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Magna Carta for the World? The Merchants' Chapter and Foreign Capital in the Early American Republic

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MAGNA CARTA FOR THE WORLD? THE MERCHANTS' CHAPTER AND FOREIGN CAPITAL IN THE EARLY AMERICAN REPUBLIC*

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All merchants may safely and securely go out of England, and come into England, and delay and pass through England, as well by land as by water, for the purpose of buying and selling, free from all evil taxes, subject to the ancient and right customs—save in time of war, and if they are of the land at war against us. And if such be found in our land at the beginning of the war, they shall be held, without harm to their bodies and goods, until it shall be known to us or our chief justice how the merchants of our land are to be treated who shall, at that time, be found in the land at war against us. And if ours shall be safe there, the others shall be safe in our land.

—MAGNA CARTA CH. 41/30, “THE MERCHANTS’
CHAPTER”¹

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1. MAGNA CARTA ch. 41 (1215), *reprinted and translated in* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 135, 142 (Ernest F. Henderson ed. & trans., New York 1965). It is chapter 41 in the original 1215 charter and chapter 30 in the so-called statutory version of 1225. Relying on Sir Edward Coke’s seventeenth-century translation as their source, most eighteenth-century commentators cited the 1225 version. *See, e.g.,* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND ch. 30, at *57.

This Article examines the early modern revival and subtle transformation in what is here called the merchants' chapter of Magna Carta and then analyzes how lawyers, judges, and government officeholders invoked it in the new American federal courts and in debates over congressional power. In the U.S. Supreme Court in the early 1790s, a British creditor and an American State debated the meaning and applicability of the merchants' chapter, which guaranteed two rights to foreign merchants: free entry and exit during peacetime, without being subjected to arbitrary taxes; and, in wartime, the promise that their persons and goods would not be harmed or confiscated, unless their own king attacked and confiscated English merchants. In other words, no harm to enemy aliens, except as retaliation. Tit for tat.

*The idea that reciprocity was a fundamental mechanism of international (and interpersonal) relations became something like a social science axiom in the early modern Enlightenment. Edward Coke claimed to find that mechanism in the merchants' chapter and publicized it to lawyers throughout the emerging British Empire and beyond. Montesquieu lauded the English for protecting foreign commerce in their fundamental law, and Blackstone basked in that praise. American lawyers derived their understanding of the merchants' chapter from these sources and then, in the early Republic, stretched the principle behind it to protect foreign capital, not just resident merchants. The vindication of old imperial debt contracts would signal to all international creditors that, in the United States, credit was safe. Federalists then invoked the chapter outside of the courts to resist Republican attempts to embargo commerce and sequester foreign credit. For Republicans, *doux commerce* had become the Achilles heel of the great Atlantic empires: their reliance on American trade could be used to gain diplomatic leverage without risking war. For Federalists, economic sanctions threatened not just their fiscal policy but their entire vision of an Atlantic world that increasingly insulated international capital from national politics. They all agreed, however, that the role of foreign capital in the American constitutional system was a central issue for the new and developing nation.*

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I. PLEADING ENGLISH RIGHTS IN POST-COLONIAL AMERICA

Magna Carta appears in the strangest places. Mythical figures often do. Broad relevance and persistence are central to their mystique. Yet omnipresence also strains credulity. For lawyers, at least, a legal myth's power is usually taken for granted, and the pertinent questions concern what the myth means, whether it applies to the problem at hand, and, if so, how. Historians, on the other hand, ask questions of epistemology and effect rather than exegesis: Why did those historical actors think it was useful to invoke the myth at that moment, what work did they want it to accomplish, and did they succeed? Why, for example, did American judges and lawyers invoke one chapter of Magna Carta, what here is called "the merchants' chapter," in one of the earliest cases to reach the Supreme Court of the United States?

The short answer is international credit—in all senses of that term. In the early 1790s, the U.S. Supreme Court tried a case between the state of Georgia and a foreign British merchant who had extended credit to a colonist before the American Revolution.² The legal dispute began in 1791 when the British creditor, Samuel Brailsford,

2. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 1–2 (1794). Many primary source documents for this case are published in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800 (Maeva Marcus et al. eds., Columbia Univ. Press 1998) [hereinafter 6 DHSC].

sought to collect that seventeen-year-old debt and sued his debtor, James Spalding, directly in the Federal Circuit Court.³ Brailsford had sold Spalding a “cargo” of slaves in 1774; in return Spalding had tendered a bond valued, in 1791, at over seven thousand pounds.⁴ Brailsford’s attorney pleaded in the Federal Circuit Court that the plaintiffs were “aliens, and subjects of his Britannick Majesty,” providing jurisdiction on the basis of the court’s alienage jurisdiction.⁵ The substantive rule of decision, according to the plaintiffs, was the Treaty of Peace of 1783, which provided that both sides would place “no lawful impediment[s]” in the way of debt collection.⁶ Despite its formal equality, everyone knew this was a one-way provision: Americans owed millions of pounds to Britons stemming from pre-revolutionary mercantile debt, not vice versa.⁷

Attorneys for the debtor argued instead that the State had confiscated all debts owed to Britons, whether it had actually collected the money from patriot debtors or not.⁸ Confiscations

3. Brailsford sued on behalf of himself and two partners, Robert William Powell and John Hopton. 6 DHSC, *supra* note 2, at 74. Spalding in turn was the named plaintiff in an action against him and partners Roger Kelsall and Job Cockton. *Id.* Two different sections of the Georgia confiscation statute of 1782 covered Brailsford, on the one hand, and his partners, on the other. One section affected debts owed by Georgia citizens, like Spalding, to British creditors, like Brailsford. The other covered property owned and debts owing in Georgia to persons whose property was confiscated in other states, like South Carolina. This section covered the other two partners, who were stipulated to be South Carolina citizens. *See id.* at 86.

4. *Id.* at 74 & n.7. Liberal sales of goods on credit characterized imperial trade before the Revolution. *See, e.g.*, JACOB M. PRICE, CAPITAL AND CREDIT IN BRITISH OVERSEAS TRADE: THE VIEW FROM THE CHESAPEAKE, 1700–1776, at 13–17 (1980) (discussing debt and credit in colonial America).

5. 6 DHSC, *supra* note 2, at 74; *see* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Whether all or some of the plaintiffs were actually aliens is historically unclear, but as a legal matter, the parties ultimately agreed that Brailsford, who went from the colonies to Britain in 1767 and evidently remained there during the war, was an alien. 6 DHSC, *supra* note 2, at 74–75. The federal courts concluded that Powell and Hopton, however, were South Carolina citizens who had become Loyalists. *Id.* at 75. The difference between those whom the new Americans classified as “real British Subjects” (in the words of Article V of the Treaty of Peace) and those they classified as state citizens who turned Loyalist is a knotty historical problem, especially when applied to people who were not born in the colonies but who resided in them for many years before the Revolution. The distinguishing feature of Brailsford’s biography seems to have been that he left the colonies well before the Revolution; the others fled after it began.

6. Definitive Treaty of Peace, Gr. Brit.-U.S., art. IV, Sept. 3, 1783, 8 Stat. 80, 82.

7. *See id.* For the problem of debts in the making of the Constitution and the early federal courts, see Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176, 180–83 (1984); Brent Tarter & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789–1809*, 49 AM. J. LEGAL HIST. 257, 259–60 (2007).

8. *See infra* notes 73–83 and accompanying text.

completed during the war, they argued, were not the postwar impediments envisioned by the treaty-makers. Georgia then interpleaded in the cause to supplant the British creditor, claiming that it owned the debt.⁹

A case between a British creditor and an American State commencing in 1791 and dealing with the messy legal aftermath of the Revolution seems an unlikely place to find Magna Carta. But there it was: the parties debated the relevance of the second part of the merchants' chapter, safeguarding foreign merchants and their goods during war, unless their own governments targeted resident English merchants. In other words, no harm to enemy aliens except as retaliation. Tit for tat. Attorneys for the creditor and at least two judges invoked the merchants' chapter to help find that Georgia—despite the State's protests—had not confiscated British debts during the war. They attributed to Georgia's wartime legislators a desire to treat British creditors reciprocally, as American creditors were treated in Britain, and supposed that the merchants' chapter had influenced the legislators' decision. In fact, Britain had not confiscated debts owed to Americans during the war. Ergo, Georgia refrained as well.

The idea that reciprocity was a fundamental mechanism of international (and interpersonal) relations became something like a social science axiom in the eighteenth-century Enlightenment.¹⁰ It was central to this federal debt case, the participants' reading of Magna Carta, and many Americans' understanding of their constitutional and commercial environment in the political branches as well as the courts. Attorney General William Bradford argued that the merchants' chapter stood for the proposition “[t]hat the faith of

9. 6 DHSC, *supra* note 2, at 76. The defendant debtor did not consent, which created a knotty legal problem: could a third-party claimant interplead into an action at common law against the defendant's will? The blackletter answer was no. *See id.* at 77. That is why the State moved in equity. However, most of the judges believed that the State did not satisfy the requirements for an equitable remedy because a satisfactory legal remedy remained: it could await the outcome of the suit between the creditor and debtor, and if the creditor won, it could sue the creditor. *See id.* at 83. However, Georgia feared that the debtor would not adequately protect the State's interest and that the British creditor would leave the country with his damages before it could sue. *See id.* These two factors swayed the Justices, and the Supreme Court permitted the State to interplead and effectively take over the defense of the debtor's position. *See id.* at 77–84.

10. *See* ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 48–56 (1977); ISTVAN HONT, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE* 6–8 (2005).

Commercial intercourse ought not to be violated.”¹¹ What was at stake was not just past promises. The vindication of old debt contracts would, he argued, also ensure the “[p]rospect of future Credit.”¹² Scrupulous repayment would signal to lenders across the Atlantic that, in the United States, credit was safe. In reply, attorneys for the debtor and State, one of whom was unofficial court reporter Alexander Dallas, argued that the laws of war recognized the power of confiscation, regardless of what Magna Carta might prohibit in Britain, and the sovereign State of Georgia had exercised that power.¹³ The law of nations was not univocal on the question of whether belligerent nations could confiscate private debts: as a matter of state practice and treaty commitments, nations were increasingly reluctant to do so; and eighteenth-century jurists had begun to question the right.¹⁴ Still, traditional authority firmly supported a belligerent’s right to confiscate enemy debt along with other personal property located in its jurisdiction. The important point for Georgia was that the early modern law of nations was the relevant source of law, not the medieval fundament of England’s ancient constitution. During the war, Georgia was an independent nation rather than a province of England.

