THE USE OF VATTEL IN THE AMERICAN LAW OF NATIONS

*By Brian Richardson**

Although careful scholarly treatment of the history of international law is now thriving, within U.S. courts that history now begins with one eighteenth-century treatise published in Neuchâtel, Switzerland, in 1758 and published in translation for modern readers under the aegis of the Carnegie Endowment for International Peace in 1916. This treatise is Emer de Vattel's *Droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains.*[1] My aim in this article is to appraise the elevation of Vattel to vaunted originalist heights in U.S. law. The claim that Vattel's theory of the law of nations completely represents how the Founding Fathers (Founders) understood the law of nations should be rejected as a matter of history.

In a number of decisions, especially those concerning the Alien Tort Statute following *Sosa v. Alvarez-Machain,*[2] much of the federal judiciary has committed itself to the two-part thesis that first, history matters in the interpretation of early U.S. statutory law referencing the law of nations, and second, this history can be comprehensively accessed by consulting Vattel's famous treatise. For example, last October three of the dissenting judges of an en banc Court of Appeals for the Ninth Circuit emphasized the "continuing authority of Vattel's *Droit des gens* as an authoritative source for determining the intent of the Alien Tort Statute. Vattel is an authority because the First Congress relied on him."[3] Similarly, in 2007, the Sixth Circuit invoked the unique authority of Vattel to dismiss an Alien Tort Statute claim for kidnapping.[4] Finally, the briefs of the parties and certain amici in *Kiobel v. Royal Dutch Petroleum Co.* demonstrate the continuing pull of the Vattelian orthodoxy in U.S. law.[5] The federal courts are not alone: several legal scholars have also assumed and defended the special place of Vattel in understanding the origins of a U.S. law of nations.[6]

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[1] EMER DE VATTEL, LE DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (Charles G. Fenwick trans., Carnegie Inst. of Washington 1916) (1758). The third volume of this edition is the Fenwick translation, entitled *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns.* This volume also includes a translation (by George D. Gregory) of the original introduction by Albert de Lapradelle.

[2] 542 U.S. 692 (2004).

[3] *See* Sarei v. Rio Tinto, 671 F.3d 736, 804 (9th Cir. 2011) (Kleinfeld, J., dissenting).

[4] *See* Taveras v. Taveraz, 477 F.3d 767, 773 (6th Cir. 2007).

[5] *Compare* Brief for Professors of International Law, Foreign Relations Law and Federal Jurisdiction as Amici Curiae in Support of Respondents at 8–9, 16–18, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 2012 WL 379581, at *8 (U.S. Feb. 3, 2012), *with* Brief for Petitioners at 23–27, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 2011 WL 6396550, at *23–24 (U.S. Dec. 14, 2011). A continually updating set of documents on the Supreme Court proceedings in *Kiobel* is available at http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al.

[6] To collect a few, of many, examples: MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776–1939, at 54 (2010); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 471–77 (2011); Matt A. Vega, *Balancing Judicial Cognizance and Caution*, 31 MICH. J. INT'L L. 385, 409–15 (2010); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 847 (2006).

In coming to final judgments in novel cases concerning old law, many U.S. courts have adopted a singular view of Vattel's authority and endowed his treatise with a special ideological status: whether the Founders cited a particular provision of Vattel or not, *Droit des gens* is taken to be an accurate restatement of the theory and doctrines of international law embraced by the "Founding" generation and the first Congress. Thus, the argument goes, if a creative modern interpreter can find a doctrine in Vattel's *Droit des gens*, it can be assigned to the Founders' theory of "international law" as well; similarly, if a doctrine is absent in the *Droit des gens*, so, too, can it be deemed absent from the law of the early Republic. This act of historical judgment by today's U.S. courts has caused a rich canon of law-of-nations literature to vanish and has substituted in its stead a Vattelian theory of the law of nations that was controversial in its day.

Vattel's talent at updating the record of "usages" for modern times garnered him wide acclaim, and his *Droit des gens* was often assigned to aspiring lawyers as an elegant introductory text to settled rules of the law of nations.[7] Like the modern treatise writer, Vattel was recognized for his talent at synthesizing mainstream rules (whatever their source). But Vattel was one of several publicists whose work enjoyed authority in the law of the early American Republic; this canon also included, among others, the treatises or commentaries of Grotius (*De jure belli ac pacis*/*On the Law of War and Peace*),[8] Pufendorf (*De jure naturae et gentium*/*On the Law of Nature and Nations*),[9] and Barbeyrac (the translator of Grotius and Pufendorf). Moreover, praise for Vattel's skill at treatise writing was often paired with the caveat that his views on the jurisprudential status of the law of nations were ill conceived. Thus, I wish to separate the Vattelian orthodoxy of modern U.S. law into two different propositions: the first, which is supported by copious evidence, is that Vattel was one of several publicists extensively cited by the Founders as part of their commitment to a broad canon of law-of-nations writing. The second, which is supported only by anachronism, is that the Founders were Vattelian.

Taken together, these first and second propositions have informed a powerful history in recent legal decisions and scholarship: because the Founders cited Vattel, they were Vattelian; and because the Founders were Vattelian, *Droit des gens* comprehensively defines the Founding generation's idea of the law of nations. This view has caused a polyphony of sources to fade to vespers in the modern story of international law in the United States. It is worth understanding how this came to be.

I. VATTEL IN THE BIBLIOGRAPHY OF THE EARLY U.S. REPUBLIC

As late as 1909, historians of international law in the early United States took it to be obvious that the Founders consumed and incorporated the work of several publicists as part of their general commitment to the law of nations. Just four years before that historical proposition vanished, the pages of this *Journal* reported:

> At the time of the American Revolution the work of Vattel was the latest and most popular if not the most authoritative of the Continental writers. Citations of Grotius, Pufendorf,

[7] James S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States,* 3 AJIL 547, 550 (1909).

[8] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., 2005)..

[9] SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM. ENGLISH & LATIN (C. H. Oldfather & W. A. Oldfather trans., William S. Hein 1995) (1688).

> and Vattel are scattered in about equal numbers in the writings of the time. Possibly after the Revolution Vattel is quoted more frequently than his predecessors.[10]

Saying this much was uncontroversial and unassailable since our artifacts of the ideological origins of the Founding are replete with references to law-of-nations writers, often in close proximity to more familiar common-law writers like Blackstone. This is why Alexander Hamilton directed the loyalist "Westchester Farmer" to "[a]pply yourself, without delay, to the study of the law of nature. I would recommend to your perusal, Grotius, Puffendorf, Locke, Montesquieu, and Burlemaqui. I might mention other excellent writers on this subject; but if you attend, diligently, to these, you will not require any others."[11] The story of how the many law-of-nations sources used by early U.S. courts and politicians were replaced by Vattelian*ism* is worth knowing; it shows both the perils of writing history by way of legal brief and the long-standing vitality of international law in the United States.

Gratuitous Authority: The Place of Benjamin Franklin's Thank-You Note in the Vattelian Orthodoxy

In the originalist account of Vattel's authority, much is made of a letter from Benjamin Franklin to Charles Dumas in which Franklin thanked Dumas for sending his new edition of *Droit des gens* across the Atlantic. Franklin lavished gratitude for the "kind present you have made us of your edition of Vattel."[12] Franklin's thank-you note effused that this new edition of *Droit des gens*

> 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 sending the other to the College of Massachusetts Bay, as you directed) has been continually in the hands of the members of Congress now sitting . . . .[13]

As the revolution progressed, Franklin's gratitude to Dumas would deepen for a different reason. Dumas became the chargé d'affaires of the revolutionary government in The Hague.

Franklin's thank-you note to Dumas, along with several citations to *Droit des gens* in the case law of federal courts, is offered as the principal proof that the Founders were Vattelian.[14] As a matter of historical fact, using this particular evidence to claim that the Founders were Vattelian is problematic. First, we know that at least George Washington possessed an English translation of Grotius's *Law of War and Peace*,[15] as well as an English translation of George Martens's *Law of Nations*.[16] Furthermore, the Library Company of Philadelphia—to which Franklin sent one of Dumas's copies of *Droit des gens*—also lists fourteen copies of Grotius's

[10] Reeves, *supra* note 7, at 551.

[11] Alexander Hamilton, *The Farmer Refuted, &c., [23 February] 1775*, *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON DIGITAL EDITION (Harold C. Syrett ed., 2011); *see also* Reeves, *supra* note 7, at 551.

[12] Letter from Benjamin Franklin to Charles Dumas (Dec. 19, 1775), *in* 2 FRANCIS WHARTON, THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64–65 (1889).

[13] *Id.* at 64.

[14] *See, e.g.*, Albert de Lapradelle, *Introduction* to 3 VATTEL, *supra* note 1, at i, xxx.

[15] This copy is now at Harvard's Houghton Library, classmark *AC7.Un33P.Zz1g.

[16] BOSTON ATHENEUM, A CATALOGUE OF THE WASHINGTON COLLECTION IN THE BOSTON ATHENÆUM 528 (1897).

