337; *see also* BURLAMAQUI, *supra* note 61, at 390 ("[S]overeigns are no less obliged, than individuals, inviolably to keep their word, and be faithful to their engagements. The law of nations renders this an indispensable duty.").

142 *See supra* notes 99–100 and accompanying text.

143 1787 VATTEL, *supra* note 54, at 553 ("[W]e are no longer bound to observe [conventions made during a war] toward an enemy who has first broken them."); SCOTT'S PUFENDORF, *supra* note 59, at 1340, ch. IX, n.11 ("[T]he second party is not obligated to perform his side of the article neglected by the other . . . ."); BARBEYRAC'S GROTIUS, *supra* note 57, at 349 ("If either Party break the League, the other is freed . . . .").

Table 1: An 18th Century Typology of Law of Nations' Agreements

CATEGORY	ELIGIBLE AUTHORS	SUBJECT-MATTER	BASIS FOR APPROVAL	GROUNDS FOR TERMINATION
Public Treaties (aka Leagues)	Sovereigns Only	• Perpetual • Executory • Equal/ Unequal	• Sovereign conclusion, instructions, or ratification	• War • Breach • Change of Circumstances
Personal Treaties	Sovereigns Only	• Any	• Sovereign conclusion (acting in their personal capacity)	• Death of the Sovereign Author(s)
Conventions	Sovereigns or Subsidiary Powers	• Transitory Executed	• Could be expressly ratified by Sovereign (making it a treaty)	• Express Terms (but not war)
Compacts (aka Agreements, Capitulations, Cartels)	Subsidiary Powers	• Executory • Executed	• Express Sovereign ratification (making it a treaty) • Instructions from Sovereign • Authorities customarily associated with officer/office	• Disavowal by Sovereign (making it a sponsion)
Sponsion	Subsidiary Powers	• Executory • Executed	• Author's own position/Promise • Sovereign ratification (making it a treaty)	• Liability of individual author or obligation to restore *status quo*

included war, fundamental changes of circumstances, and existential threats.[144] Absent such grounds, the idea of unilateral withdrawal was antithetical to the very notion of a treaty.

In sum, the law of nations evinces a relatively coherent typology of international agreements in the latter half of the eighteenth century and into the first years of the nineteenth century. Of course, the categories are not always identical throughout the corpus.[145] Still, there are sufficient commonalities to suggest there was a conceptual coherence, constituting terms of art that allows us to identify ideal types. Table 1 offers a summary of the typology that results.

II. THE ORIGINAL MEANING OF TREATIES IN THE CONSTITUTION

The foregoing treatment suggests that treaties under the law of nations had a lengthy and relatively precise pedigree within international relations in the late eighteenth century. The question becomes whether this meaning carries over to give constitutional meaning.[146] Different schools of originalism proffer different approaches to answering this question by focusing on discerning original intent, methods, or public meanings:[147]

(a) *Original Intent*: the earliest iteration of originalism, this approach looks to the understandings of the Framers and/or ratifiers to fix the legal contents of constitutional text.[148]

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144 *See* 1787 VATTEL, *supra* note 54, at 298-300, 552; *accord* MARTENS, *supra* note 67, at 56-57.

145 Witness, for example, the alternative framing of the genus as conventions (Grotius/Burlamaqui) or pact/compact (Vattel/Pufendorf/Blackstone). *See supra* notes 53–61 and accompanying text.

146 Thus, my inquiry is directed at the "Fixation Thesis"—identifying what meaning was ascribed to "treaties" in 1787. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the *Fixation Thesis*."). Obviously, different methods of constitutional interpretation will give different weight to these findings, recognizing some might dismiss the original meaning project entirely as impossible or ill-advised. *See, e.g.*, Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1427 (2021); Berman, *supra* note 25, at 6; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 223, 231-34 (1980).

147 In listing these three camps, I do not mean to suggest an exhaustive list. For other approaches, *see, e.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874 (2015); JACK M. BALKIN, LIVING ORIGINALISM 3 (2011); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 593-600 (2006). For a recent (and comprehensive) survey of the originalist discipline, see generally Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021).

148 *See, e.g.*, Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 638-39 (2014); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 975 (2004); RAOUL BERGER, GOVERNMENT BY JUDICIARY 363-72 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

(b) *Original Methods*: this approach looks to fix legal meaning by using the interpretative methods that those who enacted the Constitution would have applied at that time.[149]

(c) *Original Public Meaning*: currently the predominant form, this framework assigns constitutional meaning based primarily on the meaning the text had for competent speakers of American English at the Framing and state ratifications.[150]

Whatever (often quite important) distinctions these approaches involve, each one may be used to reach a similar conclusion, namely, that the law of nations' treaty concept fixed the original meaning of that term in the Constitution.

As a matter of original intent, the constitutional text (and its Articles of Confederation forerunner) evidences a particularized meaning for treaties in lieu of the colloquial references gleaned from reading relevant English dictionaries.[151] It is a meaning reinforced by the *Federalist Papers* and widespread expectations among the Framers that the law of nations would form part of U.S. law. The importance of the law of nations to lawyers of the time similarly supports its definition of treaties as a matter of original methods, whether because the Constitution's enactors would have intended to apply it to the Constitution or because a reasonable or knowledgeable person at the time would have been expected to turn to that body of law to clarify its meaning in the constitutional text.[152]

At first glance, public meaning originalism seems to counsel against assigning the law of nations' meaning for treaties given the more broad (and loose) general usages identified above.[153] Although his opinion lacks no shortage of critics, in *District of Columbia v. Heller*, Justice Scalia clearly preferred reading the Constitution as "written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[154] His concerns, however, focused on denying power

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149 *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116-38 (2013).

150 *See, e.g.*, Solum, *supra* note 147; Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926 (2009); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89-117 (2004); Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 35 (1999); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985).

151 *See supra* notes 34–41 and accompanying text.

152 *See* MCGINNIS & RAPPAPORT, *supra* note 149, at 117 ("To find the original intent of the Constitution's enactors, one must look to the interpretive rules that the enactors expected to be employed to understand their words.").

153 *See supra* notes 34–41 and accompanying text.

154 District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)); *see also* Nelson Lund, *The Second Amendment,* Heller*, and Originalist*

to secret understandings or agendas of the enactors.[155] Neither are implicated, however, in ascribing the widely available law of nations' conception to the term "treaty."

Moreover, as a recent paper by John McGinnis and Michael Rappaport highlights, neither Justice Scalia nor original public meaning proponents actually anticipated prioritizing lay meanings over legal ones; on the contrary, there is ample evidence to support assigning legal meanings rather than lay readings to the more than one hundred legal terms used in the Constitution.[156] Even Lawrence Solum—a chief proponent of reading the original public meaning thesis in lay terms—recognized that "some of the words and phrases that comprise the constitutional text are 'terms of art,' the meaning of which is accessible only to a specialist audience."[157]

Hence, there is no reason to exclude using terms of art under the banner of public meaning originalism:

> The Framers of the Constitution could rely on the division of linguistic labor to make the meaning of technical language in the constitutional text accessible to the public at large. If a farmer in western Massachusetts were unfamiliar with the phrase "Letters of Marque and Reprisal," he could consult a law dictionary, a lawyer, or a sea captain who could provide the necessary explanation.[158]

Like letters of marque and reprisal, constitutional references to treaties indicate it as a term of art that members of the public could access by consulting works on the law of nations or the many lawyers familiar with its terms.[159] This method, moreover, finds support in Grotius as itself an

Jurisprudence, 56 UCLA L. REV. 1343, 1352-56 (2009) (critiquing Justice Scalia's reasoning through an originalist lens).

155 *See Heller*, 554 U.S. at 576-77 ("Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."); John O. McGinnis & Michael B. Rappaport, *What is Original Public Meaning?* 12-13 (2024) (Univ. of San Diego Sch. of L., Research Paper No. 24-017, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4948825 (noting that, in a 1986 speech, Scalia focused on differentiating the original public meaning of the Constitution text from the original intent of its enactors).

156 *See* McGinnis & Rappaport, *supra* note 155, at 39 ("The drafters of the Constitution, who knew the language of law, had good reasons to write the document in that language.").

157 Lawrence B. Solum, *Semantic Originalism* 54 (Ill. Pub. L. & Legal Theory Rsch. Papers Series No. 07-24, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [https://perma.cc/7RVM-MVYK].

158 Solum, *The Public Meaning Thesis*, *supra* note 147, at 1982.

159 *Cf.* David M. Golove & Daniel 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, 981 (2010) ("Admittedly, the [Constitutional] text poses real interpretative difficulties. The significance of many of the legal terms and mechanisms that the framers employed . . . cannot be fully

originalist method.[160] As such, transposing the law of nations' treaty concept into the Constitution is consistent with at least some versions of public meaning originalism, and the originalist project more broadly.

A. *Textual Support for the Law of Nations' Treaty Concept*

1. The Articles of Confederation

Article IX of the Articles of the Confederation provided that:

> The United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever . . . .[161]

At the same time, Article VI contained limitations on agreement-making by the states:

> No State without the Consent of the United States, in Congress assembled, shall . . . enter into any conference, agreement, alliance or treaty with any king, prince or state . . . . No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.[162]

Three things are notable here. First, the text reinforces treating treaties as one of several categories of commitment.[163] Second, it aligns with the law of nations' expectation that in democracies, the treaty power lies with the "sovereign" representative of the people—the Continental Congress.[164] The

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appreciated without background knowledge about what were, even then, specialized legal doctrines and concepts.").

160 GROTIUS, *supra* note 57, at 353 ("But Terms of Art, which the common People are very little acquainted with, should be understood as explained by them who are most experienced in that Art . . . .").

161 Articles of Confederation of 1781, art. IX, para. 1. To exercise this power, the Articles required "nine states to assent." *Id.* para. 6.

162 *Id.* art. VI, paras. 1-2.

163 For recent scholarship interrogating the meaning of one of these alternatives—confederations—albeit without discussing treaties, compare David S. Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CONST. HIST. 629 (2023) with Anthony J. Bellia, Jr. & Bradford Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835 (2020).

164 *See infra* notes 76–78, and accompanying text.

explicit denial of an independent treaty power to the states reinforces the idea that Congress, as sovereign, could decide whether (and how) to instruct or ratify treaty-making by "subordinate powers" like the states.[165]

Third, the text's denial of autonomy in making "agreements" was limited to those with foreign powers; inter-state agreements appeared possible without any need for Congressional involvement.[166] Such regulations cohere with the prevailing law of nations' understanding that substate actors had authority to conclude compacts or conventions within the limits of their assigned authority (or even the apparent authority accorded such entities as a class). Signaling such permission for inter-state agreements continued a practice under the British Crown.[167] And during the Confederation period, U.S. states concluded at least four interstate boundary agreements.[168]

State agreements with foreign powers, particularly Native American tribes, had a more troubled history. The colonies had frequently competed in seeking agreements with Native Americans to gain territorial or trade advantages over each other.[169] In 1700, for example, William Penn's negotiations with the Susquehanna tribe not only afforded Pennsylvania a

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165 *See infra* subsection I.B.2. The Articles of Confederation, concluded by representative delegates of the thirteen states, never resolved its own status. Was it an international convention among thirteen new "sovereign states," or a convention/compact among subordinate powers of a single, new sovereign? The text here assumes the latter reading. If, however, the Articles of Confederation reflected an agreement among thirteen sovereign states, the text of Articles VI and IX remain significant as an express delegation of a treaty power to the Continental Congress. *See* MARTENS, *supra* note 67, at 361-62 (describing Articles of Confederation as a treaty). For more recent—and divergent—views on these questions, see generally Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13 (2024); Ryan C. Williams, *Federalism, The Law of Nations, and The Excluded Middle*, 1 J. AM. CONST. HIST. 721, 730-36 (2023); Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1, 51 (2020); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465-66 (1994).

166 *See* Weinfeld, *supra* note 7, at 456 ("[A]greements of the colonies or States among themselves were permitted without any limitation . . . ."); SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 141 (2d ed. 1916) ("A natural interference is that the expression 'agreement or compact' was intended to comprehend such agreements as had been considered by the States, under the Articles of Confederation, as not included under the terms 'treaty, confederation or alliance.'"); Engdahl, *supra* note 7, at 179-180 ("Although the restriction on arrangements between sister states covered 'treaties,' this provision contained no reference to 'agreements,' and thus contrasted with the clause defining state relations with foreign powers.").

167 *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 692, 730-32 (1925) (listing nine intercolonial boundary agreements).

168 *Id.* at 732-34.

169 *See* TIMOTHY J. SHANNON, INDIANS AND COLONISTS AT THE CROSSROADS OF EMPIRE 108-09 (2000) (discussing colonies with contrary interests and speculative investors competing for agreements with Native American tribes); DOROTHY V. JONES, LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA 122-23 (1982) (noting that states "pursued independent and conflicting policies" in negotiations with Native Americans).

territorial claim to the Susquehanna Valley and a trading monopoly there, it did so at the expense of New York's earlier, similar claims.[170] Benjamin Franklin's 1754 Albany Plan of Union—which had a strong influence on the Articles' drafting—proposed centralizing treaty making with Indians to avoid further risks from individual colonial treaty making.[171] Decades later, the Committee appointed to draft the Articles of Confederation, headed by John Dickinson, advocated for similar congressional control of agreement-making and "Indian Affairs."[172] As drafted, the Articles separated Congress' control over Indian affairs from the general prohibition on all agreements with foreign powers.[173] Still, the history of colonial-Indian agreements provides some explanation for restricting any and all state "agreements" with foreign powers, concerns largely—if not entirely—absent in the inter-state context.[174]

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170 *See* FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE 225-37 (1984) (describing the process leading up to the deeding of the Susquehanna and Pennsylvania's use of the deed to undermine New York's position); *Deed for the Susquehanna, 1700* (Sept. 13, 1700) (on file with the Historical Society of Pennsylvania available at *https://hsp.org/education/primary-sources/deed-for-the-susquehanna-1700* [https://perma.cc/FM5E-GB9D]).

