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The Reception of Vattel's *Law of Nations* in the American Colonies: From James Otis and John Adams to the Declaration of Independence

William Ossipow and Dominik Gerber*

ABSTRACT

The treatise of the Swiss philosopher and jurist Emer de Vattel, *The Law of Nations* (1758), is well known in the United States and has attracted sustained scholarly attention. Against the widespread assumption that the reception of *The Law of Nations* in America only started in 1775, this article establishes that Vattel's treatise was available on American soil already in 1762. This finding paves the way for inquiry into Vattel's intellectual authority in the revolutionary context from the early pamphleteers to the Declaration of Independence. Following a reception-based methodology that facilitates robust inferences from patterns of intertextuality, this study aims to make up for the gap in Vattel's historiography regarding the crucial period between 1762 and 1776. New England, and the Boston area in particular, turn out to be the hotbeds of Vattel's reception. A special emphasis is put on the central role of John Adams as a transmitter of Vattel's thought in the colonial discourse in spring 1776. In the great political documents of this time, most of which were written by Adams or by patriots close to him, such as Richard Henry Lee, a recurrent argument, called the Vattel-Adams argument, was put forth, forging a claim on the loss of royal protection into a justification of secession. The present study demonstrates that this rationalization bears unmistakably Vattelian marks. Furthermore, considering Thomas Jefferson's mastery of intertextual practice, it is argued that the first, second, and fifth paragraphs of the Declaration can be robustly shown to contain both immediately Vattelian hypotext and Lockean hypotext mediated by Vattel. Beyond its objective of uncovering a hitherto neglected aspect of the revolution's intellectual underpinnings, this study offers a new perspective on the intertextual complexity and density that characterize the political documents of the revolutionary era.

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At the very beginning of his *Commentaries on the Laws of England*, William Blackstone expressed concern about the state of the science of law in England. He observed that the vitality of the law studies was greater on the continent than in the British Isles:

> [N]or have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the meantime it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession, though built upon the soundest foundations, and approved by the experience of ages.[1]

Blackstone felt that a new wind was blowing in the legal domain and pointed out its main academic hotbeds: Holland, the country of Hugo Grotius; Germany, where Pufendorf and Wolff had taught; and, designated in the first place, Switzerland, host of a lively school of natural law with Barbeyrac, Burlamaqui, and a newcomer from the principality of Neuchâtel, Emer de Vattel, who in 1758 published the treatise *Le Droit des gens*.[2] Blackstone was familiar with the latter work and invoked it repeatedly.

Roughly at the same time, three European legal reference books became available in the colonies, providing legal and political elites with the state of the art in matters of law and jurisprudence. Besides Blackstone's *Commentaries* these were Cesare Beccaria's *Essays on Crime and Punishments* and two works by authors of the Swiss school of natural law, the aforementioned *Law of Nations* by Emer de Vattel as well as *The Principles of Natural and Politic Law* by Jean-Jacques Burlamaqui.[3] The importance of these works during the revolutionary period can be easily assessed because of the numerous quotations and mentions in the works of John Dickinson, John Adams, James Wilson, and Thomas Jefferson. As Kathryn Preyer rightly stated, referring to Bernard Bailyn, "[t]he American political culture had enabled Enlightenment ideology to be more effective in America than in Europe throughout the colonial period."[4]

1 1 William Blackstone, Commentaries *5.

2 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 (Neuchâtel, Abraham II Droz 1758), *first translated as* Emer de Vattel, The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns (London, J. Newbery et al. 1760).

3 Cesare Beccaria, An Essay on Crimes and Punishments (Dublin, John Exshaw 1767) (1764); Vattel, *supra* note 2; Jean-Jacques Burlamaqui, The Principles of Natural and Politic Law (London, J. Nourse 1763) (1747–1751).

4 Kathryn Preyer, *Two Enlightened Reformers of the Criminal Law: Thomas Jefferson of Virginia and Peter Leopold, Grand Duke of Tuscany, in* Blackstone in America: Selected Essays of Kathryn Preyer 252, 256 (Mary Sarah Bilder et al. eds., 2009).

Upon its arrival in America, Vattel's *Law of Nations,* which systematically applied the principles of natural law to relations between states, took its place in this vibrant intellectual environment and significantly changed the scope and language of political and legal debate in the colonies. We aim to reconstruct the story of the early reception of this work on American soil in this article.[5] We pursue this inquiry not only for its intrinsic interest, but also because we believe that this little-known piece of history enables a fresh understanding of the early ties between the American colonies and international law.

I. VATTEL'S RECEPTION IN AMERICA: A HISTORIOGRAPHICAL OVERVIEW

Given that Emer de Vattel was a jurist and his book a treatise on the law of nations, it comes as no surprise that the study of his work and in particular of his reception in America has been initiated by jurists and historians of international law. Whereas historians of the American Revolution such as Merill Jensen, Jack Rakove, Pauline Maier, Kevin Phillips tend to avoid the very name of the Swiss thinker (a notable exception is Gordon Wood),[6] we owe to the specialists of international law the first kernels of knowledge about Vattel's role in the British colonies in North America.

One narrative about Vattel's reception in America is piously transmitted from one author to the next:[7] in June 1775 an ardent admirer of the American Revolution and acquaintance of Benjamin Franklin, a certain Charles Guillaume Frédéric Dumas, a German-born *émigré* residing in Holland, sent to his friend in the colonies three copies of a new (French) edition of *Le Droit des gens* introduced and annotated by himself. Clearly Dumas was unaware that an English edition had already been circulating in

5 Insofar as the focus of this article is specifically on the pre-independence reception of Vattel's treatise, it complements the existing literature that (for reasons presented below) has almost exclusively concentrated on Vattel's *later*—post-independence—reception. *See, e.g.,* Charles G. Fenwick, *The Authority of Vattel*, 7 Am. Pol. Sci. Rev. 395 (1913); Charles G. Fenwick, *The Authority of Vattel*, 8 Am. Pol. Sci. Rev. 375 (1914); Albert de Lapradelle, *Introduction* to 3 Emer de Vattel, The Law of Nations or The Principles of Natural Law, at i (Charles G. Fenwick trans., Carnegie ed. 1916) (1758); Johannes J. Manz, Versuch einer Würdigung unter besonderer Berücksichtigung seiner Auffassung von der individuellen Freiheit und der souveränen Gleichheit (1971); Francis S. Ruddy, International Law in the Enlightenment. The Background of Emmerich de Vattel's Le Droit des Gens (1975); Emmanuelle Jouannet, Emer de Vattel et l'émergence doctrinale du droit international classique (1998); Stéphane Beaulac, The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia (2004); Vattel's International Law from a XXIst Century Perspective, (Vincent Chetail & Peter Haggenmacher eds., 2011).

6 Gordon Wood, The Creation of the American Republic 1776-1787 (1969).

7 *See* Lapradelle, *supra* note 5; Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the Unites States*, 3 Am. J. Int'l L. 547 (1909); Arthur Nussbaum, A Concise History of the Law of Nations (rev. ed. 1954); Paul Guggenheim, *Emer de Vattel et l'étude des Relations internationales en Suisse*, 10 Mémoires publiés par la Fac. droit Genève 1 (1956); Théodore Ruyssen, 2 Les sources doctrinales de l'internationalisme (1958); Esther Brimmer, *Le Droit des Gens and the Independence of the United States*, *in* Réflexions sur l'impact, le rayonnement et l'actualité du Droit des Gens d'Emer de Vattel à l'occasion du 250ème anniversaire de sa parution 37 (Yves Sandoz ed., 2010); Dominik Gerber & William Ossipow, *La réception et le destin du Droit des gens (1758) d'Emer de Vattel aux États-Unis*, *in* Réflexions, *supra,* at 79; Vincent Chetail, *Vattel and the American Dream: An Inquiry into the Reception of "The Law of Nations" in the United States*, *in* The Roots of International Law: liber amicorum Peter Haggenmacher 251 (Pierre-Marie Dupuy & Vincent Chetail eds., 2014).