Law of War and Peace and six copies of Pufendorf's *Law of Nature and Nations*, including Barbeyrac's editions of each, in its 1807 catalog.[17] Indeed, Barbeyrac's edition of the *Law of Nature and Nations* was among the first forty-five volumes that Franklin and another of the library's directors purchased when the library was founded in 1732.[18] Franklin and Thomas Godfrey drew up this first procurement list after a "long conference" with the chief justice of the Supreme Court of Pennsylvania, James Logan.[19] Barbeyrac's edition of Pufendorf's *Law of Nature and Nations* and Wood's *Institutes of the Law of England* are the only law books that appear on the Franklin-Logan list of first acquisitions.[20]

Vattel's Novelty

Unfortunately, Vattel is such a lodestar for modern legal commentators that few notice his departures from the legal theory that buttressed the influential works of his fellow law-of-nations publicists. Vattel's gift was the clarity of his prose, and in retrospect, his most effective technique was to shear vibrant mid-eighteenth-century debates over natural law of their early modern roots. While he copied most of the formal rules he could cull from the treatises of his era, Vattel also appended subtle, yet crucially distinctive, exceptions to many of the settled rules.

We know all of this because in his preliminary observations to the *Droit des gens*, Vattel described his jurisprudential goal of rewriting the law of nature as it applies to states. With some liberal borrowing, he quoted Christian Wolff for a central claim around which he would organize the entire work: the "nature and essence of [states as] moral persons will necessarily differ in many respects from the nature and essence of the physical units, or men, who compose them." It was Wolff, Vattel claimed, who finally realized that "the precepts of the natural law with respect to individuals ought . . . to be changed and modified when it came to being applied to States or political societies."[21] Vattel's ambitions in *Droit des gens* were not limited to distilling the existing law of nature as applied to nations. It is important to also see the treatise for what Vattel thought it was: a new law of nations built upon an amended normative system in which the duty of states to "perfect" themselves is taken to be the paramount principle.[22]

More specifically, in the words of a 1796 translation printed in the United States, "A state or civil society is a subject very different from an individual of the human race . . . . There are then many cases in which the law of nature does not determine between state and state, as it would between man and man."[23] After making this radical move—that is, proclaiming a disjunction between the laws applying to natural persons versus laws applying to artificial persons

[17] CATALOG OF THE BOOKS BELONGING TO THE LIBRARY COMPANY OF PHILADELPHIA 115, 217 (1807).

[18] Edwin Wolf, *The First Books and Printed Catalogues of the Library Company of Philadelphia*, 78 PENN. MAGAZINE OF HISTORY & BIOGRAPHY 45, 57 (1954).

[19] *Id.* at 45.

[20] *Id.* at 57.

[21] 3 VATTEL, *supra* note 1, preface, 7a.

[22] *Id.*, bk. I, ch. ii, §§13–14 ("If the rights of a Nation are derived from its obligations, they are chiefly derived from those which the Nation owes to itself. We shall likewise see that its duties towards others mainly depend upon, and should be regulated and measured by, its duties towards itself . . . . [A] moral being can have obligations towards itself only in view to its perfection and its happiness. *To preserve and protect one's existence* is the sum of all duties to self." (cross-reference omitted)).

[23] EMER DE VATTEL, THE LAW OF NATIONS: OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF SOVEREIGNS, preliminaries, §6, at 50 (1st Am. ed. 1796).

(that is, states)—he then built a system of doctrinal rules upon this foundation. Thus, Vattel declared, "The Law of Nations is the law of sovereigns. It is for them especially and for their ministers that a treatise should be written."[24]

Vattel's conviction that we must view natural law differently when it is inflected through affairs of state was driven by the belief that neither sociability nor self-preservation forms the ideological foundation of the law of nations. Instead, Vattel's view that a nation's "duties towards itself" (a phrase that recurs throughout his treatise) are the critical point of entry into the law of nations led him to amend both the legal theory and the formal rules of the earlier publicists. As Vattel argued, "I recognize no other natural society among Nations than that which nature has set up among men in general. . . . Each independent State claims to be, and actually is, independent of all others. . . . [T]hey ought all to be regarded as so many free individuals who live together in a state of nature . . . ."[25] Vattel was quick to note that ". . . as soon as a sufficient number of [individuals] have united under a government, they are able to provide for most of their needs, and they find the help of other political societies not so necessary to them as the State itself is to individuals."[26] Finally, Vattel proclaimed:

> I am confident that I shall be able to prove in this work that all the modifications, all the restrictions, in brief, all the changes which must be made in the strictness of natural law when applied to the affairs of Nations . . . may all be deduced from the natural liberty of Nations, from considerations of their common welfare, from the nature of their mutual intercourse, from their reciprocal duties, and from the distinction between *internal* and *external*, *perfect* and *imperfect* rights.[27]

Stated briefly, as a consequence of the method sketched out in the preliminary chapter of *Droit des gens*, Vattel eventually concluded that states are ultimately beholden to a supervening duty to perfect themselves; most international duties sound only in the internal forum of the nation's own conscience.

In Book II, "Nations Considered in Their Relations with Others," Vattel's treatment systematically demonstrated his commitment to the position—at the heart of his analysis in Book I, "A Nation Considered by Itself"—that states have a duty to pursue their own self-perfection. When Vattel turned to the law of nations, he began his discussion with what appears to be the person-state analogy typical of this genre: "whatever we owe to ourselves we owe also to others," and since "one Nation owes, in its way, to another Nation the duties that one man owes to another, we may boldly lay down this general principle: Each State owes to every other State all that it owes to itself."[28] But on Vattel's telling, this general principle is instantly qualified: these duties are compulsory only "as far as . . . such help can be given without the State neglecting its duties towards itself."[29] Thus, Vattel reassures those sovereigns "who may find [the general principle] completely subversive of wise statesmanship" that the natural law for states diverges from the natural law for persons. In particular, Vattel included the "two following considerations" to reassure the modern sovereign: "(1) Sovereign states . . . are much

[24] 3 VATTEL, *supra* note 1, preface, 12a.
[25] *Id.*, at 10a.
[26] *Id.* at 9a–10a.
[27] *Id.* at 10a.
[28] *Id.*, bk. II, ch. i, §3.
[29] *Id.*

more self-sufficient than individual men, and mutual assistance is not necessary among them. . . . ; (2) The duties of a Nation to itself, and especially the care of its own safety, call for much more circumspection and reserve than an individual need exercise in giving assistance to others."[30]

Accordingly, Vattel emphasized the need to qualify the idea of a right (leading to a distinction between "perfect" and "imperfect" obligations)[31] and to qualify the obligatory force of most of the law of nations (leading to a sharp difference between the *necessary* and the *voluntary* law of nations, in which the latter often requires states to forbear their claims of justice). These passages clarify that for Vattel, the rules of forbearance that follow from the state's stalwart duty of self-perfection, as well as the essential imperfection of many rights and duties, drive much of the voluntary law of nations.[32] The placement of the nation's duty to tend to its own self-perfection above all else renders much of Vattel's necessary law supererogatory, except when a right at issue also happens to be "essential to [the Nation's own] existence."[33]

This account of Vattel's distinctions is aptly summarized by the "general rule" that concludes the introduction:

> [S]ince the *necessary law* is at all times obligatory upon the conscience, a Nation must never lose sight of it when deliberating upon the course it must pursue to fulfill its duty; but when there is a question of what it can demand from other States, it must consult the *voluntary law* . . . .[34]

This voluntary law, as it is elaborated over specific doctrinal sections in *Droit des gens*, resembles (with some anachronism) the modern meaning of "voluntary"; many duties that are obligatory according to other canonical writers are merely voluntary in Vattel.

By alloying a new metaphysics of self-perfection with a series of fine lawyerly distinctions, Vattel was free to write a *Droit des gens* that fused a new (and weaker) theory of obligation with the old quotidian rules.[35] On the subject of treaties, for example, Vattel conceded that in the

[30] *Id.*

[31] Vattel distinguishes between perfect and imperfect obligations as follows:

> [A] right is always imperfect when the corresponding obligation depends upon the judgment of him who owes it; for if he could be constrained in such a case he would cease to have the right of deciding what are his obligations according to the law of conscience. . . . Our obligations to others are always imperfect when the decision as to how we are to act rests with us, as it does in all matters where we ought to be free.

Id., bk. I, intro., §17. Because of his conclusion that many of a state's perceived rights are not opposable to other nations, Vattel noted that states must "put up with certain things . . . , because they cannot oppose them by force without transgressing the liberty of individual Nations." *Id.* §21.

[32] *Id.* §§17–23.

[33] *Id.* §32.

[34] *Id.* §28.

[35] Two caveats are important. First, Vattel thought that most of the law of treaties was beyond the purview of *Droit des gens*: treaties are "questions of fact, to be treated of in historical works." *Id.* §24. Second, it is important to stress that there is anachronism involved in my description of "voluntary" as "weak": for most of the publicists, a consensual or "arbitrary" law could nevertheless give rise to binding duties since one could bootstrap the natural law rule of *pacta sunt servanda* to render an arbitrary choice binding. Yet for Vattel, it was important to understand that all treaties must include exceptions for the duties of a nation to itself: because the nation's "duties towards itself clearly *prevail over its duties towards others*, a Nation owes to itself, *as a prime consideration*, whatever it can do for its own happiness or advancement." *Id.* §14 (emphasis added); *see also id.*, bk. II, ch. xii, §170. Furthermore, Vattel emphasized that his theory of the voluntary law starts with the observation that "on many occasions . . . Nations

abstract, a treaty creates both a perfect duty to perform and a perfect right to demand performance. This much was uncontroversial and could be found in many other authoritative publicists. However, Vattel added a number of exceptions to this rule.

