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FROM IMPERIAL TO INTERNATIONAL LAW: PROTECTING FOREIGN EXPECTATIONS IN THE EARLY UNITED STATES
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ABSTRACT
This Essay argues that several principles associated with modern international investment law and dispute resolution arose in the wake of the American Revolution, as the revolutionaries and Britons sought to restructure trade relations, previously regulated by imperial law, under new treaties and the law of nations. They negotiated such problems as the currency in which international debts would be paid; the ability of foreign creditors pursue domestic collection remedies; whether creditors had to exhaust those remedies before their nation could resort to international arbitration; and the form of state-state arbitration of private disputes. The specific setting of these negotiations—the aftermath of a colonial settler revolution—narrowed the compass of disagreement, compared to many later postcolonial negotiations. In addition, the negotiations assumed that the exhaustion of national remedies remained the standard method of resolving private debt disputes. Notwithstanding these important differences, the principles and institutions developed after an imperial civil war influenced the development of international investment law.

TABLE OF CONTENTS
I. POLITICAL REVOLUTION AND COMMERCIAL CONTINUITY ........................................ 5
II. PACIFIC IDEALS IN THE ATLANTIC WORLD: FREE TRADE AND OPEN CREDIT .............. 7
III. “NO LAWFUL IMPEDIMENTS”: NATIONAL TREATMENT VERSUS AN ABSOLUTE STANDARD................................................................. 9
IV. THE EXHAUSTION OF NATIONAL REMEDIES IN THE 1790s .............................. 13
V. FROM IMPERIAL REGULATION TO INTERNATIONAL ESPOUSAL ................................. 14
CONCLUSION: ENLIGHTENMENT LIBERALISM AND NEO-LIBERALISM.......................... 17
I. POLITICAL REVOLUTION AND COMMERCIAL CONTINUITY

Arguably no early modern event sparked more innovation in protecting international commercial expectations than the American Revolution. What made the Revolution so rich for the history of international law was that it interrupted well-developed commercial relationships, but only temporarily. After independence, many commercial actors, on both sides of the Atlantic, sought to restore the status quo ante bellum. Yet the law governing those relationships had shifted, from imperial law to the law of nations.1 This was not the case of two established nations negotiating prospective commercial relations. Instead, traders, lawyers, and diplomats were trying to manage the uncharted, ambiguous, and sometimes bitter aftermath of a colonial civil war.2

Much hinged on debt. The major issue dividing the two nations just after peace was the legal status of a massive amount of private debt dating from before the Revolution and owed to British creditors by American debtors, typically arising from purchase-money loans for manufactured goods bought from British trading houses. Diplomatic normalization, along with the negotiation of a commercial treaty and further investment, depended in large part on the resolution of that problem. Because the American states had originated as settler colonies under British rule, the promotion of trade and capital investment was, more or less, a common objective. Indeed, it was a liberal Enlightenment ideal.3 There were of course no bilateral investment treaties in the eighteenth century.4 The protection of international commerce and capital was nonetheless an important project for merchants and lawyers at the time, especially for many Americans. That consensus, along with a tacit premise of racial, if not

always cultural, equality, placed a firm floor beneath Anglo-American diplomacy.\textsuperscript{5} Many of the key players really did speak the same language.

The conflict’s tight ideological and cultural confines permitted its participants to forge solutions that, because of the centrality of Euro-American lawyers in shaping modern international law, have influenced the foreign investment law ever since. The peacemakers’ efforts affected the development of both the law of nations and municipal constitutions, two sources of law that have ever since operated in tandem and in tension to manage international commercial expectations.\textsuperscript{6} Specifically, the Treaty of Peace (1783) forbade the United States from obstructing the collection of those old debts. Americans signaled their commitment to that unfulfilled duty and other international legal norms in the federal Constitution (1787), and then constructed institutions binding themselves to that commitment, not least federal courts enjoined to interpret treaties as the supreme law of the land.\textsuperscript{7} When the federal structure proved unable to vindicate the British creditors’ interests fully, the two nations negotiated the Jay Treaty (1794) that established what has been called the first modern international arbitration (1798–99) to process outstanding grievances surrounding those debts. And when that failed, the nations negotiated another agreement (1802) under which the U.S. government tendered a lump sum payment to Britain that settled the matter as a diplomatic controversy: another lasting precedent.

