The U.S. Supreme Court and International Law: Continuity and Change

Introduction

The twenty-first century's first decade was an extraordinarily active one for international law in the Supreme Court, with the Court issuing more than thirty decisions implicating international law. Many of these decisions came in high-profile cases, and many made important contributions to the Court's jurisprudence. In *Sanchez-Llamas v. Oregon* and *Medellin v. Texas*, the Court considered the domestic legal status of treaties and the domestic effects of decisions by the International Court of Justice. It considered the federal judiciary's role in applying customary international law under the Alien Tort Statute in *Sosa v. Alvarez-Machain*. In a series of cases including *Lawrence v. Texas*, *Roper v. Simmons*, and *Graham v. Florida*, it turned in part to international law and foreign practice to decide the scope of domestic constitutional rights. In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, *Morrison v. National Australia Bank Ltd.*, and other cases, it used principles originally rooted in international law to constrain the global reach of federal statutes. And in prominent cases arising in the aftermath of the September 11, 2001 terrorist attacks, the Court grappled with questions of individual rights and separation of powers in a new kind of international warfare.

Many of these decisions were deeply controversial, provoking strong dissents from Justices not in the majority and strong criticism from academic and political commentators. Critics and supporters often differed sharply as to whether the Court's decisions were faithful to or a radical departure from prior precedents. Indeed, the rhetoric of the criticisms can hardly be overstated: to some, the Court was abandoning a longstanding commitment to international law; to others, the Court was allowing international law to invade domestic law at the expense of traditional notions of national sovereignty.

To assess the modern Court's relationship with its international law past, it is first necessary to understand what has come before. To that end, this volume seeks to provide a complete account of international law in the Supreme Court's decisions from the Founding to the present. To assist in this project, we are fortunate to have assembled a distinguished group of contributors with expertise in international law, foreign affairs law, and legal history. This book will not resolve debates about modern decisions, but we hope that it will inform those debates by providing a better understanding of the Court's international law past.

I. Scope and Objectives

From its earliest decisions in the 1790s, the Supreme Court has used international law to help resolve some of the major controversies on its docket, and there is no doubt that it will continue to do so in the future. As it faces future controversies, it is safe to predict that the Court will look to the past for guidance. This book aims to assist judges, lawyers, and scholars in the difficult task of gleaning lessons from the past by presenting a comprehensive account of the Supreme Court's use of international law in its decisions. While not claiming to note every passing reference to international law in the Court's decisions, the intent is to cover all the cases or lines of cases in which international law has played a material role, showing how the Court's treatment of international law has developed throughout the Court's history.

A central theme of the book is "continuity and change." The Court's approach to international law has changed markedly over time. Although there was substantial continuity in the Supreme Court's international law doctrine from the Court's inception through the end of the nineteenth century, the past century was a time of tremendous doctrinal change. Few aspects of the Supreme Court's international law doctrine remain the same in the twenty-first century as they were two hundred years ago. This book provides an account of *what* changed in the Supreme Court's international law doctrine and *when* those changes occurred.

However, the book does not attempt to provide a systematic account of *why* those changes occurred. Some chapters provide broader historical context, but the book's history remains necessarily incomplete. It says only a little about developments in international law outside the Court. It provides just some of the social and political context in which the Court's decisions were made. And it touches only lightly on broader aspects of the Court itself, including its personnel, its ideological orientations and shifts, and the impact of its non-international law cases. Any complete history of the Court, or of international law, must attend to these other materials. But this book's goal is more modest. Before evaluating how various influences may have shaped the Court's international law doctrine, one must understand that doctrine. To understand the doctrine, one must understand what has changed, what has remained the same, and when key changes occurred. This book addresses those questions. We hope this account of how the Court has used international law in its decisions will form the basis for broader inquiries concerning why the Court acted as it did and to what effect.

II. Organization

The book's organization is broadly chronological. It begins, in Part I, with an assessment of the Supreme Court and international law to 1860. Parts II through IV cover, respectively, the years from the Civil War to the end of the nineteenth century (1861–1900); the first half of the twentieth century through World War II (1901–1945); and the post-war years to the century's end (1946–2000). Part V examines the leading post-2000 cases in light of this record of historical practice.

Although the dividing lines between historical periods are concededly somewhat artificial, the book is deliberately designed to devote substantial attention to the period from the Civil War to the end of World War II. The decisions of this period in particular seem under-examined by prior scholarship, compared to both earlier and more modern

decisions. As ensuing chapters describe, one can discern key doctrinal and jurisprudential shifts by examining relatively unknown cases from this era.