Insofar as treaties or conventions deal with matters not controlled by natural law, Vattel's theory presses for exceptions. He classified such treaties as *equal* or *unequal*, and (in the case of alliances) as *personal* or *real*. As a general matter, Vattel held:

> If the help and good offices which are due by virtue of a treaty of [peace and friendship] should happen on occasion to be incompatible with the duties of a Nation towards itself, . . . it is necessarily implied that the treaty does not apply . . . , for neither the Nation nor its sovereign can make an agreement to assist an ally when the contract will involve the neglect of the welfare of the State.[36]

Similarly, Vattel claimed that unequal treaties of alliance should not oblige the weaker state:

> Whatever selfish politicians may say, we must either take the position that sovereigns are entirely freed from the obligations of the natural law or agree that it is not lawful for them, without just reasons, to force weaker States to surrender their national standing, much less their liberty, by an unequal alliance.[37]

Also, in the case of alliances, the determination of whether a treaty of alliance is *personal* (that is, "expires at the death of either contracting party") or *real* (that is, "attaches to the State in its corporate capacity")[38] hangs on calculations of self-perfection. Where one state party to an alliance is deposed—a most urgent question during this period—Vattel concluded that the treaty is not obligatory if it would "render the alliance useless, dangerous, or unsatisfactory" to the other state.[39] As we shall see, Vattel's treatment of this particular topic provides a critical test of the Founders' Vattelianism; these otherwise academic distinctions bore directly upon an early foreign relations crisis of the presidential administration of George Washington. Similar exceptions appear in Vattel's discussion of self-help, the duty of commerce, state responsibility, and neutrality.[40]

To call the Founders Vattelian, and to complete the syllogism that modern U.S. courts have used to make Vattel's *Droit des gens* the lodestar for the originalist interpretation of the Alien Tort Statute, we would need to see the Founders adopt Vattel's principal thesis that there is a caesura between the law of nature for persons and the law of nature for states: a gap that, for Vattel, follows from the subordination of all natural duties to the state's paramount duty to perfect itself.[41] The historical evidence suggests that the opposite is true of the Founders.

put up with certain things . . . , because they can not oppose them by force without transgressing the liberty of individual Nations and thus destroy[] the foundations of their natural society . . . . The rules resulting from [this principle] form what Wolf[f] calls the *voluntary Law of Nations*." *Id.*, bk. I, intro., §21; *see generally* J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 29–33 (1928).

[36] 3 VATTEL, *supra* note 1, bk. II, ch. xii, §170.

[37] *Id.* §178.

[38] *Id.* §183.

[39] *Id.* §196.

[40] Charles G. Fenwick, *The Authority of Vattel II*, 8 AM. POL. SCI. REV. 375, 376–88 (1914).

[41] Vattel claimed to draw this insight from Christian Wolff. *See* TIM HOCHSTRASSER, NATURAL LAW THEORIES IN THE EARLY ENLIGHTENMENT 166–67 (2000) (referring to the "caesura" between the law of nature for states and persons in describing the theories of Wolff and Vattel).

Testing Orthodoxy for Fit: The First Neutrality Crisis

Apart from the bibliographic difficulties associated with the claim that Franklin's note establishes that the Founders were Vattelian, the recent emphasis on the Founders' Vattelianism overlooks the law-of-nations theory expressed in their legal work product. These materials show that the Founders explicitly rejected the Vattelian aspects of Vattel's doctrinal restatements and that they implicitly rejected his jurisprudence of natural law. In confronting the extraordinary legal questions raised by the diplomacy of the Washington administration, the Founders showed their lawyerly virtue by using Grotius, Pufendorf, Vattel, and other writers in the law-of-nations canon. I survey the most important surviving piece of this work product, with particular attention to the Washington administration's engagement with the law of nations as it grappled with the Neutrality Crisis. Several generations of legal scholars have parsed these materials with an eye toward the separation-of-powers questions raised by Washington's desire to proclaim neutrality. But like the law-of-nations canon from which the Founders drew, these materials also contain extensive excurses on the obligatory force of the law of nations.

The first and most pressing set of international legal questions for the Washington administration arose from a momentous turn of events in world history. From a U.S. perspective, the most significant facts of this epochal change were as follows: on January 21, 1793, King Louis XVI was sent to the guillotine in France; on February 1, the French Republic declared war upon Great Britain; and on February 2, the French dispatched Edmond-Charles Genet to disrupt British commerce along the U.S. coast. Citizen Genet departed for the United States with the expectation that American memory of France's help a generation earlier would make for a smooth privateering campaign against British trade along the Atlantic seaboard.[42] After all, in addition to widespread gratitude for France's military assistance in the colonies' war of independence with Britain,[43] two giants of the American Revolution—Benjamin Franklin and John Adams—had negotiated binding treaties between France and the aspiring U.S. Republic in 1778.

The two treaties were the Treaty of Alliance[44] and the Treaty of Amity and Commerce,[45] and they each conferred valuable wartime privileges on France. In particular, Article 11 of the Treaty of Alliance guaranteed "for the present time, and forever against all other powers, to wit: The United States to his most Christian Majesty the present possessions of the Crown of France in America."[46] And Articles 17, 21, and 22 of the Treaty of Amity and Commerce straightforwardly privileged French ships and their prizes in U.S. ports. Article 21 forbade the subjects of either country from taking a commission aboard privateering vessels that would prey upon

[42] *See generally* WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 5–18 (2006).

[43] *Id.* at 20 (quoting Jefferson's letter to William Short, in which Jefferson told the U.S. minister in Holland that "99 in a hundred citizens" support the late revolutionary events in France).

[44] Treaty of Alliance Between the United States of America and His Most Christian Majesty, Feb. 6, 1778, 8 STAT. 6 (1867).

[45] Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Feb. 6, 1778, 8 STAT. 12 (1867).

[46] Treaty of Alliance Between the United States of America and His Most Christian Majesty, *supra* note 44, Art. XI.

the other, and Article 22 made it unlawful for any privateers *except for French and U.S. privateers*, to "fit their ships in the ports of either . . . part[y]."[47]

France's imperial holdings in the West Indies made the United States' Treaty of Alliance the most problematic. Unlike Article 1 of the Treaty of Alliance, which limited the temporal reach of the defensive alliance to the "continuance of the present war between the United States and England,"[48] Article 11 obliged the United States in perpetuity. If Britain were to attack any of the French possessions in the Caribbean, it seemed that the United States would be drawn into war.

To put the point mildly, the new war between France and Britain was an adventure that the young U.S. Republic could ill afford. Appreciating this fact, France formally declared that it did not expect the United States to enter its war against Great Britain[49]—rendering moot the potential problem concerning the Treaty of Alliance. The Washington administration did, however, face more intractable difficulties in the Treaty of Amity and Commerce. France interpreted Articles 17, 21, and 22 of the Treaty to protect France from any British attempt to leverage U.S. seaports to prosecute the new war. France also construed the Treaty to confer a positive liberty to assemble a fleet of corsairs in U.S. seaports, to crew that fleet with Americans, and to commission Americans as officers to prosecute potential French maritime battles off the coast of Louisiana. Citizen Genet bore this interpretation of the treaties as he sailed from France to Charleston, South Carolina, in 1793, and it was indeed his mission to make war against Great Britain on the high seas just off the U.S. coast.[50]

Though they differed in their sympathies for the French cause, the entirety of Washington's cabinet viewed any U.S. entanglement in the war between Britain and France to be utter folly. As George Washington wrote to Gouverneur Morris, the U.S. foreign minister in Paris, "unwise should we be in the extreme, to involve ourselves in the contests of European nations, where our weight could be but small, though the loss to ourselves would be certain."[51] Washington turned this pragmatic wisdom into his administration's official policy toward the European war. Upon receiving official news of the war's outbreak from Thomas Jefferson, his secretary of state, and Alexander Hamilton, his secretary of the treasury, Washington directed his entire cabinet to "use every means in its power to prevent the citizens [of this country] from embroiling us with either of these powers, by endeavoring to maintain a strict neutrality."[52] Eventually, Washington declared that the United States would, "with sincerity and good faith," adopt a course of conduct that was at once "friendly and impartial towards the belligerent powers."[53] His proclamation directed the officers of the United States to "cause prosecutions to be instituted against all persons, who shall within the cognizance of the courts of the

[47] Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, *supra* note 45, Art. XXII.

[48] Treaty of Alliance Between the United States of America and His Most Christian Majesty, *supra* note 44, Art I.

[49] CASTO, *supra* note 42, at 17.

[50] In addition to disrupting British commerce in U.S. ports, Citizen Genet was also directed to spread the revolution to Canada, Florida, and Louisiana, and to secure an early repayment of the revolutionary war debt to France. *See generally* HARRY AMMON, THE GENET MISSION 26 (1973).

[51] Letter from George Washington to Gouverneur Morris (Mar. 25, 1793), *in* 1 AMERICAN STATE PAPERS 397 (Walter Lowrie & Matthew St. Claire Clarke eds., 1832).

[52] Letter from George Washington to Thomas Jefferson (Apr. 12, 1793), *in* 25 PAPERS OF THOMAS JEFFERSON 518, 541.