171 Benjamin Franklin, *Papers Relating to a Plan of Union of the Colonies (1754)*, *in* 3 THE WRITINGS OF BENJAMIN FRANKLIN 197, 217-20 (Albert Henry Smyth ed., 1907); PRUCHA, *supra* note 36, at 37; MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774–1781 108 (1940).

172 *See* DRAFT ARTICLES OF CONFEDERATION AND PERPETUAL UNION, BETWEEN THE COLONIES, art. IV (1776), *reprinted in* 5 JOURNALS OF THE CONTINENTAL CONGRESS 417, 547 (1906) [hereinafter JCC] ("No Colony or Colonies, without the Consent of the United States assembled, shall . . . enter into any Treaty, Convention, or Conference with the King or Kingdom of Great-Britain, or any foreign Prince or State . . . ."); *id.* art. XVIII, at 550 ("The United States assembled shall have the sole and exclusive Right and Power of . . . Entering into Treaties and Alliances . . . and managing all Affairs with the Indians . . . ."); JENSEN, *supra* note 171, at 126 (noting Dickinson's role on the Drafting Committee).

173 *Compare* ARTICLES OF CONFEDERATION OF 1781, art. VI ("No State without the consent of the United States in Congress assembled, shall . . . enter into any conference, agreement, alliance or treaty with any king, prince or state."), *with id.* art. IX, paras. 1, 4 ("The United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances . . . . Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States."); *see also* PRUCHA, *supra* note 36, at 38-39 (noting how Articles left open whether Native Americans required treatment as foreign sovereigns or dependent subjects and discussing inconsistent prior European approaches).

174 Madison considered—without explanation—the lack of congressional consent to even these "compacts" as violations of the Articles. *See* James Madison, Address to the Federal Convention, June 19, 1787, *in* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 258-59 (Jonathan Elliot ed., n.p., 1827) [hereinafter ELLIOT'S DEBATES] ("By the Federal Articles, transactions with the Indians appertain to Congress, yet in several instances the states have entered into treaties and war with them."); James Madison, *Preface to Debates*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 539, 548 (Max Farrand ed., 1911) (discussing compacts between Pennsylvania and New Jersey and between Virginia and Maryland as violations of federal authority).

2. The Constitution

The Constitution distributes the power to make treaties to the President and the Senate (Article II) while contemplating the justiciability (Article III) and domestic legal force (Article VI) of their results. Like the Articles of Confederation, it denies treaty-making to the states (Article I). In permitting agreement-making to the states, the text also tracks the Articles of Confederation, even as it shifts treatment of other state agreements. Specifically, the requirement of congressional consent for agreements with foreign powers is extended to inter-state agreements. More importantly, the scope of the qualified permission pairs a new term—"Compact"—with "Agreement." In doing so, it necessarily differentiates compacts and agreements (which states can make if Congress assents) from treaties (which states are prohibited from making entirely).[175]

As such, the text aligns with the law of nations' typology identified in Part I. It belies giving "treaties" a more generic meaning even (as shown above) contemporaneous English language dictionaries defined treaties as "compacts" or "agreements."[176] In doing so, it suggests treaties, compacts, and agreements operated as terms of art; terms whose meaning were already widely evolved and elaborated in the law of nations. Denying treaty-making to the states was consonant, for example, with treaties being an exclusive prerogative of a "sovereign" involving ongoing/executory commitments.

What about the law of nations viewing treaties as one of several types of compacts (or agreements)? That typology might suggest—if the law of nations was the source—that the constitutional text should reflect the treaty-compact connection explicitly. It might make more sense, for example, to have coupled the ban on states' treaty-making with permission to make "other" compacts or agreements with Congressional consent. Does the lack of such a modifier deny my law of nations thesis?

I doubt it. If anything, the law of nations' definitions just as easily comport with the text as written. Defining treaties as an exclusive sovereign prerogative necessarily denies treaty-status to any (permitted) compacts or agreements by U.S. states since the states were not to be sovereign under the Constitution (whatever debates persist about their sovereign status under the Articles).[177] As such, the states could not make treaties without sovereign sanction, a sanction the text already explicitly denies them.

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175 *Accord* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 678-81, 722-26 (1998).

176 *See supra* notes 34–41 and accompanying text.

177 Aaron N. Coleman & Adam L. Tate, *Thomas Burke and State Sovereignty, 1777,* 1 J. AM. CON. HIST. 593, 595 (2023) (recognizing an "absence of a scholarly consensus about American views of sovereignty in the 1770s and 1780s").

It is relatively easy therefore to infer that the reference to "Agreement or Compact" in Article I *both* excludes those compacts that are treaties while including the non-treaty agreements that non-sovereigns could make. Indeed, Blackstone himself recognized compacts could simultaneously function as both the general category and a reference to non-treaty agreements.[178] This reading is consonant, moreover, with Burlamaqui, Pufendorf, and Vattel, who all recognized that limiting treaty-making to sovereigns did not exclude the possibility of the sovereign or its subsidiary powers from concluding other international agreements or compacts.[179] In short, the text of the Constitution excludes assigning a generic meaning to treaties as international agreements in favor of transposing the more specialized meaning that then existed among experts and nations alike.

B. *Founding Era Materials*

The text is not the only evidence from the Founding that supports assigning "treaties" their contemporaneous meaning under the law of nations. It is true that neither the Constitutional Convention nor the ratification debates discuss what treaties meant or how to differentiate them from compacts/agreements, focusing instead on the treaty power's location. But early U.S. practice, including both ratified *and* unratified agreements, strongly reinforces the law of nations thesis.

1. The Framers' Understanding of, and Reliance on, the Law of Nations

To start, the law of nations, particularly as articulated by scholars like Vattel, Grotius, Pufendorf, and Burlamaqui, was widely studied and influential at the Founding.[180] English versions of the major Continental treatises were widely available in the late-eighteenth century with three editions of Grotius, five for Pufendorf, seven for Burlamaqui, and even more for Vattel.[181] Barbeyrac's edition of Pufendorf was one of the first forty-five

178 BLACKSTONE, *supra* note 56, at 43 (emphasizing that the law of nations "depends entirely upon the rules of natural law, or upon *mutual compacts, treaties, leagues, and agreements* between these several communities: in the construction also of *which compacts* we have no other rule to resort to, but the law of nature . . . .") (emphasis added).

179 *See supra* notes 53–75 and accompanying text.

180 *See, e.g.*, Ramsey, *Executive Agreements*, *supra* note 7, at 166, 170-71; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 823 (1989) (noting that in ascertaining the law of nations lawyers of the day "relied heavily on continental treatise writers"); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967); Dickinson, *supra* note 140, at 35; RAY FORREST HARVEY, JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM 75-76, 79-175 (1937); Charles G. Fenwick, *The Authority of Vattel*, 7 AM POL. SCI. REV. 395, 407 (1913); Weinfeld, *supra* note 7, at 458-59.

181 Reeves, *supra* note 51, at 550.

books purchased by the Library Company of Philadelphia in 1732.[182] By 1807, the Library's catalog included three copies of Vattel's *Le Droit des Gens*, fourteen copies of Grotius's *De Juri Pac Belli*, six copies of Pufendorf's *Law of Nature and Nations*, alongside the first-acquired Barbeyrac edition.[183]

Indeed, in 1775, Alexander Hamilton advised the "Westchester Farmer" to study without delay "Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui. I might mention other excellent writers on this subject; but if you attend, diligently, to these, you will not require any others."[184] From 1780 on, with Jefferson's support, Vattel and Burlamaqui were used as textbooks at the William and Mary College.[185] And the earliest commentators on the Constitution, St. George Tucker and Rawle, both had libraries filled with Continental treatise writers.[186]

In recent years, U.S. courts and scholars have treated Vattel's work as an almost-definitive source for the Founding-era law of nations, and thus part of U.S. law to the extent it was regarded as such.[187] Abraham Weinfeld, for example, argued for exclusively using Vattel as a source for understanding the treaty and compact distinction in Article I, declining to either recognize or engage with these categories' employment by other law of nations scholars.[188] And it is true that Vattel exercised a large influence on key decision-makers

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182 Edwin Wolf, *The First Books and Printed Catalogues of the Library Company of Philadelphia*, 78 PENN. MAG. HIST. & BIOGRAPHY 45, 57 (1954); Richardson, *supra* note 130, at 549-50.

183 CATALOG OF THE BOOKS BELONGING TO THE LIBRARY COMPANY OF PHILADELPHIA 115, 217 (Philadelphia, Bartram & Reynolds 1807); Richardson, *supra* note 130, at 550.

184 *The Farmer Refuted*, *reprinted in* 1 PAPERS OF ALEXANDER HAMILTON 86 (Harold C. Syrett ed., 1961) [hereinafter "HAMILTON PAPERS"].

185 Reeves, *supra* note 51, at 551; Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 405 (2012).

186 St. George Tucker had Barbeyrac's translations of both Grotius and Pufendorf in hand when he wrote his treatise. E-mail from Carolyn Wilson, Special Collections Research Center, Early Gregg Swem Library, William & Mary Libraries, to Duncan Hollis (June 20, 23, and 27, 2023) (the holders of Tucker's library) (on file with author). Temple University holds John Rawls's library, and I located his copies of Vattel (the 1792 Luke White edition), von Martens's 1795 treatise, and an 1805 edition of Blackstone there.

187 *See* Reeves, *supra* note 51, at 549 ("At the time of the American Revolution the work of Vattel was the latest and most popular if not the most authoritative of the Continental writers."); Bellia & Clark, *supra* note 163, at 847 ("*The Law of Nations* by Emmerich de Vattel was the most influential treatise on the law of nations in England and America during the Founding period"); *see also* Hollis, *supra* note 10, at 774-75; Engdahl, *supra* note 7, at 75-81; Weinfeld, *supra* note 7, at 458-60.

188 *See* Weinfeld, *supra* note 7, at 457-58 (citing Grotius, Wolff, Pufendorf, and Burlamaqui as among the "[m]any writers whose works were in existence at that time [and] appear not to have discussed classifications of international agreements and treaties, or, if they did, these classifications can by no stretch of the imagination be used to explain the difference between 'treaties' and 'agreements or compacts'").

both before and after the Founding.[189] Consider just three examples of his weight:

- In 1775, for example, Benjamin Franklin informed the publisher of Vattel's *Law of Nations*, "when the circumstances of a rising State made it necessary frequently to consult the law of nations" that volume "has been continually in the hands of the members of our Congress now sitting."[190]

- During the neutrality crisis (the subject of *Hamilton*'s second great Cabinet battle rap), Vattel featured prominently in Hamilton and Jefferson's competing positions. Hamilton invoked Vattel to President Washington as "perhaps the most accurate and approved of the writers on the laws of Nations."[191] And although Jefferson's opposed relying on Vattel's (unique) position that treaties could be abrogated if a nation's government changed, it did not preclude him from appealing in letters to Citizen Genet "to enlightened and disinterested Judges. None is more so than Vattel."[192]

- George Tucker's 1803 edition of *Blackstone's Commentaries* relies on Vattel's work approvingly, noting elsewhere that once formed, treaties acquired "such a sanction as to become irrevocable."[193] He appears, however, to have read Vattel's definition of treaties as

189 Edwin Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 259 n.132 (1932) (finding 92 citations to Vattel in volumes of the Supreme Court reporter between 1789–1820, in contrast to 16 for Grotius, 9 for Pufendorf and Burlamaqui); Reinstein, *supra* note 185, at 404 n.123 (between 1780–1800, Vattel was cited by counsel or the court in 50 reported decisions of state and federal courts, Grotius in 20, and Pufendorf in 17); *see also* William Ossipow & Dominik Gerber, *The Reception of Vattel's Law of Nations in the American Colonies: From James Otis and John Adams to the Declaration of Independence*, 57 AM. J. LEGAL HIST. 521, 524 (2017).

190 *See* Letter from Benjamin Franklin to Charles F.W. Dumas (Dec. 19, 1775), *in* 2 FRANCIS WHARTON, THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (1889). I located the volume of Vattel that Benjamin Franklin gave the Continental Congress; it is currently held by the Library Company of Philadelphia. The copy to which Franklin referred was likely his personal copy and is now lost. *See* EDWIN WOLF & KEVIN J. HAYES, THE LIBRARY OF BENJAMIN FRANKLIN 806-07 (2006) (listing volume location as unknown).

191 Letter from Alexander Hamilton to George Washington (Sept. 15, 1790), *in* 7 HAMILTON PAPERS, *supra* note 184, at 36, 40.

192 Letter from Thomas Jefferson to Edmond Charles Genet (June 17, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 297, 299 (John Catanzariti et al., eds., 1995) ("JEFFERSON PAPERS"). For more on how the law of nations, including the views of Vattel, suffused the neutrality crisis, see Reinstein, *supra* note 185, at 379.

193 1 BLACKSTONE'S COMMENTARIES TO THE CONSTITUTION AND LAWS, app. 310, 339 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

> "transitory" in exclusively temporal terms, a condition that would later lead Joseph Story to reject Vattel's views.[194]

But as Brian Richardson has ably argued, Vattel's views were not the only source for importing the law of nations into the Constitution. Rather, we should engage Vattel as a "coequal among giants" to whom the Founders looked.[195] Alongside a copy of Vattel, we know John Adams had copies of Grotius, Barbeyrac, Pufendorf, and Burlamaqui.[196] George Washington possessed an English translation of Grotius a well as Martens' Law of Nations.[197] And the nations' first Administrations and early U.S. judicial decisions both evidenced a reliance on all of these authors to delimit the law of nations *and* employ it as part of U.S. law.[198]

Beyond the Framers, early constitutional experts also depended on an array of law of nations' scholars. Blackstone's views, for example, were informed by his readings of Grotius, Pufendorf and Burlamaqui.[199] In the United States, reliance on these sources only began to fade as the post-Founding generation's diplomats and courts built up their own practice, making reliance on the earlier scholarship less necessary.[200] Meanwhile,

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194 *Id.* at 310 (citing Vattel and finding that treaties "relate ordinarily to subjects of great national magnitude and importance, and are often perpetual, or made for a considerable period of time; the power of making these is altogether prohibited to the individual states; but agreements, or compacts, concerning transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties, may still be entered into by the respective states with the consent of congress.") (citation omitted). Story's discomfort focused on Tucker's differentiation of "perpetual" treaties of "great national magnitude" from agreements that "relate to transitory, or local concerns," suggesting that both viewed transitory entirely in temporal terms. STORY, *supra* note 3, at § 1396. For the view that alongside its temporal meaning, "transitory" referred to the executed quality of the agreement, see notes 114-122 and accompanying text.