No one argued that Magna Carta alone was binding law. Instead, its adherents argued that it provided persuasive authority for a pro-commercial interpretation of Georgia’s revolutionary confiscation statute and the peace treaty’s protection of debts. As Supreme Court Justice James Iredell put it when holding that the British creditor retained a right to collect the debt: “[Magna Carta is] dear to all

11. William Bradford, Jr.’s Notes for Argument in the Supreme Court (Feb. 4, 1794), reprinted in 6 DHSC, *supra* note 2, at 158, 165. Bradford and, in an earlier stage of litigation, Attorney General Edmund Randolph did not participate in their official capacity as executive officers. Instead, they represented the British creditor as part of their private practice. However, Associate Justice Iredell early on alerted President George Washington and Randolph to the gravity of the case, and Randolph and Bradford typically participated only in the highest profile cases as private attorneys while in office. 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800, at 239–42, 242 n.5 (1988). The case also raised tricky procedural issues surrounding Georgia’s interpleader into the original suit between Brailsford and his debtors. See *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 416–18 (1793); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 406–07 (1792).

12. William Bradford, Jr.’s Notes for Argument in the Supreme Court, *supra* note 11, at 165.

13. 6 DHSC, *supra* note 2, at 134–35 (noting that Georgia’s attorney invoked Vattel for the proposition that “[a] Sovereign has a right to confiscate Debts or any real or personal Estate”).

14. See *infra* notes 115, 133–49 (referring to Alexander Hamilton’s arguments in *The Defence*).

Friends of Liberty, in which our Ancestors and those of the present Inhabitants of Great Britain had a common participation, and which in many of its parts we still cherish with the highest veneration.”¹⁵ Even in revolution, England’s ancient constitution informed American constitutionalism. Shifting to the laws of war, Iredell acknowledged that many authorities on the law of nations recognized a belligerent’s power to confiscate debts in wartime; nonetheless, the trend within the law of nations, in both practice and jurisprudence, was toward forbidding confiscation.¹⁶

Soon after, the merchants’ chapter played another cameo role in political debates over the degree to which this self-consciously developing nation should use economic sanctions as diplomatic weapons against the stronger Atlantic empires.¹⁷ When nascent Jeffersonian Republicans proposed embargoes and debt sequestration in retaliation against the belligerents involved in the wars of the French Revolution, which were harassing neutral trade on the high seas, Alexander Hamilton invoked the merchants’ chapter, along with the liberal trend of the law of nations condemning debt confiscation, as sources of an implied constitutional limitation against the sequestration of debt.¹⁸ The Anglo-American Jay Treaty of 1794 then explicitly prohibited debt sequestration as a diplomatic tool in

15. James Iredell’s Circuit Court Opinion (May 2, 1792), *reprinted in* 6 DHSC, *supra* note 2, at 102, 105. Technically, Iredell gave this Circuit Court decision in the contest between the creditor and the individual debtor, but Georgia was already seeking to interplead. In a suggestive account, Thomas H. Lee argues that chapter 41 of Magna Carta influenced the passage of the section of the Judiciary Act of 1789 now known as the Alien Tort Statute, which provides federal court jurisdiction in “all causes where an alien sues for a tort only in violation of the law of nations or of a treaty of the United States.” Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 837 (2006); *see also* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. But he does not provide evidence that the drafters or users of that statute invoked the chapter.

16. James Iredell’s Circuit Court Opinion, *supra* note 15, at 106.

17. The United States is sometimes seen as the first developing nation or “first new nation.” *See* SEYMOUR MARTIN LIPSET, *THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 15 (1963); RICHARD B. MORRIS, *THE EMERGING NATIONS AND THE AMERICAN REVOLUTION* 1 (1970). Its priority, however, depends on the definition of a “developing nation.” The Netherlands, while gaining independence from Spain, for example, shared some features of early America, including its innovative banking system, which Hamilton deliberately imitated. However, the Netherlands possessed much *internal* capital. Post-revolutionary Americans, on the other hand, needed to lure foreign capital. Much of early American legal and constitutional history can therefore be understood as a series of institutional experiments designed to attract foreign investment while also preserving political freedom of action. This is a major theme in my forthcoming book with David Golove, *A CIVILIZED NATION: WAR AND TRADE IN THE CONSTITUTIONAL DEVELOPMENT OF THE UNITED STATES, 1776–1815* (forthcoming).

18. *See infra* text accompanying notes 133–37.

war or peace.¹⁹ In constitutional debates in the political branches as well as in the courts, the merchants' chapter remained alive as a source of constitutional morality.

Magna Carta had earlier become part of imperial constitutional myth. Colonists had invoked it when proclaiming the principles of no taxation without representation and trial by jury.²⁰ The revolutionaries drew on the so-called due process provision of Magna Carta when writing state constitutions during the war.²¹ Now, after political separation, that transatlantic myth still informed American constitutional argument. It shaded the interpretation of a revolutionary statute, giving the federal judges authority to bend the law away from Georgia's immediate fiscal interest and toward what Federalists saw as international credit for the whole nation over the long term. The upshot was that the British creditor could collect from his American debtor. And if Georgia had already collected money from patriotic citizens who owed old debts to British merchants, the implication was that British creditors could sue Georgia too.

Two aspects of this use of Magna Carta in the 1790s are noteworthy. First, Magna Carta not only escaped England—it escaped the British Empire into the post-colonial United States. Second, and more interesting, Magna Carta had never been solely concerned with the rights of Englishmen, imperial subjects, or even Anglo-Americans. From the beginning it contained some rights for foreign merchants—for “strangers” and “aliens,” in the legal terms of medieval and early modern England. Most scholars and lawyers can

19. Treaty of Amity, Commerce and Navigation (Jay Treaty), Gr. Brit.-U.S., art. X, Nov. 19, 1794, 8 Stat. 116, 122.

20. Colonial Americans linked the representation principle to Magna Carta articles 12 and 14, and they framed their objection to juryless courts, distant venues, and innovative statutory law in the language of due process that resonated with article 29. *See* EDMUND S. MORGAN, PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 52 (1959) (reproducing colonial petitions objecting to the Stamp Act as violating Magna Carta); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 166–67, 232–33 (1986) (discussing the revolutionaries' invocation of Magna Carta).

21. MAGNA CARTA ch. 39, *reprinted and translated in* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES, *supra* note 1, at 142 (providing that “[n]o freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land”); *see, e.g.*, MASS. CONST. of 1780, art. XII (stating that “no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land”); PA. CONST. of 1776, § 9 (providing that no one can “be justly deprived of his liberty, except by the laws of the land or judgment of his peers”); VA. DECLARATION OF RIGHTS § 8 (1776) (providing that “no man be deprived of his liberty except by the law of the land, or the judgment of his peers”).

intuit how Americans grabbed hold of the medieval charter and made it their own. But how did aliens enter the picture?

The fact that Magna Carta, a document often portrayed as the “birthright”²² of native Englishmen, actually protected the rights of foreigners is significant.²³ More important is the fact that Sir Edward Coke attached a pro-commercial gloss to the chapter in the seventeenth century, and Enlightenment thinkers like Montesquieu and Sir William Blackstone celebrated that interpretation in the generation before the American Revolution. All of their books were widely available in America and cited in the new federal courts.

This Article examines the early modern revival of and subtle transformation in the merchants’ chapter and then analyzes how lawyers, judges, and government officeholders invoked it in both the new American federal courts and debates over congressional power. Part II investigates the early modern sources available to Americans that shaped their understanding of the merchants’ chapter. Part III analyzes the *Brailsford* case in the federal courts, particularly how lawyers and judges used the chapter to help interpret wartime confiscation statutes. Part III then turns to debates in the political branches about foreign capital, focusing on Jeffersonian Republican proposals to introduce economic sanctions as a new mechanism of diplomacy and, in response, Alexander Hamilton’s invocation of the merchants’ chapter in his interpretation of the protections of foreign capital under the Constitution and the law of nations. The Article concludes by suggesting that the career of the merchants’ chapter in the early United States indicates the ways it was a fiscal-commercial state.

22. Edward Coke repeatedly used the term “birthright” to describe key sections of Magna Carta, but as shown below, Coke also recognized the extra-national dimension of other clauses. For a characteristically nativist and enormously influential interpretation of Magna Carta as the cornerstone of the early modern English Constitution, see HENRY CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE* (5th ed., Boston 1721). Many editions followed, including many printed in British America.

23. It should not surprise medievalists familiar with pre-national legal doctrines in Europe. It nonetheless surprises some historians of the document: “That alien merchants were aware of chapter 30 and its value to them is apparent from an episode of 1320, *odd as it seems to hear an appeal to the Charter from men bearing the names of Bonus Philippi, Dinus Forcetti, and Manenttus Francisci!*” FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629*, at 111 (1948) (emphasis added).

II. THE MERCHANTS' CHAPTER IN EARLY MODERN EUROPE: COKE, MONTESQUIEU, BLACKSTONE

This Article does not attempt to provide a comprehensive history of the merchants' chapter between 1215 and the American Revolution. Instead it explores how American lawyers and judges understood the merchants' chapter. When they looked back at Magna Carta, what did they see? Through what lenses and against what background did they evaluate Magna Carta? Americans did not have access to some ideal, objective history of the chapter, nor any part of Magna Carta. That did not exist then (if ever it could). They also did not have access to the bulk of medieval and early modern legal learning about Magna Carta, because that was largely contained in manuscript cases and readings in the English Inns of Court, much of which is only now being recovered by historians.²⁴ Americans did, however, have ready access to the canonical printed texts of English law, such as Sir Edward Coke's seventeenth-century *Institutes of the Law of England* and Sir William Blackstone's *Commentaries on the Laws of England*, published in the decade before the Revolution. In addition, they possessed many copies of Montesquieu's *Spirit of the Laws*, a popular Enlightenment text and the most influential book on comparative legal and governmental institutions for generations. In these widely circulating texts, Americans found impeccable authority for connecting international commerce to fundamental law.²⁵ Indeed, the nexus was, according to these writers, a progressive catalyst for human civilization.

