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SOME HINTS ON THE EUROPEAN ORIGINS OF
LEGISLATIVE PARTICIPATION IN THE
TREATY-MAKING FUNCTION

PETER HAGGENMACHER*

Pour Jean et Chantal Grosdidier de Matons
—dix ans après.

The fairly restricted scope of these introductory observations, as set out by the organizers of the symposium, was to show “how the idea of making the parliament or legislature part of an historically executive function arose, and who were the thinkers and writers who influenced the process.” Assuming that “the idea was first formalized in the U.S. Constitution,” the emphasis was to be less on the American founders than on “the European foundation which may have influenced them.”¹

The result of an all too hurried search turned out rather meager. A more thorough investigation might (and probably would) have proved equally disappointing, but would at least have authorized somewhat firmer conclusions than this sketch dares to draw. Yet, the few and scattered clues it does contain could still prove helpful as a spring-board for a more elaborate enquiry; which after all may justify the publication of these tentative considerations.

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As was just pointed out, the treaty-making power is usually said to have been, prior to the “democratic” breakthrough brought about by the Philadelphia Convention of 1787, an essentially executive province. It is therefore declared to have naturally and exclusively belonged to the organ permanently in charge of the State’s foreign relations: that is, depending on the type of government, the monarch or some restricted council. This tendency could only be enhanced under European absolutism, and so it must have appeared, on the face of it, to the American Founding Fathers, even with respect to limited monarchies like England

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1. Letter from Frederick M. Abbott, Assistant Professor at Chicago-Kent College of Law, to the author (June 4, 1991) (on file with the *Chicago-Kent Law Review*). I take this opportunity to thank Professor Abbott for his kind assistance in the elaboration of this paper, and above all for his infinite patience with tardy authors.

or republics like Geneva. A few doctrinal references will be enough to illustrate this point.

Thus the Genevan Jean-Jacques Burlamaqui, whose influence was considerable in the United States, settles the question in a short formula: "Il n'y a que le Souverain qui puisse faire des Alliances & des Traités, ou par lui-même ou par ses Officiers & ses Ministres."² While there is nothing surprising in such a statement as coming from a patrician, things are hardly different, however, in the opinion of another citizen of Geneva, who had spent his early youth in the plebeian part of the town across the Rhône (where this paper has been written) and who liked to think of himself as the champion of popular rights and republicanism: Jean-Jacques Rousseau. Alliances between States, he says, as well as declarations of war and treaties of peace are not acts of sovereignty involving the whole body politic, but mere acts of government which can easily be reserved to the rulers without any loss to the people: "L'exercice extérieur de la Puissance ne convient point au Peuple; les grandes maximes d'Etat ne sont pas à sa portée; il doit s'en rapporter là-dessus à ses chefs qui, toujours plus éclairés que lui sur ce point, n'ont gueres intérêt à faire au-dehors des traités désavantageux à la Patrie."³

The picture is not different if we turn from the city state of Geneva to the British empire, which clearly remained a capital source of inspiration to the Founding Fathers who had just rebelled against British rule. John Locke, who was among their main political thinkers, had similar conceptions as to the treaty-making power, despite his views on the separation of political functions. While in principle the "federative power," which relates to "war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth,"⁴ is distinct from the executive power, which concerns "the execution of the municipal laws of the society within itself upon all that are parts of it," yet, he observes, both powers "are always almost united."⁵ Indeed, "both of them requiring the force of the society for their exercise, it is

2. 4 JEAN-JACQUES BURLAMAQUI, *PRINCIPES DU DROIT POLITIQUE* (1751) ch. 9, ¶ 19, at 188 (1763) ("Only the Sovereign can make alliances and treaties, either by himself or through his Officers and his Ministers.") (This author's translation).

3. 7 JEAN-JACQUES ROUSSEAU, *LETTRES ECRITES DE LA MONTAGNE* (1764), in 12 *COLLECTION COMPLÈTE DES OEUVRES DE JEAN-JACQUES ROUSSEAU* 300 (1782) ("The external exercise of power does not befit the People; the great maxims of State are not within its grasp; in these matters it has to follow its leaders, who, being always more enlightened than itself on this point, are hardly interested in making treaties with foreign powers to the detriment of the country.") (This author's translation).

4. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* (1690) ch. 12, ¶ 146, at 195.

5. *Id.*

almost impracticable to place the force of the commonwealth in distinct and not subordinate hands, or that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin."⁶

What Locke had granted almost reluctantly is asserted without reservations, three quarters of a century later, by his compatriot William Blackstone, equally influential among Americans: "With regard to foreign concerns," he declares, "the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves."⁷ Very naturally, therefore, the power "to make treaties, leagues, and alliances with foreign states and princes"⁸ is included in the prerogatives of the crown. "For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the king."⁹

Locke's and Blackstone's pronouncements were echoed, shortly before the American Revolution, in a classic work on the British Constitution, whose author, Jean-Louis de Lolme, again a Genevan, had been in contact with Benjamin Franklin in London. The central tenet of his essay is "that the remarkable liberty enjoyed by the English Nation, is essentially owing to the impossibility under which their Leaders, or in general all Men of power among them, are placed, of invading and transferring to themselves any branch of the Executive authority; which authority is exclusively vested, and firmly secured, in the Crown."¹⁰ Among these "branches" there is the whole field of foreign affairs and especially the treaty-making power.¹¹

Other authors could be named in the same vein, but these are enough to illustrate what would seem to have been the standard opinion on this point towards the end of the XVIIIth century, when the Founding Fathers came to consider the problem: making treaties was an essentially executive prerogative, beyond the reach of the rest of the body

6. *Id.* at 196.

7. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) ch. 7, at 252.

8. *Id.* at 257.

9. *Id.* at 297.

10. JEAN-LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND, OR AN ACCOUNT OF THE ENGLISH GOVERNMENT (1771, English, 1775) ch. 17, at 387 (1781).

11. *Id.* ch. 4, at 73.

politic. Yet, this view may be ours rather than theirs: it calls for some important qualifications if we are not unduly to project modern conceptions into the past.

* * * * *

The very concept of treaty-making power as we know it had barely emerged by the time of the Federal Convention. Far from being a timeless notion, it is intimately linked to modern international law and to its basic subject, the sovereign State, both of which started to take shape only towards the end of the Middle Ages.

Treaties existed of course since the dawn of history, however important may be the technical differences between a modern agreement and a Karolingian *pactum*, a Roman *foedus*, or Greek *synthékai*. Along with that must have gone a constant attention to the conditions of validity of treaties, and hence the formalities and powers required for their conclusion. But all this does not in itself imply the idea of treaty-making power, which is in fact a modern concept. It is already familiar to Henry Wheaton, who was among the first to use the expression; it is unknown to Hugo Grotius two centuries earlier.

The basic structure of modern treaty-making can be traced to about the end of the XIIth century, especially in Anglo-French practice.¹² Treaties at that time were of course not concluded between sovereign States but between sovereign rulers. Sovereignty attached to persons, either as individuals or as collective bodies; and it had not yet the absolute flavour it got in Early Modern Europe. All sorts of "public" persons and bodies invested with some "jurisdiction," whatever their rank and status, engaged therefore in treaty relationships, which often were hardly distinguishable from ordinary contracts between private individuals. The limitation of treaties to a narrowing circle of sovereigns was a gradual process which gathered momentum in the XVIth, but was achieved only in the XVIIth century, with the full emergence of the modern State.