Within the designated periods before 2000, the book further subdivides the Court's treatment of international law into three substantive categories: (1) treaties, (2) the direct application of unwritten or customary international law, and (3) the use of international law in constitutional and statutory interpretation. Parts II, III, and IV each also contain a historical commentary relating the Court's international law docket to wider legal, political, and social developments of their respective periods.

For the post-2000 cases, the book takes a different approach. Here it identifies five lines of cases, roughly but not precisely corresponding to the substantive divisions employed in previous parts: (1) treaty cases, particularly *Sanchez-Llamas* and *Medellin*; (2) *Sosa*'s direct application of customary international law; (3) cases like *Lawrence* and *Roper* relating to international law and constitutional interpretation; (4) *Empagran* and the use of international law to interpret statutes; and (5) the war on terror cases. For each category, the book presents one main essay and two briefer responses. Recognizing that it is more difficult to achieve historical perspective with respect to the Court's recent decisions, these essays are designed to be more opinionated and provocative than the preceding chapters.

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I *From the Founding to the Civil War*

1 International Law in the Supreme Court to 1860

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I. The United States and the Law of Nations, 1776–1789

The Declaration of Independence in 1776 marked the birth of the United States as a nation and as a subject of the law of nations. As Chief Justice John Jay later wrote, "[T]he United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed."[1] Complying with the law of nations was important for a small, weak country trying to avoid trouble,[2] but the law of nations was also a tool that the United States would use to protect its trade and commercial interests.[3] National honor was at stake as well, an idea the Revolutionary generation took quite seriously.[4] Interest *and* duty – as Jay put it – compelled the Founders to pay close attention to the law of nations.[5]

A. *Eighteenth-Century Sources of International Obligations*

For eighteenth-century Americans, international legal obligations fell broadly into two categories: treaties and the unwritten law of nations. Formal written treaties formed an important part of European international relations at the time, as a way European nations arranged alliances, settled disputes, and established economic relations. American independence itself rested heavily on treaties. Two 1778 treaties with France cemented an

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[1] Chisholm v. Georgia, 2 U.S. 419, 474 (1793) (Jay, C.J.); *see also* Ware v. Hylton, 3 U.S. 199, 281 (1796) (Wilson, J.) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").
[2] *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 839–46 (1989).
[3] *See* Douglas J. Sylvester, *International Law as Sword or Shield: Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1 (1999).
[4] *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 481–88 (1989).
[5] *See generally* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 923 (2010).

alliance that led to French assistance against Britain.[6] After French intervention turned the tide of the war, the 1783 Treaty of Peace with Britain recognized American independence on advantageous terms.[7] By 1789 the United States had also concluded treaties with Morocco, Prussia, Sweden, and the Netherlands.[8] Eighteenth-century treaties were understood as binding national commitments. That is not to say, of course, that they were never violated. But violations were regarded as serious matters that might easily lead to war, or at least to the other treaty party refusing to honor its own obligations.

The eighteenth-century conception of the unwritten law of nations is less easily described.[9] Two works in particular framed the early American view of the law of nations: Emmerich de Vattel's *The Law of Nations* and William Blackstone's *Commentaries on the Laws of England*.[10] Blackstone described the law of nations as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[11] He included within the law of nations a variety of topics: maritime law, including prize and piracy; commercial transactions between persons from different countries (the law merchant or *lex mercatoria*); and questions concerning the rights of states themselves, such as the rights of ambassadors.[12] Blackstone explained that the law of nations was a component of English law. "The law of nations," he wrote, "is here adopted in it's full extent by the common law, and is held to be a part of the law of the land."[13] However, Blackstone did not say much about the content of the law of nations, how it should be determined, or how it interacted with other sources of law.[14]

For the content of the law of nations, early Americans relied heavily on European treatise writers ("publicists"), including Grotius, Pufendorf, Bynkershoek, Burlamaqui, Wolff, and Rutherforth. Of the publicists, they turned most often to Vattel.[15] Vattel divided the law of nations into four main categories, which varied in their sources and in their obligatory force: (1) the necessary, (2) the voluntary, (3) the conventional, and (4) the customary. Vattel's "necessary law of nations" was based directly on natural law. It was immutable and absolutely binding – but only internally on the conscience of the sovereign.[16] His "voluntary law of nations" was also based on natural law, mediated through the principle of sovereign equality, but – in contrast to the necessary law – it created external rights and duties.[17] Confusingly, Vattel's "voluntary law of nations"