A brief outline of this one transit from the imperial to the international illustrates the possibilities as well as limits of viewing the early Anglo-American commercial relationship as a template for understanding the development of the modern international law of trade and investment. It also begins to sketch the international legal framework of capital investment that allowed Americans to attract an unprecedented amount of foreign investment that helped finance their new empire with money from the old


empire, a fact that strikes only nation-focused modern observers as ironic. And it shows that the United States’ commitment to protecting foreign capital runs deep—and began at home.8

II. PACIFIC IDEALS IN THE ATLANTIC WORLD: FREE TRADE AND OPEN CREDIT

For all their shrewd diplomacy during war, the Americans had few plans for the day after peace. What they did have was an astounding faith in the global importance of American trade mixed with righteous opportunism. Thomas Paine glossed the Enlightenment ideal of doux commerce when he declared in 1776: “Our plan is commerce, and that, well attended to, will secure us the peace and friendship of all Europe; because, it is the interest of all Europe to have America a free port.”9 That same year John Adams drafted Congress’s Model Commercial Treaty, which contained the nearly utopian provision that merchants of each signatory nation would be treated exactly like native subjects or citizens, and thus pay no foreign tariffs at all when importing or exporting goods.10 That provision—which no foreign nation accepted—would have turned the United States and its commercial partners into free ports. Restrained by the imperial Navigation Acts to trade mostly within the British Empire, Americans eagerly expected greater commercial opportunities outside the Empire.11

Expectations of free trade were dashed. The French, for example, were reluctant to allow their allies in war free access to their colonies or metropolitan France, and no continental merchants could offer liberal terms of credit like the British. Most European purchase-sale credit contracts marked the loans in days or weeks, not, like British colonial agreements, in months, seasons, and even years. The habit of buying on credit, with purchase-money loans to be repaid at the next harvest or later, was hard to

kick.12 This continuous process of restructuring without settling overseas trade debt, which financed in turn a revolving credit circuit within the provinces, had rested on optimism about a continuously expanding imperial economy. Despite occasional credit crises during the colonial period, liberal credit permitted Britain’s imperial economy to expand faster than any of its competitors in the eighteenth century.13

The Revolution sent this circulatory system into arrest. The peacemakers who negotiated the Treaty of Paris (1783) tried to resuscitate the system.14 Fellow subjects before the war, the peace commissioners found themselves negotiating what had become an international relationship. Some of the treaty makers, like the Scot Richard Oswald and the South Carolinian Henry Laurens, had been central players in the Anglo-American credit system. Indeed, before the war Laurens was Oswald’s slave-trading agent in South Carolina.15 Two other commissioners, Englishman David Hartley and the American Benjamin Franklin, had met regularly with other Enlightenment intellectuals in the country house of their patron, the Earl of Shelburne, and championed free trade and American equality in the Empire. It was Shelburne, who became first minister in 1782, who negotiated the peace.16

This premise was explicit. Article IV of the Treaty of Peace provided: “Creditors shall meet with no lawful Impediments to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.”17 It was a hard-won provision for the British, though in the end it was American Commissioner John Adams who seemed most committed to the

12. The best source on the mechanics and operation of the imperial trading economy in the eighteenth century is the oeuvre of Jacob M. Price. See, e.g., Jacob M. Price, Capital and Credit in British Overseas Trade: The View From the Chesapeake, 1700–1776 (1980). Also see Emory G. Evans, Planter Indebtedness and the Coming of the Revolution in Virginia, 19 WM & MARY Q. 511 (1962), and Richard B. Sheridan, The British Credit Crisis of 1772 and the American Colonies, 20 J. ECON. HIST. 161 (1960).
ideal beneath it. He arrived in Paris to find a deadlock over whether the United States would agree that American debtors should fully repay prewar debts in British pounds sterling, and also whether Congress would pledge to restore confiscated loyalist property. For practical and legal reasons, the Americans would not budge on confiscated property. Debt, however, was different. “I had no Notion of cheating any Body,” Adams declared when he got to Paris and swung the American commissioners over to the British position on the prewar debts.18

Negotiating the independence of a new nation, the peacemakers and successive diplomats believed that enduring structures of commerce would keep the two nations together in an extranational commercial network. There was no formal sense that this was a special relation. Instead, it was quite the opposite for the Americans. For them, the peace treaty’s financial guarantees were ground rules by which the imperial connection became an international one and served as models for other opportunities. Yet there would be, more or less, business as usual.