195 Richardson, *supra* note 130, at 570.

196 Reeves, *supra* note 51, at 551.

197 BOSTON ANTHENAEUM, A CATALOGUE OF THE WASHINGTON COLLECTION 528 (Appleton P.C. Griffin ed., Cambridge, Univ. Press 1897); Richardson, *supra* note 130, at 549.

198 *See* Reinstein, *supra* note 185, at 380 ("[A] strong consensus existed in the founding era (and no recorded dissent) that the law of nations was part of the law of the land."); Richardson, *supra* note 130, at 570 (explaining that the Framers relied on law of nations writers); *accord* Dickinson, *supra* note 189, at 259-60 (same). Edmund Randolph, for example, cited Grotius and Vattel in his *The Grange* opinion. 26 JEFFERSON PAPERS, *supra* note 192, at 33-34; *see also* Respublica v. De Longchamps, 1 U.S. (1. Dall.) 111, 113 (1784) (noting that James Wilson cites Vattel in urging the "necessity of sustaining the law of nations" and the connection "between the law of nations and the municipal law"); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 353-54 (1827) (Marshall, C.J.) ("When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose, that the framers of our [C]onstitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract.").

199 Reeves, *supra* note 51, at 550; MARC JANIS, AMERICA AND THE LAW OF NATIONS 1776–1939 24-25 (2010).

200 Reeves, *supra* note 51, at 561.

Jeremy Bentham's positivist conception of international law displaced earlier naturalist understandings prioritizing natural law reasoning. Bentham's views, in particular, looked to consolidate international agreements under a single heading; writing in an unpublished manuscript, he noted that the law of nations included "mutual compacts, treaties, leagues, and agreements (which to judge of them by the manner of [Blackstone's] mentioning them are so many different sorts of things, but to judge of them by what other people mean by them, are the same)."[201]

Relying on multiple authors' explications on the law of nations may, of course, introduce ambiguities where they evidence different views (as they did with questions on whether a change of government following the French revolution could be grounds to abrogate U.S. treaties).[202] In such cases, the majority position was often the one that became the "rule of recognition" for identifying the relevant law of nations.[203] Fortunately, in defining treaties, there is much overlap in the various positions and little by way of actual conflicts amongst them, aside from the aforementioned differences in preferred terminology for non-treaty instruments (e.g., compacts, pacts, conventions).

In short, there is ample evidence that the law of nations was a regular and major reference point for the Framers and the Founding generation overall. Hence, it is reasonable to assume that when the Constitution uses terms of art like "treaties" and "compacts" that had clear meanings under the law of nations, those meanings were understood or intended to carry over into constitutional contexts.

2. The Constitutional Convention and Ratification Debates

Support for assigning a law of nations meaning to treaties is both limited and mixed when we turn to the Constitutional Convention and later ratification debates. These sources have little discussion on the meaning of treaties or their constituent elements.[204]

Yet treaties were in no way absent from either discourse—far from it. The term (as well as the singular "treaty") appear a combined 392 times in BYU's *Corpus of the Records of the Constitutional Convention* (CORCC), 1,284 times in

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201 JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 36-37 (J. H. Burns & H. L. A. Hart eds., 1977); *see also* JANIS, *supra* note 199, at 14 ("Blackstone, not Bentham, reflected the reality of legal practice.").

202 *See* Richardson, *supra* note 130, at 570 (explaining the founders relied on multiple legal authorities who were all legitimate expositors of the law of nations).

203 *Id.* at 570-71.

204 *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1134 (2000) (noting "paucity of material directly addressing the scope of the treaty power" in Constitutional Convention records).

the *Corpus of State Conventions on the Adoption of the Constitution* (COSCAC), and a whopping 52,092 times in the *Corpus of Founding Era American English* (COFEA).[205] Indeed, the inability of the Confederation Congress to enforce observance of the government's treaties (most notably the Treaty of Peace with Great Britain) was a major motivator for the Constitutional Convention itself.[206] Hence, treaties were a prominent discussion topic. But instead of definitional considerations, these discussions focused on addressing *who* would exercise the treaty-making power, *how* the resulting instruments would be enforceable within the domestic legal order, and *what* subjects treaties might cover.[207]

Scholars have spent years examining how the Framers arrived at the presidential power over treaty-making subject to the advice and consent of the Senate, in lieu of assigning the power to the Senate alone or giving the House any role.[208] The need for secrecy and efficiency in treaty-making (practices notably absent under the Articles) led to agreement on the President's role.[209] Meanwhile, requiring a Senate supermajority provided a check for those Framers (and U.S. states) who were concerned that northern states might make treaties disadvantaging southern states (especially given earlier Spanish proposals to give northern states trade concessions in return for temporary cessation of Mississippi River navigation rights).[210] Hence, Virginia, North Carolina, and South Carolina's ratification debates all featured this issue prominently.[211]

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205 To access these databases, see *Law & Corpus Linguistics*, BYU L., https://lawcorpus.byu.edu [https://perma.cc/F3QM-YRUQ] (last visited Feb. 11, 2025).

206 Hathaway, *supra* note 20, at 1276-77; RAMSEY, *supra* note 7, at 37-39.

207 Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 410 (1998); Golove, *supra* note 204, at 1075, 1132.

208 *See, e.g.*, Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, *in* 1 PERSPECTIVES IN AMERICAN HISTORY 233 (Bernard Bailyn, Donald Fleming & Stephan Thernstrom eds., 1984); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—the Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 73-101 (1979); Hathaway, *supra* note 20, at 1278-79. For the story of how President Washington reduced "advice and consent" to "consent" by only seeking Senate approval post-negotiations, see SFRC STUDY, *supra* note 29, at 2-3.

209 Rakove, *supra* note 208, at 241; Hathaway, *supra* note 20, at 1278-79.

210 Prior to the adoption of the Seventeenth Amendment in 1913, state legislators appointed U.S. Senators, leading the likes of Madison to view them as the states' representatives within the federal government. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 174, at 392 ("Mr. [Madison] observed that the Senate represented the States alone."). Southern states wanted the Senate supermajority to retain an ability to block treaties akin to the Articles' earlier requirement needing nine of thirteen states for treaty approval. Hathaway, *supra* note 20, at 1282-83.

211 *See* 3 ELLIOT'S DEBATES, *supra* note 174, at 437-66 (Virginia); 4 ELLIOT'S DEBATES, *supra* note 174, at 115-120 (North Carolina); *id.* at 265-81, 291-93 (South Carolina). The treaty clause received (by far) the most attention in the Virginia debates, constituting one-tenth of recorded discussions. Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 297 (1934); Bradley, *supra* note 207, at 410; Golove, *supra* note 204, at 1141-42.

A second area of discourse focused on treaties' relationship to state laws. The original Virginia Plan contemplated a federal power "to negative" state laws contravening U.S. treaties, before the Framers settled on the Supremacy Clause.[212] The idea of giving treaties operation as law led to James Wilson's proposal to give the House a treaty-making role; a proposal that was defeated (although later Jay Treaty debates over that treaty's enforcement requiring additional Congressional action suggest this vote did not resolve the issue for all).[213] Likewise, anti-federalists like Patrick Henry complained during the ratification debates about the "unprecedented" status given to treaties, while Nicholas, Corbin, and Madison all sought to rebut such charges (albeit not always coherently).[214]

A third concern reflected the Constitution's lack of subject-matter limits on the treaty power. The Articles of Confederation had included an express limitation, barring treaty-making on imports and exports as well as those interfering with state imposts and duties on foreigners.[215] Opponents seized on the lack of similar qualifiers in the Constitution to paint the treaty power as "unbounded," engendering much debate, especially in Virginia's ratifying convention.[216]

Given these issues, it is not surprising to see that, linguistically, the top noun collocates for "treaty"/"treaties" in the CORCC and CSCAC are "peace," "senate," and "power," with additional appearances by "states," "laws," "constitution," "congress," and "commerce."[217] The COFEA exhibits similar collocates, albeit with greater frequency for treaty subjects like "peace" and treaty partners like Britain and France.[218] Terms like "compact" and

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212 *See* Hathaway, *supra* note 20, at 1279 & n.97 (discussing propositions for additional requirements for treaties to become law); Julian G. Ku, *Treaties as Laws*, 80 IND. L.J. 319, 369-70 (2005) ("But the eventual creation of a constitution giving treaties status as 'supreme law' over the states did not by itself resolve the thorny question of how treaty law would interact with laws emanating from the new federal government.").

213 Ku, *supra* note 212, at 369-70, 378-83. Madison suggested differentiating types of treaties between those that could operate as law on their own versus those requiring House action, a proposal that was never adopted. *Id.*

214 *Id.* at 372-75 (questioning the coherence of Nicholas' argument and the clarity of Corbin's views).

215 ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1; *see also id.* art. VI, para. 3.

216 3 ELLIOT'S DEBATES, *supra* note 174, at 315 (Patrick Henry claimed the treaty power was "unlimited and unbounded"); *id.* at 509 (George Mason charged that under the Constitution "[t]he President and Senate can make any treaty whatsoever").

217 *See* CORCC, *supra* note 205 (top noun collocates other than pronouns for 392 appearances of treaty/treaties: peace (50), senate (45), power (42), states (37), laws (27), authority (22), law (20), union (20), nations (17)); COSCAC, *supra* note 205 (top noun collocates other than pronouns for 1284 appearances of treaty/treaties: power (143), states (142), peace (96), senate (80), law (71), laws (56), constitution (52), president (52), congress (50), commerce (42), nations (41)).

218 See COFEA, *supra* note 205 (top noun collocates other than pronouns for 52,092 appearances of treaty/treaties: peace (3,531), commerce (2,835), article (2,660), states (2,467), Britain

"agreement" appear less frequently and are not major collocates with "treaty" or "treaties."[219] These focal points are also evident in a review of the substance of each reference; 152 out of the 392 treaty references in the CORCC, for example, arise in concert with discussions over the allocation of the treaty power, while another 60 relate to the status of treaties in U.S. law or the courts' ability to construe them.[220]

Thus, the very frequency with which "treaties" appears in the discourse without attention to its status as a term of art may suggest assigning it a more general public meaning. Moreover, there are a few statements by Framers suggesting that they employed the term that way as well. Madison, for example, said: "The object of treaties is the regulation of intercourse with foreign nations, and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary."[221] This view aligns with Edmund Randolph's earlier comment:

(2,337), France (2,127), power (1,981), nations (1,452), amity (1,172), congress (1,134), articles (1,079), law (911)).

219 *Compact/compacts* appears 99 times in the CORCC, with top collocates of states (16), state (12), agreement (8), government (7), people (6), parties (5), and union (5). *Agreement/agreements* appears only 25 times in the CORCC with its primary collocates being compact, peace, and state (8 times apiece). *See* CORCC, *supra* note 205. *Compact* also appears 138 times in the *Journals of the Continental Congress*, and 49 times as a reference to agreements involving U.S. states (many of which simply quote the Compact Clause itself). *See Journals of the Continental Congress*, LIB. OF CONG., https://web.archive.org/web/20090421005101/http://lcweb2.loc.gov/ammem/amlaw/lwjc.html; Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 773 n.151 (2010) ("[T]he term compact appears 138 times in the Journals of the Continental Congress . . . used forty-nine times to refer to agreements involving U.S. states . . . . Another forty-seven times, the term referred to international agreements between the Union and foreign governments. In seventeen cases, compact referred to a generic agreement. In ten cases, it was used to define the bond or promise that exists between a sovereign and its subjects, through instruments like the Bill of Rights. In six cases, it referred to the familial relationship of European sovereigns. Four times, compact referred to the duties members of a society owe one another. Finally, compact was used five times as either a verb or an adjective.").

220 Other prominent contexts include references to treaty compliance, such as the power to negate state laws inconsistent with U.S. treaties (30 times); references to specific treaties (21), questions of whether the Articles or the Constitution constitute treaties (20); denial of treaty-making to U.S. states (16), the scope of the treaty power generally and with respect to alienating territory (15); as well as the general power to enforce treaties (14). Twenty-six of the 392 references are to entries in the volumes' indexes. *See CORCC Treaty Categories' List* (on file with author).

221 3 ELLIOT'S DEBATES, *supra* note 174, at 514-15 (Madison). During the Constitutional Convention, Madison focused on different types of treaties as opposed to recognizing treaties as one of multiple forms of agreement in proposing a power for the "President & Senate to make Treaties eventual and of Alliance for limited terms—and requiring the concurrence of the whole Legislature in other Treaties." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 174, at 394.

> The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency.[222]

Similarly, in defending the Jay Treaty as Camillus, Hamilton emphasized the breadth of the treaty power—asserting that it conveyed "plenipotentiary authority . . . . [W]hatever is a proper subject of compact between Nation & Nation may be embraced by a Treaty."[223] Later, he would argue that the treaty power was "competent to all the stipulations, which the exigencies of National Affairs might require . . . the making of Treaties of Alliance . . . Treaties of Peace, and *every other species of convention usual among nations*."[224] The fact that Hamilton's language treats compacts, conventions, and treaties as synonyms is striking given the different relationship between these categories in the law of nations. For those preferring a public original meaning method, such treatments may be telling.