A. Edward Coke and "Merchant Strangers"

Although it is wrong to say that the prolific early seventeenth-century jurist Edward Coke rescued Magna Carta from medieval obscurity,²⁶ he did translate it from Latin and gloss it in influential, if

24. Prominently, by Sir John Baker. See generally Sir John H. Baker, Lecture at a Meeting of the American Inns of Court Foundation in Washington D.C.: Magna Carta: The Emergence of the Myth, Presented at the N.Y.U. Legal and Constitutional History Colloquium (Oct. 23, 2015) (on file with author). According to Baker, there does not appear to have been a stand-alone reading, or learned lecture, on the merchants' chapter, as there was for the more famous chapter 29 guaranteeing due process according to the law of the land. At least, such a reading has not so far been discovered. See *id.*

25. On the availability of legal texts before and after the Revolution, see Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377 (2009).

26. This was more or less Edward Jenks's view. See Edward Jenks, *The Myth of Magna Carta*, 4 INDEP. REV. 260, 272–73 (1904). But see Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1060–62 (1947) (arguing against Jenks's view).

not historically faithful, ways. Coke devoted the second volume of his *Institutes of the Laws of England* to an examination of “many ancient and other statutes.”²⁷ He began with Magna Carta, which he observed was called the Great Charter not because of its size (other statutes were longer) but rather because of “the great importance, and weightiness of the matter.”²⁸ The Magna Carta that emerged from Coke’s second *Institutes*, published posthumously during the English Civil War, was no longer a charter of barons. It was the touchstone of national liberties.²⁹

Yet for a writer so long charged with intellectual parochialism, his treatment of the merchants’ chapter is surprisingly catholic. “The end of this chapter was for advancement of trade, and traffique,” Coke wrote in his gloss, “the meanes for the well using, and intreating of merchant strangers in all the particulars aforesaid, is a matter of great moment . . . for as they be used here, so our merchants shall be dealt withall in other countries.”³⁰ Glossing another chapter, Coke maintained that

trade and traffique is the livelihood of a merchant, and the life of the commonwealth, wherein the king and every subject hath interest, for the merchant is the good bayliffe of the realme to export and vent the native commodities of the realme, and to import and bring in the necessary commodities for the defence and benefit of the realme.³¹

Here, as elsewhere, Coke pushed English jurisprudence toward economic openness and experimentation.³²

Two striking concepts emerge in Coke’s treatment of the rights of what he called “merchant strangers.”³³ First, rights for foreigners in England would induce reciprocal treatment for English merchants abroad. Second, the merchants were not just a private interest group. Instead, they could be analogized to public servants—bailiffs—who in Coke’s period were sheriffs’ assistants who executed the writs that began litigation and enforced the judgments that ended it. Coke

27. COKE, *supra* note 1, at title page.

28. *Id.* at *A4.

29. For the reinvention of Magna Carta among common lawyers in Coke’s generation, see Baker, *supra* note 24.

30. COKE, *supra* note 1, ch. 30, at *58.

31. *Id.* ch. 14, at *28.

32. For Coke’s economic liberalism, see Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 6 ECON. HIST. REV. 30 (1935).

33. COKE, *supra* note 1, ch. 30, at *57.

defined bailiff as “a safe keeper or protector.”³⁴ So too were merchants: with them lay the health, welfare, and defense of the realm.

Therefore, it was in England’s interest to protect merchant strangers because that protection would be reciprocated abroad. It is a surprisingly sociable premise for a jurist so long associated with jealous concern for England and aversion to everything continental.³⁵ There is some of that national exceptionalism in Coke’s account of the chapter’s origins and effects. Coke implied that the merchants’ chapter was a work of English genius, not a fragment of a common European culture.³⁶ Once issued, other nations would respond to what England did and open their trade to match the openness of England. So England was pushing to open up trade among the European nations.

Coke extended the obvious reciprocal dynamic of the chapter’s second right, covering merchants in wartime, to the peacetime right to be free of arbitrary taxes. More trade would benefit England, but trade required openness—not just domestic openness, as in his crusade against royal monopolies,³⁷ but also openness to international trade. The grant of rights—here, rights to foreign merchants—generated strength for the whole nation. In a fundamental insight lost on many modern theorists of liberty and the liberal state, Coke saw that liberty does not necessarily trade off from power. Liberty helps generate power. Liberal trade, not war, would build the state through the strength of its subjects. A liberal state requires tremendous

34. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND ch. 10, § 79, at *61b–62a.

35. See generally RICHARD HELGERSON, FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND 88–101 (1992) (discussing Coke’s legacy in English legal thought); J.G.A. POCKOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (1957) (discussing English constitutionalism in the seventeenth century).

36. For countering views, see R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999) (suggesting the merchants’ chapter was influenced by *ius commune*); *infra* Section II.C (discussing Blackstone’s gloss of Magna Carta). Helmholz shows that the merchants’ chapter was not wholly innovative in substance but of course cannot demonstrate the direct influence on the drafters. See also Thomas J. McSweeney, *Magna Carta, Civil Law, and Canon Law*, in MAGNA CARTA AND THE RULE OF LAW 281, 283 (Daniel Barstow Magraw et al. eds., 2014) (arguing that the language of *ius commune* was useful to drafters attempting to translate local grievances into forms legible abroad, particularly in Rome).

37. See *Darcy v. Allein* (1603) 74 Eng. Rep. 1131 (K.B.); Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261, 1262–66 (1996). Coke also located the antimonopoly principle in chapter 30: “all monopolies concerning trade and traffique, are against the liberty and freedome, declared and granted by this great charter, and against divers other acts of parliament” COKE, *supra* note 1, ch. 30, at *62.

authority if it is to challenge lesser authorities within it and vindicate what Coke repeatedly called “liberty of the subject.”³⁸ In turn, the increasing wealth of those subjects contributed to state power. Coke was not known for high-level abstraction. His jurisprudence was deeply, sometimes fantastically, empirical.³⁹ In this instance, however, he developed a functional analysis that went well beyond that suggested in the text of Magna Carta.

The premise of his pre-Enlightenment conception of international relations might be called a realist sociability. Coke did not write of the sweetness of commerce. He did not posit a natural affinity of humans across political boundaries such that, even in the state of nature, they congregated instinctively and not just for the functional purpose of improving their solitary, nasty, brutish, and short lives. Instead, he assumed that trade was good because it increased wealth for the English nation, and an effective way to foster it was to permit foreign merchants into England. The reputation of England’s openness would be reported abroad and encourage reciprocation. At least since the middle ages, a kingdom could obtain reciprocal treatment for merchants in a treaty.⁴⁰ Coke suggested that a nation could achieve that treatment even without a formal agreement by unilaterally lowering trade barriers. For Coke, the merchants’ chapter did not reflect an interest-group struggle between barons seeking foreign luxury goods and jealous domestic merchants who wanted all trade to themselves.⁴¹ Instead, he assumed that there could be gains from trade on both sides. He also recognized that foreign merchants did not just sell; they also bought English goods, leaving specie payment behind and benefiting England’s balance of

38. This was one of Coke’s signature terms. *See, e.g.*, 3 COMMONS DEBATES 1628, at 167 (Robert C. Johnson et al. eds., 1977) (Coke reporting from a “committee appointed to frame a bill concerning the liberty of the subject”).

39. *See, e.g.*, COKE, *supra* note 1, ch. 1, at *3 (“[T]his charter is declaratory of the ancient law and liberty of England, and therefore no new freedom is hereby granted . . . but a restitution of such as lawfully they had before, and to free them of that which had been usurped and inroached upon them by any power whatsoever . . .”); *id.* ch. 2, at *8 (“Lastly, this chapter of Magna Charta is but a restitution and declaration of the ancient common law . . .”).

40. *See* W.S. Culbertson, *Commercial Treaties*, in 4 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 24, 25 (Edwin R.A. Seligman & Alvin Johnson eds., MacMillan Co., 1931).

41. This schematic interest-group interpretation, common a century ago, ignores the need of English merchants to interact with foreign merchants in order to gain access to their goods and export markets. Coke had not made that mistake. There was, however, probably some tension between wholesale merchants and local retailers, which is reflected in Magna Carta’s protection of local mercantile privileges, such as London’s “old liberties.” MAGNA CARTA ch. 13, *reprinted and translated in* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES, *supra* note 1, at 135, 139.

payments (or at least counterbalancing domestic payments to foreign producers).⁴²

Coke did not elaborate his reasoning, but what he did write does not fit comfortably into the categories of mercantilism or liberalism. He was committed to benefiting England's internal economy, while also recognizing that foreign merchants would follow both their individual interests and their nations' interests as well. All those interests aligned for some purposes. A wise legal system would foster mutual gain. For Coke, the medieval charter provided one mechanism for promoting that ideal political economy. He was groping toward freer if not absolutely free trade, and he argued that legal liberties within England, even for aliens, could benefit Englishmen at home *and* abroad. Commercial rights had a diplomatic dimension. Coke was of course not himself part of the Enlightenment, the beginnings of which historians trace later in the seventeenth century. Here as elsewhere, though, he was groping toward new uses of old law. For him, the barons' resistance to King John fit nicely with his and other Parliamentarians' resistance to the Stuart Kings' claims of power. Others might take this resistance out of context, and perhaps even deploy it against representative legislatures.

There were answers to this reasoning. Some of Coke's contemporaries were more skeptical of erasing the conceptual boundary between public and private interests. In the eyes of the Stuart Kings' defenders, the realm had common interests that were of a different sort altogether from the petty interests of individual subjects. At about the same time that Coke equated commerce with national welfare, Chief Baron Sir Thomas Fleming rebutted the (admittedly different) claim that merchants ought to have unrestricted access to foreign markets by stating that "the end of every private merchant is not the common good, but his particular profit."⁴³ In contrast, King James's prerogative taxes, designed to obstruct some foreign trade, furthered the public welfare. On this account, the private interests of merchants should give way to *salus populi*.⁴⁴ And it was the king-in-council who was best positioned to gauge the common good. Trade regulation was a political matter,

42. COKE, *supra* note 1, ch. 30.

43. Bates's Case (1606) 145 Eng. Rep. 267, 272 (Exchequer) (upholding royal, rather than parliamentary, impositions on foreign trade). On the constitutional theory beneath this prerogative claim, see W. S. Holdsworth, *The Prerogative in the Sixteenth Century*, 21 COLUM. L. REV. 554, 559–60 (1921); see also GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603–1642*, at 140–41 (1992).