North America for more than a decade. Franklin wrote to his correspondent in The Hague a courteous letter thanking him for his gift and assuring him of its great utility in such tense times "when the circumstances of a rising State make it necessary frequently to consult the law of nations."[8] This letter has long been considered by many authors as a decisive clue to the arrival of Vattel's treatise on American soil. It has nourished the widespread belief that *The Law of Nations* was unknown in the colonies before 1775. The great jurist Albert de Lapradelle, for instance, argued that, while "from 1758 to 1776 Grotius, Pufendorf, and Burlamaqui were read, studied, and commented upon in the English colonies of America, Vattel seems to have been unknown."[9]

This narrative, erroneously associating the beginning of Vattel's reception in America with Dumas's gift, has been reiterated in many subsequent studies. Arthur Nussbaum, for example, wrote that Dumas sent Franklin three copies of a new French edition of Vattel's work "which was previously unknown in America."[10] To our knowledge, no study by historians of international law has since presented new evidence regarding Vattel's reception during the decade preceding the American Revolution. The efforts of most commentators have focused on Vattel's role in jurisprudence and politics after the proclamation of independence and, above all, after the adoption of the 1787 Constitution, when the Supreme Court was instituted and began to produce decisions.[11] The most recent study that specifically addresses the reception of Vattel's *Law of Nations* in the United States is by the Geneva professor of international law Vincent Chetail, who gives a number of novel and very useful indications regarding the relation between Vattel and the Founding Fathers during the colonial period.[12] Generally, however, contemporary legal historians have had little interest in contributing novel elements to the understanding of Vattel's reception at the time of the British colonies.[13] One important reason for this indifference is found in the works of John P. Reid and Jack P. Greene on the legal environment of the controversy between the British authorities and the American patriots. Both scholars convincingly demonstrate that this controversy was taking place predominantly within the framework of the British constitution. It is argued that the debate increasingly took the shape of an interpretative quarrel. According to Reid, the colonists understood the British constitution to be founded on the consent of the governed, whereas the British, faithful to William Blackstone's legal theory and to the interpretation endorsed by King George III,

8 Franklin to C.G.F. Dumas (Dec. 9, 1775), *in* 22 The Papers of Benjamin Franklin 287 (William B. Willcox ed., 1982).

9 Lapradelle, *supra* note 5, at xxix. This error does not diminish Lapradelle's merit of providing a brilliant introduction to Vattel's treatise that has been a guide for many generations of international jurists.

10 Nussbaum, *supra* note 7, at 161.

11 A comparative table by Edwin D. Dickinson displaying the amount of "citations, quotations, and paraphrases" of the great masters of the law of nations in cases submitted to the United States Supreme Court between 1789 and 1820 (Grotius, Pufendorf, Bynkershoek, Burlamaqui, Rutherforth, Vattel) provides an important account of Vattel's authority in the context of the jurisprudential developments in the new nation. It appears that Vattel is by far the most-cited author in the law of nations (152 quotations out of a total of 283). Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 Am. J. Int'l L. 239, 259 n.132 (1932).

12 Chetail, *supra* note 7, at 253–54.

13 A notable exception is a short essay by Esther Brimmer that refers to a study of the Colonial Society of Massachusetts, according to which copies of the 1758 Leyden edition "may have arrived in Harvard as early as 1763." Brimmer, *supra* note 7, at 37.

understood it to be founded on absolute parliamentary sovereignty. In this dispute, it became clear that the British authorities had plenty of institutional leverage to impose their own interpretation. In 1775-1776 the American patriots understood that the ongoing constitutional debate turned out to be to their complete disadvantage. "The British constitution," Reid concludes, "had brought Americans to a dead end."[14]

Reid and Greene seek to show that natural law played no significant role in the revolutionary debate. Greene congratulates Reid for having demonstrated "the relative unimportance of natural law theory for the colonial case."[15] Unsurprisingly, therefore, neither of them mentions Vattel's name or his role in the revolutionary discourse. This assessment, however, contrasts with the numerous invocations of natural law and natural rights in the documents of the revolutionary period.[16] We hold that the urgency with which many revolutionaries invoked the authority of an immutable, overarching system of laws offers compelling reasons for a more tempered view regarding the weight of natural law in the patriots' argument.[17] In the account we adopt in the present study it is precisely *because* the debate had led to a "dead end" in the framework of the British constitution that the American patriots turned their attention and their hopes towards natural law as their ultimate legal resource.

In recent years Vattel has found renewed recognition in American scholarship. Specialists of international relations have stressed the importance of the Swiss jurist in European politics during the second half of the eighteenth century as well as in the context of the American Revolution. Peter and Nicholas Onuf have gone so far as to call the international system of this time "*the Vattelian World*."[18] These two authors pay tribute to Vattel for having met with his *Law of Nations* the expectations of the emerging international society, which consisted of political entities aiming at freedom, independence, and sovereignty.[19]

In the same vein, David Armitage situates the American Revolution and its emblematic document, the Declaration of Independence (hereafter DI), in the context

14 John P. Reid, Constitutional History of the American Revolution 100 (abr. ed. 1995).

15 Jack P. Greene, The Constitutional Origins of the American Revolution, at xviii (2011).

16 According to Robert Middlekauf, a similar antagonism manifested itself in the Continental Congress in September and October 1774 during the deliberations on the question of the rights of the colonies and of the theoretical foundations of those rights. Whereas the conservatives and the delegates in favour of a reconciliation with Great Britain, such as James Duane, John Rutledge or Joseph Galloway, refused "to consider that colonial rights should be founded upon the laws of nature," patriots and revolutionaries insisted, as did Richard Henry Lee, that colonial rights are premised "on a fourfold foundation – on Nature, on the British Constitution, on Charters, and on immemorial Usage." Robert Middlekauf, The Glorious Cause: The American Revolution, 1763-1789, at 249–50 (2005).

17 John Dickinson, a moderate patriot and delegate from Pennsylvania to the Continental Congress, after having copiously invoked jusnaturalists like Pufendorf and Burlamaqui, quotes the famous verse by Sophocles in which Antigone recognizes and celebrates the existence of an eternal system of laws hierarchically situated above the strictly positive, human ones: "I could never think / A mortal's law of power or strength sufficient / To abrogate the unwritten law divine / Immutable, eternal." *See* John Dickinson, A New Essay on the Constitutional Power of Great-Britain Over the Colonies in America 106 (1774).

18 Peter S. Onuf & Nicholas Greenwood Onuf, Federal Union, Modern World: The Law of Nations in an Age of Revolutions (1993).