On the other hand, it is important to contextualize Hamilton's statements—he made them to reject arguments that the Constitution moved matters ordinarily subject to treaty-making (such as peace, navigation, and commerce) beyond the treaty-power if they implicated powers assigned to the whole Congress under Article I.[225] As such, Hamilton was focused on the division of the treaty power between the Senate and the House, not the meaning of treaties generally. As Ramsey suggests, we might recognize Hamilton's statement as an exercise in "the usual tendency for rhetorical overstatement in the course of partisan debate."[226]

Even as some Framers' discussions suggest a more generic meaning for treaties, other statements offer countervailing evidence of the term's law of nations' meaning. Rufus King, for example, denied that U.S. states could make treaties precisely because they were not sovereigns, harkening to the law of nations' definition that limited treaty-making to such actors.[227] James Madison explained in *Federalist 42* that "[t]he powers to make treaties and to send and receive ambassadors, speak [to] their own propriety," suggesting that

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222 3 ELLIOT'S DEBATES, *supra* note 174, at 363.

223 Alexander Hamilton, *The Defence No. XXXVI*, *in* 20 HAMILTON PAPERS, *supra* note 184, at 6; *id.* ("The power '*to make*,' implies a power to act *authoritatively* and *conclusively* . . . . With regard to the objects of the Treaty, there being no specification, there is of course a *charte blanche*."). Hamilton acknowledged that treaties, like other delegated powers, could not violate the Constitution. *Id.*

224 The Defence No. XXXVIII, *in* 20 HAMILTON PAPERS, *supra* note 184, at 22 (emphasis added).

225 *See* Ramsey, *Executive Agreements*, *supra* note 7, at 172-73.

226 *Id.* at 173. Indeed, care should be taken not to confuse debates about the institutional organization of the treaty power with the concept itself. *Accord* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1261 (2019).

227 *See* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 174, at 323.

the concepts themselves defined their nature and scope.[228] Madison would also go on to suggest that the requirements of Congressional consent to compacts and agreements "fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark."[229] Where had these concepts been so developed? Certainly, not in the Framing itself. The term "compact" (which had not appeared in the earlier Articles) was paired with "agreement" in the draft constitutional text by John Rutledge as Chair of the Committee of Detail; it remained there without any further discussion prior to being adopted by the Constitutional Convention as Section 10 of Article I.[230] In contrast, these terms were well developed under the law of nations, suggesting that is precisely the frame of reference to which Madison refers readers.

3. Early Practice[231]

On October 19, 1781, General George Washington and Lord Cornwallis signed "Articles of Capitulation" at Yorktown, delimiting terms for the surrender of British forces.[232] The agreement's fourteen articles included commitments on the delivery of artillery and arms, treatment of British soldiers as prisoners of war, and treatment of natives and inhabitants who had joined the British army.[233] The agreement obviously had tremendous importance to the new Republic, marking the end of hostilities among American, British, and French forces.

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228 THE FEDERALIST NO. 42, *supra* note 72, at 213; Golove, *supra* note 204, at 1134 (noting emergence of "a shared supposition that the [treaty] power was general and would extend as far as was customary under international practice").

229 THE FEDERALIST NO. 44, at 229-30 (James Madison) (Ian Shapiro ed., 2009).

230 The first mention of "compact" appeared in a mark-up of a draft by James Wilson, apparently in Rutledge's handwriting. Draft from the Committee of Detail, *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 174, at 129, 163 n.17. The original text in Section 10 simply read: "No State shall enter into any (A1) Treaty, Alliance (or) Confederation," which Rutledge changed to read: "No State shall enter into any Treaty, Alliance, Confederation with any foreign Power nor with[ou]t. Const. of U.S. into any agreem[en]t. or compact w[it]h another State or Power . . . ." *Id.* at 169. On August 6, 1778, the Committee of Detail delivered a draft Constitution to the Convention that, substantively, mirrors the actual Constitution, although the treaty prohibition and compact provisions operated as stand-alone articles, rather than as parts of Article I. *Compare* Draft from the Committee of Detail, *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 174, at 177, 187 *and* Draft from the Committee of Style, *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 174, at 565, 577 *with* U.S. CONST. art. I, § 10, cl. 1, 3.

231 *See* Appendix II to this Article for a chart cataloging the agreements discussed in this section.

232 Articles of Capitulation, Oct. 18, 1781, available at https://avalon.law.yale.edu/18th_century/art_of_cap_1781.asp [https://perma.cc/QKU3-HZZY]. Other parties to the capitulation included the heads of French army and naval forces as well as the commander of British naval forces. *See id.*

233 *Id.* arts. II, V, X, XI.

Washington, however, concluded the Articles in 1781 without prior Congressional instructions and never sought ratification after the fact. Nor could such lack of consultation be tracked to inexperience. He had signed his first capitulation three decades earlier, surrendering Fort Necessity to French forces.[234] For its part, Congress, on receiving word of the capitulation agreement, passed a resolution presenting "the thanks of the United States in Congress assembled" for General Washington's services to the United States.[235]

It is a little shocking that constitutional scholars have entirely ignored Washington's agreement with Cornwallis (even as it was published in *Martens'* collection of treaties and other international agreements).[236] It has never been cited in discussions of the treaty power, nor considered in the (many) histories of U.S. executive agreements. Yet, this agreement very clearly tracks the law of nation's concept of compacts/conventions made by a sovereign's subsidiary powers within the powers of their position.[237] Nor is it an isolated example—four years earlier, in 1777, British General Burgoyne and American General Gates concluded the so-called "Convention of Saratoga," an agreement by which certain British Forces surrendered, an outcome credited with catalyzing French recognition of American independence.[238]

Nor were such agreements limited to U.S. generals or their victories. In 1786, agents for the United States (Thomas Barclay) and the Emperor of Morocco (Commodore Rais Farache) concluded a "Ships Signals Agreement," in concert with the conclusion of the Treaty of Peace and Friendship between the two nations.[239] In 1814, the City of Alexandria's

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234 Articles of Capitulation, July 3, 1754, available at https://www.nps.gov/fone/learn/historyculture/capitulation.htm [https://perma.cc/9X27-6Q5X].

235 21 JCC, *supra* note 172, at 1079-80 (Oct. 29, 1781). Contrast this with its resolutions and proclamations for other treaties such as the 1778 Treaties with France or the 1783 Definitive Treaty of Peace. 11 JCC, *supra* note 172, at 457-58 (Congressional ratification and proclamation of 1778 Treaties with France and Act Separate and Secret); 26 JCC, *supra* note 172, at 28-30 (Congressional ratification and proclamation of 1783 Treaty).

236 *See Articles de la Capitulation Entre le General Washington et le Comte Cornwallis*, *in* 3 MARTENS' *RECUEIL, supra* note 46, at 177-81.

237 *See supra* notes 89–94 and accompanying text.

238 *Articles de convention Entre le Lieutenant Général Bourgoyne & le General Major Gates, à Saratoga le 16 Oct. 1777*, *in* 1 MARTENS' *RECUEIL*, *supra* note 46, at 649. The convention agreed that members of Burgoyne's army would be sent back to England, with pledges that they not serve in the war again. *Id*. On the significance of the outcome at Saratoga, see THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 31-32 (10th ed., 1980) ("In a diplomatic rather than in a military sense this blow to Britain's arms must be regarded as one of the decisive battles of world history.").

239 The agreement indicated pendants and lanterns to be displayed "to the End that the Vessels of both Parties may be known to each other at Sea." *Ship-Signals Agreement, reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 219 (Hunter Miller

Common Council surrendered to British Commodore Gordon by agreeing to turn over ordinance, stores, ships, and other merchandise in return for promises not to burn the city and to leave its inhabitants and their dwellings unmolested.[240] In 1826, a U.S. Naval Captain, Thomas Catesby Jones, concluded separate "Articles" with Tahitian and Hawaiian leaders.[241] Their contents primarily involved commercial privileges in favor of the United States and its citizens; there is, however, no record that the U.S. government in Washington ever approved or ratified their terms, providing further support for subsidiary powers' agreements viz. treaties.[242]

To be clear, the law of nations allowed the sovereign to disavow sub-sovereign compacts/conventions done outside an agent's authorities, and early U.S. practice reflected this as well.[243] In 1776, for example, Benedict Arnold concluded a "Cartel" with a British Captain, agreeing on the release of captured American soldiers from the original Cedar garrison and their reinforcements in return for the release of an equal number of British prisoners of war.[244] On receiving reports of the Cartel's contents, the Continental Congress concluded that "the agreement entered into by General Arnold was a mere sponsion on his part."[245] The Congress resolved only to honor that part of it relating to the captured reinforcements (denouncing the Cedars garrison's original surrender as "shameful"), and even then, only if the British paid an indemnity for the alleged murders of several American

ed., 1931) [hereinafter MILLER]. Although the associated Treaty was ratified by the United States, the Ships Signals agreement was not. *Id.* at 225.

240 Terms of Capitulation, Aug. 29, 1814, arts. 1, 2, 4, available at https://alexandriava.gov/1812 [https://perma.cc/6P7P-STJ7].

241 *See* Articles Agreed on with the King, Council, and Head Men of Tahiti by Captain Thomas Catesby Jones, U.S.N. (Sept. 6, 1826), *reprinted in* 3 MILLER, *supra* note 239, at 249; Articles of Arrangement with the King of the Sandwich Islands (Hawaii) and Captain Thomas Catesby Jones, U.S.N. (Dec. 23, 1826), *reprinted in* 3 MILLER, *supra* note 239, at 269.

242 Michael Ramsey disputes these agreements' bindingness because they were done without instructions or later endorsement, but Miller concluded that the authorities of Tahiti and Hawaii (for whom this was their first ever international agreement) likely viewed them as binding. *Compare* RAMSEY, *supra* note 7, at 184, *with* 3 MILLER, *supra* note 239, at 256 ("[T]he better view that the articles are to be regarded as an international act, even if deemed provisional. The wording used is that of agreement (see Article 4, 'the contracting parties'); the authorities of Tahiti undoubtedly regarded the articles as binding . . . ."); 3 MILLER, *supra* note 239, at 273-76 ("The articles were clearly an international act, signed as such by the authorities of the then independent Hawaiian Government, and by a representative of the United States, whose instructions, while vague, must be regarded as sufficient authority for his signature, in view of the then remoteness of the region from the seat of Government and the general discretion which those instructions granted . . . .").

243 *See supra* notes 84, 103 and accompanying text.

244 5 JCC, *supra* note 172, at 534-39 (July 1776).

245 *Id.* at 538.

prisoners and the plundering of Cedars "contrary to the faith of the capitulation."[246]

Putting aside the merits of Congress's repudiation, the use of the term "sponsion" here is notable. It clearly draws from the law of nations' typology where sponsions existed alongside treaties, conventions, and compacts.[247] Moreover, it was not a term that had any public meaning outside of this legal context.[248] Hence, designating Benedict Arnold's agreement as a sponsion reinforces the law of nations' thesis—a term that delimits the nature and scope of U.S. agreement-making authorities beyond treaties themselves.

What about U.S. state agreements? During the revolutionary period, there were regular negotiations with Native American tribes, resulting in declarations of peace, providing for the return of prisoners, and delimiting boundaries for colonial expansion.[249] All three issues were addressed, for example, in two 1777 "peace treaties" with the Overhill Cherokee Nation, the first with representatives of South Carolina and Georgia and another with commissioners from North Carolina and Virginia.[250] And even though the Articles of Confederation appeared to deny their capacity to do so, several states (Georgia, Virginia, Pennsylvania, and New York) entered into treaties with various Native American tribes directly during this period.[251] State officials offered various rationales for doing so consistent with the Articles (for example, treating people in Tribes as members of a U.S. state, not independent Nations).[252] In other cases, the negotiations appeared to have

246 *Id.* at 538-39. The Executive Branch took a different tact when U.S. Brigadier General Hull made an agreement to surrender the Fort—and Town—of Detroit in 1812 without any real fight: Hull was court-martialed. *See* Capitulation for the Surrender of Fort Detroit, Aug. 16, 1812, available at https://www.archives.gov.on.ca/en/explore/online/1812/big/big_014_terms.aspx [https://perma.cc/C6FQ-CE2S]. James Madison subsequently commuted Hull's death sentence considering his service during the Revolution. *See Hull, William*, ENCYC. OF DETROIT, https://detroithistorical.org/learn/encyclopedia-of-detroit/hull-william [https://perma.cc/6LGL-AYDE] (last visited Jan. 21, 2025).

247 *See supra* subsection I.B.2.c.

248 Of the ten dictionaries legal historians identify as most relied on during the Founding, only Sheridan and Walker contain entries for "sponsion"—defining it in both cases as "the act of becoming surety for another." *See sponsion*, WALKER, *supra* note 37; *sponsion*, SHERIDAN, *supra* note 38. Nor are there entries for sponsion in any of the era's prominent legal dictionaries—Jacob, Potts, Burn & Burn, Cunningham, or Whishaw. *See supra* notes 43–44 and accompanying text.

249 PRUCHA, *supra* note 36, at 35.

250 For the relevant texts, see Archibold Henderson, *The Treaty of Long Island of Holston, July, 1777*, 8 N.C. HIST. REV. 55, 76-78 (1931) (South Carolina and Georgia); 1 AMERICAN STATE PAPERS: PUBLIC LANDS 52 (Walter Lowrie ed., Washington, Duff Green 1834) (North Carolina and Virginia).

251 *See* JONES, *supra* note 169, at 150-51 (listing Georgia's three treaties with the Creek and one treaty with the Cherokee, Virginia's treaty with the Chickasaw, Pennsylvania's treaty with the Six Nations, and New York's treaty with the Oneida and Tuscarora).