[6] Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12; Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6.
[7] Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.
[8] *See* 2 Treaties and Other International Acts of the United States of America 59–227 (Hunter Miller ed., 1931).
[9] For further discussion, see Arthur Nussbaum, A Concise History of the Law of Nations (2d ed. 1954); Michael D. Ramsey, The Constitution's Text in Foreign Affairs 342–46 (2007).
[10] E. de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns (Joseph Chitty trans., 1883) (1758); William Blackstone, Commentaries on the Laws of England (facsimile 1979) (1765–69).
[11] 4 Blackstone, *supra* note 10, at 66.
[12] *See id*. at 67–73.
[13] *Id*. at 67.
[14] On the status of the law of nations in eighteenth-century English law, see Anthony J. Bellia & Bradford R. Clark, *The Federal Common Law of Nations*, 109 Colum. L. Rev. 1, 20–28 (2009).
[15] *See* Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 Am. J. Int'l L. 239, 259 n.132 (1932); Jay, *supra* note 2, at 823; Nicholas Onuf and Peter Onuf, Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776–1814, at 11 (1993).
[16] Vattel, *supra* note 10, Prelim. §§ 7–9.
[17] *Id*. Prelim. §§ 21, 28; Book III §§ 188–92.

was not in fact voluntary. "In this particular, nations have not the option of giving or withholding their consent at pleasure," Vattel wrote; they were "bound to consent."[18]

Vattel's last two categories – the conventional and the customary – arose from actual rather than presumed consent and were therefore not universal. What Vattel called the "conventional law of nations" consisted of treaties, which nations were not obliged to enter but which created externally binding obligations once they did.[19] The "customary law of nations" was made up of "maxims and *customs*, consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law."[20] It bound only those nations that had adopted it, however, and any nation remained free to declare that it would no longer abide by a particular rule of the customary law.[21]

B. *Difficulties under the Articles of Confederation, 1781–1788*

The United States had obvious interests in upholding treaty obligations and the law of nations. Its very existence depended on keeping France as an ally and encouraging Britain to tolerate its independence and respect the commitments made in the Treaty of Peace. Further, the new nation needed to demonstrate to other European powers that it could fulfill international expectations by honoring treaty commitments, protecting ambassadors and merchants, and so forth.

Unfortunately, the United States' first formal structure of government, the Articles of Confederation (1781–1788), did little to promote enforcement of international obligations. The Articles provided for a loose confederation of States, with a weak national government composed of a single body, the Continental Congress.[22] The Congress, which was more a diplomatic assembly than a legislature, had little power to make or enforce law and no power to create a national court system aside from a prize court.[23] As a result, responsibility for enforcing treaties and the unwritten law of nations fell almost exclusively to the individual States. This arrangement proved unsatisfactory on a number of counts.[24]

First, some States failed to comply with U.S. treaties, often at the behest of local interests but to the great detriment of the nation as a whole. Most notoriously, States violated key provisions of the peace treaty with Britain. Article 4 of the Treaty promised that British creditors would meet "no lawful impediment" in collecting pre-war debts from American debtors, while Article 5 pledged that "Congress shall earnestly recommend" that state legislatures provide for the restitution of "properties which have been confiscated belonging to real British Subjects."[25] Despite these treaty commitments,

[18] *Id.* Book III § 192.
[19] *Id.* Prelim § 24; Book II §§ 164, 218–19.
[20] *Id.* Prelim § 25.
[21] *Id.* Prelim. §§ 25–26; Book IV § 106. For further discussion, see Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 Yale L.J. 202, 216-18 (2010); William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 Yale L.J. Online 169, 171–75 (2010).
[22] On the Articles period, see Merrill Jensen, The Articles of Confederation (1940); Jack Rakove, The Beginnings of National Politics (1979); Richard Morris, The Forging of the Union, 1781–1789 (1984).
[23] The Federal Court of Appeals, which operated from 1780 to 1787, heard appeals from state courts in prize cases. *See* Henry J. Bourguignon, The First Federal Court: The Federal Appellate Prize Court of the American Revolution 1775–1787 (1977).
[24] For accounts of foreign affairs difficulties under the Articles, see Frederick Marks, Independence on Trial 3–95 (1973); Morris, *supra* note 22, at 194–219, 245–66; Ramsey, *supra* note 9, at 32–46.
[25] Definitive Treaty of Peace, U.S.-Gr. Brit., arts. 4–5, Sept. 3, 1783, 8 Stat. 80, 82–83.

state governments continued to block collection of pre-war debts by British creditors and refused to restore confiscated property.[26]