III. “NO LAWFUL IMPEDIMENTS”: NATIONAL TREATMENT VERSUS AN ABSOLUTE STANDARD

The meaning of lawful impediment soon generated much litigation and diplomacy in the so-called critical period. Amidst a recession brought on in no small part by the exclusion of American merchants and ships from the lucrative trade of the old empire, and exacerbated by the need to raise taxes to pay the public debts that had financed the Revolution, the states turned to debt relief measures. They instituted moratoria; mandated that creditors had to accept state paper money as payment for debts denominated in British pounds sterling; required even international creditors to accept overvalued land in exchange for debts, while retaining the venerable common-law rule disabling aliens from holding land; and even prohibited British creditors from suing in state courts. To justify what appeared to be violations of the Treaty of Peace, state legislators sometimes distinguished between rights and remedies. Other times they pleaded that they could retaliate for Britain’s own violations of the treaty, like retaining western forts on U.S. land and refusing to pay for the enslaved persons who left with British military in late 1783. Finally, some legislatures simply invoked something

like emergency power: the economy was in recession, and there was not enough hard money in circulation to fund all the debts and taxes. Debt relief from private contracts was therefore less class legislation, pitting debtors against creditors, than a kind of desperate monetary policy.

However justified, in British eyes it all violated the treaty. The British government told Congress that it would not even negotiate a commercial treaty—the great hope for American recovery—until the states eliminated those impediments. Even sympathetic Englishmen reproved Americans for violating the treaty. “Let the foundations of the new world be laid in these principles, to discharge debts of honor and conciliation to the last farthing,” peace commissioner David Hartley wrote to an American diplomat in 1786, “they may be considered as part of the purchase of independence.” Here was an internationally regarded philosopher holding up international debt repayment as something akin to a universal duty, if not a human right. American leaders like John Adams agreed entirely. Reputation mattered. “The moral character of our people is of infinitely greater worth than all the sums in question,” he wrote from Paris during the final peace negotiations. Adams continued:

The commerce of the world is now open to us, and our exports and imports are of so large amount, and our connexions will be so large and extensive, that the least stain upon our character in this respect will lose us in a very short time advantages of greater pecuniary value than all our debts amounts to. . . . To talk of a sponge to wipe out this debt, or of reducing or diminishing it below its real value . . . would betray a total ignorance of the first principles of national duty and interest.

Similarly, Foreign Secretary John Jay, asked by Congress to investigate the charges, composed a long report condemning all manner of state

20. See Letter from Lord Carmarthen to John Adams (Feb 28, 1786), in DOCUMENTS OF THE EMERGING NATION: U.S. FOREIGN RELATIONS, 1775–1789, at 165, 166 (Mary A. Gunta ed., 1998) (informing Adams that it would be “the Height[] of Folly, as well as Injustice, to suppose one Party alone obliged to a strict Observance of the Public Faith, while the other might remain free to deviate from its own Engagements . . . though at the Ex pense of its own national Credit and Importance”).
22. Letter from J. Adams to Morris (July 11, 1783), in 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 536, 536 (Francis Wharton ed. 1889).
governance. “History furnishes no precedent of such liberties taken with treaties under form of Law in any nation,” he reported in late 1786.\footnote{Report of the Secretary for Foreign Affairs (Apr. 13, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 176, 180 (Roscoe R. Hill ed., 1936).} Congress endorsed Jay’s report and asked him to draft a circular, which it sent to the states recommending that they repeal any legislation inconsistent with the treaty and start enforcing its provisions. “Not only the obvious dictates of religion, morality, and national honor,” Congress informed the states a month before the opening of the Philadelphia Convention, “but also the first principles of good policy demand a candid and punctual compliance with engagements constitutionally and fairly made.”\footnote{Id. at 177.}

The American states, creditors, and debtors really were caught in a bind.\footnote{For a sympathetic account of the debtors’ plight, see WOODY HOLTON, UNRULY AMERICAN AND THE ORIGINS OF THE CONSTITUTION 85–95 (2007).} Indeed, they were, legally, in a worse position than the British creditors. As in some modern investment treaties, the peace treaty created an asymmetry between American and British creditors—favoring the latter. U.S. creditors had to accept the state-mandated remedies, even though the legislatures altered those remedies after deals had been made. In contrast, British prewar creditors got—by law at least—the full value of their original expectations. In modern terms, Britons received absolute protection, not national treatment. But then the largest American debtors, who were creditors at home, were stuck holding paper currency while owing international debts payable only in specie.