252 *See* PRUCHA, *supra* note 36, at 44 (recounting James Duane's advice to New York Governor Clinton).

the national government's sanction, such as those at Fort Stanwix, when, following U.S. treaties, the Six Nations agreed to cede property along the Allegheny River to Pennsylvania in return for goods.[253]

Further evidence that early practice accorded with the law of nations' differentiation of treaties from other compacts and conventions is seen in the (relatively few) U.S. agreements concluded without Senate Advice and Consent after the Ratification. In 1792, Congress authorized the Postmaster General to make "arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets."[254] As with generals' capitulations, the authorization of a sovereign subsidiary to conclude agreements within its assigned authority tracks the law of nations. The statute itself became the basis for making subsequent "postal conventions" without Senate involvement, with the first between the United States and Great Britain (with respect to Canada) occurring sometime in 1792.[255]

In 1799, William Vans Murray, the U.S. representative to the Netherlands, negotiated an agreement through an exchange of notes with that country's Foreign Minister to waive claims regarding a Dutch prize court upholding the seizure of a vessel owned by an American citizen in return for 20,000 florins.[256] In 1825, the United States and Colombia concluded a "Convention" settling claims arising out of the capture of four American ships by Venezuelan brigs of war.[257] That same year, the United States and Russia settled claims relating to the brig *Pearl* via an exchange of diplomatic notes.[258] In none of these cases was there any suggestion of the need to submit the agreements to the Senate in accordance with Article II.[259]

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253 *Id.* at 48.

254 Postal Service Act, Pub. L. 2–7, § 26, 1 Stat. 232, 239 (1792).

255 *See* MCCLURE, *supra* note 32, at 38-39 (noting that in March 1792, the U.S. Postmaster General proposed an international arrangement or "a more formal convention" with his Canadian counterpart, and, although no record of the agreement text remains, later Canadian correspondence referenced an agreement and its 1794 expiration).

256 Settlement of the Case of the Schooner 'Wilmington Packet', Dec. 7 & 12, 1799, U.S.–Batavian Republic [The Netherlands], *reprinted in* 5 MILLER, *supra* note 239, at 1075-78. Miller identifies this as the nation's first claims settlement agreement without Senate involvement. *Id.* at 1079.

257 Convention For Adjusting Certain Claims, Mar. 16, 1825, U.S.–Colom., *reprinted in* 3 MILLER, *supra* note 239, at 195-99. John Quincy Adams notified the Congress of the settlement in his first Presidential Address. *Id.* at 197. For more on claims settlement agreements, see Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 21-22 (2003).

258 Exchange of Notes for the Settlement of the Claim in the Case of the Brig "Pearl", Apr. 19 & 22, 1825, U.S.–Russ., *reprinted in* 3 MILLER, *supra* note 239, at 201-03.

259 *See* Ramsey, *Executive Agreements, supra* note 7, at 174-79 (surveying early executive agreements made without Senate advice and consent).

In 1813, Nova Scotia's advocate general and a British naval lieutenant concluded a "Cartel for the exchange of prisoners of war between Great Britain and the United States of America" with a U.S. State Department agent.[260] As Secretary of State, James Monroe subsequently "declare[d] that the said Cartel is accepted, ratified and confirmed on the part of the United States," even though the Senate had never given its advice and consent.[261]

Four years later, in 1817, Acting Secretary of State Richard Rush concluded an exchange of notes with British envoy Charles Bagot (the "Rush-Bagot Agreement") on stationing naval vessels in the Great Lakes.[262] As President, Monroe submitted it to the Senate in 1818 for their consideration as to

> whether this is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution, or is such an [sic] one as requires the advice and consent of the Senate; and, in the latter case, for their advice and consent, should it be approved.[263]

Implying an affirmative answer, the Senate consented to the agreement's ratification later that year.[264]

Aside from these examples, most early U.S. agreements were ratified with (i) Congress's approval (under the Articles) or (ii) via the Article II process of presidential ratification following Senate advice and consent (under the Constitution).[265] From 1776-1826, the United States made forty-four agreements with non-Native American parties via Congress's approval or the Article II process.[266] Of these, twenty bear the "Treaty" title—one treaty of alliance (with France),[267] two treaties ceding territory (the Louisiana

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260 Cartel for the Exchange of Prisoners of War, May 12, 1813, U.S.–U.K., *reprinted in* 2 MILLER, *supra* note 239, at 557, 565.

261 *Id.* at 565.

262 Exchange of Notes Relative to Naval Forces on the American Lakes, April 28 & 29, 1817, U.S.–U.K., *reprinted in* 2 MILLER, *supra* note 239, at 645-47.

263 *Id.* at 647 (citing John Quincy Adams' diary reports of President Monroe's skepticism on the need to submit the Rush-Bagot agreement to the Senate; President Monroe eventually agreed to send it to the Senate on advice of his advisers and to allay British concerns over its binding effect).

264 *Id.* at 648.

265 Between 1789-1839, the United States apparently concluded twenty-seven "Executive Agreements" and sixty Article II "Treaties." SFRC STUDY, *supra* note 29, at 39. For his part, Ramsey identifies twelve executive agreements before 1840, including seven I've cited here. I do not discuss the other five—with Brazil and Colombia in 1829, Portugal in 1832, and the Netherlands and Samoa in 1839—as they lie beyond the Founding era. *See* RAMSEY, *supra* note 7, at 184.

266 *See generally* MILLER, *supra* note 239 (listing treaties entered into by the United States between 1776 and 1863).

267 Treaty of Alliance, Feb. 6, 1778, U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 35.

Purchase and the 1819 Onís-Adams Treaty),[268] nine treaties of peace,[269] and eight treaties of amity/friendship, commerce, and/or navigation.[270] Most of these, moreover, align with the law of nations' treaty definition.[271] The United States was the designated party as sovereign, and the obligations assumed were indefinite and executory in nature vis-à-vis topics—peace, amity, commerce, and navigation—for which other nations had long employed the treaty form.[272] Nor was there any real contemporaneous controversy about qualifying these as treaty instruments.[273]

What about the other agreements proceeding through the Continental Congress or under Article II that did not bear the title "treaty"? Interestingly, their contents suggest their title choices were significant; these agreements

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268 Treaty for the Cession of Louisiana, April 30, 1803, U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 498; Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, U.S.–Spain, *reprinted in* 3 MILLER, *supra* note 239, at 3-5.

269 (i) Definitive Treaty of Peace, Sept. 3, 1783, U.S.–Gr. Brit., *reprinted in* 2 MILLER, *supra* note 239, at 151; (ii) Treaty of Peace and Friendship with additional article, June 28 & July 15, 1786, U.S.–Morocco, *reprinted in* 2 MILLER, *supra* note 239, at 185; (iii) Treaty of Peace and Amity, Sept. 5, 1795, U.S.–Algiers, *reprinted in* 2 MILLER, *supra* note 239, at 275; (iv) Treaty of Peace and Friendship, Nov. 4, 1796 and Jan. 3, 1797, U.S.–Tripoli, *reprinted in* 2 MILLER, *supra* note 239, at 349; (v) Treaty of Peace and Friendship, Aug. 28, 1797 & Mar. 26, 1799, U.S.–Tunis, 2 MILLER, *supra* note 239, at 386; (vi) Treaty of Peace and Amity, June 4, 1805, U.S.–Tripoli, *reprinted in* 2 MILLER, *supra* note 239, at 529; (vii) Treaty of Peace and Amity, Dec. 24, 1814 (Treaty of Ghent), U.S.–Gr. Brit., *reprinted in* 2 MILLER, *supra* note 239, at 574; (viii) Treaty of Peace, June 30 & July 3, 1815, U.S.–Algiers, *reprinted in* 2 MILLER, *supra* note 239, at 585; (ix) Treaty of Peace and Amity, Dec. 22 & 23, 1816, U.S.–Algiers, *reprinted in* 2 MILLER, *supra* note 239, at 617.

270 *See* (i) Treaty of Amity and Commerce, Feb. 6, 1778 (ratified by U.S. May 4, 1778), U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 3; (ii) Treaty of Amity and Commerce, Oct. 8, 1782, U.S.–Neth., *reprinted in* 2 MILLER, *supra* note 239, at 59; (iii) Treaty of Amity and Commerce, Apr. 3, 1783, U.S.–Swed., *reprinted in* 2 MILLER, *supra* note 239, at 123; (iv) Treaty of Amity and Commerce, Sept. 10, 1785, U.S.–Prussia, *reprinted in* 2 MILLER, *supra* note 239, at 162; (v) Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794 (Jay Treaty), U.S.–Gr. Brit., *reprinted in* 2 MILLER, *supra* note 239, at 245; (vi) Treaty of Friendship, Limits, and Navigation, Oct. 27, 1795, U.S.–Spain, *reprinted in* 2 MILLER, *supra* note 239, at 318; (vii) Treaty of Amity and Commerce, July 11, 1799, U.S.–Prussia, *reprinted in* 2 MILLER, *supra* note 239, at 433; (viii) Treaty of Friendship and Commerce, Sept. 4, 1816, U.S.–Swed., *reprinted in* 2 MILLER, *supra* note 239, at 601.

271 The first two treaties with Prussia and two with Sweden had limited durations of between eight and fifteen years, leading to new treaties following their expirations. *See* 2 MILLER, *supra* note 239, at 144, 182, 433, 612. Given their temporary duration, these agreements might have been better labeled as conventions. Still, while in force, their commitments were executory in nature, suggesting the treaty label might still have been viewed as appropriate. *See supra* notes 112–126 and accompanying text.

272 *See supra* Section I.B and accompanying text.

273 Chief Justice Rutledge did object to the Jay Treaty, saying "the title was a perversion of terms," for the document was not "a treaty of Amity, Commerce and Navigation, but in fact, it was an humble acknowledgment of our dependence upon his majesty." PHILADELPHIA AURORA GENERAL ADVERTISER, July 29, 1795. But Rutledge's objections involved the deal's substance, not its treatment as a treaty. *Id.* And even if his objections were concerning the treaty form, they would not be sound under the law of nations given its acceptance of equal *and* unequal treaties. *See supra* note 138 and accompanying text.

were not treaties under the law of nations but involved other agreement forms. For example, the United States received financing from the French King in two "Contracts," which recall a monarch's capacity to make private treaties.[274] Three "Articles" preceded or followed formal treaties—the 1782 Preliminary Articles of Peace with Great Britain and two others interpreting the Jay Treaty.[275]

Seventeen agreements bore the title "Convention." In many cases, their contents hewed to the law of nations' convention concept. Six contained terms that were (largely) executed, effectuating payment of a fixed sum or otherwise settling/endorsing indemnifications (in contrast to the executory arbitral claims settlement processes of the 1783 and 1784 treaties with Great Britain).[276] Four implicated commercial, navigation, and consular topics usually subject to a treaty, but with fixed (and short) durations of between two to twelve years.[277] And one involved regulations dealing with the law of prize and recaptured vessels concluded alongside (but separate from) the

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274 Interestingly, the King concluded his contracts with the "thirteen" states. *See* Contract between the King and the Thirteen United States of North America, July 16, 1782, 2 MILLER, *supra* note 239, at 48; Contract between the King and the Thirteen United States of North America, Feb. 25, 1783, 2 MILLER, *supra* note 239, at 115.

275 *See* Preliminary Articles of Peace, Nov. 30, 1782, U.S.–Gr. Brit., 2 MILLER, *supra* note 239, at 96; Explanatory Article to Article 3 of the Jay Treaty, May 4, 1796, U.S.–Gr. Brit., 2 MILLER, *supra* note 239, at 346; Explanatory Article to Article 5 of the Jay Treaty, Mar. 15, 1798, U.S.–Gr. Brit., 2 MILLER, *supra* note 239, at 427.

276 *See* (i) Convention Regarding Articles 6 and 7 of the Jay Treaty and Article 4 of the Definitive Treaty of Peace, Jan. 8, 1802, U.S.–Gr. Brit., *reprinted in* 2 MILLER, *supra* note 239, at 488-89 (stipulating that the U.S. commits to pay £600,000 to Great Britain to satisfy Jay Treaty-related claims); (ii) Convention for Indemnification, Aug. 11, 1802, U.S.–Spain, *reprinted in* 2 MILLER, *supra* note 239, at 492 ("Convention . . . for the indemnification of those who have sustain'd Losses, Damages or Injuries in Consequences of the excesses of Individuals of either Nation during the late war, contrary to the existing Treaty or the Laws of Nations"); (iii) Convention for the Payment of Sixty Million Francs ($11,250,000) by the United States, Apr. 30, 1803, U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 512-13 (solidifying a U.S. agreement to pay sixty million Francs, minus sums determined by another Convention as debts due by France to U.S. citizens under the Louisiana Purchase); (iv) Convention for the Payment of Sums Due by France to Citizens of the United States, Apr. 30, 1803, U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 516 (fixing process for settling debts due by France to U.S. citizens); (v) Convention for Determining the Indemnification under the Decision of the Emperor of Russia as to the True Construction of Article 1 of the Treaty of Ghent, July 12, 1822, U.S.–Gr. Brit., *reprinted in* 3 MILLER, *supra* note 239, at 91; (vi) Convention for the Payment of $1,204,960 by Great Britain, Nov. 18, 1826, U.S.–Gr. Brit., *reprinted in* 3 MILLER, *supra* note 239, at 261.

277 *See* (i) Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, Nov. 14, 1788, U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 228, 241, art. 16 (twelve year duration); (ii) Convention, Sept. 30, 1800, U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 457, 482-85 (originally negotiated as a "provisional treaty" pending resolution of disputes under 1778 treaties, but later agreed to be retitled as a convention with an eight year duration); (iii) Convention to Regulate Commerce, July 3, 1815, U.S.–Gr. Brit., *reprinted in* 2 MILLER, *supra* note 239, at 595, 599, art. 5 (four year duration); (iv) Convention of Navigation and Commerce, June 24, 1822, U.S.–Fr., *reprinted in* 3 MILLER, *supra* note 239, at 77, 81, art. 7 (two year duration).

U.S.–Dutch Treaty of Amity and Commerce.[278] As such, the early titling of U.S. agreements as treaties or conventions often tracked the executory/executed distinctions directed by the law of nations.

Things admittedly changed after the War of 1812. The United States began to make "conventions" on topics that the law of nations previously qualified as treaties. In 1818, for example, the United States and Great Britain concluded a Convention (later dubbed the Oregon Treaty) setting their boundary at the forty-ninth parallel.[279] In 1824, the United States and Tunis concluded a Convention that amended their earlier 1797 treaty.[280] That same year, the United States began entering into conventions (sometimes called a "General Convention") on topics previously reserved for treaties—namely peace, amity, navigation, and commerce.[281] By the 1820s, therefore, U.S. practice suggests the conflation of treaties and conventions from their previously separate categories.