This is also the critical period that witnessed the slow formation of a general theory of treaties, including a clear notion of the treaty-making power. Treaties started to attract sporadic attention in legal literature as from the end of the XVth century.¹³ Publications were still far between

12. LUDWIG BITTNER, *DIE LEHRE VON DEN VÖLKERRECHTLICHEN VERTRAGSURKUNDEN* 6-7 (1924).

13. See, e.g., MARTINUS LAUDENSIS, *TRACTATUS DE CONFOEDERATIONE, PACE & CONVENTIONIBUS PRINCIPUM* (n.d.), reprinted in 16 FRANCESCO ZILETTI, *TRACTATUS UNIVERSI IURIS* 302r-303r (1584); JOHANNES LUPUS, *TRACTATUS DIALOGICUS DE CONFOEDERATIONE PRINCIPUM & AN & QUANDO CONFOEDERATIONES HUIUSMODI SINT LICITAE, VEL ILLICITAE*, (n.d.), reprinted in 16 FRANCESCO ZILETTI, *TRACTATUS UNIVERSI IURIS* 303r-308r (1584).

during the following century. But then, especially after the Peace of Westphalia, there is a steadily growing flow of monographies and dissertations dealing with various aspects of treaties.¹⁴ The manuals of the early authors on international or public law also touch on the topic in one or more chapters or at least in some paragraphs. Yet one would hesitate to look upon even Grotius's or Pufendorf's relevant chapters as a truly general theory on treaties.¹⁵ Such a theory only appears around the middle of the XVIIIth century in Wolff's *Jus Gentium* followed by *Le Droit des Gens* of his popularizer Vattel.¹⁶ By the same token, these are probably the first to pose the question of the treaty-making power in modern terms, right at the beginning of their respective developments: *Qui sont ceux qui font les traités*, is Vattel's marginal title, which exactly renders Wolff's *Quinam foedera pangere possint*.¹⁷

Such formulations are missing in the earlier doctrine, where the idea of treaty-making power is at best embryonic. In fact it appears with two distinct connotations which are, however, sufficiently related to be easily confused. On the one hand, it can mean the competence in a State to conclude treaties — which is how we usually understand it. On the other hand, it can stand for one of the basic capacities of the State under international law — which is how it tended to be understood before Wolff and Vattel. The two connotations are clearly perceptible in Wheaton's *Elements of International Law*, at the outset of the chapter on "Rights of Negotiation and Treaties": "The power of negotiating and contracting public treaties between nation and nation," he says with regard to the second aspect, "exists in full vigour in every sovereign state which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other states."¹⁸ At the end of the same paragraph the first aspect comes forth: "The constitution or fundamental law of every particular state must determine in whom is vested the power of negotiating and contracting treaties with foreign powers."¹⁹ This first paragraph bears the title "Faculty of contracting by treaty, how limited

14. DIETRICH H.L. VON OMPTEDEA, LITTERATUR DES GESAMMTEN SOWOHL NATÜRLICHEN ALS POSITIVEN VÖLKERRECHTS §§ 269-76, at 583-95, ¶ 278, at 597-98 (1785).

15. 2 HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES (1625) ch. 15, at 299-312 (1919); 8 SAMUEL VON PUFENDORF, DE IURE NATURAE ET GENTIUM LIBRI OCTO (1672) ch. 9, at 1258-70 (1706).

16. CHRISTIAN VON WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (1749); EMER DE VATTEL, LE DROIT DES GENS: OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE & AUX AFFAIRES DES NATIONS & DES SOUVERAINS (1758).

17. 2 VATTEL, *supra* note 16, ch. 12, ¶ 154, at 368; WOLFF, *supra* note 16, ch. 4, ¶ 370, at 297.

18. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW pt. 3, ch. 2, ¶ 1, at 289 (1836), reprinted in CLASSICS OF INTERNATIONAL LAW pt. 3, ch. 2, ¶ 252, at 274 (Richard Dana ed., 8th ed. 1866) (1936).

19. WHEATON, *supra* note 18, at 290.

or modified.”²⁰ The heading of the fifth paragraph reads: “The treaty making power dependent on the municipal constitution.”²¹ It resumes and completes the first aspect broached at the end of the previous paragraph: “The municipal constitution of every particular state determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation.”²²

The two connotations, implicitly distinguished by Wheaton, tended to be mingled by earlier writers, owing to their conception of sovereignty, or rather their failure to separate neatly the internal sovereignty of the supreme state organ and the external sovereignty of the State itself. In fact the very notion of state sovereignty remained implicit. The ruler’s supreme power in the State immediately conferred on him sovereignty outside inasmuch as he depended on no earthly superior. Incongruous as this may seem to us, it was the normal perception in a time when sovereign princes and powers, not States, were the actors under the law of nations. Hence it is that the two distinct notions of treaty-making capacity and treaty-making power were but two aspects of a single problem, the conclusion of treaties by the sovereign. In fact only the treaty-making capacity was mentioned in general terms, while the treaty-making power merely appeared in connection with specific kinds of treaties. Even thus, both aspects got but slight attention, hidden as they remained in the shadow of the capacity to make war.

The link between treaties and war is essential and sheds some light on the genesis of both the capacity and the power to make treaties. In spite of frequent interactions, both aspects must be examined separately.

* * * * *

The treaty-making capacity was considered as an integral part of sovereignty. But mostly it appeared as a mere extension of the right of war. The *ius belli* had a long tradition in legal literature; and peace being the natural end of war, the *ius pacis* was usually appended to it. In addition to peace treaties, as a further appendix there were also alliances as a means either of avoiding or of waging war. Finally, truces received considerable attention for their practical importance in warfare. This is what we find in the pioneers of international law such as Belli, Ayala, Gentili or Grotius. While this may be explained by the nature of their works, which bear mainly on war and military law, a similar link between treaties and war is perceptible throughout the period of European

20. *Id.* at 289.

21. *Id.* ¶ 5, at 290.

22. *Id.*

absolutism in other publicists, from Bodin to Montesquieu. The sovereign's power is shown to exert itself in two main directions, either to insure peace among the citizens within the State, or outside to warrant their security against threats from abroad. These external powers, comprising the right of legation as well as the faculty to enter treaties, tend to be subjoined to the power of war and peace.

Central in the whole discussion is the concept of sovereignty. In Early Modern Times it is usually analyzed in Roman and feudal law terms, especially through the notion of rights of majesty. Thus Bodin, in his discussion of the "marks" of sovereignty, lists, second only to the legislative power which he considers fundamental, the power to "decerner la guerre, ou traiter la paix, qui est l'un des plus grands poincts de la majesté."²³ Making peace, and incidentally alliances, is merely seen as the counterpart of declaring war, not as elements of a universal treaty-making capacity. This is also Charles Loyseau's view in his *Traicté des Seigneuries* of 1608, which describes the French institutions in Bodin's categories: again, the capacity to make treaties is not expressed in general terms; it remains implicit in the capacity to enter specific types of agreements; and this fragmentary capacity is engulfed in the sovereign's right to make war: "Ce droict de guerre," he says, "comprend les traictez de paix, d'alliance, les treues . . ."²⁴ A similar view is put forth by Henning Arnisaeus two years later in his *De Jure Majestatis libri tres*: he distinguishes major and minor rights of majesty, and first among the former he lists the *potestas movendorum armorum*, which includes "the power to declare war and to end it, to conclude peace and to dissolve it, to make treaties, to send and receive ambassadors, and to raise troops."²⁵

Hobbes, four decades later, is even less explicit as to treaties; but these are doubtless comprised in the sovereign's right "to be Judge both of the meanes of Peace and Defence," as well as in "the Right of making Warre, and Peace with other Nations, and Common-wealths."²⁶ Like Bodin, Hobbes is aiming at the greatest possible concentration of powers in the hands of the sovereign. Pufendorf follows on the same track in a very Hobbesian chapter of his *De Jure Naturae et Gentium* of 1672 bear-

23. 1 JEAN BODIN, SIX LIVRES DE LA REPUBLIQUE (1576) ch. 10, at 164 (1577).

24. CHARLES LOYSEAU, TRAICTÉ DES SEIGNEURIES, (1608) ch. 3, ¶ 27, at 39 (1620).

25. 1 HENNING ARNISAEUS, DE JURE MAIESTATIS LIBRI TRES, (1610) ch. 1, ¶ 9, at 170 (1635) (Huc igitur pertinet, bellum indicere, & componere, pacem facere & dissolvere, foedera inire, legatos mittere & recipere, exercitus conscribere, quae omnia uno capite continentur, videlicet sub potestate movendorum armorum.).