44. *Bates's Case*, 145 Eng. Rep. at 271.

centered in the king's court rather than fragmented in the mercantile community or in Parliament. The contrast between *and* the conflation of mercantile interest and public welfare both circulated in English-speaking political culture at least since the Stuart period. Coke's conception was not alone in crossing the Atlantic. But it was strongly stated and influential. Its influence derived in no small part from the fact that it comported with many Americans' own views of the centrality of international commerce to the survival of the newly independent United States.

B. The Merchants' Chapter in the Enlightenment: Montesquieu

Despite the reservations of other English lawyers, Coke's treatment became the proximate source for Magna Carta and its meaning for over a century afterward. That was true especially outside the British Empire. Montesquieu, for example, had evidently read Coke's gloss on Magna Carta before drafting *Spirit of the Laws* in 1748. A significant part of that book celebrates the English Constitution. One example is the Frenchman's recapitulation of Coke's version of the merchants' chapter: "The Magna Charta of England forbids the seizing and confiscating, in case of war, the effects of foreign merchants, except by way of reprisals," Montesquieu wrote.⁴⁵ "It is an honor to the English nation that they have made this one of the articles of their liberty."⁴⁶ The paean came in the part of the book that famously celebrates *doux commerce*. Commerce not only diffuses wealth, he argued; it also destroys prejudice, softens manners, diffuses learning, and promotes peaceful international relations because it makes nations mutually and consciously interdependent.⁴⁷ "Peace," he declared, "is the natural effect of trade."⁴⁸ Here Montesquieu moved beyond Coke's

45. BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. XX, § 14, at 324 (Thomas Nugent trans., Colonial Press 1900) (1748). Montesquieu's spelling of Magna Charta, with an "h", suggests the influence of Coke's treatment of the charter. Coke helped partially Anglicize the spelling, and throughout most of the eighteenth century "Charta" was the preferred spelling. William Blackstone appears to have begun the reversion to "Carta" in his 1759 treatise: WILLIAM BLACKSTONE, *THE GREAT CHARTER AND CHARTER OF THE FOREST, WITH OTHER AUTHENTIC INSTRUMENTS: TO WHICH IS PREFIXED AN INTRODUCTORY DISCOURSE ON THE HISTORY OF THE CHARTERS*, at xxix (Oxford, Clarendon Press 1759).

46. MONTESQUIEU, *supra* note 45, bk. XX, § 14, at 324.

47. *Id.* bk. XX, § 2, at 316–17.

48. *Id.* bk. XX, § 2, at 316. Montesquieu contrasted Spanish laws penalizing trading with the British enemy in the War over the Asiento (also known as the War of Jenkins' Ear). Spain had imposed the death penalty on its merchants who traded with Britain. This was uncivilized:

calculated and functional reciprocity and posited a utopian human sociability. Commerce does not just strengthen individual nations. It brings nations together.

The English had taken the lead. “Other nations have made the interests of commerce yield to those of politics,” Montesquieu went on to observe, “the English, on the contrary, have ever made their political interests give way to those of commerce.”⁴⁹ Commerce was beneficial, and politics should not frustrate it in favor of corrupt, local gain. Therefore, commerce should be partially insulated from politics. Yet he also warned that a state should never permit unfettered trade, which would lead to “slavery.”⁵⁰ Montesquieu characterized the difference between the healthy and detrimental commerce by contrasting what he called “economical commerce,” in which merchants incessantly pursued small gains, to “commerce of luxury,” in which merchants speculated for quick fortunes.⁵¹ An economy relying on slavery was his example of luxury commerce. A country with slavery had fewer commercial restrictions than a free one, but a slave-based economy was, in Montesquieu’s view, not the most productive.⁵² The contrast between Britain’s pro-commercial regulation of commerce and a slave society’s anti-commercial protection of unfettered trade in human beings epitomized for Montesquieu the difference between governments that favor economical commerce and those that foster unhealthy luxury commerce. Slave-based economies sacrificed long-term commercial health for short-term gains. Some restrictions on commercial greed

An ordinance like this cannot . . . find a precedent in any laws but those of Japan. [He criticized Japan and China for tightly controlling foreign trade.] It equally shocks humanity, the spirit of commerce, and the harmony which ought to subsist in the proportion of penalties; it confounds all our ideas, making that a crime against the state which is only a violation of civil polity.

Id. bk. XX, § 14, at 324. Montesquieu seems to have believed that Britain did not criminalize trading with the enemy, because, after all, the British let enemy merchants remain among them without confiscation. This did not at all follow. He was not aware that Britain had its own laws penalizing trade with the enemy, as well as a much-abused licensing system for avoiding them. *See generally* Su Jin Kim & James Oldham, *Insuring Maritime Trade with the Enemy in the Napoleonic Era*, 47 TEX. INT’L L.J. 561 (2012) (discussing Parliamentary statutes prohibiting trade with France and the issuance of licenses intended to protect the British economy).

49. MONTESQUIEU, *supra* note 45, bk. XX, § 7, at 321.

50. *Id.* bk. XX, § 12, at 323.

51. *Id.* bk. XX, § 4, at 318–19. The latter, he thought, was a species of gambling. *Id.*

52. *See id.* bk. XV, § 8, at 240–41.

and exploitation redounded, in the long run, in favor of commerce.⁵³ Observing the example of the British Navigation Acts, which forbade foreign nations to trade directly with British colonies, Montesquieu reasoned, “[t]he English constrain the merchant, but it is in favor of commerce.”⁵⁴

What Montesquieu meant when he contrasted commerce and politics, while retaining space for regulation, is not entirely clear. He was famously epigrammatic and analytically pluralist, if not inconsistent.⁵⁵ Commerce could be a force for peace, if well regulated; governments should not, however, frustrate commerce; and a well-balanced constitution would tend to produce the right sort of “moderate government.”⁵⁶ On balance, though, Montesquieu argued that politics were national, jealous, and tended toward belligerence. Commerce, on the other hand, was international, cosmopolitan, and promoted peace. A mixed constitution would produce the right balance between policy and commerce. It was a naïve view even by eighteenth-century standards. Istvan Hont demonstrated that there were debates among Enlightenment thinkers about whether and to what degree commerce promoted peace, as well as about the quality of peace it created. Some writers compared international-trade competition to an unstable equilibrium akin to commercial quasi-war.⁵⁷ And Montesquieu himself stressed the complex preconditions necessary before nations would be able to come together in commercially based confederations.⁵⁸ Nonetheless Montesquieu broadcast optimistic views of the English Constitution and the relationship between international commerce and world peace.

He also drew two distinctions that became increasingly influential as the eighteenth century moved toward the nineteenth. First, he suggested that there was or should be some kind of

53. Economical commerce was based on “reciprocity and competitive advantage,” while luxury commerce served “the fantastic consumption demands of a small ruling class.” Robert Howse, *Montesquieu on Commerce, Conquest, War, and Peace*, 31 *BROOK. J. INT’L L.* 693, 702 (2006).

54. MONTESQUIEU, *supra* note 45, bk. XX, § 12, at 323.

55. *Cf.* Howse, *supra* note 53, at 708 (arguing that readers “should not project onto his sober spirit the actual project of world government or a universal liberal society. But, without some such conception, his contentions about the relationship of commerce, war and peace collapse into a set of contradictions, paradoxes and tautologies”).

56. MONTESQUIEU, *supra* note 45, bk. XI, § 20, at 182.

57. HONT, *supra* note 10, at 186–87.

58. Howse, *supra* note 53, at 698 (noting that Montesquieu observes that there are “a diversity of laws, both over time and among different political communities at a given time, which would at face value make any project depending on legal harmonization or integration seem utterly unrealistic”).

separation between commerce and ordinary politics.⁵⁹ Second, he divided politics into constitutions, on the one hand, and daily governance, on the other.⁶⁰ Montesquieu also connected these distinctions to the English Constitution.⁶¹ Embedding commercial welfare in fundamental law, along with the exclusion of some dimensions of commerce from the ken of ordinary legislators, was a plausible inference. In other words, the ancient idea of fundamental law carried into the Enlightenment on the back of theory that tended to insulate healthy “economical commerce” from rent-seeking politics. It would not take much to start packing economic liberties into constitutional forms. As lawyers attempted to do so, the merchants’ chapter remained alive.

C. *Proximate Authority: Blackstone’s Gloss on Magna Carta and Montesquieu*

When William Blackstone glossed Magna Carta in his *Commentaries on the Laws of England* two decades later, he invoked both Coke and Montesquieu.⁶² Magna Carta “gave new encouragements to commerce, by the protection of merchant strangers,” he noted in his spirited celebration of English legal history at the end of the *Commentaries*.⁶³ “Indeed, the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances.”⁶⁴ He enjoyed noting Montesquieu’s celebration of the merchants’ chapter⁶⁵ and then flaunted his own learning, and demystified the merchants’ chapter, or at least Coke’s exceptionalist version of it, by observing that the reciprocal treatment of resident merchants during wartime

seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook, that it was a maxim among the Goths and Swedes, “*quam legem exteri nobis*

59. See MONTESQUIEU, *supra* note 45, bk. XX, § 7, at 321.

60. See *id.* bk. XX, § 11, at 323; § 18, at 325–26.

61. Montesquieu may have derived this distinction between the constitution and government as separations in government power from Bolingbroke. See Robert Shackleton, *Montesquieu, Bolingbroke, and the Separation of Powers*, 3 FRENCH STUD. 25, 37 (1949) (“Montesquieu’s general attitude to England was coloured by Bolingbroke’s views.”). For Bolingbroke’s distinction between constitutions and government, see DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 37–38 (2005).

62. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *260–62.

63. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *425.

64. 1 BLACKSTONE, *supra* note 62, at *260.

65. *Id.*

posuere, eandem illis ponemus.” [The same law that foreign powers have shown us, we should observe to them.]⁶⁶

That appeared to be a local rule of interstate comity, much like the guarantees that modern nations could obtain through treaties. In sum, the notion of reciprocal treatment of foreign merchants in wartime had long circulated in the European world before Magna Carta. The barons and King John had not invented it.

However, Blackstone drove home the point that it was one thing for a nation to pledge commercial reciprocity in treaties with trading partners and another to promise it gratuitously and unilaterally in a constitutional document. “[I]t is somewhat extraordinary, that it,” meaning the principle of wartime reciprocity, “should have found a place in *magna carta*, a mere interior treaty between the king and his natural-born subjects.”⁶⁷ The sociability of the English Constitution was yet additional proof of its uniqueness. And the principle was more Teutonic than Roman: it derived from northern European practice rather than the *ius commune*. Indeed the Romans, Blackstone claimed, had a very different approach to commerce. They,

in their manners, their constitution, and even in their laws, treated commerce as a dishonorable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune: and equally different from the bigotry of the canonists, who looked on trade as inconsistent with christianity, and determined at the council of Melfi, under Pope Urban II, A.D. 1090, that it was impossible with a safe conscience to exercise any traffic, or follow the profession of the law.⁶⁸

For Blackstone, the English embrace of commerce marked a salutary divergence from the two major (and related) continental legal traditions: Roman and canon law. Yet all of Europe was the beneficiary.