When it came to agreements with Native Americans, the United States largely deployed the treaty form, as it concluded 137 of these between 1776-1826.[282] Two of the earliest did not bear the "treaty" title. For example, the so-called "Treaty of Fort Pitt" between the United States and Delaware Tribe describes itself (in terms drawn up by U.S. Commissioners) as "Articles of Agreement and Confederation."[283] And although the Agreement was sent to Congress, there is no indication Congress ever approved it.[284] Beginning with

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278 *See* Convention Concerning Vessels Recaptured, Oct. 8, 1782, U.S.–Neth., *reprinted in* 2 MILLER, *supra* note 239, at 91; *cf.* Treaty of Amity and Commerce, U.S.–Neth., Oct. 8, 1782, *supra* note 270. Similarly, alongside its two 1778 French treaties, the U.S. concluded "Acts Separate and Secret" with France regarding Spain's ability to accede to those treaties' terms. *See* Act Separate and Secret, Feb. 6, 1778, U.S.–Fr., *reprinted in* 2 MILLER, *supra* note 239, at 45.

279 Convention Signed at London, Oct. 20, 1818, U.S.–Gr. Brit., *reprinted in* 2 MILLER, *supra* note 239, at 658-59.

280 Convention Amending the Treaty of Aug. 28, 1797, and March 26, 1799, Feb. 24, 1824, U.S.–Tunis, *reprinted in* 3 MILLER, *supra* note 239, at 141.

281 *See, e.g.*, Convention Regarding Navigation, Fishing, and Trading, and Establishments on the Northwest Coast of America, Apr. 17, 1824, U.S.–Russ., *reprinted in* 3 MILLER, *supra* note 239, at 151; General Convention of Peace, Amity, Navigation, and Commerce, Oct. 3, 1824, U.S.–Colom., *reprinted in* 3 MILLER, *supra* note 239, at 163 (Miller's header calls it a "treaty," noting that usage in the instrument and ratification papers is inconsistent—alternating between "treaty" and "convention"—but as the first agreement with Latin America, it became a template for later agreements. *Id.* at 188-89); General Convention of Peace, Amity, Commerce, and Navigation, Dec. 5, 1825, U.S.–Federation of the Centre of America, *reprinted in* 3 MILLER, *supra* note 239, at 209; General Convention of Friendship, Commerce, and Navigation, April 26, 1826, U.S.–Den. *reprinted in* 3 MILLER, *supra* note 239, at 239, 244 (including notes by Miller discussing both treaty and convention terminology).

282 *See* PRUCHA, *supra* note 36, app. B.

283 Articles of Agreement and Confederation, U.S.–Delawares, Sept. 17, 1778, 7 Stat. 13; *see also* Articles concluded at Fort Stanwix, Oct. 22, 1784, U.S.–Six Nations, 7 Stat. 15.

284 12 JCC, *supra* note 172, at 986; PRUCHA, *supra* note 36, at 33.

the 1785 Wyandot agreement, however, U.S. Commissioners began to label and refer to all agreements with Native Americans as treaties.[285]

Thus, twenty-six of the first thirty U.S. agreements with Native Americans were designated as treaties, using similar titling to agreements with European powers (e.g., Treaties of Peace and Friendship).[286] The fact that these were often framed as establishing "perpetual peace" or as "definitive" agreements may explain that titling (at least by the U.S. authors) with respect to the law of nations.[287] Meanwhile, the earlier meaning of "'treaties' as councils for discussion . . . disappeared to a large extent."[288]

Whether to treat the European and Native American agreement practices as equivalent remains an open question. Prucha emphasizes "treaties were European instruments."[289] And the United States viewed their formations quite differently. Congress gave three U.S. Indian Commissioners blanket treaty-making authorities vis-à-vis Native Americans; the resulting treaties were often short and focused on land cessions.[290] In contrast, treaty-making with European powers was carefully circumscribed with specific agents limited to specific instructions.[291]

The U.S. practice of deploying the treaty label broadly alongside the practice of ratifying so many "conventions" could be read to suggest that the reference to treaties in the Articles and the Constitution was broad enough to encompass all agreements binding on the United States. President

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285 Articles of a Treaty Concluded at Fort M'Intosh, Jan. 21, 1785, U.S.–Wyandot, 7 Stat. 16.

286 The four cases of non-treaty agreements were: (i) an 1802 "Indenture" with the Seneca, 7 Stat. 70, where under U.S. authority, the Seneca agreed to treaty cessions with certain Dutch citizens; (ii) an 1802 "Provisional Convention" with the Choctaws, 7 Stat. 73; (iii) "Articles of Arrangement" with the Chickasaw in 1805, 7 Stat. 89; and (iv) an 1805 "Convention" with the Creek, 7 Stat. 96. Thereafter, the treaty form became universal, save for Andrew Jackson dictating "Articles of Agreement and Capitulation" with the Creeks in 1814. 7 Stat. 120.

287 *See, e.g.*, Articles of a Treaty Concluded at Hopewell, Jan. 3, 1786, U.S.–Choctaw, 7 Stat. 21, art. XI ("The hatchet shall be forever buried, and the peace given by the United States of America, and friendship re-established between the said states on the one part, and all the Choctaw nation on the other part, shall be universal . . . ."); Wyandot Treaty, *supra* note 285, art. II (Indian nations "acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whatsoever."). The fact that these agreements were regularly unequal in the exchange of commitments would not deprive them of their treaty status given that the law of nations recognized a category of unequal treaties. *See supra* note 138, and accompanying text.

288 PRUCHA, *supra* note 36, at 67.

289 *Id.* at 103; *id.* at 39 ("Procedures for dealing with established foreign nations were quite different from those for dealing with the Indian nations, although eventually the patterns of the former crept into those of the latter").

290 *Id.* at 43; *id.* at 103 (noting massive land transfers occurred as result of land cessions in treaties between U.S. and Native American tribes).

291 *See id.* at 39 ("The Continental Congress during the Revolutionary War made elaborate preparations for treaties of alliance or commerce with European nations. A detailed 'Plan of a Treaty' was drawn up, discussed, and amended in Congress, and specific instructions were issued to specially appointed agents.").

Washington adopted that view in setting the early precedent of Senate advice and consent for treaties with Native Americans. In presenting the two Fort Harmar treaties (one with the Wyandot and the other with the Six Nations) to the Senate in May 1789, he emphasized:

> [T]he general understanding and practice of nations, as a check on the mistakes and indiscretions of Ministers or Commissioners, not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be adviseable to observe it in the conduct of our treaties with the Indians; for though such treaties being, on their part, made by their chiefs or rulers, need not be ratified by them, yet, being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation until approved and ratified by the government. It strikes me that this point should be well considered and settled, so that our national proceedings, in this respect, may become uniform, and be directed by fixed and stable principles.[292]

By referencing the law of nations, Washington's statement affirms it as a reference point for interpreting constitutional powers. His proclamation accompanying the ratification of the Wyandot treaty further enjoined and required "all officers of the United States civil and military and all other citizens and inhabitants thereof faithfully to observe and fulfil the same"—a reminder of the binding force of U.S. treaty commitments under both the Constitution's Supremacy Clause and the law of nations.[293]

At the same time, as we have seen, the law of nations did not restrict the binding effect of international agreements to treaties, but allowed for such force to accompany transitory conventions and agreements by subsidiary powers that the sovereign did not disavow. Indeed, it is notable that Washington himself ignored the lack of ratification of the Six Nations treaty (the Senate never gave advice and consent), as he referred to it in 1791 correspondence as valid and binding.[294]

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292 *Thursday Sept. 17, 1789*, *in* 1 J. EXEC. PROCEEDINGS S. 26-27 (Washington, Duff Green 1828) (transmitting to the Senate two Fort Harmar treaties, one with the Wyandot and the other with the Six Nations).

293 2 THE TERRITORIAL PAPERS OF THE UNITED STATES 219-220 (Clarence Edwin Carter ed., 1934). The practice of proclaiming treaties continued in a similar fashion for several hundred years until being discontinued circa 1999 (full disclosure: the author was working in the State Department Treaty Office at that time and participated in the decision—one that went largely unnoticed in both political and academic circles).

294 *To the Cornplanter, Half-Town, and Great Tree, Chiefs of the Seneca Nation, Jan. 19, 1791*, *in* 31 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799197-98 (John C. Fitzpatrick ed., 1939);

Conceptually, moreover, it is not necessary to give treaties a colloquial (viz. law of nations) reading to explain the Senate's early practice of consenting to both treaties and conventions. It seems unassailable that, whatever "treaties" are, they must proceed through Article II. Yet the law of nations also anticipated sovereigns making (executed) conventions directly or ratifying their agents' agreements (converting these into treaties).[295] These possibilities may explain Article II's operation as simultaneously *required* for treaties on the one hand, but discretionary in approving conventions on the other. And if it was discretionary for non-treaty agreements, it left open the door for other pathways to emerge to approve agreements, such as legislation or the delegated/customary powers of the office holder.

Taken together, there is strong evidence that the law of nations served as a general reference point for constitutional meaning on relevant matters. The text of the Articles and the Constitution bear this out in the specific context of suggesting differences between treaties, compacts, and agreements. And, although the Framing materials offer less, and occasionally mixed, evidence for treaties as a term of art (versus as a more generic stand in for all agreements), they do not foreclose the possibility. Looking to actual U.S. practice in the early years, there is concrete evidence of U.S. generals/agents concluding the sorts of compacts anticipated by the law of nations. At the same time, at the national level, the titling and content of treaties versus conventions aligns with the law of nations even as the Senate appears to have regularly treated *both* treaties and conventions as matters for its advice and consent.

CONCLUSION

For nearly two centuries, both political branches, the Supreme Court, and scholars from Story to Henkin have assumed that the original meaning of treaties was lost or otherwise indeterminate. I think this was an error born out of looking in the wrong place. We can, in fact, recover an original meaning for treaties.

Doing so begins by looking beyond the public meaning of treaties as a synonym for compacts and agreements and recognizing it as a term of art under the law of nations. In the late eighteenth century, the treaty was one form of international agreement defined by its sovereign parties making executory or "perpetual" commitments binding under the natural law of nations. As such, treaties contrasted with national "conventions" that focused

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PRUCHA, *supra* note 36, at 73-74. U.S. Commissioners would also later reference the Six Nation treaty's legal effects in 1793. *Id.* at 74.

295 *See supra* notes 81, 87 and accompanying text.

on transitory matters, in the sense of their limited duration or their "executed" operation where performance coincided with the agreement's conclusion. Subsidiary powers also concluded compacts directly, based either on instructions of the sovereign or via the authorities customarily assumed by the office. But if those actors made agreements without such authority (or the sovereign disavowed them) they were left with a sponsion and the personal, but not national liability, that accompanied that category. The fact that such concepts have largely been forgotten does not undercut their historical value. They were clearly commonly understood across the entire corpus of the law of nations and international relations more generally.

With this law of nations' typology in hand, it is equally possible to see its operation as a vehicle for giving meaning to terms like treaties and compacts in the Constitution. The relevance of the law of nations to the Framing has long been recognized even if not (yet) its particular manifestations concerning treaties and compacts. The text of both the Articles of Confederation and the Constitution aligns with the law of nations' thesis. The Framing offers a more complicated picture, given an apparent consensus that the meanings of terms like treaties, compacts, and agreements were sufficiently well understood as to avoid any need for their definition. Hence, the materials debating the location of the treaty power and the status of treaties in the U.S., including their justiciability, offer little to the definitional exercise.

Yet, looking at the actual practice—including, for the first time, various agreements by U.S. agents like Generals Washington and Arnold—it is not difficult to see the law of nations' concepts at work. Similar support may be found in the practices of the Continental Congress and the President and Senate pursuant to Article II. Indeed, in the early years, U.S. treaties and conventions represented different types of agreement, far afield from the synonyms they have become today as a matter of both international law and U.S. law and practice.

Somewhere after the turn of the nineteenth century, things began to change. Whether due to the shift from the naturalist law of nations to the positivist international law framework or a budding U.S. practice that freed it from further dependence on continental treatises, the divisions among treaties, conventions, compacts, and other agreements began to fade. Today, treaties have become synonymous with *all* agreements governed by international law, while the Article II treaty-making process is considered a function of political expedience and is entirely outcome-determinative.

In the end, therefore, this Article may be read as an invitation—a platform on which foreign relations law may construct new meanings from those long-thought lost or return them to desuetude. For originalists, the law of nations'

thesis is a test case for interpretation, inviting scrutiny of whether and when public meanings or terms of art hold the key to constitutional meaning. And for those persuaded by that thesis, further questions follow.

Consider Article II's treaty power. It seems quite plausible that focusing on treaties' original meaning could require the Constitution's process protections for *all* agreements falling within the law of nations' functional definition. As President Washington explained in his 1796 message to Congress during the Jay Treaty debates: "The power of making treaties is *exclusively* vested in the President, by and with the advice and consent of the Senate."[296] That statement has little modern meaning if the treaty definition is coterminous with the Article II process—whatever the Senate gives advice and consent to comprises a treaty, and whatever it does not assent to can turn to the authorities of sole executive or congressional-executive agreements.

But what if we define treaties to cover all U.S. agreements with other sovereigns that are executory in character? Today, most U.S. international agreements are done as executive agreements.[297] As such, dozens—if not hundreds—of U.S. executive agreements include executory commitments by the sovereign (United States) that would have originally qualified them as treaties. The USMCA, for example, contains ongoing commitments to Mexico and Canada regarding rules of origin, food, and agriculture, while promising national and most-favored nation treatment for financial services as well as executory commitments to protect intellectual property and the environment.[298] Likewise, extensive ongoing commitments persist by virtue of U.S. membership in congressional-executive agreements establishing the World Trade Organization, the World Health Organization, and the International Monetary Fund.[299] In other words, many commitments core to

296 George Washington, United States President, Message to the House, Declining to Submit Diplomatic Instructions and Correspondence (Mar. 30, 1796), available at UNIVERSITY OF VIRGINIA MILLER CENTER, https://millercenter.org/the-presidency/presidential-speeches/march-30-1796-message-house-representatives-declining-submit [https://perma.cc/8NFR-BT3X].