26. THOMAS HOBBS, LEVIATHAN, OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL & CIVIL (1651) pt. 2, ch. 18, ¶¶ 6, 9, at 136, 138 (1965).

ing on "the parts of the sovereign power and their natural connection."²⁷ In his polemics against the advocates of "mixed" constitutions, he insists on the necessity in a "regular" government to have all the sovereign powers united in a single authority. Among these powers there is the *potestas belli et pacis, idemque foederum feriendorum*.²⁸ Pufendorf may thus have been among the first to coin a label for the treaty-making capacity, and his explanations show his awareness of its specific nature as an essential component of the ruler's external power.²⁹

This really marks the moment when the capacity to conclude treaties comes to the fore as one of the main characteristics of sovereignty under international law. International law itself was of course barely emerging as an autonomous legal order, usually known by then as *Jus Gentium*, the time-honoured Roman expression being endowed since Hobbes with its modern meaning of Law of Nations. Significantly, the treaty-making capacity appears with a label of its own in several works published shortly after Pufendorf's monumental treatise. Thus Ulrich Huber, in 1674, counts the *jus foederis pangendi* among the *jura majestatis majora*. Leibniz in a dissertation of 1677 several times mentions the *jus foederum* as belonging to true sovereigns, along with the *jus belli*, the *jus pacis*, and the *jus legationum*. In 1680 Johann Wolfgang Textor, Goethe's grandfather, talks of the *potestas foederis*.³⁰

Only nine years later we meet again with Locke's "federative power."³¹ As we have seen, it comprises not just the conclusion of treaties, but the entire field of foreign relations in peace and war. By a curious reversal the expression that had stood for a subordinate part had thus come within a few years since Pufendorf to encompass the whole of that external sector of sovereign power. But Locke had proposed this wide meaning only tentatively, and in fact it remained isolated. When the expression obtained official standing in the Genevan constitutional charter

27. 7 PUFENDORF, *supra* note 15, ch. 4, ¶¶ 1, 11-14, at 957, 965-971.

28. 7 *id.* ¶ 5 (Summary), at 957.

29. 7 *id.* ¶ 5, at 961. "Cum autem & pacis & belli temporibus inservient foedera, ut & comoda diversarum civitatum melius communicari possint, & validior hostis junctis viribus repelli, aut in ordinem redigi queat: penes summum imperium erit, utrique tempori inservientia foedera inire, universosque subditos ad eadem servanda obstringere simulque exinde redundantia comoda in civitatem derivare." The latter part of the sentence reveals an awareness of the municipal effects of treaties.

30. 1 ULRICH HUBER, *DE IURE CIVITATIS LIBRI TRES* (1674) ch. 18, ¶ 10 at 179 (1752); GOTTFRIED W. LEIBNIZ, *CAESARINI FUERSTENERII TRACTATUS DE JURE SUPREMATUS AC LEGATIONIS PRINCIPUM GERMANIAE* (1677); in 1 *DIE WERKE VON LEIBNIZ GEMÄSS SEINEM HANDSCHRIFTLICHEN NACHLASSE IN DER KÖNIGLICHEN BIBLIOTHEK ZU HANNOVER* ch. 11, 20, 21, 22, 33, at 58, 94, 96, 101-04, 144 (Onno Klopp, ed. 1872); 2 JOHANNES W. TEXTOR, *SYNOPSIS JURIS GENTIUM* ch. 23, at 82 (1680).

31. See discussion *supra* pp. 314-15.

of 1738 as the *pouvoir confédératif*,³² its content had boiled down to its etymological dimensions again. The former tradition was actually still much alive and war continued to loom large. Thus even after the middle of the XVIIIth century Thomas Rutherford could name the "external executive power" the "military power."³³

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So far we have dealt with the treaty-making capacity, which logically precedes the treaty-making power. We can now consider the latter notion and its genesis. Grotius may be a convenient starting point. While his *De Iure Belli ac Pacis* does not yet spell out the modern concept of treaty-making power, it does indicate the basis from which it developed.

But before getting there, let us note the Grotian terminology. His generic name for treaties is *conventiones publicae*, which he borrows from Ulpian and equates to the Greek *synthékai*. These public conventions he divides into three species, *foedera*, *sponsiones* and *pactiones alias*.³⁴ All three terms are again Roman; but while the first two had a technical meaning, the latter was rather informal.

To Romans, *foedus* meant an alliance solemnly concluded by the fetials, who were the specific organs acting in the name of Rome on the international level, immediately binding the whole community by their oath. The *sponsio* was a formal contract in Roman private law; but it could also be used by officials in public transactions with foreign nations, especially by generals in the field acting under pressure on their own initiative. Unlike *foedera*, *sponsiones* obliged but the contracting person; they became binding on the Roman people only if ratified; and ratification could be refused without offence to the divinities, provided the *sponsors* (usually there were several of them) were delivered to the opposite party. Ratification had thus been denied in two famous instances, the Caudine peace with the Samnites in 321 B.C. and the agreement with the Numantians in 133 (or 136) B.C.³⁵

As to the term *pactio*, it could mean all sorts of informal agreements in private or public law. It took on a more definite meaning only through subsequent elaborations by the medieval Romanists. A treaty of peace would by then usually be styled *pacis pactio*. By the XVIth century the

32. See discussion *infra* pp. 329-30.

33. 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* ch. 3, ¶ 8, at 54-55 (1756).

34. 2 GROTIUS, *supra* note 15, ch. 15, ¶ 2, at 299.

35. On Roman treaty practice, see 1 COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME*, ch. 15, at 375-419 (1911); on the fetials, see 2 *id.* ch. 26, at 315-48; see also ANDRÉ MAGDELAIN, *ESSAI SUR LES ORIGINES DE LA SPONSIO*, 6-96 (1943).

pactiones had become a category on their own and taken place as such beside the *foedera* and the *sponsiones*. This is what we find in Bodin³⁶ and half a century later in Grotius.

How far this terminology handed down by weighty authorities since Antiquity truly reflected contemporary treaty practice is not clear. One suspects them to have been alive mainly in the minds of some humanist lawyers trying as best they could to impress some meaning on them in a context that had widely changed since Livy and Ulpian. Yet such terms have a life of their own and may through their very inadequacy stimulate further conceptualizations, not just in the books but also in the practice of diplomats and legists, both of whom happened to read and even to write books.

As to the treaty-making power, Grotius does not deal with it in general terms. Instead, he separately goes through the different types of agreements that have been mentioned and shows how they are concluded. In his chapter on treaties he limits himself to the *foedus* and the *sponsio*, which leads him to a few remarks on full powers and ratification.³⁷ The question of the treaty-making power remains implicit. It only appears in quite another part of the work in relation with the *pacis pactio*.³⁸ And here lies in fact the doctrinal starting point of the modern concept of treaty-making power.

Long before Grotius, the power to negotiate and to conclude peace was almost axiomatically linked to the antecedent power to declare and to wage war. Grotius merely recalls this axiom when he declares at the beginning of his chapter on peace treaties: *Pactiones inire quae bellum finiant eorum est quorum est bellum*. In other words, the belligerents themselves are alone entitled to conclude peace, again understanding that they are not yet thought of as personified abstractions of communities, but as persons or bodies of persons in charge of some degree of jurisdiction. In a fully public war the belligerents are both supposed, in Grotius's definition, to be not only public but sovereign persons within the meaning set out above, i.e. "those who have the right to exercise the supreme power." This very naturally leads him to ask which is that authority. The answer lies in the particular form of government: in a true monarchy it will be the monarch himself, provided his power is not fettered by constitutional limitations; in aristocracies or democracies it will

36. 5 JEAN BODIN, *DE REPUBLICA LIBRI SEX, LATINE AB AUTORE REDDITI, MULTO QUAM ANTEA LOCUPLETIORES* ch. 6, at 578 (1586).

37. 2 GROTIUS, *supra* note 15, ch. 15, §§ 16, 17, at 310-12.

38. 3 *id.* ch. 20, at 650-69.

be the majority of either the supreme council or of all the citizens respectively.³⁹

Clearly, it is not the treaty-making power in general which is contemplated; it is only the power to make peace. This made sense in a work bearing precisely "on the law of war and peace," not on international law as understood today. Even later, however, when international law by and by became a full-fledged discipline, more general considerations on the treaty-making power were still slow to appear in the wake of the peace-making power which continued to obtain pride of place. One finds some signs of this growth during the last quarter of the XVIIth century in the works of Huber, Leibniz or Textor.⁴⁰ But not before Wolff was the general concept of treaty-making power clearly crystallized, including the power to make peace treaties, which from then on was merely a particular case of a general principle, though still singled out and considered apart because of its special features and function.

Wolff's *Jus Gentium* is in this respect — as in several others — a true landmark, although its heavy Latin syllogisms got much less credit than the elegant manual Vattel was able to extract from it in the major diplomatic language of the time. Wolff's terminology is the same as Grotius's inasmuch as he distinguishes *foedera*, *alias pactiones Gentium*, and *sponsiones*; his generic term comprehending the three of them is *pactum*, instead of the Grotian *conventiones publicae*.⁴¹ Yet there are some differences in Wolff's definition of the three kinds of public treaties. His main division seems to be the one between *foedera* and *pactiones*. The former are more solemn and aim at establishing a permanent relationship between two sovereigns, such as an alliance; the latter have in view transactions to be executed at once and are therefore of a transient nature.⁴² This division, perhaps borrowed from Huber,⁴³ is thus predicated on the substance of the agreement. But there is another, more formal criterion: while *foedera* are entered into by the sovereigns themselves, *pactiones* may be concluded by subordinate authorities either upon instruction of the sovereign or within their general powers.⁴⁴ Finally, if such a subordinate authority makes an agreement in disregard of its general

39. 1 *id.* ch. 20, §§ 2-4, at 651-652. As to Grotius's conception of the belligerent, see PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* 536-47 (1983).