State recalcitrance on the 1783 Treaty commitments quickly became a major issue between the United States and Britain. Congress agreed with Britain that the Treaty had been violated but could do no more than urge State compliance. Some nationalists, including John Jay and Alexander Hamilton, argued that state laws in conflict with treaties were void under the Articles,[27] but the Articles did not directly say so. The States denied that treaties trumped state laws, and state courts (the only courts available) generally declined to invalidate state laws or provide remedies for British plaintiffs.[28] As Hamilton described it: "The treaties of the United States under [the Articles] are liable to the infractions of thirteen different legislatures. . . . The faith, the reputation, the peace of the whole are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."[29]

Similar issues arose with respect to the law of nations. In 1783, New York passed a Trespass Act allowing those whose property had been taken under the British occupation to sue for damages. Hamilton represented a number of British defendants in these suits and litigated the famous test case *Rutgers v. Waddington* before the Mayor's Court of New York in 1784.[30] Relying heavily on Vattel, Hamilton argued that applying the New York Act to British subjects would violate the law of nations and the peace treaty with Britain.[31] Mayor James Duane sat as Chief Judge and authored the court's opinion in *Rutgers*. He rejected Hamilton's broadest proposition – that statutes in violation of the voluntary law of nations were void – but found "great force" in the argument that no single State could violate that law. Under the Articles, Duane wrote, "[T]hese states are bound together as one great independent nation" and "must be governed by one common law of nations."[32] "[T]o abrogate or alter any one of the known laws or usages of nations, by the authority of a single state, must be contrary to the very nature of the confederacy."[33] Ultimately, though, Duane construed the Trespass Act not to violate the law of nations, applying a rule of interpretation he derived from Blackstone.[34] "The repeal of the law of nations," he wrote, "could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation."[35] In a Solomonic ruling, Duane held that the Trespass Act did not apply while the defendants occupied the plaintiff's brew house under the direct authority of

[26] *See* 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 781–874 (John C. Fitzpatrick ed., 1934) (Foreign Secretary John Jay's report on state treaty violations); MARKS, *supra* note 24, at 5–15.
[27] *See* RAMSEY, *supra* note 9, at 44–45.
[28] *See* ALLEN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 268–74, 336–37; 386–89 (1969).
[29] THE FEDERALIST, No. 22, at 183 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Although the peace treaty violations were the most serious, States provoked diplomatic problems by violating other treaties as well. *See* 3 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 437–42 (U.S. Dept. of State, 1834) (note from Dutch minister Van Berkel to John Jay protesting violations of U.S.-Netherlands treaty).
[30] Hamilton's papers and the court's opinion are reprinted in 1 JULIUS GOEBEL, JR., THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 282–419 (1964).
[31] *Id.* at 368–73. The treaty argument relied not on an express provision but on the principle that by the law of nations "every treaty of peace includes an AMNESTY." *Id.* at 373.
[32] *Id.* at 405.
[33] *Id.* at 406.
[34] *Id.* at 415.
[35] *Id.* at 417.

the British commander, allowing the plaintiff to recover damages for approximately half the period.[36]

During that same summer of 1784, the Pennsylvania Supreme Court tried Charles Julian de Longchamps for criminal violations of the law of nations in *Respublica v. De Longchamps*.[37] Longchamps, a French subject, had insulted and then assaulted François Barbé-Marbois, secretary of the French legation in Philadelphia. He was convicted on two counts of violating the law of nations respecting ambassadors. As Chief Justice McKean explained at sentencing, "the law of nations . . . in its full extent, is a part of the law of this state," and it was "the interest as well as duty of the government to animadvert upon your conduct with a becoming severity."[38] The court sentenced Longchamps to two years in prison and a fine of one hundred French crowns.[39]

In both cases, the state courts applied the law of nations as part of the common law. *Rutgers* construed a state statute to avoid a violation of the law of nations, while *Longchamps* redressed a law of nations violation with a criminal prosecution. But *Longchamps* in particular illustrates how difficult it was to ensure compliance without a system of federal courts. When France protested the assault on Marbois to the Continental Congress, there was nothing Congress could do but recommend action by the States.[40] It had to explain "the difficulties that may arise . . . from the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them only that of advising in many of those cases in which other governments decree."[41]

By 1787, national leaders had developed serious concerns about Congress's inability to enforce treaties and the law of nations under the Articles. Relations with Britain were near a crisis point – Britain refused to evacuate military posts on U.S. soil, as it had promised to do in the peace treaty, until state violations of the treaty were resolved.[42] Congress had been unable to make key commercial treaties, in part because European nations viewed the United States as an unreliable treaty partner. Although the Marbois incident had been largely defused by the state court's decision, Congress's embarrassment lingered, as did fears that another affront to an ambassador would provoke even more serious difficulties.[43]