297 Hathaway, Bradley & Goldsmith, *supra* note 24, at 719. More recently, the Executive has shifted to also emphasize the conclusion of non-binding "political commitments." *See, e.g.*, Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 1281 (2023) (reviewing the history of nonbinding agreements in the United States); Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 581 (2009) (discussing how U.S. political commitments have become "an indispensable tool" of U.S. foreign policy).

298 *See generally* Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States, and the United Mexican States, Nov. 30, 2018, T.I.A.S. No. 19-1120, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf [https://perma.cc/ESZ5-ZS7E].

299 *See, e.g.*, Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 185; Articles of Agreement of the International Monetary Fund, July 22, 1944, 2 U.N.T.S. 39.

the United States' place in the global order did not go through the Senate's advice-and-consent process. If constitutional meaning is limited to 1787's understanding, such commitments might have to.

On the other hand, the history may justify other executive agreements that courts and scholars have long posited rest only on post-Founding historical gloss or structural claims about separation of powers.[300] Some may qualify as conventions in the original sense of that term, like the 1999 U.S.–China agreement settling claims resulting from the U.S. bombing of the Chinese Embassy in Belgrade, through which the United States paid China $28 million.[301] Or, just as the Framing period understood the basic authority of generals or governors to make capitulations, could there be modern equivalents, where U.S. agencies' missions and responsibilities authorize the conclusion of binding—but non-treaty—agreements? This logic could provide authority for an array of recent agreements made in the name of the Defense Department,[302] the Department of Energy,[303] the Department of Interior,[304] NASA,[305] the National Institutes of Health (NIH),[306] and the Nuclear Regulatory Commission.[307] Broader lessons from this history might have additional value. As the U.S. Supreme Court requires the government to reshape Administrative Law post-*Loper-Bright*, the law of nations' idea that delegations can, expressly *or* tacitly, empower inter-ministerial agreements

300 As Hathaway, Bradley, and Goldsmith catalog, many of these agreements are justified citing Executive power alone, or congressional legislation authorizing (i) the conclusion of international agreements, (ii) their negotiation, (iii) furnishing assistance, (iv) engaging in cooperation, or (v) without any discernable delegation of agreement-making authority. Hathaway, Bradley & Goldsmith, *supra* note 24, at 679-83. Deploying original meaning would not, however, solve the problem of how specific (or ambiguous) agreement-making instructions from the sovereign must be. Nor will it address transparency concerns raised in recent executive agreements. *See id.* at 684-91

301 Agreement Between the Government of the United States of America and the Government of the People's Republic of China, China–U.S., Dec. 16, 1999, at https://2009-2017.state.gov/documents/organization/6599.doc [https://perma.cc/2SU6-EFNK].

302 *See, e.g.*, FMCW Radar Agreement between the U.S. Department of Defense and the Ministry of Defense of the Kingdom of Denmark, U.S.–Den., Mar. 14, 2022, T.I.A.S. No. 22-314.

303 *See, e.g.*, Agreement to Extend the Agreement Between the Department of Energy of the United States of America and the Commissariat à l'Énergie Atomique et aux Énergies Alternatives Français for Cooperation in Low Carbon Energy Technologies, U.S.–Fr., Oct. 19, 2022, T.I.A.S. No. 22-1019.

304 *See, e.g.*, Memorandum of Agreement Concerning Scientific and Technical Cooperation in the Earth Sciences, U.S.–Mex., Oct. 5, 2022, T.I.A.S. 22-1005.

305 *See, e.g.*, Agreement Extending the MOU on Space Geodetic Research between Comisión Nacional de Actividades Espaciales (CONAE) & NASA, U.S.–Arg., Mar. 8, 2022, T.I.A.S. No. 22-0308.

306 Agreement between NIH and Uganda Virus Research Institute, to Amend and Extend the Agreement for Continuation of Cooperation on an International Center of Excellence in Research, U.S.–Uganda, May 11, 2022, T.I.A.S. No. 22-0511.2.

307 Arrangement Between U.S. Nuclear Regulatory Commission and Nuclear Regulatory Authority of Ghana for the Exchange of Technical Information and Cooperation in Nuclear Safety Matters, U.S.–Ghana, September 28, 2022, T.I.A.S. No. 22-0928.4.

might have important implications for other considerations of delegation and deference.[308]

And what of treaties' role as U.S. "supreme" law? Chief Justice Marshall was the first to introduce the idea that treaties must be divided between those that are self-executing and speak to the Courts for direct implementation versus those that are non-self-executing because they speak to Congress, requiring legislative implementation before they are justiciable.[309] In *Medellin v. Texas*, the Court clarified that a

> "self-executing" . . . treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.[310]

Although the grounds for making such distinctions have proven "confounding," courts now regularly refuse to enforce U.S. treaty commitments on the grounds of non-self-execution while debates continue over if these treaties qualify as federal law at all.[311] But what if the Founding-era history suggesting that "treaties" are, by definition, executory was taken seriously? Wouldn't the fact that (a) the Founding had no real discussion of external mechanisms to execute treaties while also (b) making them the Supreme law of the Land suggest that all "treaties" falling within the term's original meaning are self-executing?[312]

The rising number and scope of U.S. state commitments with foreign powers—Ryan Scoville recently cataloged 637—also suggests there is value in

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308 *See* Loper-Bright Enters., v. Raimondo, 603 S. Ct. 2244, 2263 (2024) ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.").

309 *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (distinguishing a treaty's general operation as "a contract between two nations" from the treatment accorded it by the Supremacy Clause, where it is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision").

310 552 U.S. 491, 505 n.2 (2008).

311 *See, e.g.*, *id.* at 516-19 (declining to enforce provisions of the UN Charter, the Statute of the International Court of Justice, and the Optional Protocol to the Vienna Convention on Consular Relations); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 161 n.21 (2d Cir. 2007) ("Non-self-executing treaties do not become effective as domestic law until implementing legislation is enacted."); Renkel v. United States, 456 F.3d 640, 643 (6th Cir. 2006) ("'[N]on-self-executing' treaties do require domestic legislation to have the force of law."); *but see* RESTATEMENT (FOURTH), *supra* note 29, § 310 Reporters' Note 12 ("[T]here is no clear reason at present to conclude that non-self-executing provisions are, as a general matter, less than supreme law."); United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979) ("The self-execution question is perhaps one of the most confounding in treaty law.").

312 I am indebted to Jean Galbraith for highlighting this potential consequence.

at least (re)considering an originalist approach.[313] Inspired by Story's non-originalist analysis, the existing doctrine posits three categories: (i) prohibited treaties; (ii) compacts requiring congressional assent; and (iii) compacts that states can create without supervision or approval.[314] As a result, Congress rarely consents to U.S. state agreements with foreign powers; indeed, for the most part they are done without anyone in Congress knowing about them at all, let alone assessing their status as treaties or compacts.[315]

The law of nations' thesis I advance here, however, could give some force to the Article I prohibition on U.S. State treaty-making. Indeed, Scoville suggested at least 10% of these agreements could run afoul of that prohibition given their executory terms.[316] On the other hand, if treaties are agreements *between* sovereigns only, the prohibition may not reach so far. If U.S. states are making agreements with foreign sub-national counterparts who do not claim sovereign status and to whom a sovereign has not delegated a treaty-making capacity, those agreements would likely fall under the banner of subsidiary powers' agreements, not treaties.[317]

Compacts, however, are a different story. The law of nations, after all, treated compacts as the genus of which treaties were a species.[318] Read this way, constitutional requirements for Congressional consent to U.S. state compacts and agreements would be comprehensive. Nor would doctrines pertaining to agreements by subsidiary powers necessarily vary this conclusion.[319] That doctrine endorses the authority of sub-national actors like

313 Scoville, *supra* note 10, at 344. His findings are already 87% more than the 340 I cataloged in 2010. Hollis, *supra* note 10, at 750.

314 *See* Virginia v. Tennessee, 148 U.S. 503, 518-20 (1893) (discussing Justice Story's *Commentaries*); *see also* Ne. Bancorp, Inc. v. Bd of Governors of the Fed. Rsrv. Sys., 472 U.S 159, 175 (1985) (identifying "classic indicia" of a compact); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. at 460, 469-70 ("[S]everal decisions of this Court have upheld a variety of interstate agreements effected through reciprocal legislation without congressional consent . . . . [N]ot all agreements between states are subject to the strictures of the Compact Clause."); New Hampshire v. Maine, 426 U.S. 363, 369-70 (1976) ("Whether a particular agreement respecting boundaries is within the [Compact] Clause will depend on whether 'the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.'"). The Court has, however, only upheld this category of consent-free compacts with respect to inter-state compacts; its application to the foreign context remains unresolved. Hollis, *supra* note 10, at 769-96; Scoville, *supra* note 10, at 322-24.

315 Hollis, *supra* note 10, at 769-96; *see also* Scoville, *supra* note 10, at 367-68 (noting six cases of specific Congressional approval, agreements approved under the International Bridge Act of 1972, 33 U.S.C. § 535a, and those where there may be an argument of implicit Congressional assent).

316 *See* Scoville, *supra* note 10, at 363 (applying Vattel's definitions).

317 Indeed, the constitutional prohibition may be read to preclude any suggestion that the U.S. states retained (or were delegated) a treaty power per the law of nations. *See supra* notes 80–82, and accompanying text. Even U.S. state agreements with foreign nations themselves might be disavowed as treaties if the states make clear they claim no sovereign status of their own.

318 *See supra* notes 53–61 and accompanying text.

319 *See supra* notes 85–102 and accompanying text.

States to make agreements on the instructions of the sovereign *or* within those powers that are customary to their position. Therefore, in the absence of the Compact Clause, the law of nations could endorse at least *some* compact-making authority independent of congressional approval based on the powers customarily associated with an agency's mission. Yet, the constitutional text forecloses that result. Indeed, that foreclosure appears to be its very purpose.

Even skeptics of original meaning may find value in the present account. It can provide a baseline for measuring just how much circumstances have changed, and with them, the grounds for continuing to apply old meanings. After all, the Senate's Article II advisory role never took hold. The Civil War and the Reconstruction that followed represent a new constitutional moment that might displace the law of nations' frame, while the Seventeenth Amendment adjusted the distribution of the U.S. treaty power after its original meaning had faded from public view. In short, there is plenty of new history (and the historical gloss of the political branches that followed) to contrast with original meanings even if the result of that combination may be contested.

International law has, moreover, emerged as a positivist reply to the utopian perspectives of naturalism and the continental treatises that advocated it. That naturalist vision has received (well-deserved) broadsides for its perpetuation of colonial and imperial ambitions that may caution against returning to a legal regime that permitted so much subjugation and oppression. Additionally, the law of treaties itself has continued to evolve, developing new rules for the formation, validity, interpretation, and termination of treaties. Applying an original meaning could thus create tensions for the United States in its international relations vis-à-vis other States who apply modern international law rather than centuries' old concepts. We cannot, moreover, ignore the elephant in the room: the political deadlock that has brought the Article II treaty-making process to its knees. A return to original meanings could dramatically unsettle the validity of existing treaties and executive agreements to say nothing of forestalling the ability of the United States to make agreements on critical issues going forward.

But any normative argument for—or against—giving treaties, conventions, and compacts their original meaning requires an appreciation of that original meaning in the first place. Even as foreign relations law has stalemated over the scope of the treaty power or the role of treaties before U.S. courts, there has been virtually no attention to what treaties (or compacts) actually are. This Article offers a modest first step, excavating meanings that modern lawyers have too often skipped past since the ideas

presented (public versus private treaties, dispositive conventions, compacts of capitulation, sponsions) are entirely unfamiliar to modern practice.

Yet, the law of nations was critical to the Founding of this nation. And its concepts have meanings that U.S. lawyers have yet to recognize, including the very terms by which the war for its independence ceased. Having found what was lost, foreign relations law should now take the time to develop, measure, and assess what to do with the original meaning of treaties for the United States as it continues to navigate its place in world affairs.

APPENDIX I: FRAMING ERA ENGLISH DICTIONARY DEFINITIONS OF "TREATY"

AUTHOR/ EDITOR	TITLE	EDITION YEAR	TREATY DEFINITION
Nathan Bailey	*English Dictionary*	1736	"Treaty, *traité, accord, convention* . . . ."
Thomas Dyche & William Pardon	*A New General English Dictionary*	1760	"the consultation or agreement made between publick nations, or private people, in relation to any matters in dispute between them."
Samuel Johnson	*A Dictionary of the English Language*	1765	"1. Negotiation; act of treating." "2. A compact of accommodation relating to publick affairs." "3. For entreaty: supplication; petition; solicitation."
John Ash	*The New and Complete Dictionary of the English Language*	1775	"Treaty (s. from treat) The act of treating, a negociation, a compact relating to public offices; an intreaty, a supplication . . . ."
James Barclay	*A Complete and Universal English Dictionary*	1782	" . . . a covenant between two or more nations; or the several articles and conditions stipulated and agreed upon between sovereign powers."
John Etwick	*The New Spelling Dictionary*	1785	"Treaty, s. a negotiation, contract, supplication"
William Perry	*The Royal Standard English Dictionary*	1788	"Treaty, s. negotiation, supplication"

Thomas Sheridan	*A General Dictionary of the English Language*	1789	"Treaty . . . negociation, act of treating; a compact of accommodation relating to publick affairs."
John Walker	*A Critical Pronouncing Dictionary and Expositor of the English Language*	1791	"Negotiation, act of treating; a compact of accommodation relating to publick affairs; for entreaty, supplication, petition. In this last sense not in use."
Noah Webster	*An American Dictionary of the English Language*	1828	"An agreement, league or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state . . . ."