40. See discussion *supra* p. 320.

41. WOLFF, *supra* note 16, ch. 4, § 369, at 296-97.

42. *Id.* ch. 4, § 369, at 297.

43. 3 HUBER, *supra* note 30, ch. 9, § 1, at 592.

44. WOLFF, *supra* note 16, ch. 4, § 464, at 376.

powers or without any powers at all, it will be a mere *sponsio*, binding only if ratified by the sovereign.⁴⁵

These categories are faithfully rendered in French by Vattel, and through him they may have left some traces in the Articles of Confederation and later in the Constitution.⁴⁶ Vattel also endorses Wolff's principles on the treaty-making power. These essentially correspond to what Grotius had set out with regard to treaties of peace. By restating those principles *more geometrico* and by applying them to treaties in general, Wolff confers universal validity on them. His central tenet is that treaties properly so called are exclusively a matter between sovereign authorities, invested with the supreme power in the State. Thus only can the respective States be obliged as such.⁴⁷

This marks an important if inconspicuous evolution since Grotius. The State — or the nation, not yet sharply distinguished from the former — which hitherto had been overshadowed by the person of the sovereign, has itself become the true subject of sovereignty. The king therefore merely represents the State, and he does so in the terms of its fundamental laws. Originally, Wolff reminds us, the civil power belonged to the whole people, and the same applies to the *jus percutiendi foedera* as a part of that power. Each nation determines for itself in what manner and to whom it is to be delegated. As an example he mentions a treaty-making power shared between the king and the whole people or some restricted council.⁴⁸

A similarly broad and balanced view is expressed by Vattel: "Public Treaties," he says, "can only be entered into by the supreme Authorities, by Sovereigns who contract in the name of the State . . . A Sovereign who possesses full and absolute Empire has doubtless the right to treat in the name of the State which he represents, and his undertakings are binding on the whole Nation. But all Leaders of Peoples have not the power to make Public Treaties on their own authority: Some of them have to take the advice of a Senate or of the Representatives of the Nation. It is in the fundamental Laws of each State that one sees which Authority is capable of contracting validly in the name of the State."⁴⁹

45. *Id.* ch. 4, ¶ 465, at 376-77.

46. VATTEL, *supra* note 16, chs. 12, 14, ¶¶ 152-53, 206-09, at 368, 414-18. For Vattel's possible influence on the terminology of the American framers, see Edwin Borchard, *Shall the Executive Agreement replace the Treaty?*, 53 YALE L.J. 664, 667-69 (1944) (citing a study by A.C. Weinfeld).

47. WOLFF, *supra* note 16, ch. 4, ¶ 370, at 297-98.

48. *Id.* ch. 4, ¶ 370, at 298.

49. Les Traités Publics ne peuvent se faire que par les Puissances supérieures, par les Souverains, qui contractent au nom de l'Etat . . . Le Souverain qui possède l'Empire plein & absolu, est sans-doute en droit de traiter au nom de l'Etat, qu'il représente, & ses engagements lient toute la Nation. Mais tous les Conducteurs des Peuples n'ont pas le pouvoir de faire seuls des Traités Pub-

Needless to say, this passage of 1758 strikingly foreshadows the celebrated provision of 1787, including some of the fluctuations which had preceded its adoption by the Federal Convention. But to single out Vattel among his fellow publicists is not the point. For their basic principles on the treaty-making power are not really different when properly analyzed. No doubt, some of them could be seen as attributing it exclusively to what in Lockean parlance had become the *executive* power; but this is at best a marginal position which found its clearest (if not unparadoxical) expression in Rousseau's seventh Letter from the Mountain.⁵⁰ The true principle is that the treaty-making function belongs to the *sovereign* power (normally coinciding in those times with the executive). Hence the traditional conception outlined above, regarding the sovereign's treaty-making *capacity* in general and his particular *power* to make treaties of peace. All Vattel has done, following Wolff's lead, is to reformulate the said principle by changing the emphasis from the personal sovereign to the state person behind, so that the treaty-making *capacity* becomes a prerogative of the nation. In its turn, the treaty-making *power* is spelled out in general terms, applying to any kind of treaty, not just to treaties of peace. By the same token it is dissociated from the treaty-making capacity, and its exercise by the supreme authority in the State becomes merely the result of a delegation. Originally the body politic was indeed free, and despite practical limitations basically remains so now, to confer it on any other organ or on several organs jointly. This basic freedom in the attribution of the treaty-making power is an obvious implication of Vattel's views; it was doubtless noticed by the men called upon precisely to make use of that freedom in the State House of Philadelphia.

To be sure, the Records of the Federal Convention yield no evidence of any direct Vattelian influence on this point. But *Le Droit des Gens* was among the leading textbooks in America ever since Benjamin Franklin, in the year preceding the Declaration of Independence, had received three copies of it from its latest editor, Charles-Guillaume-Frédéric Dumas. Acknowledging the gift, Franklin wrote to The Hague: "It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept, (after depositing one in our own public library here, and

lics: Quelques-uns sont astreints à prendre l'avis d'un Sénat, ou des Représentans de la Nation. C'est dans les Loix fondamentales de chaque Etat, qu'il faut voir quelle est la Puissance capable de contracter valablement au nom de l'Etat. 2 VATTEL, *supra* note 16, ch. 12, ¶ 154, at 368-69 (The English is this author's translation.)

50. See ROUSSEAU, *supra* note 3.

sending the other to the college of Massachusetts Bay, as you directed) has been continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author."⁵¹ The success of the work was immediate and overwhelming, even more so than earlier in England (as against France where its Anglophile leanings were not relished). Like Burlamaqui, Vattel was not an inventive mind; but both had an exceptional gift for clear formulation (including sublime ambiguities) and skilful exposition, which is really what counts in the transmission and propagation of ideas. Their common republican and Lockean background may explain their eager reception in the nascent United States.⁵² Thus it is that Vattel had already become at the time of the Federal Convention an almost unrivalled authority on international law; his chapters on treaties were doubtless familiar to most of its members.

* * * * *

What concrete cases may have been in Vattel's mind when he mentioned a "senate" or the "representatives of the nation"? He fails to answer that question directly. All one finds in the above-quoted paragraph are two illustrations of a slightly different case of delegated treaty-making power, or rather a partial delegation of the treaty-making capacity to subordinate persons or entities: certain German princes and free cities having entered treaties with foreign powers; or certain Swiss cities allied to some of the Thirteen Cantons although they were dependent on a prince.⁵³ Vattel may have thought of cities like Bienne, St. Gall or his own Neuchâtel. Such situations, quite common during the Middle Ages, had become rather exceptional in his times. At any rate they did not really illustrate what he had said on the treaty-making power.

Yet some additional indications can be gleaned elsewhere in *Le Droit des Gens*, partly in a passage on peace treaties at the beginning of the fourth book, partly in the connected area of territorial alienations at the end of the first book. Here then the traditional relationship between

51. Letter from Benjamin Franklin (Dec. 9, 1775), in 22 THE PAPERS OF BENJAMIN FRANKLIN, 287, 287-88 (1982). The "college of Massachusetts Bay" is now Harvard College.

52. On Vattel's influence in America, see Charles G. Fenwick, *The Authority of Vattel* (pts. 1 & 2), 7 AM. POL. SCI. REV. 295 (1913), 8 AM. POL. SCI. REV. 375 (1914); Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT'L L. 547 (1909); Albert de Lapradelle, *Emer de Vattel*, in 1 LE DROIT DES GENS [THE LAW OF NATIONS], at iii, xxix-xxx (1916). On Burlamaqui, in addition to Reeves' above-cited article, see RAY F. HARVEY, JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM (1937); BERNARD GAGNEBIN, BURLAMAQUI ET LE DROIT NATUREL (1944); see especially *id.* at 277-291; see also, for both authors, the statistical evidence produced by Edwin D. Dickinson, 26 AM. J. INT'L L. 259 n.132 (1932).