For Montesquieu and Blackstone, the merchants’ chapter reflected the commercial progress that had helped move European civilization out of a barbarous age. The medieval guarantee promised

66. *Id.* (internal citations omitted). Johann Stiernhook was a Swedish legal writer in the seventeenth century who wrote as an institutionalist in the continental tradition, a tradition to which Blackstone tried to conform. See generally John W. Cairns, *Blackstone, an English Institutional: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318 (1984) (discussing how Blackstone’s *Commentaries* reflected trends in the continental tradition).

67. 1 BLACKSTONE, *supra* note 62, at *260.

68. *Id.* at *261 (internal citations omitted).

in the charter between the barons and King John was transformed into something larger by Enlightenment legal thinkers struggling to work out the complex relationship between commerce and international relations. None of these writers documented how, or even whether, the merchants' chapter played a pivotal role in specific controversies, or whether it had autonomous force as a motive for official action in any real situation. These writings were jurisprudential, or didactic and moral exercises, rather than concrete legal or especially historical investigations. As such, they all circulated freely in early America.⁶⁹

The story of the merchants' chapter of Magna Carta in the Enlightenment was not, however, just about moral philosophy, jurisprudence, and theory. Constitution-makers in the late eighteenth century debated many interesting jurisprudential and moral concepts. At the same time, they also built legal institutions that had significant consequences for real people. Putting aside the question of whether the merchants' chapter or its early modern gloss in the form of the general reciprocity principle ever had motivating force in English international affairs, elsewhere it did play at least a supporting role in vigorous debates over the degree to which a new, post-colonial society should be open to foreigners and their money.

III. FOREIGN MERCHANTS AND REVOLUTIONARY COMMERCE

A contagion of constitution-making spread across the Atlantic world for two generations after the American Revolution.⁷⁰ At the same time, commerce also continued to expand across the Atlantic world and beyond. Almost everywhere, constitution-makers—drafters, ratifiers, readers, and implementers—grappled with the

69. On the circulation of Coke's *Institutes* in the early United States, see James Haw, *John Rutledge: Distinction and Declension*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 70, 82 (Scott Douglas Gerber ed., 1998) (quoting John Rutledge's claim that Coke's *Institutes* were "almost the foundation of our law"). On Montesquieu's readership in early America, see PAUL MERRILL SPURLIN, *MONTESQUIEU IN AMERICA 1760-1801* (1940). On the circulation of Blackstone's *Commentaries*, see Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990) (discussing the influence of Montesquieu and Blackstone's works in early American legal education); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976) (discussing Blackstone's impact on American politics, courts, and legal education).

70. For the explosion of constitution-writing after the American Revolution, see Linda Colley, *Empires of Writing: Britain, America and Constitutions, 1776-1848*, 32 LAW & HIST. REV. 237 (2014). For the similar rise in declarations of independence after the American Revolution, see David Armitage, *The Contagion of Sovereignty: Declarations of Independence Since 1776*, 52 S. AFR. HIST. J. 1 (2005).

problem of foreign trade and capital and how, or to what degree, constitutions ought to structure and protect foreign commerce. Some of those constitution-makers sought to open their economies from the foundation up; others were more skeptical. But almost everywhere, issues concerning foreign trade and foreign capital were on constitution-makers' agendas.

In the early United States especially, access to and regulation of foreign trade and capital were salient issues in the ratification debates over federal legislative power, the treaty power, and the federal courts. Pre-war debts were on many minds, and so was the need for increased trade and capital to shore up the finances of the new nation.⁷¹ Such problems also motivated Antifederalists to demand, in the Bill of Rights, the guarantee of a jury in civil cases: a jury of native peers who would not only protect individual debtors but also pluralist sources of law.⁷² Domestic and diplomatic controversies concerning foreign trade and investment remained salient in the 1790s, as Europe broke into continent-wide wars over the French Revolution. Throughout the federal government, in the courts as well as in the political branches, the problems of foreign credit—whether to attract it, where to seek it, what to do with it, and how to control it—shaped the ways that the founding generation began to interpret the new Constitution and construct the federal government.

A. *Judicial Interpretation of Creditors' Rights: The Brailsford Case*

The ink was barely dry on the ratified Federal Constitution when proto-partisan debate began over how it applied to international commerce and finance. The *Brailsford* case became one of the earliest cases argued in the new Supreme Court, only the fourth to reach judgment, and the first (and one of only a few) to culminate in a jury trial in the Court itself.⁷³ Again, the case began when the British

71. See ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 11–21 (1993); MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT 149–90 (2003); E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at 179–219, 289–305 (1961).

72. On the jury as a pluralist source of law, see WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 96–97 (1975); SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 5–6, 48–49 (1990).

73. See 6 DHSC, *supra* note 2, at 73. The Supreme Court rendered three decisions in the case over two years; the third and final judgment is here counted as the fourth judgment in the Court's history. The Court entered two default judgments in other cases that would have gone to trial had the state defendants appeared: *Oswald v. New York*,

creditor sued his Georgia debtor in federal circuit court for a pre-war debt.⁷⁴ Georgia moved to interplead because, it claimed, it had confiscated the debt during the Revolution and feared that the defendant would not adequately protect the State's ownership interest.⁷⁵

The merchants' chapter did not fit the case well. The dispute involved debts, rather than merchandise, owed to some merchants, like Brailsford, who were outside Georgia and even North America during the war. A chapter written for medieval resident merchants trading goods was refitted onto early modern transatlantic credit networks. Before the Revolution, agents of English and Scottish creditors could sue freely in colonial courts to collect debts, or sue against the person, property, or guarantor of colonial debtors located in Britain.⁷⁶ In the 1780s, these foreign agents had limited recourse to the state courts, several of which were inhospitable to debt collection suits either because of statutory obstructions, judicial rulings, or jury nullification.⁷⁷ But now the Judiciary Act of 1789 allowed them to sue in the new federal courts, with the rule of decision coming from either state law or, when applicable, federal law, treaties, or the

Minutes of the Supreme Court, Feb. 5, 1795 (unreported) and *Cutting v. South Carolina*, Minutes of the Supreme Court, Aug. 8, 1797 (unreported). See 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800, at 62, 458–59 (Maeva Marcus et al. eds., Columbia Univ. Press 1994) [hereinafter 5 DHSC].

74. The federal circuit courts had

original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds [\$500], and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The \$500 minimum amount in controversy requirement was a significant bar to suits for modest debts.

75. See *supra* notes 8–9 and accompanying text.

76. This right to sue in any court in the British Empire that had subject matter and personal jurisdiction over the matter flowed from another imperial reciprocity principle, the one that gave subjects equal access to all the King's courts, in any dominion. See Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 456 (2003).

77. Virginia, for example, passed statutes forbidding British creditors from suing in its courts until Britain met its obligations under the Treaty of Peace. See, e.g., *An Act to Repeal So Much of All or Every Act or Acts of Assembly as Prohibits the Recovery of British Debts*, in 12 GEORGE COCHRAN, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 528, 528 (William Waller Hening ed., 1823) (passed Dec. 12, 1787) (purporting to repeal disability on suits by British creditors but suspending the Act until Britain complied with Article VII by returning or paying compensation for slaves).

Constitution.⁷⁸ This was just one example of a prominent theme in early American legal history: as imperial relationships became international, Federalist reformers reconfigured colonial legal and commercial practices into new federal institutions.⁷⁹

In the *Brailsford* case, the circuit court judges, Justice James Iredell and Judge Nathaniel Pendleton, both invoked the reciprocity principle of the merchants' chapter to help find that Georgia had not confiscated the old debt.⁸⁰ The judges parsed Georgia's statute to find that its drafters had distinguished debts owed to British merchants residing in Britain from those owed to British subjects in Georgia.⁸¹ This was a plausible reading of awkward statutory language.⁸² Because Brailsford had resided in Britain throughout the war, the Circuit Court concluded that the legislature had only sequestered, but not confiscated, the debt owed to him.⁸³

The statute did not clarify *why* the legislature drew this distinction. Judge Pendleton supposed that that legislature might have distinguished creditors abroad for a number of reasons. One was the sense that many merchants in Britain opposed the war against their American trading partners.⁸⁴ Another was that the legislators passing the 1782 statute foresaw that creditor rights would be central to the peace treaty and wished to set them aside from confiscation.⁸⁵ In addition, the legislators might have been influenced by the general principle that "debts contracted on the faith of commercial intercourse ought to be deemed of a sacred and inviolable nature."⁸⁶ Elaborating the last supposition, Pendleton reminded his American audience how debt between colonists and metropolitan merchants

78. For the purpose of alienage jurisdiction, see Tarter & Holt, *supra* note 7, at 259.

79. See HULSEBOSCH, *supra* note 61, at 203–58.

80. Iredell's opinion credits one of Brailsford's attorneys in the Circuit Court proceeding for introducing the chapter during oral argument. James Iredell's Circuit Court Opinion, *supra* note 15, at 105.

81. See *id.* at 104–05.

82. See, e.g., *id.* Section five of the Georgia statute provided that debts owed to "merchants and others residing in Great Britain should be sequestered" rather than confiscated, though it did not define sequestration. 6 DHSC, *supra* note 2, at 96. The next section confiscated the real and personal property of British subjects, except that owed to merchants in Britain, which instead was to be sequestered. *Id.* at 93, 96.

83. James Iredell's Circuit Court Opinion, *supra* note 15, at 112. The judges also analyzed the legal difference between sequestration, which was akin to holding property in trust for the creditor-beneficiary, and confiscation, which transferred title to the State. 6 DHSC, *supra* note 2, at 98–99.

84. *Id.* at 96.