APPENDIX II: INTERNATIONAL AGREEMENTS BINDING ON THE UNITED STATES UNDER THE LAW OF NATIONS (1776–1826)

YEAR CONCLUDED	SHORT TITLE	U.S. PARTY OR PARTIES	FOREIGN PARTY OR PARTIES	DURATION LIMITED?	SUBJECT MATTER(S)	CONSENT BY CONTINENTAL CONGRESS/ SENATE	SOURCE
1776	**Cartel** [Continental Congress labeled it a Sponsion]	Brig. Gen. Benedict Arnold	Captain Forester [Great Britain]	No	Release of American Soldiers in return for release of British POWs	Denied	5 JCC 534-39
1777	**Articles** of Capitulation [aka "Convention of Saratoga"]	General Maj. Gates	Lt. Gen. Burgoyne [Great Britain]	No	Parole of British Forces, promise not to resume fight	No	2 MARTENS 559
1778	**Treaty** of Amity and Commerce	Thirteen United States of North America	Christian King [France]	No	Peace and trade agreement	Yes	2 MILLER 3
1778	**Treaty** of Alliance	United States of North America	Christian King [France]	No	Alliance in American Revolution against Great Britain	Yes	2 MILLER 35

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1778	**Act** Secret and Separate	Deputies of the United States	Christian King [France]	No	Giving King of Spain power to accede to US-French Treaties of Amity and Alliance	Yes	2 Miller 45
1781	**Articles** of Capitulation	General Washington	Lord Cornwallis Thomas Symonds (Great Britain); Counts de Rochambeau and de Grasse [France]	No	Terms of Surrender, disposition of troops, artillery, and arms, prohibition of reprisals	No	1 Martens 177
1782	**Contract**	Thirteen United States of North America	King [France]	No	Loan from France to Congress of the United States	Yes	2 Miller 48
1782	**Treaty** of Amity and Commerce	United States of America	States-General of the United Netherlands	No	Peace and trade agreement	Yes	2 Miller 59

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1782	**Convention** Concerning Vessels Recaptured	United States of America	Lords, States-General of the United Netherlands	No	Prize Principles for cases where privateers of either of two nations recapture a vessel from their common enemies	Yes	2 Miller 91
1782	**Preliminary Articles** of Peace	Commissioners of the United States of America: John Adams, Benjamin Franklin, John Jay, & Henry Laurens	Richard Oswald Esquire, Commissioner of his Britannic Majesty [Great Britain]	No	Terms of peace and recognition to be inserted into a Treaty of Peace once Great Britain and France conclude a Treaty of Peace	Yes	2 Miller 96
1783	**Contract**	Thirteen United States of North America	King [France]	No	Loan from France to Congress of the United States	Yes	2 Miller 115

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1783	**Treaty** of Amity and Commerce	United States of America	King of Sweden	Yes (15 years)	Peace and trade agreement	Yes	2 Miller 123
1783	**Definitive Treaty** of Peace	United States of America	His Britannic Majesty [Great Britain]	No	Peace treaty by which Great Britain recognized United States and two sides addressed disputes and other matters	Yes	2 Miller 151
1785	**Treaty** of Amity and Commerce	United States of America	King of Prussia	Yes (10 years)	Peace and trade agreement	Yes	2 Miller 162
1786	**Treaty** of Peace and Friendship	United States of America	Emperor of Morocco	Yes (50 years)	Promises to not fight or support each other's enemies	Yes	2 Miller 185

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1786	[Ship Signals Agreement]	Thomas Barclay (US)	Commodore Rais Farache [Morocco]	No	Display patterns for pendants/lanterns to identify vessels to other State	No	2 Miller 219
1788	**Convention**	United States of America	Most Christian Majesty [France]	Yes (12 years)	Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls	Yes	2 Miller 228
1792	[Postal **Convention**]	U.S. Postmaster General (US)	Great Britain (on behalf of Canada)	Yes (2 years)	Postal relations between the United States and Canada	No (but authorized by 1 Stat. 239)	McClure 38-39
1794	**Treaty** of Amity, Commerce, and Navigation [Jay Treaty]	United States of America	His Britannick Majesty [Great Britain]	In part: Arts 1-10, "permanent"; Arts. 11, 13-27 (12 years); Art. 12 (2 years)	Resolving outstanding issues between the two nations	Yes	2 Miller 245

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1795	Treaty of Peace and Amity	President and Citizens of the United States of North America	Hassan Bashaw [Algiers]	No	Treatment of citizens and vessels of both nations	Yes	2 Miller 275
1795	Treaty of Friendship, Limits, and Navigation [Pinckney's Treaty]	United States of America	His Catholic Majesty [Spain]	No	Fixing U.S. southern boundary; commercial relations; Mississippi river navigation rights	Yes	2 Miller 318
1796	Explanatory Article	United States of America	His Majesty the King of Great Britain	No	Agreed interpretation of Jay Treaty Article 8 on free passage and navigation	Yes	2 Miller 346
1796, 1797	Treaty of Peace and Friendship	United States of America	Bey and Subjects of Tripoli of Barbary [under protection and guarantee of Dey of Algiers]	No	Treatment of citizens and vessels in Tripoli's waters	Yes	2 Miller 349

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1797, 1799	**Treaty** of Peace and Friendship	President of the Congress of the United States of America	Prince Hamuda Pasha, Bey, Ibrahim Dey, and Agha Suleiman [Government of Tunis]	No	Treatment of citizens and vessels in Tunis's waters	Yes	2 Miller 386
1798	Explanatory **Article**	United States	His Britannick Majesty [Great Britain]	No	Agreed interpretation of Jay Treaty Article 5	Yes	2 Miller 427
1799	**Exchange of Letters**	Minister Resident of the United States William Vans Murray	Minister of Foreign Relations of the Batavian Republic Maarten van der Goes	No	Agreement to waive claims regarding a Dutch prize court upholding seizure of a U.S. vessel in return for 20,000 florins	Yes	5 Miller 1075
1799	**Treaty** of Amity and Commerce	United States of America	King of Prussia	Yes (10 years)	Renewal of 1785 Treaty that had expired by its terms	Yes	2 Miller 433

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1800	**Convention** with additional article and provisos	United States of America	The French Republic	Yes (8 years)	Restored peace (ending quasi-war), returned ships, compensated injured parties and regulated trade and commercial affairs between the two nations	Yes	2 Miller 457
1802	**Convention** Regarding Articles 6 and 7 of the Jay Treaty and Article 4 of the Definitive Treaty of Peace	President of the United States	His Britannic Majesty [Great Britain]	No	U.S. commits to pay £600,000 to Great Britain in satisfaction of U.S. claims under Jay Treaty Article 6 and directing completion of Jay Treaty commissioners' work within three years	Yes	2 Miller 488
1802	**Convention** for Indemnification	United States of America	His Catholic Majesty [Spain]	No	Establishing commission to indemnify both sides' nationals who were injured by losses in violation of existing treaty or law of nations	Yes	2 Miller 492

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1803	**Treaty** for the Cession of Louisiana [aka Louisiana Purchase]	United States of America	The French Republic	No	Cession of sovereignty over Louisiana territory to United States along with accompanying commitments including most favored nation status in ports granted to France	Yes	2 Miller 498
1803	**Convention**	United States of America	The French Republic	No	Part of Louisiana Purchase, providing for U.S. Payment of 60 million Francs, less Sum fixed by companion Convention re payment of debts owed by France to U.S. citizens	Yes	2 Miller 512

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1803	**Convention**	United States of America	The French Republic	Yes (Art. 11 requires all decisions be within 1 year of ratifications)	Part of Louisiana Purchase, established process of settling debts owed by France to U.S. citizens	Yes	2 Miller 516
1805	**Treaty** of Peace and Amity	United States of America	The Bashaw, Bey and Subjects of Tripoli in Barbary	No	Updating 1796 / 1797 treaty (*supra*) re treatment of citizens and vessels in Tripoli's waters	Yes	2 Miller 529
1813	**Cartel** for the Exchange of Prisoners of War	John Mitchell, American Agent for Prisoners of war [United States]	Advocate General for the Province of Nova Scotia, Richard John Uniacke, and Lt. Gen. William Miller [Great Britain]	No (Art. 15 provides unilateral denunciation right on 6-months' notice)	Exchange of prisoners	No (but ratified by Secretary of State James Monroe)	2 Miller 557

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1814	Terms of **Capitulation**	Common Counsel, City of Alexandria	Capt. John Gordon [Great Britain]	No	City turned over stores and supplies in return for British promise not to destroy town or invade homes	No	alexandria va.gov/ 1812
1814	**Treaty** of Peace and Amity [aka Treaty of Ghent]	United States of America	His Britannic Majesty [Great Britain]	No	Ending the War of 1812, restoring peace, agreeing on boundaries and processes for resolving boundary issues	Yes	2 Miller 574
1815	**Treaty** of Peace	The President and Citizens of the United States of America	The Dey and Subjects of the Regency of Algiers in Barbary	No	Treatment of citizens and vessels in Algiers's waters	Yes	2 Miller 585
1815	**Convention** to Regulate Commerce	United States of America	His Britannick Majesty [Great Britain]	Yes (4 years)	Providing for freedom of commerce; most favored nation status and right to appoint consuls	Yes	2 Miller 595

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1816	**Treaty** of Friendship and Commerce	United States of America	His Majesty the King of Sweden and Norway	Yes (8 years)	Following expiration of original treaty (*supra*), affirming friendship and regulating commerce and shipping between the two nations	Yes (except for Arts. 3, 4 and 6)	2 Miller 601
1816	**Treaty** of Peace and Amity	United States of America	The Dey and Regency of Algiers	No	Renewing 1815 treaty (*supra*) with an additional article	Yes	2 Miller 617
1817	**Exchange of Notes** [aka Rush-Bagot Agreement]	Acting Secretary of State Richard Rush [United States]	His Britannick Majesty's Envoy Extraordinary Charles Bagot [Great Britain]	No (but text allows unilateral denunciation on 6-months' notice)	Agreement on stationing of naval vessels in the Great Lakes	Yes	2 Miller 645

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1818	**Convention** [aka Oregon Treaty]	United States of America	His Majesty the King of the United Kingdom of Great Britain and Ireland	In part	Extending U.S. Canadian Border along 49th parallel and extending for ten years certain commercial provisions of 1815 Commercial Convention (*supra*)	Yes	2 Miller 658
1819	**Treaty** of Amity, Settlement and Limits [aka Onís-Adams Treaty]	United States of America	His Catholic Majesty [Spain]	No	Establishes firm and lasting peace; cession of Florida to US; sets boundaries for West of Mississippi; settles existing claims; annuls 1802 Convention for indemnification (*supra)*	Yes	3 Miller 3
1822	**Convention** of Navigation and Commerce	United States of America	His Majesty the King of France and Navarre	Yes (2 years or until conclusion of a "definitive Treaty" or renunciation w/ 6-months' notice)	Providing mutual commitments on treatment of commerce and navigation	Yes	3 Miller 77

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1822	**Convention** for Determining the Indemnification under the Decision of the Emperor of Russia as to the True Construction of Article 1 of the Treaty of Ghent	United States of America	His Majesty the King of the United Kingdom of Great Britain and Ireland The Emperor of all the Russias	No	Implementing the proposal by the Emperor of Russia to resolve differences between the two governments regarding the Article 1 promise in the Treaty of Ghent to restore territory, places and possessions taken by either party during the War of 1812	Yes	3 Miller 91
1824	**Convention** Amending the Treaty of August 28, 1797, and March 26, 1799	Chargé d'affaires of the United States of America at Tunis, S.D. Heap	His Highness Mahmoud Bashaw Bey of Tunis	No	Agreement to amend various articles of the 1797/1799 Treaty (*supra*) subject to final ratification of the President following Senate advice and consent	Yes	3 Miller 141

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1824	**Convention** Regarding Navigation, Fishing, and Trading, and Establish-ments on the Northwest Coast of America	The President of the United States of America	His Majesty the Emperor of all the Russias	No	Resolved boundary between two nations on the Northwest Coast of America and established commercial and navigation rights for both sides	Yes	3 Miller 151
1825	**General Convention** of Peace, Amity, Navigation and Commerce	The United States of America	The Republic of Colombia	No	Affirms "perfect" peace between two nations and lays out various mutual rights of navigation and commerce	Yes	3 Miller 163
1825	**Convention** for Adjusting Certain Claims	Minister pleni-potentiary of the United States of America	Secretary of State and Foreign Relations of the Republic of Colombia	No	Settled claims arising out of the capture of four American ships by Venezuelan brigs of war	No	3 Miller 195

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1825	**Exchange of Notes**	Secretary of State Henry Clay	Envoy Extraordinary and Minister Plenipotentiary from Russia Baron de Tuyll	No	Settling the Claim in the Case of the Brig *Pearl*	No	3 Miller 201
1825	**General Convention** of Peace, Amity, Commerce and Navigation	The United States of America	The Federation of the Centre of America	No	Affirms "perfect" peace between two nations and lays out various mutual rights of navigation and commerce	Yes	3 Miller 209
1826	**General Convention** of Friendship, Commerce and Navigation	United States	H.M. the King of Denmark	Yes (10-year duration, thereafter until 1-year's notice of termination by either contracting party)	Affirms "firm and permanent" peace between two nations and lays out various mutual rights of navigation and commerce	Yes	3 Miller 239

Year concluded	Short Title	U.S. party or parties	Foreign party or parties	Duration limited?	Subject Matter(s)	Consent by Continental Congress/ Senate	Source
1826	**Articles** Agreed	Capt. Thomas Catesby Jones, U.S.N.	King, Council, and Head Men of Tahiti	No	Exchange of consuls; shipping and trading rights	No	3 Miller 249
1826	**Articles** of Agreement	Capt. Thomas Catesby Jones, U.S.N.	Kauikeaouli King of Sandwich Islands and his Guardians (Hawaii)	No	Exchange of consuls; shipping and trading rights	No	3 Miller 269
1826	**Convention** for the Payment of $1,204,960	United States of America	His Majesty the King of the United Kingdom of Great Britain and Ireland	No	Compensation by Great Britain to U.S. slaveholders for freed slaves during the War of 1812	Yes	3 Miller 261