The asymmetry was noticed at the time. Ralph Izard, a South Carolina planter who had served as a revolutionary diplomat and became an ardent Federalist, was genuinely ambivalent about the inequality. State debt relief was a fair response to the recession, but it compounded the problem by driving all good money out of the country and into the hands of British creditors. “The British merchants and the Tories who lost little or nothing by the war, are in possession of the greatest part of the specie in the country and would enrich themselves at the expense of the real friends of America, who risked everything for her defence.” This asymmetry was “an evil of considerable magnitude.” Yet, weighing the tradeoffs, Izard concluded: “[I]n my opinion it would be better that the treaty should be fulfilled, and the law take its course, than that a reproach should be cast on so many States in the Union.”\footnote{Letter from Ralph Izard to Thomas Jefferson (July 1, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON 83, 84 (Julian P. Boyd ed., 1954).} Vindicating the new nation’s international reputation, as
well as the principle of honest dealing, was worth the pain of repayment. The asymmetry created by the treaty, rather than the legal obligation, was the sticking point.

    It is to be lamented that at the negotiation of the general treaty of peace it had not been provided that no greater obstruction should be thrown in the way of the recovery of British debts than those of the citizens of America, instead of the words which now stand in the treaty. The reasonableness of such a proposition must have been obvious to the British negotiators, and could not have been opposed.27

Izard endorsed the revolutionary ideal of equality between national and foreign merchants. As he knew, many Americans were both debtors and creditors. Equal or national treatment would protect domestic merchants in the seaports from having their purses filled with local paper currency, while owing their international creditors hard money.

This connection between treaty guarantees and domestic recession helps explain why, the following year, the framers of the new federal Constitution created a government that eliminated much of the states’ power to frustrate treaty enforcement and also prohibited them from issuing paper money or interfering with the obligations of contracts.28 These measures equalized the condition of domestic and foreign creditors, prospectively at least, while British private debt foreign public debt, and domestic public debt received retroactive protection.29 Yet the backward- and forward-looking constitutional provisions were linked. According to Alexander Hamilton, the equalization of all creditors’ rights in the future would make debt, both public and private, preexisting as well as future, more valuable and help integrate the domestic and international credit markets.30

27. Id..
29. See id. art. VI (declaring existing public debts of the Confederation “valid” against the United States, and declaring “Treaties made, or which shall be made” the supreme law of the land).
30. See, e.g., Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit, reprinted in 6 THE PAPERS OF ALEXANDER HAMILTON 65 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (reporting the “general belief” after the establishment of the “new” government “that the credit of the United States will quickly be established on the firm foundation of an effectual provision for the existing debt” and that the restoration of public credit would affect private credit, “restore landed property to its due value,” and “furnish new resources both to agriculture and commerce”); Alexander Hamilton, Report on a Plan for the Further Support of Public Credit, reprinted in 18 THE PAPERS OF ALEXANDER HAMILTON 56 (Harold C. Syrett ed., 1973) (“Public and private Credit are closely allied, if not inseparable. . . . The security of each Creditor is inseperable from the security of all
This was how international creditors understood the Constitution, not least because they derived much of their understanding from key Federalists. After analyzing the Constitution, the British government concluded that all the lawful impediments to debt collection had been eliminated.31

IV. THE EXHAUSTION OF NATIONAL REMEDIES IN THE 1790S

Official doctrine was promising, even at first in Virginia. Chancellor George Wythe, the highly regarded law teacher to a generation of the Virginia gentry like Thomas Jefferson, held in a Virginia state court that the treaty—and indeed the law of nature—required the state’s debtors to repay the full value of their debts in sterling, plus interest, despite having paid some or all of it into the state’s wartime sequestration fund. Sequestration was not confiscation, for no modern government retained the barbaric power to confiscate property, Wythe maintained, except as reprisal. Further, a court had to defy the political pressure to benefit citizens at the expense of foreigners, even former enemies:

A judge should not be susceptible of national antipathy, more than of malice towards individuals—whilst executing his office, he should be not more affected by patriotic considerations . . . . What is just in this hall is just in Westminster hall, and in every other prætorium upon earth.32

Other Virginia state judges disagreed with Wythe about the power of expropriation, and the federal courts throughout the South were slow to process British debt cases.33 Nonetheless, three years later the U.S. Supreme Court agreed in the main by holding that Virginia debtors were liable to their British creditors even if they had already paid those debts into the state’s revolutionary sequestration fund.34 That decision paved the way, in principle, for full recovery of prewar debts in the state were Americans owed the most.