85. *Id.*

86. *Id.*

had facilitated imperial trade.⁸⁷ It could do so again—outside the Empire. Interpreting the statute as merely sequestering these debts would promote reconciliation and a resumption of that trade. That, too, he supposed, might have been in the minds of Georgia’s wartime legislators. It was at this point that Pendleton invoked the second part of the merchants’ chapter, whereby in wartime “the merchants of the inimical country shall be attached, without injury to their persons or goods,” until it was known how the enemy was treating English merchants in its country.⁸⁸ “Perhaps,” concluded Pendleton, “this wise and equitable provision in favor of commerce might have suggested to the framers of the Confiscation Act the idea of this distinction.”⁸⁹

Supreme Court Justice Iredell, then riding circuit in the southern states, likewise invoked the merchants’ chapter to “illustrat[e]” the legal distinction between confiscation and sequestration.⁹⁰ He also invoked Montesquieu’s “high eulogium” of the merchants’ chapter to help explain why “every one must admit” the reasonableness of distinguishing between resident Loyalists, who “basely betrayed their Country,” and British creditors abroad, who played no role in the war and even “used the greatest efforts to prevent it.”⁹¹ Then Iredell addressed the law of nations. The traditional allowance under the laws of war for belligerent powers to confiscate enemy property, even debts, was something like a trump card for the debtor and Georgia. Iredell admitted that the customary law of nations did not prohibit a nation at war from confiscating the debt owed to subjects of its enemy.⁹² Yet the “modern practice in Europe” was *not* to confiscate debts in wartime, and Britain respected that practice during the Revolution: it had not confiscated American debts.⁹³ The law of nations was becoming more liberal, these Federalist judges argued, though only beginning to catch up with the protection guaranteed in Magna Carta.

87. *Id.* at 100 (supposing that the treaty-makers considered the debts owed to real British subjects to have been “contracted on the faith of commercial credit” and thus inviolable).

88. *Id.* at 97 (“*Magna Charta*, a law well known in America, declares, that, in case of a war, the merchants of the inimical country shall be attached, without injury to their persons or goods, till it is known in what manner English merchants are treated in that country.”).

89. *Id.*

90. James Iredell’s Circuit Court Opinion, *supra* note 15, at 105.

91. *Id.* at 106. Iredell elided the distinction between Loyalists who had not made themselves “Citizens” of Georgia and other British subjects who had not. *Id.*

92. *Id.* at 105–06.

93. *Id.* at 106. Of course there were few debts owed to Americans by Britons to confiscate in the first place.

Because both Pendleton and Iredell admitted that the law of nations traditionally permitted belligerent states to confiscate debts, it was crucial for them, as it had been for Brailsford's attorneys, to argue that the State had *not* confiscated debts. A holding that Georgia had not confiscated Brailsford's debt would avoid the more difficult question of whether it had the power to do so and, if so, whether the Treaty of Peace nullified that forfeiture.⁹⁴ Here is where the merchants' chapter did real work. The chapter, along with the liberal trend in the law of nations of exempting debt from confiscation, enabled Brailsford's lawyers to contend that Georgia had behaved liberally during the war, whether or not it possessed the ultimate power to expropriate debts.

The Supreme Court agreed with the interpretation of the Circuit Court below: Georgia had sequestered but not confiscated the debt.⁹⁵ When peace returned, under the law of nations, a foreign creditor could return to seek collection. The Treaty of Peace's prohibition of additional "impediments" further protected the creditor's right to obtain satisfaction. In the trial between Georgia and the creditor in the Supreme Court, Chief Justice John Jay charged the jury accordingly. Although newspapers reported that he told the jury that it possessed the power to determine law as well as fact, he strongly instructed the jury that the Justices unanimously agreed that Georgia had not confiscated, but rather only sequestered, the debts owed to Brailsford.⁹⁶ Consequently, "his Right to recover them revived at the peace bot[h by] the Law of Nations & the Treaty of peace."⁹⁷

94. Justice Iredell, rehearsing his dissent in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), indicated that the Supremacy Clause could not be invoked to reverse state actions taken before the Constitution's ratification. James Iredell's Circuit Court Opinion, *supra* note 15, at 112–13.

95. 6 DHSC, *supra* note 2, at 77.

96. See Fragment of John Jay's Charge to the Petit Jury, reprinted in 6 DHSC, *supra* note 2, at 170, 170; DUNLAP'S AM. DAILY ADVERTISER, Feb. 17, 1794, as reprinted in 6 DHSC, *supra* note 2, at 171, 173 (reporting Jay's jury charge).

97. Fragment of John Jay's Charge to the Petit Jury, *supra* note 96, at 170. A newspaper reported that Jay told the jury it could decide law as well as fact. See DUNLAP'S AM. DAILY ADVERTISER, *supra* note 96, at 173. For a recent Note arguing that the case involved the application of the law merchant as applied by a special jury of merchants, see Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 211 (2013). Although the lawyers and judges in *Brailsford* did analyze the laws of war and the Treaty of Peace, they did not mention the law merchant, which concerned peacetime commercial transactions rather than wartime confiscation of debt. In addition, the special jury did not appear to bring expert wisdom to the case. Instead, after Chief Justice Jay charged the jury with strong and clear statements of the Court's view of the governing legal rules, the jurors interrupted their deliberations to ask the Court to specify once again the two major issues and the Court's view of the relevant law on those issues—to Jay's annoyance. See DUNLAP'S AM. DAILY ADVERTISER, *supra* note 96, at 174. Jury selection

Apparently that unvarnished instruction was not clear enough. Later that day the jury submitted two questions to the Court. The first asked whether sequestration “[v]est[ed] the State of Georgia completely with the debts,” and the second asked, if sequestration had vested title in Georgia, whether the treaty “or any other cause” revived the creditor’s right to recover.⁹⁸ Jay explained that his charge had covered the ground of both questions already and repeated that the Justices believed that Georgia’s statute had not vested title to the debts in the state.⁹⁹ As to the second and more difficult question, Jay did not answer. Instead, he simply stated that “no sequestration divests the property in the thing sequestered.”¹⁰⁰ So instructed, the jury found that Georgia had only sequestered and not confiscated British debts. Brailsford had finally won.¹⁰¹

The extension and elaboration of the merchants’ chapter in the *Brailsford* case cannot stand for the proposition that the federal courts unequivocally protected the rights of foreign merchants, even the subset of British merchants who enjoyed explicit protection in the Treaty of Peace. At exactly the same time that the Supreme Court decided that it would permit Georgia to interplead in the case against Brailsford, it also held, in *Chisholm v. Georgia*,¹⁰² that the citizen of another state—including a foreign citizen or subject—could sue a state, here again the State of Georgia.¹⁰³ In other words, the states did not enjoy sovereign immunity and could be sued in the federal courts.

by a Federalist marshal probably had more to do with the jury’s judgment than the nature of their employment as merchants (though the two characteristics probably overlapped). On Federalist jury selection, see Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997 (2007); Tarter & Holt, *supra* note 7. Moreover, historians are increasingly skeptical that the early modern law merchant was actually a coherent body of law generated by merchants. See, e.g., Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1153–59 (2012).

98. Questions Proposed by the Petit Jury, reprinted in 6 DHSC, *supra* note 2, at 171.

99. See 6 DHSC, *supra* note 2, at 87.

100. DUNLAP’S AM. DAILY ADVERTISER, *supra* note 96, at 174.

101. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 5 (1794). Brailsford’s legal victory did not mean he could easily collect the debt. He sought execution for several years and eventually recovered only part of what he was owed. 6 DHSC, *supra* note 2, at 87–88.

102. 2 U.S. (2 Dall.) 419 (1793). The *Chisholm* decision came down the same week as the decision that the Court would hear the *Brailsford* case. 6 DHSC, *supra* note 2, at 83 n.58.

103. *Chisholm*, 2 U.S. (2 Dall.) at 431. Article III of the Federal Constitution provides jurisdiction in the federal courts for suits “between a State and Citizens of another State,” “foreign States,” or “[foreign] Citizens or Subjects,” and the Federal Judiciary Act of 1789 did not clarify this ambiguous formulation. See U.S. CONST. art. III, § 2; Judiciary Act of 1789, ch. 20, §§ 11–13, 1 Stat. 73, 78–81.

Chisholm led to grumbling among the states and proposals to amend the Constitution to prevent at least some suits against states.¹⁰⁴ Congress did not, however, muster a supermajority to send an amendment to the states in the winter of 1793.¹⁰⁵ Then, in February 1794, the jury returned a verdict for Brailsford in the Supreme Court, and one week later the Court determined final damages in the *Chisholm* case.¹⁰⁶ It was one thing for a state to decide to sue in the Supreme Court and risk loss, as in *Brailsford*. It was another for a state to be sued in the Supreme Court as an involuntary defendant—and lose. When Georgia lost to the British creditor in *Brailsford* on the merits and one week later received the damages judgment in *Chisholm*, complaints about involuntary suits against states in federal court cascaded into constitutional reform to protect state sovereign immunity.¹⁰⁷ The reason was not just the sense of offended dignity. In addition—and previously unknown in American constitutional history—*Chisholm* involved the claim of a creditor of ambiguous loyalty.¹⁰⁸ “Nothing remains but to give the key to our treasury to the Agents of the Refugees, Tories and men who were inimical to our Revolution,” complained a Boston newspaper in the months between *Chisholm* and the final *Brailsford* decision.¹⁰⁹ Federal jurisdiction over state wartime behavior would force states “to distribute the hard money, now deposited in that office, to persons of this description.”¹¹⁰ The argument is not that *Brailsford* was the final straw. Instead, the jury verdict in *Brailsford* and the damages determination in *Chisholm* fitted with other cases filed against the states, not least a notorious

104. For an examination of the reaction to *Chisholm*, see generally James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

105. 5 DHSC, *supra* note 72, at 597.

106. See 6 DHSC, *supra* note 2, at 83 n.58.

107. For the passage of the Eleventh Amendment, see 5 DHSC, *supra* note 72, at 596–604.

108. The standard narrative of the facts in *Chisholm* is recited in 5 DHSC, *supra* note 72, at 127–28. Newly discovered sources complicate the conventional understanding of the case’s origins. The Scottish merchant whose estate sued Georgia in the *Chisholm* case traded with both the revolutionary states and Britain early in the Revolution; resided in British-controlled Charleston after 1780, where he entered a partnership with other British merchants; evacuated with the British military in late 1782 and left for British East Florida; and applied for citizenship in South Carolina in 1783. The contract at issue in *Chisholm* appears then to have been a composition for damages. Table of Events, *Trezevant v. Mortimer*, In Chancery ([1840?]), S.C. Historical Soc’y (copy of manuscript on file with author). *Chisholm* will be explored in another article explaining how binational merchants navigated the imperial civil war and then integrated into the United States.