Government under the Articles had other problems as well, but the difficulty in ensuring compliance with the nation's international legal obligations was a key factor generating political momentum for a new constitution.[44] James Madison's influential

[36] *Id.* at 419.
[37] 1 U.S. 111 (Pa. Ct. Oyer & Terminer 1784).
[38] *Id.* at 116, 117. Both quotations repeat, almost word for word, passages in Blackstone. *Compare* 4 Blackstone, *supra* note 10, at 67, 68.
[39] 1 U.S. at 118. For accounts of the episode and its aftermath, see G.S. Rowe & Alexander Knott, *Power, Justice and Foreign Relations in the Confederation Period: The Marbois-Longchamps Affairs, 1784–1786*, 104 Pa. Mag. Hist. & Biog. 275 (1980); William Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491–94 (1986).
[40] *See* 1 Diplomatic Correspondence, *supra* note 29, at 89 (French protest); 27 Journals of the Continental Congress 1774–1789, at 478–79 (Gaillard Hunt ed., 1928).
[41] 28 Journals of the Continental Congress 1774–1789, at 314–15 (John C. Fitzpatrick ed., 1933).
[42] On the escalating crisis with Britain, see Samuel Bemis, A Diplomatic History of the United States 65–84 (4th ed. 1955).
[43] *See, e.g.*, Letter from Thomas Jefferson to James Madison, May 25, 1784, 8 Papers of James Madison 43–45 (William Hutchinson et al., eds., 1962–1991) (discussing the Marbois incident).
[44] *See, e.g.*, Marks, *supra* note 24, at 3–95; Morris, *supra* note 22, at 194–219, 245–66.

1787 essay, "Vices of the Political System of Government in the United States," identified the inability to enforce treaties and the law of nations as an important defect of the Articles.[45] When delegates from the various States met in Philadelphia in the summer of 1787, Virginia Governor Edmund Randolph opened the Convention with a speech listing problems suffered under the Articles, including that Congress "could not cause infractions of treaties or of the law of nations, to be punished."[46] And when a new structure of government emerged from the Convention in the document that became the U.S. Constitution, it was clear that the delegates had taken dramatic steps to augment federal power to enhance compliance with international obligations.

C. *The Constitution's Text and International Law*

The document produced in Philadelphia in 1787 and ratified the next year revolutionized the structure of American government, including its relationship to treaties and the law of nations. Among other core changes, the new Constitution created a new Congress with true legislative power.[47] Although it was limited to enumerated topics,[48] especially in international matters Congress appeared to have broad lawmaking ability. Indeed, one of its specific powers was to "define and punish . . . Offenses against the Law of Nations."[49] The new Constitution also created a federal Supreme Court and empowered Congress to create lower federal courts.[50] The federal courts, like the federal Congress, had limited jurisdiction, but their jurisdiction in international matters was plentiful, including cases arising under the Constitution, laws of the United States, and treaties; cases affecting ambassadors; admiralty and maritime cases; and cases between U.S. citizens and foreign nations or foreign citizens.[51] Further, the Constitution made federal statutes supreme over state laws and specifically required state courts to enforce them.[52] Congress would no longer have to depend on state legislatures and state courts to enforce treaties and the law of nations.

Even more dramatically, the Constitution's Article VI spelled out a new status for treaties: "Treaties made, or which shall be made, under the Authority of the United States," would (like federal statutes and the Constitution itself) be "the supreme Law of the Land," binding on state courts "any Thing in the Constitution or Laws of any State to the contrary notwithstanding."[53] That provision, coupled with the federal courts' jurisdiction over cases arising under treaties, appeared to empower federal courts to enforce treaties even in conflict with state law. Hamilton explained: "Laws are a dead letter without courts to expound their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."[54]

[45] 9 Papers of Madison, *supra* note 43, at 348–49.
[46] 1 Records of the Federal Convention of 1787, at 19 (Max Farrand ed., 1911).
[47] U.S. Const. art. I.
[48] *See id.*, art. I, § 8.
[49] *Id.*, art. I, § 8, cl. 10.
[50] *Id.*, art. III, § 1.
[51] *Id.*, art. III, § 2.
[52] *Id.*, art. VI. cl. 2.
[53] *Id.*
[54] The Federalist No. 22, at 182 (Alexander Hamilton) (Isaac Kramnick ed., 1987).