[53] Proclamation of Neutrality, Apr. 22, 1793, *in* 1 AMERICAN STATE PAPERS 140 (Walter Lowrie & Matthew St. Claire Clarke eds., 1832).

United States, violate the law of nations, with respect to the Powers at war, or any of them."[54] Washington affixed the seal of the United States to his "Proclamation."[55]

What is most relevant for our purposes is that in the set of cabinet debates concerning the United States' duties under the French treaties, a Vattelian legal theory was offered—and it was defeated. Given Vattel's account of treaties of alliance and friendship, it should come as no surprise that one of the first options considered by the cabinet was to repudiate the treaties altogether. Hamilton mounted this fundamentally Vattelian challenge to France's legal claims arising from her treaties with the United States. As I shall now describe, Hamilton lost on the merits of his Vattelian interpretation of the law of nations.

Although Vattel's treatise consistently privileged states' duty to achieve self-perfection, Vattel also skillfully wove in the rules that he found in other law-of-nations treatises. As I have argued, in annealing his legal theory with the settled rules of the past masters, Vattel often modified the inherited rules so that they were consonant with his own theoretical focus. Hamilton found just such a passage. In section 197 of Book II of *Droit des gens*, Vattel posed the rhetorical question: "what is the obligation of a *real alliance*, when the King, who is the ally, is driven from the throne?" The portion of Vattel's response that caught Hamilton's eye reads as follows:

> *[T]he ally remains the ally of the state*, notwithstanding the change which has happened to it. However when this change renders the alliance *useless, dangerous, or disagreeable*, it may renounce it; for it may say, upon a good foundation, that it would not have entered into an alliance with that nation had it been under the present form of government.[56]

While prior publicists had permitted renunciation of a dangerous alliance, adding "disagreeableness" as a ground for renunciation is a Vattelian exception that swallows the prior rule. Although Vattel's conclusion about the legal effect of disagreeableness is at odds with the cardinal rule of *pacta sunt servanda*, his rendering of these broad grounds for renunciation is consistent with his overarching legal theory that the "strictness" of natural law must be modified when the law applies to the affairs of nations.

Hamilton immediately took his discovery to Washington, who called a cabinet meeting to debate Hamilton's proposal "arguing for the right of the United States to suspend or void the French treaties."[57] When the cabinet met, Hamilton argued strongly in favor of declaring the French treaties "void," and outlined an argument drawn from Vattel that the Treaty of Amity and Commerce was void. Hamilton was able to persuade only Henry Knox, the secretary of war. Jefferson was vehemently opposed to the view that the treaties could be suspended, and pressed the position that the treaties "remained valid."[58] Although Edmund Randolph, the attorney general, was unconvinced by Hamilton's "disagreeableness" exception, he reserved judgment. Jefferson later recalled that "on H[amilton]'s undertaking to present to [Randolph] the authority in Vattel (which we had not present) and to prove to him that, if the authority

[54] *Id.*

[55] *Id.*

[56] Alexander Hamilton to George Washington (cabinet paper), *in* 4 THE WORKS OF ALEXANDER HAMILTON 369, 370–71 (1904) (quoting *Droit des gens*, bk. II, ch. xii, §197).

[57] Thomas Jefferson, Notes on Washington's Questions on Neutrality and the Alliance with France (May 6, 1793), *in* THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION (Barbara B. Oberg & Jefferson Looney eds., 2008).

[58] *Id.*

was admitted, the treaty might be declared void, [Randolph] agreed to take further time to consider."[59] Because nobody had a copy of *Droit des gens* ready to hand, and since Hamilton's argument failed to attract a consensus, the cabinet meeting adjourned. Both Hamilton and Jefferson set to work producing separate written legal opinions that would persuade the rest of the cabinet that the other was wrong in his interpretation of the law of nations.

Hamilton's written opinion quoted extensively from the section of *Droit des gens* that includes an exception for "dangerous or disagreeable" alliances; argued that *Droit des gens* represented the state-of-the-art of the law of nations; and proceeded to enumerate the many reasons why the treaties with the new government of France had become dangerous, disagreeable, and useless. Unfortunately, Hamilton could not find much in Grotius to support his overall position and conceded that the "obligation of real treaties upon nations, notwithstanding the changes in their governments" was affirmed in Grotius's *Law of War and Peace*.

Hamilton's argument thus hung primarily upon the Vattelian option for "the United States to hold the operation of the treaties suspended" since the alliance had become dangerous and disagreeable.[60] In response, Jefferson's memorandum framed the question as follows: "[w]hether the U S. have a right to renounce their treaties with France, or to hold them suspended till the government of that country shall be established?"[61] Jefferson marveled at Hamilton's "ingenuity" but rejected Hamilton's use of Vattelian doctrine.

Taking his cue from the other authoritative law-of-nations publicists, Jefferson began his legal argument with a *prolegomenon* of his own. In charting the foundations for the law of nations, Jefferson adopted Grotius and Pufendorf exactly: the duty to abide by treaties follows from the branch of the law of nations concerning the "moral law of our nature." There is no trace of the Vattelian claim that the natural law of persons must be amended for states. Jefferson wrote:

> The Moral duties which exist between individual and individual in a state of nature, accompany them into a state of society & the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other; so that between society & society the same moral duties exist as did between the individuals composing them while in an unassociated state, their maker not having released them from those duties on their forming themselves into a nation.[62]

It bears emphasis that this passage appears at the start of Jefferson's legal memorandum to the cabinet. Like Grotius, Pufendorf, and Vattel, Jefferson took seriously the natural law discourse of all legal obligation—including the obligatory force of the law of nations—and thus included an account of the reasons why the law of nature binds nations in his legal work product.

Jefferson's technical legal argument followed Grotius and Pufendorf in admitting that in some circumstances, the performance of contracts, compacts, or treaties might be excused—for example, when performance is literally impossible, or when "the law of self-preservation overrules the laws of obligation to others." As Jefferson would argue, these "excuses" are not "exceptions" to the obligatory force of law since self-preservation is a fundamental precept of

[59] *Id.*

[60] Alexander Hamilton to George Washington (cabinet paper), *supra* note 56, at 385.

[61] Thomas Jefferson, Opinion on French Treaties, *in* 7 WORKS OF THOMAS JEFFERSON 283, 283 (1904).

[62] *Id* at 285.

natural law. Indeed, the overriding excuse of self-preservation (as against Vattel's theory of self-perfection) can be found in nearly all classical law-of-nations publicists because self-preservation is one reason why natural persons covenant to form civil society. After reciting this commonplace of the law of nature-and-nations, Jefferson refused to accept Vattel's innovative views on treaties of alliance. Jefferson noted that apart from Vattel, most of the canonical publicists held fast to the natural duty to keep faith in agreements, and thus tightly cabined the excuses of impossibility and self-preservation. As Jefferson wrote:

> For the reality of these principles [of excused performance of treaties when performance is impossible and self-*destructive*] I appeal to the true fountains of evidence, the head & heart of every rational & honest man. It is there Nature has written her moral laws, & where every man may read them for himself.[63]

Jefferson's legal memorandum thus reads like a perfect summary of a pre-Vattelian view that even impious states are bound by their sociability and self-preservation to follow the law of nations; in this passage of his memorandum, Jefferson restated the exact identity between the law of nature for persons and states. In so doing, he fundamentally rejected the Vattelian thesis as a matter of legal theory.

From Jefferson's classical theoretical foundation for the law of nations, all else follows. Turning to Vattel's exception for disagreeableness, Jefferson noted that the right-reasoning man "will never read [in his head and heart] the permission to annul his obligations for a time, or for ever, whenever they become 'dangerous, useless, or disagreeable.' Certainly not when merely *useless* or *disagreeable*, as seems to be said in an authority which has been quoted, Vattel . . . ."[64] Jefferson anticipated that the classical excuse of self-preservation could be bent to include Vattel's criteria of disagreeableness. So, after repudiating Vattel by explaining that the basis of the natural law of states is the same as that of persons, Jefferson set out to answer Hamilton's claim that the treaties with France were "disagreeable" as a matter of fact.

In the last section of his memorandum, Jefferson disputed the authority of Vattel by reproducing Hamilton's excerpt from Vattel along with the applicable sections from several other authoritative publicists in the law-of-nations canon. This is a remarkable passage in Jefferson's memorandum because it indicates just how vital the *entire* canon was to the Founders. They did not have "before them" a single "bible of international law, the book of recognized authority, Vattel."[65] Instead, Jefferson's long disquisition on the voidability of treaties is full of passages from Grotius, Pufendorf, Vattel, and Wolff, all of whom he took to be authoritative expositors of the law of nations. But in lining up passages from each of the publicists, Jefferson suggested to the cabinet that one of these treatise writers should be differentiated from the others: Vattel's views regarding the voidability of certain "disagreeable" alliances could not withstand the collective, contrary authority of the others.

As Jefferson argued, the only exception to the principle that treaties continue to bind after a state's constitution changes arises when the object of an alliance is *solely* to preserve the current

[63] *Id* at 286.