109. *Communications*, INDEP. CHRON. (Boston), Sept. 16, 1793, at 3, col. 2.

110. *Id.*

case brought by an exiled Loyalist to recover damages from Massachusetts for goods confiscated from his mansion during the war.¹¹¹ When combined, these cases starkly displayed to the state governments the potency of Supreme Court jurisdiction.¹¹²

In sum, *Brailsford* raised a substantial bar against finding that a state had successfully confiscated at least some loyalist property, and it came on the heels of *Chisholm*'s holding that individuals (including foreigners such as British subjects) could sue the states for debts in the Supreme Court. The combination terrified the states. States that had confiscated loyalist and British property began to fear that their targets would return from hiding, enter federal court, and reopen cases that the states believed had been settled with finality years earlier. Within a month after the *Brailsford* decision, Congress passed the Eleventh Amendment to close the federal courts to suits against states by any individuals, domestic or foreign, and the states ratified it the next year.¹¹³ The upshot was that alien merchants and creditors still had access to federal courts when suing U.S. citizens, which is what they most wanted. However, they no longer had the option of suing the states directly.

B. Creditors' Rights in the Political Branches in the 1790s

The degree of protection owed to foreign merchants and creditors was not a matter only for the early federal courts. Congress and the Executive grappled with it as well. In those branches, also, the merchants' chapter was a useful authority for Federalists who wished to protect international capital from national politics.

The degree of protection due to foreign capital was a central issue in the partisan debates that raged during the 1790s, and indeed to the development of what some historians call the first party system.¹¹⁴ Some American constitution-builders like Alexander Hamilton began to conceptualize the field of commerce as a space

111. *Vassall v. Massachusetts* (U.S. 1793) is unreported, but case documents are published in 5 DHSC, *supra* note 72, at 352–449.

112. Cf. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1938 (describing the Eleventh Amendment as a compromise and “diversionary” maneuver to stifle calls for a new constitutional convention, while preserving federal court jurisdiction over treaty-based cases arising from state courts).

113. See U.S. CONST. amend. XI. Whether the amendment prohibited all suits, including those arising under federal law, treaties, and the Constitution, or only those based on diversity jurisdiction, has been much mooted. See, e.g., Pfander, *supra* note 104, at 1352–56 (presenting both sides of the argument over the amendment's meaning).

114. On the rise of the Jeffersonian Republicans, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 195–208 (1993).

outside normal politics, a field structured by the high politics of constitution-making and at least partly immune from the normal, low politics of everyday governance.¹¹⁵ Directly or indirectly, Hamilton was following ground that Montesquieu had mapped a generation earlier.¹¹⁶ Others, like Thomas Jefferson, agreed that international trade was central to the new nation and its constitutional structure. However, they believed that the hydraulic pressure of international reciprocity was now so intense and unavoidable that the United States could compel foreign states to alter their trade and military policies by threatening to cut off their commerce with the United States. Economic sanctions, including penalties against foreign merchants, became new, indeed revolutionary, diplomatic technology for reducing the probability of war.

The same year that the Court decided *Brailsford*, the newly organized Jeffersonian Republicans drove a package of economic sanctions against Britain through Congress.¹¹⁷ After the outbreak of the wars of the French Revolution, Britain began vacuuming up neutral commerce on the high seas.¹¹⁸ Turning the reciprocity principle almost on its head, Secretary of State Thomas Jefferson argued that nations trading in the Atlantic world were now so interdependent, or at least so dependent on American trade, that boycotts and embargoes would almost instantly force Britain to respect U.S. grievances. “Peaceable coercion” was an alternative to war. “I think it will furnish us a happy opportunity of setting another precious example to the world,” Jefferson wrote to James Madison, then serving as his point man in Congress, in March 1793, “by shewing that nations may be brought to do justice by appeals to their interests as well as by appeals to arms.”¹¹⁹ He then recommended that Congress initiate trade embargoes with belligerent nations, a proposal that would have gotten nowhere had he suggested it in President Washington’s cabinet in the spring of 1793. “I should hope that Congress instead of a denunciation of war,” Jefferson continued,

would instantly exclude from our ports all the manufactures, produce, vessels and subjects of the nations committing this

115. This is a major theme in *The Defence*, essays published in 1795–1796 to defend the Jay Treaty against Republican criticisms in Congress. See *infra* notes 133–49 and accompanying text.

116. See *supra* notes 59–61 and accompanying text.

117. See *infra* notes 123–27 and accompanying text.

118. See ELKINS & MCKITRICK, *supra* note 114, at 303–449.

119. Letter from Thomas Jefferson to James Madison (Mar. 24, 1793) (on file with the Library of Congress), http://founders.archives.gov/documents/Jefferson/01-25-02-0408#normal_view [http://perma.cc/EQT8-27EH].

aggression, during the continuance of the aggression and till full satisfaction made for it. This would work well in many ways, safely in all, and introduce between nations another umpire than arms. It would relieve us too from the risks and the horrors of cutting throats.¹²⁰

Jefferson had identified the perennial criticism of international law: there was no “umpire” between nations when problems reached the break point. There was only war. To him, as to many Republicans, the increasing economic interdependence among nations offered the possibility of a new kind of weapon, socially wounding but not bloody. They now saw reciprocity not as an ideal or goal, but instead as an economic fact. It was an economic mechanism for preserving the old Enlightenment ideal of the balance of power.¹²¹ Even if nations were not actually balanced when measured by political or economic power, they were nonetheless mechanically balanced by virtue of their need for each other’s trade. Jefferson was convinced that the large European trading nations were especially dependent on American commerce because the United States provided crucial produce and a necessary market for finished goods.¹²² *Doux commerce* was now an unbreakable addiction.

Congress did enact a short-term embargo on trade a year later, in 1794, amidst uncertainty about Britain’s intentions towards the United States as it swept up much neutral commerce in the Carribean.¹²³ Some congressmen proposed going farther and proposed a complete ban on commerce with Britain and the sequestration of debt, including government issued debt in the form of Treasury bills.¹²⁴ The British were becoming large holders of such debt, gradually supplanting Dutch investors as the largest group of creditors of the federal government.¹²⁵ Congress did not adopt this form of economic sanction, but the idea got a lot of play¹²⁶—just as

120. *Id.* For background on Jefferson’s and Madison’s commitment to economic sanctions as tools of international diplomacy, see generally Drew R. McCoy, *The Virginia Port Bill of 1784*, 83 VA. MAG. HIST. & BIOGRAPHY 288 (1975); Merrill D. Peterson, *Thomas Jefferson and Commercial Policy, 1783–1793*, 22 WM. & MARY Q. 584 (1965).

121. Today the balance of power has a realist connotation; in the eighteenth century, however, it was an aspirational alternative to “universal monarchy.” See MICHAEL SHEEHAN, *THE BALANCE OF POWER: HISTORY AND THEORY* 97–120 (1996).

122. See Peterson, *supra* note 120, at 591–95.

123. ELKINS & MCKITRICK, *supra* note 114, at 390–95.

124. *Id.* at 392.

125. MIRA WILKINS, *THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914*, at 34–36 (1989).

126. See ELKINS & MCKITRICK, *supra* note 114, at 392, 394.

the federal courts repeatedly handed down decisions forcing Americans to repay decades-old debts to British creditors.¹²⁷

Hamilton was aghast at these proposals, and not only because they threatened his financial program, which depended heavily on foreign trade and foreign investment in Treasury bonds.¹²⁸ Indeed, most Federalists opposed the provocative Republican policy of peaceable coercion and, especially, the prospect of including the suspension of public debt obligations in the arsenal.¹²⁹ In the fall of 1794, President Washington sent Supreme Court Chief Justice Jay to London to negotiate a treaty with Britain to resolve American grievances arising from captures of neutral shipping in the French wars and those stemming from the Revolution and the Treaty of Peace, including the obstacles British creditors like Brailsford faced when trying to collect old debts and also Britain's retention of several western forts within U.S. territory.¹³⁰ Apparently on Jay's initiative, the resultant Jay Treaty also included a provision by which both sides promised never to confiscate private or public debt obligations in wartime, thereby committing the United States not to include Treasury bills or shares of the Bank of the United States in the repertoire of economic sanctions.¹³¹ Because treaties were the law of the land, and it was not yet clear whether Congress could simply supersede treaty pledges with ordinary legislation,¹³² the Jay Treaty provision effectively stymied Jeffersonian attempts to employ

127. The federal courts were then hearing cases in which it was fairly clear that a state, Jefferson's own Virginia, had successfully appropriated the debt, thus raising the very question that the federal judges and the Supreme Court had dodged in *Brailsford* by relying on the merchants' chapter. Hobson, *supra* note 7, at 187–88. Those cases culminated in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 234–36 (1796) (holding that a British creditor could sue an American debtor even if that debtor had paid the debt to the state under a revolutionary sequestration statute).

128. See EDLING, *supra* note 71, at 208. Through the nineteenth century, foreign creditors owned a majority of the federal debt. See JAY SEXTON, *DEBTOR DIPLOMACY: FINANCE AND AMERICAN FOREIGN RELATIONS IN THE CIVIL WAR ERA, 1837–1873*, at 10 fig.1 (2005); WILKINS, *supra* note 125, at 90, 54 tbl.3.2. For Hamilton's financial program, see generally EDLING, *supra* note 71, at 206–18; FERGUSON, *supra* note 71, at 292–96.

129. See Peterson, *supra* note 120, at 586–87.

130. ELKINS & MCKITRICK, *supra* note 114, at 397.

131. Treaty of Amity, Commerce and Navigation (Jay Treaty), Gr. Brit.-U.S., art. X, Nov. 19, 1794, 8 Stat. 116, 122; see also Letter from John Jay to Edmund Randolph (Nov. 19, 1794), reprinted in *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 137, 141 (Henry P. Johnston ed., 1893) (explaining Article X and reporting that Britons “wishing to invest their property in our funds and banks, have frequently applied to me to be informed whether they might do it without risk of confiscation or sequestration”).

132. 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, 1157 (2000).

economic sanctions against British creditors of the federal government.