Creditors. The boundary between foreigner and Citizen, would not be deemed a sufficient barrier against extending the precedent of an invasion of the rights of the former to the latter”.

31. See Hulsebosch, supra note 1, pt. III.
34. See Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
Still, there remained a gap between liberal statements in the Constitution, judicial opinions, and diplomatic pledges, and the successful prosecution of debt claims. Barriers included the wildcard of jury discretion; evidentiary problems in proving generation-old debts; and not least the issue of whether the treaty protected interest as well as principal. British creditors therefore petitioned the British government for compensation on the model of the commission that had compensated loyalists for confiscated land. Strapped by new war costs and disinclined to compensate risk-hungry merchants, the British government sought a diplomatic solution to what was also a decade-long domestic political problem. To settle this dispute, and others arising from the wars of the French Revolution, Chief Justice Jay and Secretary of State William Grenville negotiated a new treaty in 1794.

V. FROM IMPERIAL REGULATION TO INTERNATIONAL ESPOUSAL

The Jay Treaty featured familiar imperial institutions recast creatively to serve international relations. It established three mixed commissions: arbitral panels staffed by an even number of commissioners selected by each side, with a final commissioner appointed by consensus or lot. Arbitration was an old device, but it was rarely used to resolve international disputes in the eighteenth century. When it was used, the arbitrator was typically a third-party umpire from a neutral power. By contrast, arbitration by representatives from the interested jurisdictions was used frequently to resolve intercolonial disputes in the eighteenth-century British Empire. Now that imperial device became an international institution.

Here is where the Jay Treaty was especially creative. The mixed commission to review private debts marked an early instance of espousal, by


which Britain took up the cause of its private creditors, and the U.S. government made itself liable for debts whose collection was obstructed by lawful impediments. The conception of espousal here, however, did not imply that the two nations saw U.S. compensation of British debtors as a negotiated alternative to reprisal or even war. The stakes were not alone that high. In addition, the problem was not the denial of justice generally: it was, specifically, the lawful impeding of collection of contractual debt. The mixed commission was imagined as a more effective device for satisfying meritorious claims, bringing relief to creditors, removing criticism of the American judiciary from Anglo-American diplomacy, and (not least) eliminating the issue from the British government’s own, crowded domestic political agenda. In sum, international contracts deserved an international dispute resolution system, at least after a civil war.

Because it was staffed by common lawyers, the arbitration soon became as litigious as any ordinary legal controversy, more so than the standard early modern arbitration by a neutral sovereign on behalf of two disputing sovereigns. Mirroring their normal practices, these common lawyers created a process that looked more similar to private commercial arbitration at the time than public state-to-state dispute resolution. Even that model or analogy fits poorly: The conceit in private arbitration was that the arbitrators possessed expertise about commercial dealings. No commissioner possessed expertise about settling the aftermath of a colonial civil war, and it was the very issues of revolution that stymied the commission.

The first contentious issue was whether U.S. debtors owed interest for all years that the debts had gone unpaid. At simple interest of 5 percent,

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38. Jay Treaty, supra note 35, art. 6, 8 Stat. at 119–20 (providing for compensation for “such losses only, as have been occasioned by the lawful impediments aforesaid, and is not to extend to losses occasioned by such Insolvency of the Debtors or other Causes”).


40. The litigious claims and counter-claims between the commissioners, not least about the procedures of the commission itself, are documented in Arbitration of Claims for Compensation for Losses and Damages Resulting From Lawful Impediments to the Recovery of Pre-War Debts, in 3 INTERNATIONAL ADJUDICATIONS: ANCIENT AND MODERN, HISTORY AND DOCUMENTS (John Bassett Moore ed., 1931) (cataloguing the claims and procedures in the “arbitration of claims for compensation for losses and damages resulting from lawful impediments to the recovery of pre-war debts”). On the legalization of arbitration in the late eighteenth century, see Henry Horwitz & James Oldham, John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century, 36 HIST. J. 137, 158–59 (1993).
over twenty-plus years, interest exceeded the principal. Many American legislatures and juries deducted interest for the war years. British claimants, by contrast, argued that interest was an inseparable part of the underlying agreement. Second, did the tribunal have jurisdiction over debts owed to people that the United States considered disloyal citizens and whose property, both land and debts, had been confiscated during war? This again raised the controversial issue of how to determine allegiance during the war. Third, did creditors have to exhaust all remedies available in American courts before seeking compensation from the tribunal? Doing so would have disabled many creditors from petitioning the tribunal, which by the treaty had a brief lifespan. In addition, frustrated claimants, especially in Virginia, argued that litigation was hopeless.