[64] *Id.*

[65] Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by Agreements or Compacts?*, 3 U. CHI. L. REV. 453, 461 (1936). Weinfeld's article was later quoted in *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 463 (1978), which itself is cited as an authoritative judicial determination that the Founders were Vattelian. *See, e.g.*, Sarei v. Rio Tinto, 671 F.3d 736, 804 & n.40 (9th Cir. 2011) (Kleinfeld, J., dissenting).

government. Whereas the exception, so defined, might apply in the case of Article 1 of the United States' Treaty of Alliance with France, it did not hold for the Treaty of Amity and Commerce. Thus Jefferson argued:

> [W]hen [Vattel] adds that, because a contract is become merely *useless* or *disagreeable*, we are free to renounce it, he is in opposition to Grotius, Puffendorf, & Wolff, who admit no such license against the obligation of treaties, & he is in opposition to the morality of every honest man . . . .[66]

Jefferson concluded that the Treaty of Amity and Commerce was intended to outlive the U.S. war of independence; the language of the Treaty's operative articles is explicitly framed in perpetual terms. The settled doctrine of Grotius and Pufendorf, coupled with Jefferson's stylized reading of Wolff, defeated Hamilton's attempt to void the 1778 treaties.

On May 6, Randolph concurred with Jefferson, and Washington determined that the treaties with France still obliged the United States. After his victory, Jefferson recorded in his notes that Washington assured "me the same day he had never had a doubt about the validity of the treaty: but that since a question had been suggested he thought it ought to be considered."[67]

The accretion of authority in Jefferson's memorandum (from Grotius, to Pufendorf, to Wolff, and even to friendlier sections of Vattel) amounted to a persuasive argument precisely because the memorandum cultivated the impression that its argument reflected the broad authority of the law-of-nations publicists. In this legal contest, partisans who wished to evade an onerous treaty obligation advanced Vattelian exceptions to the law of nations. Jefferson's winning rendition of the law adopted a synthesis of rules drawn from the entire law-of-nations canon and rejected Vattel's position as an indiscretion by an otherwise lucid encylopedist.

It is possible to multiply examples of the Founders' reception of a broad law-of-nations canon. That reception, as we have seen, can be described both as rejecting Vattel's thesis that natural law binds nations more weakly than persons and as citing Vattel because he was one of many authoritative publicists who illuminated the natural law of nations. Similar examples abound in other legal work product by members of Washington's cabinet and in grand jury instructions for prosecutions arising from Washington's Neutrality Proclamation.[68]

Apart from the cabinet debate between Hamilton and Jefferson, the clearest evidence that Vattel was used as a treatise rather than as the signal legal theorist of the time is Attorney General Randolph's opinion in the matter of *The Grange*.[69] Citizen Genet captured a ship called *The Grange* within Delaware Bay but outside of the customary three-mile territorial belt of sea that was commonly considered to be sovereign territory. The open question was whether the

[66] Jefferson, *supra* note 61, at 295.

[67] Thomas Jefferson, Notes on Washington's Questions (May 6, 1793), *in* 1 WRITINGS OF THOMAS JEFFERSON 227 (Paul Ford ed., 1892).

[68] John Jay, Charge to Grand Jury, Richmond, Virginia, May 22, 1793, *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 478, 480–82 (Henry P. Johnston ed., 1891); *see generally* Daniel Hulsebosch & David Golove, *A Civilized Nation: Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

[69] Edmund Randolph, Edmund Randolph's Opinion on the Grange, *in* 26 PAPERS OF THOMAS JEFFERSON (11 MAY–31 AUGUST 1793), at 31 (2008).

Neutrality Proclamation reached the capture of a ship within the bay but without the customary territorial sea. Randolph opined that the entire bay was subject to U.S. sovereignty because the water within the bay is within the headlands of U.S. territory—the water was *intra fauces terrae*. Randolph could have easily cited common law precedent for this principle.[70] Instead, Randolph ignored common law precedent and looked to the entire canon of the law of nations. Among others, Randolph cited Bynkershoek, Grotius, Selden, and Vattel. Crucially, Randolph completely ignored the section in Vattel's *Droit des gens* in which Vattel averred an opinion on the precise legal question at issue. Vattel's section on the sovereignty of bays was simply too equivocal.[71] Instead, Randolph quoted only Vattel's description of Roman dominion over the Mediterranean Sea in section 294 of the *Droit des gens* as an ornament to his general argument. Randolph cited those sections of each of the canonical writers that most clearly supported his conclusion that the Delaware Bay was subject to the sovereignty of the United States as the successor-in-title to the British Crown. Randolph was, in short, an excellent lawyer writing as an advocate for his client the United States.

I have made these sorties into the international legal work product of the early Republic to show that Vattel was never taken to be the cynosure of the U.S. law of nations. The *Droit des gens* was one of many authoritative sources that addressed the rules of the law of nations, and was treated (and cited) accordingly. The legal theory buttressing Vattel's law of nations—especially his thesis that the strictness of natural law must be tempered when applied to states—was never adopted by Founding-era U.S. lawyers. In fact, legal work product during this era articulated a basis for the obligation of the law of nations that is directly opposed to the account given in Vattel's *Droit des gens*. Accordingly, the Vattelian aspects of Vattel's treatise were never adopted tout court by the Founders. Vattel's excesses of theory were taken to be errors in an otherwise elegant treatise about the law of nations, and as a result the early U.S. lawyer used Vattel in conjunction with the other publicists to support his workaday legal arguments.

II. THE TWENTIETH-CENTURY RENOVATION OF VATTEL

In 1908, Lassa Oppenheim lamented that "the history of international law is virgin land which awaits its cultivators."[72] If it was ever true, Oppenheim's lament is no longer accurate as we now face a different sort of problem: the history of international law has been written and rewritten, often with a teleological eye toward solving modern crises in international politics. Indeed, in 1909, the Division of International Law for the Carnegie Endowment for International Peace (Endowment) undertook a project to translate and reprint the "Classics of International Law," a project that "aim[ed] to show the development of international law"[73] across human history.

[70] Lord Hale had developed the *intra fauces terrae* principle centuries earlier in a case discussing the sovereign status of the Bay of Bristol. MATTHEW HALE, DE JURE MARIS 10 (1787).

[71] 3 VATTEL, *supra* note 1, bk. I, ch. xxiii, §291.

[72] Lassa Oppenheim, *The Science of International Law: Its Task and Method,* 2 AJIL 313, 316 (1908).

[73] Letter from James Brown Scott to William Barnum (Apr. 4, 1916), Rare Book and Manuscript Library of Columbia University, Carnegie Endowment of International Peace Records, Division of International Law [hereinafter CEIP Division of International Law], vol. 344, no. 185. The Carnegie Endowment records were recently rebound. All citations are to the finding aid as of July 2012; the archival documents cited here and in subsequent notes can be located using the volume and document numbers provided.

The argument that the Founders' view of international law was coextensive with that of Vattel is entirely a creation of scholars writing in support of neutrality at the dawn of World War I. The early-twentieth-century renovation of Vattel to the exclusion of other canonical writers was intentional, as lawyers at the Endowment and U.S. Department of State struggled to give the "law of neutrality" a patina of historical timelessness. Despite the best of intentions, the Endowment's commitment to showing the progressive development of international law through the republication of the classics led some to embrace the classics project as a vehicle for proving the authority of the law of neutrality at the advent of World War I. In particular, it led them to proclaim the authority of Vattel in a time when Vattel was seldom read.

James Brown Scott, the Endowment's secretary, spearheaded the effort to translate and republish "the classics." Soon after his appointment as secretary, Scott wrote to every prominent professor of international law to solicit opinions about the merit of the classics project as well as the list of works that should be translated. He received many terse, yet supportive, replies. Few discussed the specific works that the Endowment should republish as "classics." But the most extensive reply came from Richard Kleen, a Swedish professor of international law, who broadly supported the effort but cautioned against imparting too much authority to Vattel and too little to Vattel's immediate predecessor, Christian Wolff:

> Vattel . . . although he ranges himself with natural law and considers himself a continuator of Wolff, does not deserve either of these qualifications. He is an opportunist and a politician—devoid of solid and natural principles. However his splendid work *Droit des gens* . . . had such remarkable success and created so favorable an impression that it could not be excluded from your series.[74]

Kleen's reservations about Vattel did not appear in the Endowment's official reports on the classics project. Among the replies that Scott received from professors, Kleen's hesitancy about Vattel's theory of law represented an isolated voice that did not make an impression.

Scott spread the work of translating for the Endowment across the Western academy, retaining classicists and international law professors from Cambridge, Oxford, Princeton, and Yale. But he selected his translator of Vattel from among the students at the graduate school of Johns Hopkins University, where he had given an introductory series of lectures about international law.[75] This student was Charles Fenwick, a man to whom the modern academy now owes both the translation and the twentieth-century renovation of Vattel's *Droit des gens*.

Soon after the Second Hague Conference concluded in 1907, Fenwick selected the history of U.S. neutrality as the topic of his doctoral dissertation. Scott directed the Endowment to grant Fenwick $1000 to translate Vattel, and by 1911, Fenwick submitted his modern translation of *Droit des gens* to the Endowment for printing.[76] The Endowment also asked Albert de Lapradelle, an eminent professor of international law in Paris and frequent advocate for France, to write an introduction to Fenwick's translation. Lapradelle's introduction was enormously delayed, and by the end of 1914, Scott and his assistants began sending him frequent requests for something—anything. Finally, in December of 1915, Lapradelle used the quiet of

[74] Letter from S. R. Kleen to James Brown Scott (Nov. 25, 1909). CEIP Division of International Law, *supra* note 73, vol. 246, no. 1471.