19 For similar conclusions regarding the status of *The Law of Nations* in the system of international relations during the second half of the eighteenth century, see Jouannet, *supra* note 5; Beaulac, *supra* note 5; Vattel's International Law from a XXIst Century Perspective, *supra* note 5; David Armitage, Foundations of Modern International Thought (2013).

of international relations as well as in the emerging structure of the international society as a society of independent states, like Onuf and Onuf.[20] Leaning on available historical sources (including the inescapable letter of Franklin to Dumas), Armitage decidedly links the DI to Emer de Vattel. His argument is that, in spring 1776, the main colonial activists were perfectly aware that the success of the revolution was conditioned on the recognition of the colonies' independence by other powers, in particular France, Spain, and Holland. As rebels, the colonists had not the slightest chance to obtain the necessary recognition and the decisive advantages it would bring to their cause in terms of trade and military supplies. Armitage correctly highlights the importance of reading the DI against the background of international relations and the law of nations. This approach explains why his analysis attributes such a significant weight to Vattel's treatise in the decisive year 1776. According to him, "the standard guide to those norms [of the law of nations] available in 1776 was the compendious work by the Swiss jurist Emer de Vattel, *The Law of Nations* (1758)."[21]

By their insistence on setting the events in 1776 in an international context rather than merely in a British one, and by putting their emphasis on the *jus gentium* rather than on the British municipal and imperial law (*pace* Philipp Reid and Jack Greene), scholars such as Peter and Nicholas Onuf, David Armitage, and Daniel Lang[22] have made an indispensable contribution to our understanding of the American Revolution and of the DI. However, their analytical position would benefit from a more systematic and precise textual analysis of the DI and the colonial documents prior to 1776. Closing this gap from the vantage point of Vattel's *Law of Nations* is the purpose of the remainder of this article.

By insisting on Vattel's contribution to American revolutionary thought, we diverge from the findings of a well-known study conducted in the early 1980s by Donald Lutz, which aspired to capture the influence of "European writers" on American thought by comparing citation and quotation counts for the period between 1760 and 1805.[23] Lutz found that Vattel had been quoted about sixteen times, which corresponds to a share of 0.5% of the overall count of 3,154 'European' quotations during the period under scrutiny. If this count is accurate, then one ought to conclude that Vattel's influence was negligible. However, this conclusion contrasts oddly with the legal and political authority authors like Gordon Wood, Charles Fenwick, or Edwin D. Dickinson have attributed to Vattel's treatise. Apart from his apparent ignorance of Dickinson's data, it is likely that Lutz did not account for Vattelian quotations in the decisions of American courts and, in particular, of the Supreme Court. With regards to Vattel, Lutz's claim seems also questionable in light of our own reception-based data. For the period from 1762 to 1820 we identified ninety-one citations, quotations, or paraphrases, of which twenty-nine fall in the period of interest here, namely from 1762 to 1776.[24]

20 David Armitage, The Declaration of Independence: A Global History (2007).

21 *Id.* at 38.

22 Daniel G. Lang, Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power (1985).

23 Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Thought*, 78 Am. Pol. Sci. Rev. 189 (1984).

24 An overview of our results will be given in the next section.

II. RECEPTION ANALYSIS: METHODOLOGICAL CONCEPTS

Studies on the reception of an author typically have recourse to explicit citations or quotations identified in textual sources written in the place and period of interest. The study of explicit quotations within a given corpus, insofar as the original authorship of the fragments is unequivocally credited, offers a very convenient and robust way to assess the author's reception and authority. A straightforward approach is to locate all instances of the name(s) of interest in a sample of texts that are representative of the investigated context. Edwin D. Dickinson has employed this method with respect to Vattel in the domain of Supreme Court jurisprudence, and Donald S. Lutz has used it in his effort to elucidate the relative authority of several European writers in the American colonies.[25] If conducted systematically, this method yields precious contextual data as to who quotes, which passages are quoted and when, and whether the quotation or paraphrase is explicit. Such data enables the reconstruction of a sort of a sociometric network measuring the relationship between a received author or work and a given audience.

Obviously, explicit quotations are only one modality among several for a text *B* to be present in a text *A*. It is a commonplace that texts sometimes contain fragments written by other authors that are not distinguished using quotation rules, i.e. quotation marks. When a text *B* written by another author has been incorporated in text *A*, we may say it (or its language) has been "borrowed."[26] Certainly, on a trivial level, this is the case with a pupil cribbing from his classmate's copy, but the practice of textual borrowing is much wider in scope than mere plagiarism. It is as old as the art of writing and has always co-constituted processes of cultural circulation and creation, particularly in religious matters. The Gospels of the New Testament, for example, are imbued with texts of the Old Testament. In addition to the aforementioned modality of explicit quotations, we therefore also invoke *silent quotations*, the presence of a text *B* in a text *A* without being explicitly indicated as originally distinct from *A*.[27]

The presence of different authorial layers in a given text has attracted a great deal of attention not just within religious studies, but also in the disciplines of law and literature. Literary scholars use the term *intertextuality* to refer to the process of making one text present inside another.[28] Intertextuality, as it instructs the methodology of the present study, is based on two basic concepts drawn from the celebrated book *Palimpsests* by the French scholar Gérard Genette: *hypotexts* and *hypertexts*.[29]

25 Dickinson, *supra* note 11; Lutz, *supra* note 23.

26 We follow here Tony Davies, *Borrowed Language: Milton, Jefferson, Mirabeau, in* Milton and Republicanism 254 (David Armitage et al. eds., 1995).

27 The concept of *silent quotation* has been proposed in Günter Gawlick & Lothar Kreimendahl, Hume in der Deutschen Aufklärung: Umrisse einer Rezeptionsgeschichte (1987). Note that *plagiarism* is a submodality of a silent quotation: the plagiarist reproduces text *B* in his own text *A* while withholding the references to the origin of the borrowed text in the aim of making readers believe that she/he is the author of the borrowed text.

28 This renewed preoccupation is indebted to the Russian scholar Mikhail M. Bakhtin, who spoke of the *different voices* constituting a literary work. *See* Mikhail Bakhtin, Problems of Dostoevsky's Poetics (Caryl Emerson ed. & trans., 1984) (1963); Tzvetan Todorov, Mikhail Bakhtin: The Dialogical Principle (Wlad Godzich trans., 1984) (1981). Chapter 5 of the latter is dedicated to *Intertextuality*. The value of the intertextual approach in legal studies has been emphasized by Marylin Raisch, *Codes and Hypertext: The Intertextuality of International and Comparative Law*, 35 Syracuse J. Int'l L. & Com. 309 (2008).

29 Gérard Genette, Palimpsests: Literature in the Second Degree (Channa Newman & Claude Doubinsky trans., 1997) (1982).

Following Genette, hypertexts are texts of type '*A*'—in our case the documents of the American Revolution—and hypotexts are of type '*B*', explicitly or silently present in the hypertexts.