53. 2 VATTEL, *supra* note 16, ch. 12, ¶ 154, at 369.

treaty-making and peace-making power becomes conspicuous again. Indeed, Vattel's exposition of peace treaties starts with a paragraph on the competent authority; this is followed by another paragraph on territorial alienations consented to in a peace treaty; which in turn refers back to book I, where such alienations are examined from the constitutional point of view. The three passages are clearly connected.⁵⁴

Two considerations prevail: the interest of the nation not to be lightly stripped of its territory by an inconsiderate monarch; and the other contracting power's interest to get its due. Strictly speaking only the first aspect had some bearing on the treaty-making power; but the other one naturally interfered with it inasmuch as it often had occasioned the participation in the treaty-making process of "representatives of the nation" or of a "senate." Vattel refers to three countries, France, Sweden and England.

The French case in point was the cession of Burgundy granted by King Francis I to Emperor Charles V by the Treaty of Madrid in 1526. The validity of a treaty entered into by a captive sovereign was in itself an ever recurring *question célèbre*.⁵⁵ But that issue mattered less in the present connection than the refusal by the estates of Burgundy to be detached from France and the subsequent rejection of the peace treaty which the Estates-General declared to violate the fundamental laws of the kingdom.⁵⁶ Vattel's presentation of the case, founded on Mézeray's *Histoire de France*, may not be quite accurate historically; Renaissance politics had weighed more in it than the legal veneer he highlights;⁵⁷ but it does show the attention he paid to the domestic conditions of treaty-making. He was of course aware that this had not been truly a formal restriction on the monarch's treaty-making power but rather a substantive restriction on his freedom to grant whatever peace conditions he pleased; for he rightly observes that Francis "had war and peace in his absolute disposition," in accordance with the time-honoured axiom handed down by Grotius.⁵⁸ Nevertheless, these passages on the whole appear as an illustration of a possible participation by representative institutions in the treaty-making function. Vattel also mentions in this connection the

54. See 4 *id.* ch. 2, ¶¶ 10-11, at 255-59, bk. 1, ch. 21, ¶¶ 257-65, at 226-32; see also WOLFF, *supra* note 16, ch. 8, ¶ 981, 985, at 780-81, 786-87.

55. 4 VATTEL *supra* note 16, ch. 2, ¶ 13, at 259-61.

56. 1 *id.* ch. 21, ¶¶ 262-65, at 228-32.

57. J. RUSSELL MAJOR, REPRESENTATIVE INSTITUTIONS IN RENAISSANCE FRANCE 1421-1529, 134-40 (1960).

58. 4 VATTEL, *supra* note 16, ch. 2, ¶ 10, at 255. On the belligerent's obligation to make allowance for his subjects' rights in peace negotiations, see HAGGENMACHER, *supra* note 39, at 302-03.

Parlement of Paris formerly registering treaties as it registered laws, though he is aware that this had been a mere formality mostly intended to reassure the other contracting party.⁵⁹

But whatever relevance French practice of Valois times may have had under absolute Bourbon rule, Vattel also alludes to the case of contemporary Sweden which had become, with England, a foremost example of limited monarchy. Since the death of Charles XII in 1718 both the powers of war and peace were shared between the king and other organs. While the king could only declare war with the consent of the diet, he could make peace with the concurrence merely of the senate, though for the treaty to be effectively performed the diet also had to consent, just like the parliament in England.⁶⁰ Here then the treaty-making power was properly shared, and Vattel probably had this type of situation in mind when he mentioned "the advice of the Senate or of the Representatives of the Nation."⁶¹

Again, the main point for him was that, while making treaties was by essence a sovereign function, nations were basically free to regulate it as they thought fit. Vattel's native Switzerland might also have inspired him in this respect, although he omits to mention it among his illustrations relating to shared treaty-making power. Switzerland then still consisted of a complex network of alliances between states and dominions of all sorts, none of which had quite the same constitution. In spite of their alliances, the cantons remained sovereign and were basically free to enter into treaties with foreign powers. The rural cantons were governed by direct democracy; treaties were approved by the whole citizenry. In the city cantons the democratic element had slowly faded away in absolutistic times; most of them were republics, the political power being exclusively concentrated in oligarchic councils; some were principalities, ecclesiastical like St. Gall, or secular like Neuchâtel.

Several city cantons had nevertheless gone through a relatively democratic phase during the decades following the Reformation. Already in the XVth century the ruling councils had sometimes consulted their subjects in the countryside on important decisions concerning foreign relations such as treaties; but they had done it freely, out of prudential motives, to ensure active support especially in the event of war. Such consultations were in tune with the late medieval practice, in France or

59. 1 VATTEL, *supra* note 16, ch. 21, ¶ 265, at 232; *see also* 1 FÉLIX AUBERT, HISTOIRE DU PARLEMENT DE PARIS DE L'ORIGINE À FRANÇOIS IER (1250-1515) 350-53 (1894); GASTON ZELLER, LES INSTITUTIONS DE LA FRANCE AU XVIÈ SIÈCLE, 146 (1948).

60. 4 VATTEL, *supra* note 16, ch. 2, ¶ 10, at 256-57.

61. 2 *id.* ch. 12, ¶ 154, at 368-69.

elsewhere, of assembling the estates, a diet or parliament, in order either to confirm or to repudiate a treaty, and of course mainly to elicit additional subsidies. But during the religious upheavals of the XVIth century this practice had turned into a legal obligation in at least two of the major city cantons, Berne and Zurich. Thus the Bernese people prevented its authorities from ratifying the peace with Savoy in 1589 whereby Geneva would virtually have been abandoned to its powerful southerly neighbour. These popular rights had even been consigned in written charters, but in a manner sufficiently vague to be tacitly disregarded and soon to become obsolete.⁶²

This was the situation as Vattel knew it in Berne where he was accredited as the diplomatic envoy of the Elector of Saxony, no less than in Neuchâtel where his merely intermittent functions allowed him to reside most of the time. There was one notable exception to this evolution, Geneva, a city equally familiar to Vattel, who had made there part of his studies during Burlamaqui's professorship. Like Neuchâtel, Geneva had only the status of an ally of some of the Thirteen Cantons. Owing to its strategic position between France, Savoy and Berne, the tiny republic heavily depended on these alliances for its survival; no wonder therefore that the citizens were keenly interested in having a share in the treaty-making power. Already in the XVth century the General Council, which comprised the whole citizenry, had in conjunction with the bishop, its suzerain, resisted the Duke of Savoy's all too "protective" offers of alliance. In the XVIth century the Duke's faction in the city, the "Mammelus" (i.e. Mamelukes, renegades) had to give way to their opponents, the "Eidgnots" or "Huguenots," who favoured the alliance with the Swiss Confederates ("Eidgenossen"). Here too this popular participation in the treaty-making process had subsided during the XVIIth century. But in contrast to Berne or Zurich it was revived in 1738 after popular revolts had led to the adoption of a constitutional charter worked out under the mediation of Berne, Zurich and France. Among the attributions of the General Council there was "invariably" to be the "Pouvoir Confédératif, d'approuver ou rejeter les Traités et Alliances qui lui seront proposés avec les Puissances Etrangères." The Lockean language of this ruling was almost literally maintained in the Edict of Pacification of 1782, although the latter had been the result of a patrician reaction. Mean-

62. See generally LUDWIG S. VON TSCHARNER, *VOLK UND REGIERUNG BEIM ABSCHLUSS VON STAATSVERTRÄGEN UND SONSTIGEN FRAGEN ÄUSSERER POLITIK IN DER ALTEN EIDGENOSSENSCHAFT* (1914); for discussion on Zurich and Berne see *id.* at 16-70; see also EDOUARD GEORG, *LE CONTRÔLE DU PEUPLE SUR LA POLITIQUE EXTÉRIEURE: ETUDE D'HISTOIRE DES INSTITUTIONS POLITIQUES SUISSES ET DE DROIT PUBLIC FÉDÉRAL* 15-157 (1916).

while, that regulation had not remained purely theoretical: the Genevans were several times called upon to vote on treaties, such as the one with France in 1749 or the one with Savoy in 1754.⁶³ As we have seen, Rousseau, when commenting on the Mediation of 1738, did not consider this popular prerogative as essential.⁶⁴ His judgment was no doubt widely shared under the European *Ancien Régime*; popular participation in treaty-making after all remains exceptional even today. Still, Rousseau's comment may have drawn some attention to the Genevan regulation among the men who were setting up a new order of things across the Atlantic.