[75] *Lectures at the Hopkins*, BALT. SUN, Feb. 9, 1908, at 7.

[76] Letter from James Brown Scott to Robert S. Woodward (Dec. 26, 1911), CEIP Division of International Law, *supra* note 73, vol. 346, no. 1409.

Columbia University's Maison française to finish the introductory essay to the Endowment's new edition of Vattel.

James Brown Scott's Project of History and Neutrality

In the years that elapsed while waiting for Lapradelle's introduction to Fenwick's translation, much had changed in world affairs and in the Endowment's relationship to them. In the summer of 1914, much of Europe plunged into war. The United States' central preoccupation was to maintain neutrality in the face of a bellicose Europe. Crucially, the task of reasoning through the legal requirements of neutrality fell to none other than Scott. In 1914, Scott proposed to the secretary of state that Scott chair a "Joint State Navy Neutrality Board" to issue advisory opinions regarding any matters that might be placed before it by the government.[77] The secretary of state approved the board, and until the United States entered World War I, Scott authored more than 150 legal opinions regarding the neutral rights and duties of the United States. Much like Jefferson, Scott did not shy away from citing his contemporary "publicists" in aid of his findings of law.[78]

The Endowment supported Scott's work on the Neutrality Board. The Endowment permitted the board to locate its office within Endowment headquarters and made its library available to the board for all of its deliberations and research between 1914 and 1917. Despite his prolific opinion writing for the State Department, Scott was a faithful servant of the Endowment in shepherding the classics project to press. Scott censored himself in his Endowment-related correspondence with foreign academics,[79] and although he did not publish in his own name while an adviser to the State Department, he was insistent that the classics project continue. For example, during the period of his joint tenure at the Endowment and the Neutrality Board, Scott wrote to Lassa Oppenheim:

> We feel that we should not allow the war to interfere with the publication of works on international law; indeed, we believe that more than ever we should confess our faith in international law by the publication of works dealing with its principles. There are no doubt many people who honestly, but mistakenly, believe that treaties and international agreements are scraps of paper, and there is at present at least one nation that is acting upon that theory. We do not accept that view and we do not allow the conception to interfere with the continuance of work which recognizes international law, popularizes its principles, and tends to build up and to strengthen the system as a whole.[80]

[77] *See generally* James Brown Scott, *The Neutrality Board*, 13 AJIL 308 (1919); Alice Morrissey McDiarmid, *The Neutrality Board and Armed Merchantmen, 1914–1917*, 69 AJIL 374 (1975).

[78] *See, e.g.*, Joint State and Navy Neutrality Board, Opinion No. 91: Exercise of Reprisal in Connection with the Falaba, Cushing, Gulflight and Lusitania Cases 2 (May 11, 1915) (discussing the right to reprisal by quoting extensively from Scott's contemporary publicists Perels, Oppenheim, Holland, Stockton, Bonfils, Pillet, and Rivier).

[79] Letter from James Brown Scott to John Pawley Bate (Sept. 3, 1914), CEIP Division of International Law, *supra* note 73, vol. 261, no. 1857 ("I find great difficulty in persuading myself that I am really awake and not suffering from a hideous nightmare. The wars are, however, only too true, and I hope that the end, for the end must come (please God it may be soon), will in some inscrutable way make for progress. It is wonderful in this world of ours how right is liberated, as it were, from wrong, and that crime itself brings forth indirectly good fruit. I dare not say more and I can not say less.").

[80] Letter from James Brown Scott to Lassa Oppenheim (Nov. 19, 1914), CEIP Division of International Law, *supra* note 73, vol. 261, nos. 1870–71.

Indeed, Scott aimed to confess his faith in international law while practicing neutrality in all of his endeavors. By 1916, he advised his editors at the Endowment to retain only translators from neutral countries since "in view of the war, it would be better to have the works translated by neutral persons, as the failure to do this would militate against the circulation of the volumes in the belligerent countries, where they seem to be most needed."[81]

That said, however, Scott did permit himself some public engagement with the U.S. debate over neutrality at the advent of World War I. First, as the war became a reality, Scott began to recast the purpose of the classics project. He thought that, unlike a treatise written by an eminent yet *living* professor of international law, the materiel of the past could be called upon to show the authority of the law of neutrality from time out of mind. Scott revealed as much to Fenwick, his translator of Vattel:

> There seems to be a widespread belief that because some of the provisions of the Hague Conventions have been violated, there is no international law. These volumes of the Classics will show that many of the provisions of the Hague Conventions, violated by one or other of the belligerents, are time-honored principles of international law. This seems to be the best way o[f] showing it, as otherwise one might be taxed with partiality.[82]

In nearly all of his prefaces to the Carnegie edition classics, Scott followed a formula explaining that "[o]ne reason for undertaking the reprinting of the classics of International Law is the difficulty of procuring the texts."[83] Scott departed from this practice only once: in his preface to Vattel's *Droit des gens*.

In his preface, Scott drew particular attention to the thank-you note from Benjamin Franklin to Charles Dumas—the note, as we have seen, that is the principal historical reed supporting the originalist case for the Founders' Vattelianism. Scott further urged the reader to consider that "not merely a rising State, but that States already risen might imitate the example of the United States and consider it necessary 'frequently to consult the Law of Nations,' as contained in the masterly pages of Vattel."[84] Finally, Scott assured the reader that after reading *Droit des gens*, he would be

> in a position to see that International Law is not a thing of the Hague Conferences or of our century, but that its principles . . . antedate the lawlessness of the wars of the French Revolution, which they survived, and that the principles of International Law . . . will likewise survive the lawlessness of the Great War of 1914, which reason and the practice of nations, as stated by Vattel, condemn.[85]

When read together with his earlier letters to Fenwick, and when considered in light of his then secret jurisprudence on the United States's neutrality, one sees that Scott had designs for Vattel. Scott later wrote to the editor, "You will note that I took a larger liberty with the preface in the case of Vattel, because I was anxious to break a lance in behalf of international law."[86]

[81] Letter from James Brown Scott to William Barnum, *supra* note 73.

[82] Letter from James Brown Scott to Charles G. Fenwick (Apr. 23, 1915), CEIP Division of International Law, *supra* note 73, vol. 345, no. 710.

[83] James Brown Scott, *Preface*, 1 VATTEL, *supra* note 1, at 1a, 2a.

[84] *Id.*

[85] *Id.*

[86] Letter from James Brown Scott to William Barnum (Mar. 30, 1916), CEIP Division of International Law, *supra* note 73, vol. 344, no. 179.

Lapradelle's delayed introduction to *Droit des gens* took Fenwick and Scott's claim about the Vattelian Founders further, concluding that the "fathers of independence soon felt that they were in accord with the ideas of Vattel."[87]

I now turn to explain what Fenwick, Lapradelle, and Scott all found so useful about Vattel in the first few years after the Hague Conference—as well as what they found irresistible as the United States tried to remain neutral in World War I. Although Scott thought publishing *Droit des gens* along with a new preface could "break a lance" in defense of international law and the Hague Conventions on neutrality,[88] the subsequent war undermined the immediate project of neutrality. All that remains is the Endowment scholars' assertions of Vattel's special authority.

Charles Fenwick's Revivification of Vattel's Droit des gens

As I have written, Fenwick performed the work of translating *Droit des gens* for the Endowment, and it remains the predominant translation used by U.S. courts and legal scholars. But there is more to judge in Fenwick's history: along with his translation, he contemporaneously published his dissertation on neutrality and a pair of influential articles emphasizing Vattel's singular authority.

On October 18, 1907, the Second Hague Peace Conference—to which Scott was a U.S. delegate—concluded its work. The final agreement comprised thirteen conventions, nearly all of which entered into force on January 26, 1910. Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War aimed to delimit, once and for all, those rights and duties for both belligerents and neutrals.[89] The Hague Conventions posed a host of questions for scholars of international law. Convention XIII anticipated a worldwide effort to harmonize municipal legislation relating to neutrality, and it presented the exciting possibility that positive law would finally settle legal questions that had been contested (even in George Washington's cabinet) since the maritime wars of the eighteenth and nineteenth centuries. Charles Fenwick supplied a timely response to these developments in his dissertation.

Fenwick's dissertation, including recommendations for a new statutory law of neutrality, was quickly published by the Endowment and circulated at the Endowment's expense throughout the U.S. government in 1913. With Lapradelle's introduction complete, the Endowment also published Fenwick's translation of Vattel's *Droit des gens* in 1916.

In the introduction to his eventual book on neutrality, Fenwick claimed a threefold purpose, which was described as "technical" and "historical." But the timing of the publication of his dissertation was not lost on Fenwick. The introduction to his book claimed a weighty purpose:

> In consequence of . . . the Second Hague Conference of 1907 . . . , it is all the more imperative that the states of the world should amend their neutrality legislation so as to enable them to meet the obligations which they have thus defined for themselves. In view of this fact, the experience of the United States may not only be of interest, but of service as

[87] Lapradelle, *supra* note 14.

[88] *See infra* note 89 and accompanying text.

[89] Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723. Another convention, Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654, addressed neutrality in case of land war.