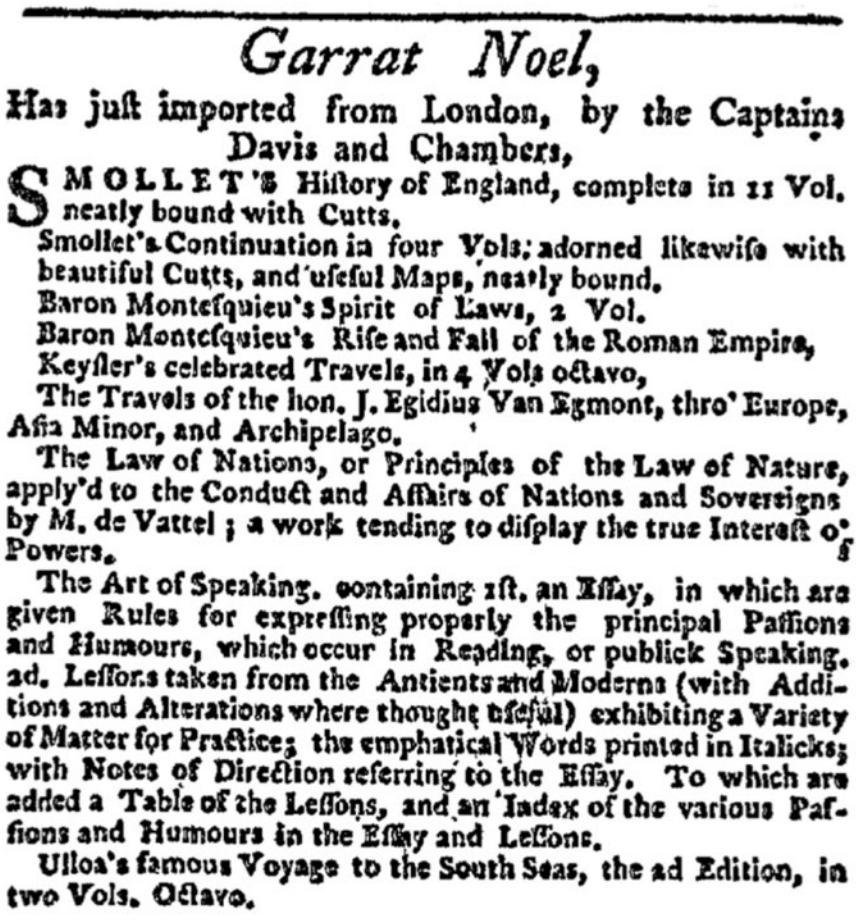
While today the ethics of editing are firmly established and, in particular in academia, the rules of quoting are clear and imperative, this was certainly not always the case. Indeed, at the time of the American Revolution, the conjugation of creativity, political radicalism, and the authority ascribed to old legal and philosophical texts created fertile ground for silent intertextuality.

The lack of explicit quotations in many contemporary documents obviously poses a methodological challenge when analyzing Vattel's intellectual role during the revolution. The analysis of silent intertextuality involves at least two methodological steps. Unsurprisingly, the first step is to *identify* hypotextual fragments present in the hypertext under scrutiny. Roughly speaking, this amounts to a quest for similarities that may be lexical (same lexemes, use of synonyms), argumentative (the arguments are sufficiently congruent), or, in fictional media, reminiscent of the same plot. There are scant automated means to proceed at this stage, although computational technologies to parse intertextuality, in combination with the steady sophistication of the data supply, are likely to play a more significant role in the future—as testified by the proliferation of anti-plagiarism software in universities. The identification stage is crucial in that it very much relies on the personal capacities of the scholar, particularly on his/her familiarity with the author and the epoch under study. It is susceptible to severe failures that threaten the validity of the entire inquiry. A famous example of an error at this initial stage is Garry Wills's identification of the Scottish philosopher Francis Hutcheson as Thomas Jefferson's main source in drafting of the DI.[30]

The second methodological step necessitated by silent intertextuality is demonstrating that the hyper- and hypotextual similarities identified are *robust*. In each case, our claim of the presence of Vattelian hypotext in colonial documents is premised on two distinct robustness criteria. The first is historical *plausibility*. Similarities in terms of lexemes or arguments prove neither an intentional borrowing process nor that the hypotext uncovered is indeed what inspired the author. For this reason the analysis of hyper- and hypotextual similarities must be accompanied by contextual analysis to assess whether the author of text *A* actually knew of text *B*.

The second test pertains to *consistency*. Simply put, the consistency of a hypotextual passage in text *A* is greater if it is observed on various levels rather than on just one single level. When the same logic of similarity runs through different levels, say, when the similarities are not only lexical but also argumentative and thematic, it enhances the likelihood that there is indeed an intertextual link between *A* and *B*. Repetitions of a given similarity pattern across a certain number of fragments also indicate consistency. It will become clear in the following that some of the crucial revolutionary writings contain consistently Vattelian hypotext both because they refer to *The Law of Nations* on multiple levels—lexically and argumentatively—and such

30 Garry Wills, Inventing America: Jefferson's Declaration of Independence (1978). For a vigorous refutation of Wills's argument, *see* Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence*, 36 Wm. & Mary Q. 503 (1979).



Garrat Noel,

Has juſt imported from London, by the Captains Davis and Chambers,

SMOLLET'S Hiſtory of England, complete in 11 Vol. neatly bound with Cutts.

Smollet's Continuation in four Vols; adorned likewiſe with beautiful Cutts, and uſeful Maps, neatly bound.

Baron Monteſquieu's Spirit of Laws, 2 Vol.

Baron Monteſquieu's Riſe and Fall of the Roman Empire,

Keyſler's celebrated Travels, in 4 Vols octavo,

The Travels of the hon. J. Egidius Van Egmont, thro' Europe, Aſia Minor, and Archipelago.

The Law of Nations, or Principles of the Law of Nature, apply'd to the Conduct and Affairs of Nations and Soverigns by M. de Vattel; a work tending to diſplay the true Intereſt of Powers.

The Art of Speaking, containing 1ſt. an Eſſay, in which are given Rules for expreſſing properly the principal Paſſions and Humours, which occur in Reading, or publick Speaking. 2d. Leſſons taken from the Antients and Moderns (with Additions and Alterations where thought uſeful) exhibiting a Variety of Matter for Practice; the emphatical Words printed in Italicks; with Notes of Direction referring to the Eſſay. To which are added a Table of the Leſſons, and an Index of the various Paſſions and Humours in the Eſſay and Leſſons.

Ulloa's famous Voyage to the South Seas, the 2d Edition, in two Vols. Octavo.

Figure 1. Advertisement by Garrat Noel, The New-York Gazette, Nov. 29, 1762

similarities repeat systematically throughout, thus forming an intertextual unity we call the Vattel-Adams argument.

III. DATA: ARRIVAL AND DIFFUSION OF *THE LAW OF NATIONS* IN THE COLONIES

Historians have been unable to date the arrival of the first copies of Vattel's treatise in the American colonies with precision up to now. Presumably for the first time, we have been able to establish that *The Law of Nations* arrived on American soil as early as November 1762. A certain Garrat [also spelled Garrett] Noel, a New York bookseller of Spanish origin,[31] put an advertisement in the *New York Gazette* announcing the arrival of a shipment of new books from London, among them the 1760 London edition of Vattel's work (figure 1). Four years after its first publication in French,

31 W. H. [William Hall?], *Garrett Noel, The First New York Bookseller*, 16 Mag. Am. Hist. With Notes & Queries July–Dec. 1886, at 109.

The Law of Nations could begin its great destiny in North America. Starting from the early 1760s it was a vital ingredient in the genesis of revolutionary thought and political discourse. The common narrative, according to which Vattel's work had reached the colonies only in 1775, is therefore invalid.

We have gathered data on quotations of *The Law of Nations* in various colonial documents, books, pamphlets, and newspapers. The complete set of collected data covers the period from 1762 to 1820. However, for the sake of the present paper, we focus on entries relevant to the period from 1762 to 1776. Table 1 summarizes the Vattelian reception in the colonies. In view of our argument about the Vattelian traces in the DI, it is of vital methodological importance in that it indicates, by pointing out the manifold references to *The Law of Nations* in the revolutionary context, that the *plausibility* criterion discussed in the previous section is indubitably met. We give the following information for each instance of Vattelian intertextuality identified: 1) the colonial source containing the Vattelian fragment (the hypertext); 2) the date of publication of the colonial source; 3) the quoted or paraphrased fragment of *The Law of Nations* (the hypotext),[32] referencing the source book (Arabic numerals), chapter (Roman numerals), and paragraph; and 4) the quotation type (explicit or silent).[33] The table is organized chronologically. For the period under study, 29 fragments referring to Vattel have been identified, ranging from November 1762 to February 1776, and appear in 19 different documents.