Explaining the wisdom of this guarantee to the public, Hamilton gazed back longingly on the merchants' chapter of Magna Carta, or, more accurately, at its Enlightenment gloss, and lamented that he and the other constitution-makers had only implicitly, and incompletely, accomplished what the barons and King John had done so well. "How much is it to be regretted, that **our Magna Charta** is not unequivocally decorated with a like feature," Hamilton noted wistfully about the absence of an explicit provision protecting foreign debt from confiscation.¹³³ "[I]n this instance," he continued, "we who have given so many splendid examples to mankind are excelled in constitutional precaution for the maintenance of Justice."¹³⁴ He then cobbled together some clauses from the Federal Constitution to fashion a substitute for the missing merchants' chapter. His central claim was that the spirit of the Contract Clause,¹³⁵ which by its letter only prohibited the states from interfering with the obligation of contracts, restrained the federal government as well. In addition, it applied to the government's *own* contractual promises, another controversial claim at the time.¹³⁶ Consequently, Congress could not confiscate foreign-held Treasury bonds.¹³⁷

Perhaps because of the weakness of this doctrine of implied constitutional limitation, or simply to plead in the alternative, Hamilton also countered the argument that the law of nations empowered states to confiscate debts. In another of his thirty-eight public letters defending the Jay Treaty, and as Justice Iredell and Judge Pendleton had done during the *Brailsford* litigation,¹³⁸ Hamilton emphasized the modern, pro-creditor trend in the

133. ALEXANDER HAMILTON, *The Defence No. XVIII* (Oct. 6, 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON 299, 302 (Harold C. Syrett ed., 1973) (bold added).

134. *Id.*

135. U.S. CONST. art. I, § 10.

136. HAMILTON, *supra* note 133, at 302. Whether the Contract Clause applied to a state's own contracts was unclear in the first decade or so after the Constitution was ratified. The Supreme Court held that it did in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810). It followed an interpretation Hamilton had offered as counsel in the case years earlier. See Alexander Hamilton, Draft Case and Draft Answer, by Hamilton for William Constable (Mar. 1796), in 4 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 428, 428–31 (Julius Goebel Jr. & Joseph H. Smith eds., 1980).

137. HAMILTON, *supra* note 133, at 304–05.

138. A decade later, Pendleton was Hamilton's second in his fateful duel with Aaron Burr.

customary law of nations.¹³⁹ The latest authorities, notably Emer de Vattel, embraced the principle that states *should* not confiscate debts.¹⁴⁰ On Hamilton's reading, this principle was not just normative but also positive: the modern customary law amounted to the principle that belligerent powers *could* not confiscate debts. Hamilton conceded that the United States had "a natural right of War in certain cases to confiscate or sequester enemy's property found within our Country; but . . . on motives relative to Commerce and Public Credit, the Customary Law of Europe has restrained that right as to *private debts* and *private property* in public funds."¹⁴¹ The main authority for an unlimited right to confiscate derived from Roman law.¹⁴² As Blackstone had in his gloss on the merchants' chapter, Hamilton expressed contempt for Roman public law. It was the same law, he argued, that justified killing all enemies or simply enslaving them.¹⁴³ Conquest, not trade, was the main Roman business; "for the most part Commerce was little cultivated."¹⁴⁴ Fortunately, "moral science" had undergone "improvement . . . in modern times."¹⁴⁵ Along with that improvement came restraints on public authority, at least respecting debts owed to foreigners. The modern customary law of nations trumped the natural law of nations.

Hamilton's attempt to read the protections of the merchants' chapter into the Federal Constitution, along with his strong reading of the law of nations,¹⁴⁶ was designed to insulate international commerce, or at least capital, from the hurly-burly of partisan politics.¹⁴⁷ Although he rejected Montesquieu's utopian belief that commerce automatically produced peace,¹⁴⁸ Hamilton argued that the

139. ALEXANDER HAMILTON, *To Defence No. XX* (Oct. 23–24, 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 133, at 329, 337–42.

140. EMER DE VATTEL, THE LAW OF NATIONS 453 (Béla Kapossy & Richard Whatmore eds., Liberty Fund, Inc. 2008) (1757).

141. HAMILTON, *supra* note 139, at 341.

142. *Id.* at 331–32.

143. *Id.* at 332–33.

144. *Id.* at 332.

145. *Id.* at 333.

146. Throughout he assumed that the law of nations was binding on the United States. For the Federalist belief that the law of nations bound the United States, see generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729 (2012) (discussing how the Founders approached the law of nations).

147. This is a major theme in *The Defence*.

148. See, e.g., THE FEDERALIST NO. 6, at 19–20 (Alexander Hamilton) (Terence Ball ed., 2003) (arguing that "the rivalships and competitions of commerce between

partial insulation and deft management of commercial relations would create gains for all sides involved in international trade. Together, constitutional limitations and adroit diplomacy would minimize the damage that political conflict between nations might inflict on international commerce.¹⁴⁹ The capital-starved United States especially benefitted from such a system. Here, Hamilton reformulated Coke's realist sociability to fit the unusual financial circumstances of a post-colonial and developing nation.

Post-revolutionary American legal arguments and political debates took the centrality of international capital for granted. Participants disagreed, however, about whether to insulate it with law or make it a weapon of peace. In short, these disputes about the relationship between fundamental law and commerce offer insight on the constitutional arguments for capitalism as it began to triumph.¹⁵⁰ Some of those arguments derived authority from a medieval provision meant to protect commerce from royal prerogatives. Now that tradition was reconfigured to restrain democratic legislation. If the King could not do it, argued Federalists, neither should the people.

CONCLUSION: CONSTITUTING A FISCAL-COMMERCIAL STATE

The career of the merchants' chapter of Magna Carta in the early Republic demonstrates the enduring power of the medieval charter almost six centuries after its drafting, even outside the British Empire. It also reveals more. The resonance of the merchants' chapter for Federalists, especially, owed much more to its early modern gloss than to King John and the barons at Runnymede. To Coke, Montesquieu, and Blackstone, the chapter conveyed the wisdom and utility of pledging a nation's good faith to foreign traders. For them all, the chapter illustrated fundamental principles of political economy about the virtues of international reciprocity and the benefits, all around, of (relatively) free commerce. Many revolutionary Americans believed that gloss contained a lesson especially important for a post-colonial and developing nation. Pledging national faith in constitutional forms would send signals

commercial nations" can generate war). Hamilton was answering Antifederalist claims that commerce would unite the states in a peaceful confederation, making a strong national government unnecessary and possibly dangerous. *See id.* at 21–22. His position, by contrast, was that although commerce between states was beneficial, it nonetheless required careful management—as did all interstate and international relations. *See id.* at 24.

149. This is the gravamen of *The Defence*.

150. *See* HIRSCHMAN, *supra* note 10 (analyzing the intellectual arguments that facilitated the "triumph of capitalism").

abroad that foreign capital was safe from political manipulation in the United States.¹⁵¹

This episode also sheds light on the broader international dimensions of early American constitutionalism. The early American constitutions, contrary to the exceptionalist myth of constitution-making, engaged the rest of the world.¹⁵² They were designed and functioned to integrate the new states into a larger international system, which the process of constitution-making presupposed. Given the Enlightenment context for the outburst of revolutionary constitution-making and the centrality in the Enlightenment of questions of political economy—or the relation between political structure and economic development in what contemporaries saw as an international and even global economy¹⁵³—it was inevitable that constitution-makers and interpreters debated how to promote or channel international commerce.

The Federal Constitution in particular is filled with provisions designed to integrate the United States into the larger world of European states, including many clauses that relate to international trade and credit.¹⁵⁴ It took away all foreign affairs powers from the states and distributed many of them to Congress and the Executive;¹⁵⁵ it disabled them from issuing paper money or interfering with future contracts;¹⁵⁶ it made the peace treaty and protection of existing contracts the supreme law of the land;¹⁵⁷ and it gave the federal courts jurisdiction over cases involving aliens and foreign states.¹⁵⁸

151. Cf. Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 85–86, 89–90 (2002) (modelling the signaling function of nations' human rights protections for foreign investors in the modern world); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. L. REV. 1277, 1282 (2008) (modelling a "constitutional 'race to the top' driven by competition among countries for capital and skilled migrants").

152. Golove & Hulsebosch, *supra* note 146, at 934; Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 761 (2014).

153. See HONT, *supra* note 10, at 99–111. See generally Steve Pincus, *Rethinking Mercantilism: Political Economy, the British Empire, and the Atlantic World in the Seventeenth and Eighteenth Centuries*, 69 WM. & MARY Q. 3 (2012) (outlining contest between two competing views of commerce and political economy in late seventeenth-century Britain).

154. Daniel J. Hulsebosch, *Being Seen Like a State: The American Constitution and Its International Audiences at the Founding* 96–100 (Jan. 2012) (unpublished manuscript) (on file with author). Max Edling focuses on the public finance dimensions of Hamilton's conception of the Constitution. See EDLING, *supra* note 71, at 207.

155. U.S. CONST. art. I, §§ 8, 10; *id.* art. II, § 2.

156. *Id.* art. I, § 10.

157. *Id.* art. VI.

158. *Id.* art. III, § 2.

Amidst the construction of a legal environment hospitable to foreign trade and investment, the merchants' chapter played a supporting role in the transformation of that text into constitutional governance. In one of the many early cases involving the rights of foreigners in America,¹⁵⁹ federal judges invoked Magna Carta to frame a debatable interpretation of a state statute and protect a foreign stream of credit. Soon after, Alexander Hamilton invoked the merchants' chapter when formulating an aggressive interpretation of the Contract Clause to apply it to governmental contracts, including contracts made by the federal government. And although the Jeffersonian Republicans did not agree that international capital should be insulated from ordinary politics, they concurred with the Federalist premise: the United States was deeply enmeshed in an international economy, indeed inevitably so, and its future development depended on the openness of that economy. This solicitude for foreign trade and investment, and the belief that war would stifle American development, casts doubt on the proposition that American constitution-makers aspired to create a fiscal-military state of the sort supposed to have emerged in early modern Europe.¹⁶⁰ It is better characterized as a fiscal-commercial state.

159. For the dominance of cases involving aliens in the federal docket, see Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 872–73 (2006); Kevin Arlyck, *Forged by War: The Federal Courts and Foreign Affairs in the Age of Revolution* (Sept. 2014) (unpublished Ph.D. dissertation, New York University) (on file with author).

160. This is Edling's argument, working off JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783* (1990), who in turn derived it from Charles Tilly and his followers. CHARLES TILLY, *COERCION, CAPITAL AND EUROPEAN STATES, AD 990–1992* (1992). Steve Pincus challenges Brewer's bellicist account of the British state in the eighteenth century. See Pincus, *supra* note 153, at 40.