* * * * *

Granted that the Founding Fathers looked to Europe at all, such republican governments as Geneva, Berne or Zurich, as well as other unitary states like France or Sweden, were apt to interest them. If need be, they had just been familiarized with many of them by John Adams' *Defense of the Constitutions of Government of the United States of America*, which was being published in London and hurriedly reprinted in America at the very time of the Federal Convention.⁶⁵ Its central purpose was to show the absolute necessity of a balance between the several powers in the State, and it was from this angle that Adams analyzed a whole series of constitutions, ancient and modern, among them all the Swiss governments. His judgment, not devoid of a polemical tinge, was mostly unfavourable, and Geneva appeared as a particularly negative example since the indolence of its citizens made them unfit to "balance" the power of a few patrician families left free to administer the republic like a private estate.⁶⁶ This was certainly not the whole truth, but it may have been fairly accurate in the ultimate years before the French invasion, at the time Adams was writing. In any event, he hardly touched upon the treaty-making power.⁶⁷ On the other hand, he did draw attention to political systems based on treaties such as the confederacies of ancient

63. On this whole development see Paul E. Martin, *Le Conseil général de Genève et le vote des Traités*, in VOLK UND REGIERUNG BEIM ABSCHLUSS VON STAATSVETRÄGEN UND SONSTIGEN FRAGEN ÄUSSERER POLITIK IN DER ALTEN EIDGENOSSENSCHAFT, *supra* note 62, at 91-104; see also GEORG, *supra* note 62, at 84-95.

64. See Rousseau, *supra* note 3.

65. Reprinted in THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES vols. 4-6 (Charles F. Adams, ed. 1865) [hereinafter 4 ADAMS]. For the importance of Adams' DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA with regard to the framers of the Constitution, see Gilbert Chinard, *Polybius and the American Constitution*, 1 J. HIST. IDEAS, 38-58; see especially *id.* at 42-46 (1940).

66. 4 ADAMS, *supra* note 65, at 343-46.

67. For his observations on Glarus and Lucerne, however, see 4 *id.* at 319-38.

Greece.⁶⁸ He clearly felt that these complex entities were relevant, even negatively, in the current American context; they could be positively relevant in the more restricted context of the treaty-making power.

It is important at this juncture to elude the fallacies of hindsight. We are accustomed to look upon the Federal Convention as having brought about a sharp break in the constitutional evolution of the United States; such was certainly its result inasmuch as the confederation turned into a federal state. But this was not yet the perspective of its members when they assembled in May 1787. While they clearly realized what a crucially important shift of sovereignty they were effecting in favour of the union — empowering it henceforth to command not merely to the States but directly to all Americans — few of them probably thought they were setting up a distinctly new type of government. To most of them the change must have appeared as a matter of degree rather than of principle, not deep enough to disrupt the basic continuity of a statehood that was still known thereafter, like before, as the United States of America. There was no desire to replace it by something entirely new; all they strived for was to make it more efficient. They had gathered “for the sole and express purpose of revising the Articles of Confederation,” in order to “render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.”⁶⁹ One might say that they invented the federal state almost without realizing it. In their own perception they had not really stepped beyond the “federative republic” Montesquieu had extolled as a panacea reconciling the internal advantages of republics with the external power of monarchies, to the point that “Holland, Germany, and the Swiss Leagues are regarded in Europe as eternal republics.”⁷⁰ And Hamilton himself, at the beginning of his defense of the new Constitution, had prudently equated the union he was advocating with his fellow federalists as just such a “society of societies

68. 4 *id.* at 580-81.

69. CONGRESSIONAL RESOLUTION, FEB. 21, 1787, reprinted in MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 28 (1913); see also *id.* at 42-44 (Farrand's particularly authorized appreciation of the Framers' general conception of their task, at least at the outset of the Convention). For a similar appreciation see C.H. McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709-71 (1958). At the same time, however, one has to allow for considerable differences among the Framers, according as they belonged to the “Virginia” or to the “New Jersey” tendency. Moreover, some of the most radical innovators may have found it advisable not to proclaim their ideas too openly in order to let sleeping dogs lie.

70. 9 CHARLES L. DE MONTESQUIEU, *DE L'ESPRIT DES LOIS* (1748) ch. 1, at 208 (1820). The main authority on confederacies was Pufendorf; see in particular 7 PUFENDORF, *supra* note 15, ch. 5, ¶¶ 16-21, which was doubtless Montesquieu's chief source. But see LEIBNIZ, *supra* note 30, ch. 11, at 57-58, and, shortly after Montesquieu, Louis de Jaucourt's observations on “composite states” (*états composés*) in 6 *ENCYCLOPÉDIE, OU DICTIONNAIRE RAISONNÉ DES SCIENCES, DES ARTS ET DES MÉTIERS*, 19-20 (1756).

that constitutes a new one."⁷¹ Only later did he set out with Madison to run a relentless attack on a whole series of past and present confederacies, which from then on were presented as an altogether distinct category to be utterly rejected. While the Lycian confederacy, which Montesquieu had praised as a model, is passed over in silence, not a good thread is left on the Amphictyonic and Achaian leagues, the Germanic body, the Polish anarchy, the Swiss cantons, and the United Provinces.⁷²

Yet, though it was finally rejected by the Convention, that type of complex system might still have assisted the Framers in the matter of treaties. In both confederations and federal states the treaty-making capacity has to be allotted somehow between the central and the state authorities; and this in turn is likely to have some bearing on their respective treaty-making powers. In this light, therefore, confederacies remained potentially relevant as a source of inspiration for the particular modalities of the federal treaty-making power, although there is no tangible sign of it in the Records of the Federal Convention. To be sure, almost nothing was known about the "interior structures and regular operation"⁷³ of the ancient confederacies; but there was no such obstacle as to the contemporary ones.

The Swiss cantons had little to offer in this respect. The connection between them, as Hamilton and Madison rightly state, "scarcely amounts to a confederacy."⁷⁴ Treaties with foreign powers were mostly concluded by the cantons themselves; as to "federal" treaties, they felt free individually to ratify them or not. Such was the practice and it was in keeping with the legal position as expressed by Josias Simler, the foremost XVIth century authority on the Swiss commonwealth.⁷⁵ The deliberations in the diet clearly show that each canton freely decided for itself on purely prudential and political grounds.⁷⁶ In other words, the diet (which had long since split into two distinct assemblies owing to confessional division) did not even amount to the American Congress under the

71. THE FEDERALIST NO. 9, at 38 (Alexander Hamilton) (Max Beloff ed., 1948).

72. *Id.* NOS. 17-20, at 82-97 (Alexander Hamilton & James Madison). The Lycian confederacy is, however, mentioned in other places, such as *id.* NO. 9, at 40 (Alexander Hamilton). Poland, without being a confederacy, was mentioned in passing "as a government over local sovereigns," in *id.* NO. 19, at 92 (Alexander Hamilton & James Madison). Hamilton had indeed drawn a close analogy between "the ancient feudal systems" and confederacies in *id.* NO. 17, at 81-82. The mention of the Polish case must be seen in that light.

73. *Id.* NO. 18, at 85 (Alexander Hamilton & James Madison).

74. *Id.* NO. 19, at 92 (Alexander Hamilton & James Madison).

75. 2 JOSIAS SIMLER, DE REPUBLICA HELVETIORUM (1576) 317 (1627).

76. *See, e.g.*, the protracted deliberations preceding the conclusion of the treaty of peace of 1516 with France, 3 AMTLICHE SAMMLUNG DER ÄLTESTEN EIDGENÖSSISCHEN ABSCHIEDE, sec. 2, at 929-87 (1869); *see also* ERNST WÜTHRICH, DIE VEREINIGUNG ZWISCHEN FRANZ I. UND 12 EIDGENÖSSISCHEN ORTEN VOM JAHRE 1521, 11-28 (1911).

Articles of Confederation, which after all did conclude several treaties and could do so with the assent of nine States. The question of a genuinely federal treaty-making power could not therefore properly arise in the Swiss context.