An important finding of these data is that the majority of these documents (14/19) were published in New England: one in Connecticut (F10), the others in Massachusetts. Among the latter, three fragments (F3.1-F3.3) are found in James Otis's 1764 pamphlet *Rights of the British Colonies Asserted and Proved*,[34] one (F4) in Oxenbridge Thacher's *Sentiments of A British American*,[35] three (F7, F8 and F19) in articles by Samuel Adams,[36] ten in texts involving John Adams,[37] and six (F9.1-6) in a *Massachusetts Spy* essay written under the pseudonym *Agricola*.[38] Among the

32 Henceforth, unless otherwise specified, the reference edition for all quotations of *The Law of Nations* is Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury (Béla Kapossy & Richard Whatmore eds., 2008) (1758).

33 Vattelian hypotext that is not distinguished explicitly (using quotation marks or footnotes), but either clearly alluded to or unmistakably paraphrased, is not coded as "silent". In F15, for example, Massachusettensis introduces a paraphrase of Vattel's I § 210 with "the best writers upon the law of nations tell us that. . .." In F16, Novanglus, 2 months later, repeats (and vigurously criticizes) the same paraphrase.

34 *Reprinted in* Collected Political Writings of James Otis, 119, 121, 175 (Richard Samuelson ed., 2015).

35 *Reprinted in* 1 Pamphlets of the American Revolution, 490, 490 (Bernard Bailyn ed., 1965).

36 For F8 and F19, see 2 The Writings of Samuel Adams, 258 (Harry Alonzo Cushing ed., 1906); and 3 *id.* at 266 (1907), respectively. F7 is found in Speeches of the Governors of Massachusetts 1765-1775, at 134 (Alden Bradford ed., Boston, Russell and Gardener 1818).

37 F2 and F5.1-3 are from 1 The Adams Papers: Diary and Autobiography of John Adams, 235 (L. H. Butterfield ed., 1961), and *id.* at 278, respectively. F11, F12.1, F12.2, and F13 are from Speeches of the Governors of Massachusetts 1765-1775, *supra* note 36, at 337, 362, 356, and 395, respectively. F15 and F16 are from John Adams & Daniel Leonard, Novanglus and Massachusettensis 170, 83 (Boston, Hews and Goss 1819).

38 Agricola [pseud.], [untitled article], Mass. Spy (Boston), Oct. 22, 1772, *microformed on* (OCoLC)10686761, (Libr. of Cong.).

Table 1 Explicit and 'silent' quotations of The Law of Nations in colonial sources 1762–1776

	Colonial sources (hypertext)	Publication date	Vattelian fragment (hypotext)	Quot. type (Explicit/ Silent)
F1	*The New York Gazette*, Advertisement	Nov. 29, 1762	"GARRAT NOEL Has just imported from London (. . .) The Law of Nations (. . .) By M. de Vattel."	E
F2	Diary of John Adams	Feb. 1, 1763	"The idea of M. de Vattel indeed, scowling and frowning, haunted me."	E
F3.1	James Otis, *Rights of the British Colonies Asserted and Proved*	1764	1, XVIII, §210	E
F3.2	Ibid.	1764	1, III, §34	E
F3.3	Ibid.	1764	3, XIII, §201	E
F4	Oxenbridge Thacher, *Sentiments of A British American*	1764	1, II, §24	E
F5.1	Diary of John Adams	Dec. 27, 1765	2, XVII, §282	E
F5.2	Ibid.	Dec. 27, 1765	2, XVII, §292	E
F5.3	Ibid.	Dec. 27, 1765	2, XVII, §297	E
F6	Richard Bland, *An Inquiry into the Rights of British Colonies*	1766	Preliminaries, §4-5	E
F7	Samual Adams, *Massachusetts Circular Letter*	Feb. 11, 1768	1, III, §34	S
F8	*Boston Gazette*, essay signed "Valerius Poplicola" [Samuel Adams]	Oct. 28, 1771	1, XIX, §220	S
F9.1	*Massachusetts Spy*, essay signed "Agricola"	Oct. 22, 1772	Preliminaries, §13	S
F9.2	Ibid.	Oct. 22, 1772	Preliminaries, §15	S
F9.3	Ibid.	Oct. 22, 1772	Preliminaries, §18	S
F9.4	Ibid.	Oct. 22, 1772	Preliminaries, §2	S
F9.5	Ibid.	Oct. 22, 1772	Preliminaries, §5	S
F9.6	Ibid.	Oct. 22, 1772	Preliminaries, §8	S
F10	*Connecticut Courant*, "The Just Ruler," signed "Amicus Judicum Bonorum"	Dec. 29, 1772	1, III, §30	E

(*Continued*)

Table 1 (continued)

	Colonial sources (hypertext)	Publication date	Vattelian fragment (hypotext)	Quot. type (Explicit/ Silent)
F11	Governor Hutchinson's Address to the Massachusetts HR	Jan. 6, 1773	1, XVIII, §210	E
F12.1	Reply of the Massachusetts HR to Hutchinson's First Message	Jan. 26, 1773	1, III, §34	E
F12.2	Ibid.	Jan. 26, 1773	2, XVII, §265	E
F13	Reply of the Massachusetts HR to Hutchinson's Second Message	Mar. 2, 1773	1, III, §34	E
F14	William Bradford to James Madison	Oct. 17, 1774	"Vattel, Barlemaqui [sic] Locke & Montesquie[u] seem to be the standar[d]s to which [Congressmen] refer either when settling the rights of the Colonies or when a dispute arises on the Justice or propriety of a measure."	E
F15	*Massachusetts Gazette*, letter signed "Massachusettensis" [Daniel Leonard]	Jan. 9, 1775	1, XVIII, §210	E
F16	*Boston Gazette*, letter signed "Novanglus" [John Adams]	Mar. 6, 1775	1, I, §9	E
F17	Second Continental Congress [John Dickinson, Thomas Jefferson] *A Declaration (. . .) Setting Forth the Causes and Necessity of Their Taking Up Arms*	Jul. 6, 1775	3, IV, §51-52	S
F18	B. Franklin to C.G.F. Dumas	Dec. 9, 1775	"[The Law of Nations] has been continually in the hands of the members of our congress, now sitting."	E

(Continued)

Table 1 (continued)

	Colonial sources (hypertext)	Publication date	Vattelian fragment (hypotext)	Quot. type (Explicit/ Silent)
F19	*Pennsylvania Evening Post*, article signed "Candidus" [Samuel Adams]	Feb. 3, 1776	Preliminaries, §2	E

four references stemming from the middle or the southern colonies, only one (F6) contains a distinctly Vattelian fragment.[39]

F17 deserves special mention, referring to the famous *Declaration by the Representatives of the United Colonies of North America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of their Taking Up Arms,* which has been described as "one of the most popular of all state papers of the early days of the Revolution."[40] This document represents a significant turning point in Vattel's reception in the American colonies since, for the first time, his authority is no longer confined to theoretical debates or pamphlets, but came to influence a political message issued by the highest body of the colonies. After the battles of Concord, Lexington, and Bunker Hill, patriots knew that the state of war would last a rather long time. As most of the delegates to the Continental Congress were jurists with strong legal culture, they were determined to organize the war with the same respect for the law as in peacetime.[41] In these conditions, they had to turn their attention to the rules of law governing peace and war, namely to the law of nations. And, as David Armitage has aptly pointed out, Vattel's *Law of Nations* was, at this time, the "standard guide" of international law.[42]