> well, to states contemplating the adoption of new or the amendment of existing neutrality laws.[90]

In his dissertation, Fenwick also attributed to the United States a special genius in anticipating the positivist project of the Hague Conventions. But, Fenwick explained, the U.S. genius was in execution, not creation. Fenwick argued that more than a century earlier, as the United States set about implementing the 1793 Neutrality Proclamation as domestic law, the Washington administration had realized the force of one crucial section of Vattel's *Droit des gens.*

By means of this remarkable historiography, Fenwick credited Vattel with almost perfectly anticipating Hague Convention XIII, and he credited the Founding generation with codifying Vattel's innovation. Thus, while Fenwick criticized Vattel for permitting two "exceptions" to the correct principles of neutrality, his praise of Vattel is otherwise unyielding:

> Vattel is to be credited with having formulated in clear terms the two fundamental principles of neutral duty: First, that the mere impartial treatment of the belligerent parties in the sense of giving equal help to both is not sufficient to comply with the duties of neutrality. A nation must abstain from helping either party . . . . Secondly, in all matters not connected with the war, a neutral state must not refuse to one of the belligerents what it grants to the other.[91]

Fenwick had noticed that these Vattelian principles (purged by Fenwick of their exceptions) corresponded to Article 9 of Hague Convention XIII of 1907.[92]

Fenwick further argued that in legislating for these principles in the early Republic, the United States finally perfected Vattel's theoretical breakthrough:

> The subsequent history of the law of neutrality shows us an increasingly better understanding of the force of the two principles formulated by Vattel . . . . It was left for the United States, in 1794, by the enactment of municipal legislation for the better fulfillment of its neutral duties, to formulate into a consistent system the most enlightened usages, and to set a new standard of the obligations incumbent upon the status of neutrality.[93]

Though Fenwick wrote his dissertation for a doctorate in political science, the historical arc he drew between Vattel's *Droit des gens,* the United States' early neutrality laws, and the Hague Conventions—when paired with the support he received from Scott and the Endowment—transformed his early scholarship into a dominant history of the law of nations in the early U.S. Republic.

In 1913 and 1914, during the same period that he completed his book on neutrality and his translation of *Droit des gens,* Fenwick published a pair of articles in the *American Political Science Review* entitled "The Authority of Vattel."[94] In these articles, Fenwick cited the introduction of his own edition of *Droit des gens* and again quoted Franklin's thank-you note to cement

[90] CHARLES G. FENWICK, THE NEUTRALITY LAWS OF THE UNITED STATES, at viii (1913).

[91] *Id.* at 6.

[92] Article 9 provides that

> a neutral power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes. Nevertheless a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, *supra* note 89, Art. 9.

[93] FENWICK, *supra* note 90, at 6.

[94] Charles G. Fenwick, *The Authority of Vattel,* 7 AM. POL. SCI. REV. 395 (1913); Fenwick, *supra* note 40.

Vattel's exclusive place in the history of the Founders' law of nations.[95] The first of these articles emerged in the afterglow of the Endowment's distribution of Fenwick's book on neutrality. Fenwick boldly proclaimed:

> A century ago not even the name of Grotius himself was more potent in its influence upon questions relating to international law than that of Vattel. Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence of executive officials.[96]

Revealingly, Fenwick lamented that by the first decade of the twentieth century, "the name and treatise of Vattel have both passed into the remoter field of the history of international law."[97] Fenwick found almost no present recognition of Vattel, which may indicate just how far afield today's narrative of Vattel's timelessness in U.S. law has gone: Vattel's subsequent dominance in the modern historical canon is a testament to the young Fenwick's knack for persuasion in his history of ideas. Indeed, Fenwick's first article sought to revivify Vattel by giving a distinctive gloss to Vattel's legal theory that was at once "deductive" and "democratic." Fenwick wrote that according to Vattel, "Since men are subject to the law of nature, so nations, whose common will is but the result of United wills of their citizens, and which possess, in consequence, a moral or corporate personality, are likewise subject to the law of nature."[98] In passing, Fenwick acknowledged that for Vattel, "on certain points" there may be some difference between the rules prescribed by the law of nature for human beings and for states, but he overlooked that feature of Vattel's legal theory to emphasize that it was still "purely deductive."[99] Despite what Fenwick considered to be the faults of Vattel's deductive method, Fenwick attempted to "go[] considerably beyond . . . Vattel"[100] to reconcile Vattel's theory of the law of nations with the ambition to make neutrality a bulwark against current events in Europe.

The young Fenwick ultimately found Vattel's theoretical *préliminaires* to embrace a distinction without a difference: "The question still remains, what is to determine whether or not a given right carries with it the auxiliary right of constraint and is, therefore, a *perfect* right? Vattel does not answer it, so that the voluntary law of nations remains to the end a deductive and theoretical system."[101] As I have argued, the conclusion that Vattel used a "deductive method" tells us too little about Vattel's philosophy of law. In particular, it overlooks how the Founders' understanding of international law differed from Vattel's view that the rigorous obligation of natural law, or "la rigueur du Droit Naturel," must be lessened if it is to be applied to the affairs of nations.

Fenwick's conclusion that Vattel was simply the most avant-garde writer in the natural law tradition was an important moment in the intellectual history of international law in the United States. In branding Vattel yet another "deductive" theorist of the law of nations, Fenwick was consigning him to a rustic past: in Fenwick's view, Vattel may have been prescient

[95] Fenwick's effort to count citations to Vattel in early U.S. case law was later aided by Edwin Dickinson, who conducted an informal citation count of references to Vattel for this *Journal* in 1932. *See* Edwin D. Dickinson, *Changing Concepts in the Doctrine of Incorporation*, 26 AJIL 239, 241 (1932).

[96] Fenwick, *supra* note 94, at 395.

[97] *Id.*

[98] *Id.* at 400.

[99] *Id.* at 401.

[100] *Id.* at 402.

[101] *Id.* at 403.

in reporting rules that future positivist lawyers would embrace, but the systematic jurisprudential foundations of his work were outmoded. Fenwick noted with an air of proud positivism that

> [i]t is evident that a system of international law into which the law of nature enters as the chief constituent element cannot stand the test of critical analysis. . . . If [Grotius and Vattel] assume to pronounce authoritatively that certain rules deduced from what they considered the law of nature were binding upon nations independently of their consent, we must rather be grateful to them for their boldness and high-mindedness than critical of their unscientific spirit.[102]

Having thus declared Vattel's dependence on the "unscientific spirit" of the natural law tradition, Fenwick criticized Vattel as one might criticize Grotius or Pufendorf: "Vattel's method . . . is entirely deductive. He intends to lay down what *ought* to be the law if we accept the fundamental principles . . . set forth; and as these principles embody a moral obligation independently of man's will, Vattel substitutes the word *is* for *ought*."[103] This point in the argument reached, Fenwick then collected citations to Vattel in oblique support of the historical claim that "[t]he warm reception accorded to Vattel's work immediately upon its publication is sufficient evidence that the moral foundations upon which he built his treatise and the details of the structure commended themselves to the statesmen of his day."[104]

Missing from Fenwick's story is the evidence showing that the statesmen of Vattel's day also cited the broader law-of-nations canon and that Vattel's "moral foundations" represented a major departure from the commonplace person-state analogy in the natural law of nations. Fenwick argued that in Vattel, even

> [i]f the practice of nations is frequently quoted, . . . it is merely because Vattel regards it as confirming the truth of a rule which he has already established *a priori*; the real test of the lawfulness or unlawfulness of a given act is always its conformity with the law of nature.[105]

Apart from overlooking the evidence that Vattel differs from other publicists by distinguishing the natural law of states from that of persons, Fenwick's description of Vattel as the most modern of the natural lawyers funds two important conclusions: first, that Vattel and the "natural law" theory of international law are synonymous; and second, that since the *Droit des gens* is completely representative of this tradition, the modern lawyer can look past the "a priori deficiencies" of Vattel's theory to his description of usages as evidence of positive state practice. Thus, in Fenwick's hands Vattel became "the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration."[106] Fenwick suggested that in a past age, during which the natural law theory remained influential, "Publicists considered it sufficient to cite the authority of Vattel to justify and give conclusiveness and force to statements as to the proper conduct of a state in its international relations."[107]

[102] *Id.* at 405.
[103] *Id.* at 404.
[104] *Id.* at 406.
[105] *Id.* at 404.
[106] *Id.* at 395.
[107] *Id.*

Fenwick's second article in the *American Political Science Review* about the authority of Vattel follows from his conclusion in the first article, where he proposed to "present[] a critical estimate of *the actual rules* of international law formulated by Vattel."[108] Once Fenwick had concluded that Vattel was the apotheosis of the natural law tradition, he looked past Vattel's outmoded theory of law to access what he considered the wealth of positive rules and state practice in the remainder of *Droit des gens*. Thus, in his second article, Fenwick conducted a robustly anachronistic thought experiment: he asked how closely Vattel—despite the "deductive" faults that he supposedly shared with Grotius and Pufendorf—managed to anticipate the twentieth-century rules of international law. Fenwick came to the following happy historical conclusion: "The fundamental principles of international law as they are set forth in Vattel's treatise remained practically unchanged down to the present day . . . . [T]he fact that the author draws from *a priori* sources does not affect the practical value of the rules themselves." Vattel's a priori indiscretions, Fenwick found, should not detract from his prescience:

> It will have been observed from several illustrations of Vattel's doctrine that the author is not always consistent when he comes to apply his general principles to the concrete situations of international politics . . . . Such evasions are, perhaps, inseparable from the attempts to apply moral principles to the necessities of actual life.[109]