It did arise, however, in another complex body (of which Switzerland had originally been a part), the Holy Roman Empire. Its cohesion had gradually loosened in the course of the centuries, so that it was not easy to define in terms of classical political categories. Pufendorf had described it as "some kind of irregular body resembling a monster;"⁷⁷ but Montesquieu had put it among the "federative republics,"⁷⁸ which was indeed a reasonable choice in spite of its monarchical components; and so it was perceived by the Founding Fathers, especially Hamilton and Madison, who offered it as yet a further case of impotent confederacies.⁷⁹

The treaty-making capacity of the electors, princes and estates of the Empire had been guaranteed by the Westphalian peace settlement: they were free to enter treaties among themselves or with foreign powers, provided such treaties were compatible with the public law of the Empire. Moreover, they had the *jus suffragii* which entitled them to a share in the major transactions of the Empire, especially in the conclusion of treaties, which were not to be made by the emperor "but with the free suffrage and consent of all the Estates of the Empire in diet assembled" (*nisi de Comitiali liberoque omnium Imperii Statuum suffragio et consensu*).⁸⁰ This and similar provisions were regularly included in the emperors' electoral capitulations (*Wahlkapitulationen*).⁸¹ They were echoed by the commentators of German public law. Lyncker around 1726 mentions the "advice and consent" (*consilium et consensus*) of the estates with respect to the peace negotiations of Nijmegen half a century earlier.⁸² Moser in 1742 talks of the estates' "consent" (*Consens*) for alliances, and their "cooperation and consent" (*Zuthun und Einwilligung*) for peace treaties, both with reference to Charles VII's electoral capitulation of the

77. SAMUEL VON PUFENDORF, *DE STATU IMPERII GERMANICI AD LAELIUM FRATREM, DOMINUM TREZOLENI, LIBER UNUS* (1667) ch. 6, ¶ 9, at 126 (1910).

78. See MONTESQUIEU, *supra* note 70.

79. THE FEDERALIST, *supra* note 71, No. 19, at 88-92 (Alexander Hamilton & James Madison).

80. Treaty of Osnabrück, Oct. 14/24, 1648, art. 8, ¶ 2, *reprinted in* KARL ZEUMER, *QUELLEN-SAMMLUNG ZUR GESCHICHTE DER DEUTSCHEN REICHSVORFASSUNG IN MITTELALTER UND NEUZEIT* 416 (2d ed. 1913); Treaty of Münster, Oct. 14/24, 1648, art. 63, *reprinted in id.* at 437.

81. See, e.g., Charles V's Electoral Capitulation of July 3, 1519, ¶ 7, *reprinted in* ZEUMER, *supra* note 80, at 310; see also Project for a Permanent Electoral Capitulation of 1711, art. 26, *reprinted in id.* at 492.

82. NICOLAUS CHR. DE LYNCKER, *commenting on*, 1 HUBER, *supra* note 30, ch. 18, ¶ 9, at 179.

same year.⁸³ Pütter in 1770 also points out that no peace is to be negotiated and concluded without their "cooperation and consent" (*ohne Zuthun und mit Bewilligung*).⁸⁴

These phrases have a familiar ring inasmuch as they seem to foreshadow the "advice and consent" of the United States Senate in the treaty-making procedure. How far could they have inspired the framers of the Constitution? Robertson's *History of Charles the Fifth* was common reading and contained an excellent account of the Empire, as well as of other States, up to the middle of the XVIth century;⁸⁵ and the Treaties of Westphalia were generally known through works of publicists like Mably or Pffeffel.⁸⁶ Some link, therefore, cannot be excluded, although one may doubt whether the technicalities of German public law were among their preferred studies.

The Framers probably felt more attracted by the Dutch Provinces, whose history and constitution presented some analogy with theirs. In Sir William Temple's words, the Netherlands could not "properly be styled a commonwealth," being "rather a confederacy of Seven Sovereign Provinces, united together for their common and mutual defence, without any dependence one upon the other."⁸⁷ To that extent the United Provinces resembled the Swiss Cantons, except that they were grounded on a single instrument, the Union of Utrecht of 1579. The notion of a common interest, of a "generality," was therefore more developed than in the Swiss case; and there was indeed one political tendency, in the wake of the stadholders,⁸⁸ which stressed the authority of the central organs as against the unfettered sovereignty of the provinces (especially Holland). There were mainly two such central organs: the States General and the Council of State. The former was the supreme governing body composed of the deputies of the Provinces; the latter an executive body dominated by the stadholders.

83. 4 JOHANN JACOB MOSER, *COMPENDIUM JURIS PUBLICI MODERNI REGNI GERMANICI: ODER GRUND-RISS DER HEUTIGEN STAATS-VERFASSUNG DES TEUTSCHEN REICHS* ch. 15, ¶¶ 17, 20, at 425, 427 (1742).

84. JOHANN STEPHAN PÜTTER, *INSTITUTIONES JURIS PUBLICI GERMANICI* ¶ 395, note a (1770). I owe this indication to Professor Jochen Abr. Frowein.

85. WILLIAM ROBERTSON, *HISTORY OF THE REIGN OF CHARLES THE FIFTH* (1769).

86. GABRIEL BONNOT DE MABLY, *LE DROIT PUBLIC DE L'EUROPE FONDÉ SUR LES TRAITÉS* (1748), reprinted in *5 OEUVRÉS COMPLÈTES DE L'ABBÉ DE MABLY* 207-79 (1792); in particular see *id.* at 242-84; CHRISTIAN-FRÉDÉRIC PFEFFEL, *ABRÉGÉ CHRONOLOGIQUE DE L'HISTOIRE ET DU DROIT PUBLIC D'ALLEMAGNE* (1754) (2d ed. 1776).

87. SIR WILLIAM TEMPLE, *OBSERVATIONS UPON THE UNITED PROVINCES OF THE NETHERLANDS* (1672), in *1 THE WORKS OF SIR WILLIAM TEMPLE* ch. 2, at 114-15 (1757).

88. ROBERT FRUIN, *GESCHIEDENIS DER STAATSINSTELLINGEN IN NEDERLAND TOT DEN VAL DER REPUBLIEK* ch. 1, ¶¶ 1-5, at 181-213 (H.T. Colenbrander ed. 1980); S.J. FOCKEMA ANDREAE, *DE NEDERLANDSE STAAT ONDER DE REPUBLIEK* ch. 1, ¶¶ 1-5, at 3-22 (1960).

Foreign relations and especially treaties had initially been entrusted to the Council of State, save the approval of the States General. But in fact the States General had almost immediately got the upper hand under Oldenbarnevelt's leadership; and hence it came that they had monopolized the treaty-making power, as confirmed by Sir William Temple who had negotiated several treaties with Their Mighty Lordships.⁸⁹ Such initial waverings as to the precise attributions in matters of treaties did not exceed the terms of the Union of Utrecht, which had not been very specific on this aspect. It had been quite specific, however, as to the participation of the provinces in the conclusion of treaties. Thus Article IX provided that no truce nor peace be concluded without "the common advice and consent of the aforesaid Provinces" (*met gemeen advys ende consent van de voorsz. Provincien*). Article X prescribed that no confederation or alliance of any province, city or people should be allowed "without the consent of these united Provinces and confederates" (*sonder consent van dese geunieerde Provincien ende bontgenoten*). Conversely, Article XI subjected the participation of neighbourly potentates, countries or cities in the union to "the common advice and consent of these Provinces" (*by gemeen advyse ende consent van dese Provincien*).⁹⁰

We thus again meet with the "advice and consent" phrase. The emphasis no doubt lies on the word *gemeen*, marking the need for unanimity in the cases set out, as against other decisions which could be taken at a mere majority. Moreover the States General were not just sharing in a decision with another organ as had been the case with the German princes and estates; they were alone to decide the issue. And yet, for the reasons already mentioned, a link with the Founding Fathers definitely lies within the realm of possibility. The analogy between the States General and their own Congress under the Articles of Confederation is obvious and was probably perceived as such. Well before the Declaration of Independence such an analogy had been felt with respect to a predecessor of Congress, the Grand Council of Benjamin Franklin's *Short Hints towards a scheme for uniting the Northern Colonies* of 1754.⁹¹ Commenting on it, James Alexander likened the Grand Council to the States General, while he advocated in addition the creation of a Council of State

89. TEMPLE, *supra* note 87, at 128-29.

90. FRUIN, *supra* note 88, at 393-96. Time did not allow me to explore the more remote origins of the expression; they probably must be looked for in medieval "parliamentary" practice and legal theory. For some possible clues, see GAINES POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE*, 1100-1322, at 27-238, 310-32 (1964). Suffice it, by way of epitome, to quote the following: "The whole medieval tradition, Roman and feudal alike, called for the king's seeking counsel and, if specific rights were in question, obtaining consent." *Id.* at 322.

91. 5 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 51, at 337-38.