The young John Adams considered the Boston lawyer James Otis his mentor and friend, admiring him as a "genius."[43] Moreover, Samuel and John Adams were cousins, and we can therefore safely claim that the circles acquainted with Vattel's work were strongly concentrated in the Boston area and, in particular, among Adams's friends, colleagues, and relatives. There is no conclusive evidence regarding the person behind the pseudonym *Agricola*, but we suspect that it is somebody in John Adams's coterie, if not Adams himself.[44] John Adams unmistakably emerges in table 1

39 F6 is from Tracts of the American Revolution 1763-1776, at 112 (Merrill Jensen ed., 1966). F14 is from 1 The Papers of James Madison, 126 (William T. Hutchinson & William M.E. Rachal eds., 1962) (mentions Vattel without quoting him).

40 1 The Papers of Thomas Jefferson, 190 (Julian P. Boyd ed., 1950). The declaration as adopted by the Congress is reprinted in *id.* at 213. We shall examine this declaration more closely below.

41 Robert A. Ferguson, Law and Letters in American Culture 11–33 (1984).

42 Armitage, *supra* note 20, at 38.

43 Zoltan Haraszti, John Adams and the Prophets of Progress 43 (1952).

44 There are some contextual clues that lead us to suspect one of the Adamses to be the author of the 1772 article in the *Massachusetts Spy*. Peter Shaw reports an interesting story: "When a printer put out an American edition of Paine's *Rights of Man* in 1791 he prefaced it with a letter from Jefferson containing an obvious slur on Adams's current ideas. John Quincy Adams opposed Paine and the Jefferson preface in a series of anonymous pieces by 'Publicola', whom many believed to be the senior Adams. Jefferson apologized to Adams for the unauthorized preface, and Adams accepted, explaining that John Quincy Adams had written entirely without consultation with his father." Peter Shaw, The Character of John Adams 239 (1976). It is then quite

as an excellent expert on Vattel's work on natural law and the law of nations. He clearly displayed the best knowledge of the Swiss jurist and his work.

Most of the explicit quotations shown in Table 1 pertain to arguments exchanged in the course of the increasingly strained constitutional debate between the colonial elites and the British. It appears that colonists, patriots, and loyalists alike used Vattel's *Law of Nations* as a repertoire of arguments. On the colonies' status as appendages of the British Empire and thus subject to British law as promulgated by the parliament, Vattel would assent (1, XVIII, §210 in F3.1; F11; F15). However, this argument was immediately opposed by the principle that a parliament's power does not imply a right to change fundamental laws, and again Vattel could serve as an authoritative guide (1, III, §34 in F3.2; F12.1 and F13). In another case, the conservative argument that the colonies belong to the mother country is opposed by John Adams who, in his seventh *Novanglus Letter* (F16), argues that several independent states may have the same king, implying also that allegiance to the British king does not preclude being a free and independent state. Vattel, early in 1775, appears at the center of the ultimate endeavor to re-establish a fair constitutional concord between Great Britain and its colonies and to reconcile a patriotic point of view with preserving a bond with the Crown.

Vattel's most quoted paragraph is 1, III, § 34 (four times). In *The Law of Nations* the title of this paragraph reads: "Of the legislative power, and whether it can change the constitution." To this question, Vattel provided an answer that was perfectly in line with the colonists' view that the British Parliament had no right to change the fundamental rules of the country or of the colonies:

> The principles we have laid down lead us to decide with certainty, that the authority of these legislators does not extend so far, and that they ought to consider the fundamental laws as sacred, if the nation has not, in very express terms, given them power to change them.

Vattel's paragraph constitutes a hypotext providing a powerful argument successively to James Otis, Samuel Adams, and John Adams. John Locke had dealt with the same problem at the end of the seventeenth century in the *Second Treatise of Government.*[45] Chapter XI of the *Second Treatise* is entitled *Of the Extent of Legislative Power.* There is no doubt that it served as a model for Vattel in this matter. The intertextual structure, therefore, is more complex than we had initially supposed. Some hypertextual fragments (F3.2; F7; F12.1; F13) are related to the Vattelian hypotext, which itself refers to a Lockean hypotext. We find this complex *three-layered structure* elsewhere in Table 1:

- In F3.3, James Otis extracts a long quotation out of Vattel's 3, X, § 201 concerning the rights and obligations of a sovereign who had conquered a country. This Vattelian fragment is related to Locke's *Second Treatise* § 222.

plausible that a loving son (John Quincy) had chosen a pseudonym (*Publicola*) as a not-too-distant variation of the pseudonym *Agricola* (see items F9.1-6), possibly adopted decades before by his father, or of *Poplicola* (see item F8), which was adopted by his uncle Samuel Adams.

45 John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1991) (1690).

- In F8, Samuel Adams writes about the right of a person to leave his/her country. He explicitly refers to the Vattelian hypotext of 1, XIX, § 220. This fragment, in turn, refers to Locke's *Second Treatise*, Chapter VIII, § 115. Moreover, in Samuel Adams's fragment, Locke is explicitly mentioned, and excerpts of Chapter VIII (*Of the Beginning of Political Societies*) are paraphrased. We are faced here with an obvious continuity of arguments and formulations between Locke and Vattel.
- In one footnote of his pamphlet (F6), Richard Bland mentions side by side the names of Yattel (sic) and John Locke regarding to the statement that men are born free and independent, but that when they enter into society they have to consent to government by a compact and ought to obey laws. Bland refers here to Vattel, Preliminaries § 4-5, which themselves are related to Locke, Chapter VIII, § 95 sq.

This analysis shows that the main colonial activists were fully aware that quoting Emer de Vattel means very often, whether directly or not, also quoting John Locke. The patriots did not fail to notice that the intertextual relationship between Vattel and Locke could serve their cause as a rich discursive resource. In Locke's work they found a powerful set of political arguments, including those vindicating rights to resist a despotic sovereign and to rebel against him. In Vattel's *Law of Nations* they found a remarkable articulation of these very same arguments, transposed from the language of philosophy into the concise, fluent, and clear language of law. With the Swiss jurist, Locke's Whig political philosophy migrated to another textual genre: a treatise on the law of nations.[46]

IV. THE VATTEL-ADAMS ARGUMENT

At the beginning of January 1776 two decisive events gave a powerful impulse towards independence. The first is the promulgation of the *Prohibitory Act* by the British Parliament on December 22nd, 1775. This act is conventionally understood to have "put the colonies out of the protection of the King."[47] Early in 1776 news of this parliamentary decision reached North America, leading the colonists to integrate it into their strategic thinking. For many of them the act delivered a fatal blow to any hope of reconciliation with the Crown and the United Kingdom. The patriots did not fail to note that British themselves, not the colonists, had initiated this deep break in the relations between the mother country and the colonies and that the king had precipitated the move towards independence.[48]

The second event was the publication in January 10th, 1776 of the first edition of Thomas Paine's pamphlet *Common Sense*. Paine was not a member of the Continental Congress, nor was he a lawyer, unlike most of the radical activists. His literary style was in sharp contrast to the legal or theological mode of

46 On the influence of Locke upon Vattel, *see* Jouannet, *supra* note 5; *see also* Richard Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant ch. 6 (1999).