In surveying these illustrations, Fenwick remained convinced that Vattel was the first to distill the correct principles of the modern law of neutrality. Restating almost exactly the introduction to his dissertation on neutrality, Fenwick noted in this second article that "[i]n the chapter on neutrality Vattel shows himself considerably in advance of his time. He is the first writer to explain clearly the two fundamental principles of neutrality."[110]

Also following the argument of his dissertation, Fenwick concluded in the second article that the exceptions written into Vattel's chapter on neutrality were merely accidental blemishes on Vattel's record of modernizing the old law of nature for a new era:

> Unfortunately Vattel qualifies his general rule in such a way as to deprive it of part of its value. . . . The absurdity of such quibbles reaches its highest point when Vattel attempts to justify a nation in granting to one belligerent permission to levy troops within its territory . . . on the ground that the neutral state "might have reasons" for confining its troops to one belligerent rather than to the other. Vattel as a Swiss is defending the Swiss mercenaries.[111]

Vattel's choice, in Fenwick's words, to "qualify a general rule in such a way as to deprive it of part of its value" was not, in fact, a momentary indiscretion in *Droit des gens*, but rather a reflection of Vattel's distinctive legal theory. At the time of this second article, Fenwick either had not yet grasped the implications of Vattel's break with the rest of the publicists or had overlooked Vattel's emphasis upon the difference between the law of nature for persons and the law of nature for states. This oversight was crucial. Based upon his merger of Vattel into the rest of the canonical natural law publicists, Fenwick wrote an effective history of the *Droit des gens* that vaulted it from historical obscurity to its current position as the paragon example of the

[108] *Id.* at 410, n.36 (emphasis added).
[109] Fenwick, *supra* note 40, at 390.
[110] *Id.* at 388.
[111] *Id.* at 389.

law of nature-and-nations tradition within which Grotius, Pufendorf, Vattel, and the American founders are all interchangeable exemplars. Fenwick thus inaugurated the technique of using Vattel to settle modern questions: Fenwick suggests that even though the natural law account of the law of nations has now passed into desuetude, to collect evidence of authoritative rules and state practice from that bygone era one need only turn to Vattel.

The irony of taking Fenwick's claims about "the authority of Vattel" at face value is that Fenwick would come to repudiate the project of neutrality, as well as Vattel's treatise, in his later work. Fenwick eventually noticed Vattel's divergence from the other publicists and faulted *Droit des gens* for it. Yet this last chapter in Fenwick's history is never told.

Fenwick's Volte-Face

The historical argument that Fenwick, Lapradelle, and Scott developed to link Vattel to the early history of the United States—and then to the 1907 Hague Conventions—represents a clever use of history to communicate that the nascent positive law of neutrality would outlive the Great War. In tragic fashion, the international law of neutrality has passed into obscurity, but the history that Fenwick wrote to herald the new age has lingered. After the fall of the League of Nations,[112] and the cataclysm of World War I, Fenwick repudiated his earlier views. At the advent of the World War II, Fenwick came to repudiate Vattel precisely because of Vattel's claim that the natural law of states materially differs from the natural law that binds persons. Although modern scholars frequently cite Fenwick's early scholarship on Vattel, they almost never acknowledge Fenwick's change of heart.

In 1940, Fenwick, by then a professor at Bryn Mawr College, was invited to give a public lecture to the undergraduates at New York University. The title of his lecture, "American Neutrality: Trial and Failure," conveys the effect of three war-weary decades and Fenwick's sober reassessment of international law at the dawn of World War II.

Fenwick began his NYU lectures by declaring the conceptual bankruptcy of the law of neutrality. The failure of the Hague Conventions on neutrality was not an effect of inartful drafting or insufficient adherence to the Conventions' dictates by neutrals or belligerents, but rather the folly of neutrality tout court: "Neutrality broke down in 1917 from its own inherent weaknesses and self-contradictions. . . . . [N]ow, . . . with the outbreak of the present war, the inconsistencies and paradoxes of neutrality are again causing us embarrassment and making us realize how insecure is a peace that is built upon it."[113]

The occasion of this public lecture also offered Fenwick the opportunity to reassess his history of the natural law publicists whom he had earlier treated as interchangeable theorists in the "Grotian school."[114] Although Fenwick had once maintained that Vattel accurately anticipated the modern positive law of neutrality, Fenwick now viewed Vattel's legal theory as deeply flawed. Most centrally, Fenwick recognized Vattel's fundamental error in treating the law that applies to states as something less than obligatory.

The passage in which Fenwick mounts this criticism of Vattel and repudiates his earlier hagiography is worth quoting at length:

[112] *See generally* CHARLES G. FENWICK, THE LEAGUE OF NATIONS AFTER SIX YEARS (1930).

[113] CHARLES G. FENWICK, AMERICAN NEUTRALITY: TRIAL AND FAILURE 4–5 (1940).

[114] Fenwick, *supra* note 94, at 405.

> Unfortunately, Vattel built up his system of international law upon the philosophical basis of a "law of nature" quite different from that of the Schoolmen. . . . [W]hen he argued that nations were still living in a "state of nature," and that in consequence of the absence of a supreme authority capable of deciding between them there were cases in which each nation must be allowed its own interpretation of the law of nature, . . . he gave an argument to sovereign states which they put to good use.[115]

Fenwick, at last, had his history of ideas right. But Fenwick's public lecture is never read with the same reverence as his attempt to disinter *Droit des gens* in the early twentieth century.

III. CONCLUSION

Given the manifold examples in which the Founders cited a broad canon of law-of-nations publicists, it is time to replace the young Fenwick's stylized history with the older Fenwick's reassessment. As I have argued, the Founders had in their hands a law-of-nations *canon*, in which multiple authorities were legitimate expositors of the law. The Founders also had in their hands a classical legal theory of the law of nations drawn from writers like Grotius and Pufendorf, not solely from Vattel.

The inevitable vices of telling history by way of legal brief are, in the end, the keys to understanding both how the Founders received the law of nations and how Fenwick's history became dominant. Within the Washington administration, those who cited the law of nations were *advocates* who respected a broad canon of sources. They wrote legal briefs. They defended their claims with legal reasoning. In short, they drew upon whatever authoritative sources supported their arguments. Those who aim to write the intellectual history of the Founders' reception of the law of nations must be aware that the Founders drew upon a varied canon and that they did so with an advocate's disposition toward truth and theory.

The young Fenwick's cast of mind was also that of an advocate. His intellectual history of Vattel, written to support the early-twentieth-century law of neutrality as the United States again tried to avoid war with Europe, excluded a rich set of arguments and materials from modern courts' conversation about what the Founders could have meant by the "law of nations." Taken together, these neglected materials suggest that modern U.S. courts' history of international law incorrectly privileges Vattel's *Droit des gens*; what the Founders took themselves to be doing is lost when their own discourse of international law is reduced to the provisions of Vattel's treatise.

Although I have contended that Vattel held no monopoly on wisdom in the Founders' eyes, this argument does not require that Vattel be dismissed. Rather, he should be read as the Founders read him: as one of several authoritative interpreters of the law of nations whose theory reflected his time, place, and intentions. Although the Founders rejected aspects of the Vattelian legal theory, his masterly collection of rules and usages deserved its widespread popularity. Vattel was a coequal among giants.

This conclusion about the law of nations at the time of the Founders introduces predictable problems: where more than one source is authoritative, it is difficult to discern what the law is. Because the Founders cited a broad canon, this difficulty was not lost on them. Although it has been lost beneath Fenwick's "Authority of Vattel," the Founders addressed the problem

[115] FENWICK, *supra* note 113, at 10–11.

of a multivocal canon by adopting a de facto rule of recognition for the natural law publicists. As we saw in Jefferson's memorandum, the Founders took to be authoritative that version of a rule to which a majority of publicists subscribed. Chancellor Kent gave this rule of interpretation a more formal definition in his *Commentaries*:

> In cases where the principal jurists agree, the presumption will be very great in favour of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.[116]

Kent's doctrine resolves a problem that is clear only if one views the history the right way around. For Kent in 1819, as for Jefferson in 1792, the problem was not that the law of nations was of suspect authority, but rather that several publicists who elaborated this law were all taken to be persuasive expositors of the law of nature applied to states.

One cannot hear the voice of the Founders in the silence of Vattel; there is, for example, no dispositive answer to the question of corporate liability for offenses against the law of nations written between the lines of the *Droit des gens*. Those who aim to give effect to original meaning in the interpretation of the law must tread carefully before concluding that there is any definitive interpretation of the Alien Tort Statute to be drawn from the ambient law of nations at the Founding. A single publicist from the distant past will rarely offer the modern lawyer a definitive original meaning of the law of nations, not least because in the legal work product of the Founders we find evidence of lawyers at work. What is more certain, given the model of the Founders' own legal craft, is the imperative to do one's thinking about the reach of the law of nations for oneself.[117] Like the modern lawyer, the Founders used many sources to answer novel legal questions. Their craft required them to invoke or evade legal rules drawn from a canon that was at once broad, diverse, and authoritative. We thus find as many "original" descriptions of the Founders' law of nations as we do legal questions: the story neither begins nor ends with Vattel.

[116] KENT, 1 COMMENTARIES 18–19 (1826); *see also The Paquete Habana*, 175 U.S. 677, 701 (1900).

[117] Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 52 (1969).