"like that of the United Provinces."⁹² Franklin's plan had but a limited scope within the British Empire, yet it did provide for a joint "duty and power of the Governour General and Grand Council to order all Indian Treaties."⁹³ The Albany Plan of July 10th, 1754, which to a great extent derived from Franklin's *Short Hints*, provided that "the President General with the Advice of the Grand Council, hold or direct all Indian Treaties in which the General Interest or Welfare of the Colony's may be Concerned."⁹⁴ A subsequent elaboration of that provision requested "the Advice and Consent of the Grand Council."⁹⁵

But the point here is not to establish any stringent genealogy between the U.S. Constitution and the Union of Utrecht.⁹⁶ Rather, it is to show that in matters of treaty-making power confederal structures, such as the Dutch or the German one, were susceptible to give the Framers food for thought at least in the same measure as simple political bodies. In any case, the available evidence (as far as known to this writer) does not allow to go beyond more or less plausible conjectures as to the sources of their thinking in this field.

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In final analysis, then, the provision on the treaty-making power in Article 2, Section 2, of the Constitution probably cannot be traced back to any precise model or authority. Yet against the background that has been sketched, however fragmentarily, it is safe not to consider it as a creation *ex nihilo*. Just how important that background was to the Framers is difficult to assess, the more so as their individual attitudes may have widely differed. Generally speaking, however, there is no doubt that, despite its republican radicalism, their political culture was essentially European. More particularly, they all shared the same common law education, and most of them would have been ready to recognize the English constitution as the best in the world if only it had not been a monarchy. In spite of their recent rebellion against Great Britain, the "British Model," while admittedly "inapplicable to the situation of

92. Letter to Benjamin Franklin (June 9, 1754), in 5 *id.* at 340.

93. 5 *id.* at 338.

94. 5 *id.* at 389.

95. 5 *id.* at 384.

96. The possibility of such a filiation, by way of the New England Confederation of 1643, is suggested by L.K. Mathews, *Benjamin Franklin's Plans for a Colonial Union, 1750-1775*, 8 AM. POL. SCI. REV. 393; 396 (1914). It might be added that Dutch public law was discussed by Cornelis van Bynkershoek, an author well known among American jurists; for some aspects relevant in this context, see 1 CORNELIUS VAN BYNKERSHOEK, *QUAESTIONES JURIS PUBLICI* ch. 23, at 163-171 (discussion of Article IX of the Union of Utrecht); *id.* ch. 25, ¶ 7, at 183-84 (Article X of the Union of Utrecht); 2 *id.* ch. 9, at 244-51 (1757) (right of legation of the several provinces).

this Country," was still considered an "Excellent fabric;"⁹⁷ and what had been seen as its basic feature by Montesquieu, the distinction and "balance" of the powers, became one of the Framers' central tenets.

Moreover, the Federal Convention numbered quite a few widely read members whose political and legal ideas were comparable to those of the enlightened élite in Europe.⁹⁸ Natural law theories that had evolved since the confessional struggles of the XVIth century were prominent in their minds. The joint and sometimes conflicting testimonies of a whole array of publicists, historians, jurists and political thinkers pervaded the debates at Philadelphia. There was evidently no intention of discarding this European heritage, which had furnished them with their best ideological weapons in their revolution against the Old World.

On the other hand, the weight of this ideological factor should not be exaggerated. Authorities were not slavishly followed; they were above all used; and they could be exploited in various, sometimes opposite ways, depending on the concrete point to be made. Apart from some truly basic ideas and principles, what mainly appeared as precious were the "experimental" materials afforded by the authors in the shape of historical precedents. And these could of course again be alleged with ample freedom in support of quite different positions. In other words, while the European heritage did on the whole enjoy great credit, it was not seen as a set of holy scriptures, but rather as an immense arsenal where almost any kind of weapon for almost any kind of purpose could be found.

The prevailing attitude was largely undogmatic, which was of course also in line with Anglo-Saxon pragmatism, instinctively averse to purely theoretical speculations.⁹⁹ The American revolutionaries never indulged in such doctrinaire orgies as were soon to become fashionable among their French counterparts. Concrete institutions, interests and worries, rather than abstract ideas and textbook models were dominant in their minds, and mainly appear in their discussions. Their task after all was an eminently practical one, as has already been recalled, and it had to be dealt with in practical terms if the results of their deliberations were to stand any chance of acceptance by the several State conventions.

97. James Wilson and Edmund Randolph, *The Federal Convention of June 1, 1787*, in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 66 (Max Farrand ed. 1965).

98. Chinard, *supra* note 65; *THE FEDERALIST*, *supra* note 71, at lvii-lxi.

99. That point is excellently made by Max Farrand: "It was a time when men indulged in philosophical speculation and in political theorizing, but farmers and traders are practical people, and the compelling characteristic of the framers of the constitution was hard-headed common sense. While several of the delegates in preparation for their task read quite extensively in history and government, when it came to the concrete problems before them they seldom, if ever, went outside of their own experience and observation." FARRAND, *supra* note 69, at 52.

It is probably also in this light that their solution concerning the treaty-making power has to be appreciated, rather than against some preconceived models handed down by European theory and practice. The Records of the Federal Convention show that the question was indeed hardly discussed in terms of principles.¹⁰⁰ The arguments for or against a given solution were more of a practical nature. Besides, while the question clearly had its importance and had to find a solution, it did not elicit any ample debate. Apart from occasional apprehensions as to the possible dangers involved in this or that alternative, the subject aroused much less passion than the two *Federalist* papers devoted to it by Jay and Hamilton might suggest.¹⁰¹ In fact it does not seem to have been considered as a central problem at all. Rather, it appears as an important side issue that fell into place almost by itself once the truly fundamental points had been settled.

First among these points had been the solution adopted by what is known as the great compromise reached in the Convention on July 16, 1787, with respect to the basic features of the two branches of the legislature, viz. proportional representation in the lower house and equal representation of each State in the upper house.¹⁰² The Senate appearing henceforth to some degree as the successor to the former congress, it was natural to entrust it with the conclusion of treaties. This was the solution apparently suggested by the Committee of Detail that after the great compromise elaborated the basis for the subsequent discussions. But this solution aroused some misgivings lest the Senate become too dominant and take unchecked action by way of treaties, especially in territorial questions.¹⁰³ Hence the suggestion to shift the treaty-making power over to the President, who meanwhile had in the Committee of Detail reached an entirely new status, ceasing to be a mere instrument of the legislature to become almost a temporary monarch. To this quasi-monarch, then, the power to conclude treaties was now transferred, but not without leaving the Senate an important share in it.¹⁰⁴

100. Which is not to say that such considerations were wholly absent; see e.g. James Wilson's remarks on the "Legislative nature" of several of the prerogatives of the British monarch, among them "that of war and peace &c.," which probably includes the treaty-making power.

101. THE FEDERALIST, *supra* note 71, No. 64, at 328-33 (John Jay), No. 75, at 382-86 (Alexander Hamilton).

102. FARRAND, *supra* note 69, ch. 7, at 91-112.

103. See for instance, the discussion in the Federal Convention on August 15, 1787, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 97, at 297-98.

104. For a comprehensive account of this genesis, see McLaughlin, *supra* note 69, at 732-39; see also CONGRESSIONAL RESEARCH SERVICE, STUDY ON TREATIES & OTHER INTERNATIONAL AGREEMENTS PREPARED FOR THE COMMITTEE OF FOREIGN RELATIONS 25-30 (1984).

The final distribution of the treaty-making power was not therefore the result of heated debates in terms of basic principles, although the part attributed to the President may well owe something to the role monarchs had traditionally played in it (as sovereigns more than as executive organs). It rather looks like a final adjustment reached after other more fundamental options had been decided. Participation by the legislature in making treaties was not so much a gain in terms of democratic principles than an almost fortuitous remainder of the fuller attributions formerly enjoyed by the congress under the Confederation, the main part of it being handed over to the President.

In other words, there was some kind of inherent logic in the process. Its final result can be quite satisfactorily explained without any recourse to foreign models, doctrinal or otherwise. At least there is no proof in the Records of the Federal Convention of any direct influence of such a model. But indirect influences may still have been almost subconsciously at work. The idea of dividing the treaty-making power was by no means unheard of; this at least should have emerged from the above observations, however inconclusive they may be on other accounts. Considered in this light, the seminal provision of the United States Constitution is but a new combination of existing elements, a variation on prior themes that could hardly have gone unnoticed by men of the breadth of vision and stature of Hamilton, Madison or Wilson.