47 *See, e.g.,* Preamble and Resolution of the Virginia Convention (May 15, 1776), http://avalon.law.yale.edu/18th_century/const02.asp (accessed May 25, 2017).

48 "For John Adams and others, the Prohibitory Act provided a wholly sufficient justification for Independence since the Americans had no obligation of allegiance to a King who publicly promised to treat them like enemy aliens." Pauline Maier, American Scripture: Making the Declaration of Independence 121 (1997).

arguing adopted by many advocates of the patriotic cause. Paine's pamphlet was a violent polemic against the British monarchy and a passionate plea for independence.

John Adams saw in the *Prohibitory Act* the ultimate confirmation that reconciliation with the British was no longer possible and that more active steps towards independence were required. The publication of *Common Sense* confirmed this conviction and aggravated popular resentment against Great Britain. By January 1776 the intellectual leadership of the patriotic movement had slipped out of the grasp of its usual protagonists John Dickinson, Samuel and John Adams, Richard Henry Lee, Patrick Henry, and Benjamin Franklin. The ideological tone adopted by Paine was populist, nourished by a sentiment of anger and contempt towards monarchy. It fully succeeded in hitting the nerve of the population, and its commercial success was extraordinary, selling between 120,000 and 150,000 copies within a few months.[49] The enlightened political elites of the colonies, most of them delegates to the Congress, lawyers, or diplomats, had no choice but to acknowledge this unexpected and challenging discursive turn.

John Adams considered the *Prohibitory Act* and *Common Sense* opportunities to reconquer ideological leadership and to develop a strategy of his own in the Continental Congress. Ideologically, Adams's reply to Paine was *Thoughts on Government.* Strategically, he increased his efforts to maneuver delegates of the Continental Congress towards instituting representative bicameral governments in each colony and, ultimately, towards independence. Adams had a double-barreled response to the challenges he faced, and his knowledge of Vattel's *Law of Nations* would turn out to be an important resource.

Thoughts on Government was written "as a corrective to the wildly egalitarian ideas of Thomas Paine's *Common Sense.*"[50] John Adams wrote this pamphlet following discussions he had had with friends and fellow delegates to the Continental Congress during winter 1776, in particular with George Wythe of Virginia, mentor and friend of Thomas Jefferson. The text initially appeared in the form of a letter to a friend. Richard Henry Lee, also a Continental Congress delegate from Virginia, was so impressed upon reading the manuscript that he asked John Adams to publish it. Adams accepted under the condition of anonymity. Eventually, the pamphlet was published anonymously in Philadelphia in April 1776.[51]

The *prima facie* object of *Thoughts on Government* was to reflect theoretically on the framing of constitutions and governments in the colonies—John Adams's most urgent concern. The pamphlet has long been considered one of the best pieces in eighteenth-century American political literature. According to Gordon Wood, *Thoughts on Government* "became the most influential work guiding the framers of

49 Robert A. Ferguson, *The Commonalities of Common Sense,* 57 Wm. & Mary Q. 465, 466 (2000).

50 Shaw, *supra* note 44, at 94.

51 In a memorandum dated July 22nd, 1811, John Adams notes that "Richard Henry Lee, who asked me to let him print [the letter]; to which I consented, provided he would suppress my name; for if that should appear, it would excite a continental clamor among the tories, that I was erecting a battering-ram to demolish the royal government and render the independence indispensable." John Adams, [untitled note] (July 22, 1811), *in* 4 The Works of John Adams, Second President of the United States 191 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856).

the new republics."[52] With this pamphlet Adams consolidated his fame as a leading expert on constitutional matters among the delegates in the Continental Congress.[53]

A single sentence in *Thoughts on Government* captures our attention, since we consider it a core discursive model for the most important political documents to be issued in the colonies during the decisive months of May and June 1776. Moreover, this sentence displays a fascinating intertextual complexity and density that includes four different hypotextual levels: the first layer relates this sentence to Paine's *Common Sense*; the second relates it to an act of the British Parliament; the third relates it to Vattel's *Law of Nations*, and the fourth to Hobbes's *Leviathan*. The pivotal sentence reads as follows:

> In the present exigency of American affairs, when by an act of Parliament we are put out of the royal protection and consequently discharged from our allegiance, and it has become necessary to assume government for our immediate security, the governor, lieutenant-governor, secretary, treasurer, commissary, attorney-general should be chosen by joint ballot of both houses.[54]

This sentence has two distinct parts. The first (until "immediate security") refers to the events that had just unsettled the relationship with Great Britain, mainly the promulgation of the *Prohibitory Act* and the military threat of British troops. Adams obviously accorded due weight to the hostile legislation and relentlessly insisted on this subject, making it the fulcrum of his discursive strategy during the subsequent months. He interchangeably spoke of the "prohibitory," "piratical," or "plundering" act, and yet of the "act of independency," which "throws thirteen colonies out of the royal protection, levels all distinctions and makes us independent in spite of our supplications and entreaties."[55]

The second part of the sentence (from "the governor" onwards) mirrors the theoretical developments on constitutional matters that form the main purpose of the pamphlet. It has no immediate link with the first one. In seeming disregard for concerns of consistency, Adams connects this technical claim on the requirement of choosing higher magistrates by means of a bicameral ballot with a more strategic claim (in the first part of the sentence) about the necessity of assuming governmental power in the colonies and thus proceeding to fully mobilize all patriots.

This sentence, which embodies his central argument in favor of breaking the ties with Great Britain, somewhat oddly appears amid a theoretical discussion of ideal forms of constitutional design in the future states—a fundamental and permanent concern of Adams.[56] We call this argument the Vattel-Adams argument.

52 Wood, *supra* note 6, at 568.

53 "By late March and April, as the pace toward independence accelerated, Adams had become Congress's resident constitutional expert." John E. Selby, The Revolution in Virginia, 1775-1783, at 113 (1988).

54 John Adams, Thoughts on Government (1776), *reprinted in* 4 The Works of John Adams, *supra* note 51, at 197.

55 John Adams to Horatio Gates (Mar. 23, 1776), *in* 1 The Works of John Adams, *supra* note 51, at 206–08. The same rhetoric was later echoed in the DI: "He [the King of Great Britain] has abdicated government here, by declaring us out of his protection and waging war against us." The Declaration of Independence para. 3 (U.S. 1776).

56 By pointing out this incongruence, we do not mean to discount the critical importance of Adams's constitutional concerns for the theoretical and practical aspects of the American Revolution, like the political and military mobilization of the colonies. We are indebted to an anonymous reviewer for this point.

The sentence begins with a reference to the most pressing problems of the colonies ("in the present exigency of American affairs"). It undoubtedly echoes a subdivision of Paine's *Common Sense* called "Thoughts on the Present State of American Affairs." The allusion to the *Prohibitory Act* ("when by an act of Parliament we are put out of the royal protection") paves the way for the following political argument: first, we, the colonists, are left without royal protection; second, it follows that we are no longer bound by any allegiance to the British Crown; third, it is necessary for our safety to constitute our own governments in each colony. This political reasoning, which, given its radical urgency, is very different from the sophisticated constitutional theory that had characterized the *Thoughts*, is directly inspired by the title of Chapter XVII of the first book of Vattel's *Law of Nations*:

> How a Nation may separate itself from the State of which it is a Member; or renounce its Allegiance to its Sovereign when it is not protected.