The two British commissioners and the fifth commissioner chosen by lot (also a Briton) voted in favor of the British claimants on all three issues. The two American commissioners then walked out, preventing a quorum (which required the presence of at least one commissioner from each nation). A few years later, the two countries negotiated a composition whereby the United States paid the British government 600,000 pounds sterling, or a fraction of the outstanding debts probably totaling in the millions. In exchange, the British government agreed to drop the issue as a diplomatic grievance between nations. All these issues and solutions have since become familiar features of modern arbitrations between nations.41

One feature of this 1802 Convention that now seems unusual was that the private creditors retained the right to sue their debtors in the United States, and such cases, litigated by descendants of British creditors against heirs and estates of American debtors, continued percolating through American courts well into the nineteenth century.42 A more dramatic difference, implied in the same article and throughout the negotiations, was that international arbitration was the exception to the rule that debt disputes should be resolved in domestic, national tribunals. International arbitration between states was a last resort, not the standard practice.

CONCLUSION: ENLIGHTENMENT LIBERALISM AND NEO-LIBERALISM

The story of the Anglo-American commercial rapprochement after the Revolution suggests that what historians later termed the imperialism of free trade, and dated to the mid-nineteenth century, originated at least partly in the Enlightenment ideal of insulating international commerce from political recrimination during the aftermath of an imperial civil war. It was negotiated mutually, not imposed east to west. Critically, many Americans did not perceive fiscal rectitude and non-expropriation as neocolonial infringements on sovereignty. Nor did they flow by necessity from an inchoate world system of capitalism. The premise was not primarily economic; it came from political economy. This liberal internationalism, for better and worse, derived from a vision of how and why nations and their people should connect across national boundaries. That these same people had just several years earlier reached easily across colonial boundaries, within a single empire, shaped the way that Americans and Britons imagined international cooperation and competition. The good faith protection of international expectations was already becoming part of the law of nations that Americans admired and under which they had achieved independence. Functionally, the protection of capital was supposed to generate commercial reciprocity and an influx of much-needed investment. Political independence and commercial dependence was not a paradox. For leading Americans, it was an Enlightenment ideal.

There appears to have been a causal relationship between the federal government’s commitments to protect foreign expectations and the flood of foreign investment that followed. At least, participants at the time cited the legal guarantees as causal. Soon British investors expanded their reach beyond liberal private credit and purchase money credit. They also became portfolio investors in public and private debt. When war broke out between Britain and the United States in 1812, they owned about half of all federal public debt, which meant in effect that, retroactively, Britons financed the Revolution and, prospectively, then funded the United States’

43. See John Gallagher & Ronald Robinson, The Imperialism of Free Trade, 6 ECON. HIST. REV. 1 (1953).
44. Hulsebosch, supra note 1, pts. III, IV (detailing foreign assessments of the federal Constitution and its effect on investment).
development as a continental empire. And none of that debt was confiscated.

Why the United States did not confiscate that debt is at once an easy question—the Jay Treaty and arguably the customary law of nations forbade confiscation of capital46—and complicated. The complexity derives from working through the domestic interests in both nations that pushed and pulled each government toward insulating capital from the vicissitudes of domestic and international politics.47 That more complex story demands a searching analysis of those mutual interests as well as the Enlightenment ideals of reciprocity and peaceful commerce through which those interests expressed themselves and perhaps, on which the people who held those beliefs defined their interests in the first instance. Many Americans in the early Republic believed that debt was a mutual interest, yielding positive-sum benefits on both sides, not something imposed by capital-rich nations on the capital poor. The preservation of that mutuality required international law protections. For better and worse, the institutionalization of this legal liberalism in the aftermath of the American Revolution has shaped the international law of investment ever since.

46. See Jay Treaty, supra note 35, at 122 (including a permanent article forbidding the confiscation of public and private debts and stock shares because of “national Differences or Discontents”).

47. For some of these politics, see Daniel J. Hulsebosch, Magna Carta for the World? The Merchants’ Chapter and Foreign Capital in the Early American Republic, 94 N.C. L. REV. 1599 (2016).