Many distinguished American historians have reiterated Adams's way of describing the *Prohibitory Act*'s content: the king had ousted the colonies from his protection, and the colonists passively suffered this royal will. The use of the grammatical passive clearly emphasizes the instance of suffering ("we *are put out* of the royal protection") as well as the king's active and divisive role.[57] Adams, using such language, provides a highly partisan interpretation of the British document, an interpretation that has left its mark on future generations.

Clearly, Adams and his revolutionary allies slanted the interpretation of the *Prohibitory Act* so as to make it subsumable to Vattel's case for separation. It is, therefore, understandable that the British historian Peter D. G. Thomas has called the *Prohibitory Act* "the most misrepresented measure at the time and the most misunderstood subsequently."[58]

The *Prohibitory Act* was only the second of two major political moves with respect to American affairs made by the British authorities in 1775. In Britain, it was officially referred to as *An Act to prohibit all Trade and Intercourse with the Colonies*. It is a very long and essentially technical document organizing the practical details of naval measures against the colonies. The first move was the king's *Proclamation for Suppressing Rebellion and Sedition* of August 23rd, 1775. Obviously, John Adams was referring to the *Proclamation* when speaking of the loss of protection and the ensuing denial of allegiance to the Crown. It looks as if Adams amalgamated the two documents, assigning the name of the second to the supposed meaning of the first.

57 It is remarkable how uncritically many historians have adopted Adams's interpretation. Kevin Phillips, for instance, speaks of the *Prohibitory Act* as "declaring the colonies outside of royal protection." Kevin Phillips, 1775: A Good Year for Revolution 432 (2012). Jack Rakove speaks of the events ensuing "[o]nce the king had definitively removed the colonists from his protection." Jack N. Rakove, The Beginnings of National Politics: An interpretive History of the Continental Congress 81 (1979).

58 Peter D. G. Thomas, Tea Party to Independence: The Third Phase of the American Revolution 1773-1776, at 297 (1991).

The first lines of the *Proclamation* read as follows:

> Whereas many of our subjects in divers parts of our Colonies and Plantations in North America, misled by dangerous and ill designing men, and forgetting the allegiance which they owe to the power that has protected and supported them (. . .).[59]

The king indeed had never ceased to view himself as the protector of his subjects, but he deplored that the colonists had forgotten their duty of allegiance to the power that had always been actively benevolent to them. With their rebellion, the disloyal colonists disqualified themselves from protection. The king reacted to the seditious machinations in North America by calling their authors rebels.

By suggesting that the king and Parliament had actively revoked protection from the colonies, John Adams reversed the substantive message of the *Proclamation*. Reformulated in terms of renouncing protection, the *Proclamation* was thenceforth read in light of the title of Vattel's Book 1, Chapter XVII, mentioned above. It looks as if Adams had seized the opportunity provided by the *Proclamation* and the *Prohibitory Act* to lift colonial concerns to the level of the law of nations, which, following the Vattel-Adams argument, authorizes separation from Great Britain (although Adams carefully avoids the term 'separation' used by Vattel). The Swiss jurist had previously expounded at length the core of his radical reasoning in Book 1, Chapter XVII, which deals with a nation "released from its engagements as soon as the protection fails" (1, XVII, § 200) and argues that people "being thus abandoned, become perfectly free to provide for their own safety and preservation in whatever manner they find most convenient" (1, XVII, § 202).

A fourth layer of intertextuality may be found in the sentence from *Thoughts on Government* under scrutiny. It is a layer that refers to a fragment in Hobbes's *Leviathan* that is very likely to have inspired Vattel himself:

> The Obligation of Subjects to Sovereign is understood to last as long, and no longer, than the power lasts, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished.[60]

It is not uncommon to find multi-layered intertextuality in colonial texts. However, in the present case, the intertextual network is not only exceptionally dense and complex, but also reflects a deep transformation in political theory that occurred in the wake of the cultural and political revolution under way in the Euro-Atlantic world. For the first time in the history of the law of nations, a right to separation was explicitly proclaimed. As a matter of fact, what Vattel develops in 1, XVII, §§ 200-202 is what one century later would be termed a *right to secession*. In spring 1776 the political question at stake was no longer one of a despot who should be replaced by a

59 *Reprinted in* William MacDonald, Documentary Source Book of American History 188, 189 (enlarged ed. 1916).

60 Thomas Hobbes, Leviathan pt. 2, ch. XXI, § 21 (Richard Tuck ed., rev. student ed., Cambridge Univ. Press 1996).

republican sovereign, but one of establishing a new state or, indeed, several new states seeking recognition by other states in the society of civilized nations. Legal theory had arguably never before allowed for such a right to separation/secession. Hugo Grotius, speaking of the relationship between the Netherlands and Spain, did not vindicate the separation of the United Provinces from Spain on the basis of a conditional right to separation. Rather, his justification was grounded in the argument that the Dutch Provinces had been sovereign states without discontinuity since the antique Batavian Republic and that they were therefore simply exercising their immemorial sovereignty.[61] What made the American revolutionary discourse into such an extraordinary precedent, as David Armitage expresses it, was the fact that it proved, "for the first time in modern history, that it is possible for new states to emerge."[62]

Writing on constitutional theory was only one part of John Adams's remarkable activism in spring 1776. The other, more thoroughly researched part was his assiduous commitment as a highly gifted delegate, very experienced on the parliamentary scene with all its procedures, possibilities, and limits. Undoubtedly one of the most remarkable features of his personality was his ability to build coalitions. In the Continental Congress, he successfully established a strong alliance with Virginian delegates, particularly with Richard Henry Lee and Thomas Jefferson. The cooperation with Lee, which gave rise to what James Henderson calls the "Adams-Lee faction,"[63] was decisive during these crucial months. It was Lee who encouraged Adams to publish his *Thoughts on Government*. Furthermore, it was Lee, seconded by John Adams, who on June 7th presented to the Continental Congress the famous *Lee Resolution*, declaring that the United Colonies should be free and independent states, that a confederation of the thirteen colonies should be established, and that treaties should be signed with foreign nations.

In spring 1776, when Adams published his *Thoughts on Government*, he no longer acted within the safe confines of legal debates, but was now immersed in a fierce political struggle with immediate military implications against the British power. When it no longer seemed possible to convince the adversary by means of the better argument, considerable efforts were taken to mobilize and unite activists of all the colonies in favor of independence. *Thoughts on Government*, while marking an important stage in this struggle, was soon superseded by other events in the political arena. But never did Adams's views budge from the very heart of the revolutionary movement heading towards independence.

Adams's activism increasingly concentrated on the Continental Congress. The most important political documents of May and June 1776 are either products of his pen or bear his mark. They incorporate, and thus institutionally reproduce, the Vattel-Adams argument as it was formulated in *Thoughts on Government.* In the Congress and, as Pauline Maier emphasizes, in provincial assemblies, congresses, and local conventions, a powerful political offensive in favor of independence was launched.[64] On May 15th, John Adams wrote to James Warren: "This Day the

61 Cornelis G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century, in* Hugo Grotius and International Relations 95, 101–02 (Hedley Bull et al. eds., 1992).

62 Armitage, *supra* note 19, at 192.

63 James H. Henderson, Party Politics in the Continental Congress (1974).

64 Maier, *supra* note 48, at 58–63.

Congress has passed the most important Resolution that ever was taken in America."[65] Adams was referring to the congressional adoption of a preamble, which he himself had written, to a resolution accepted on May 10th:

> Whereas his Britannic Majesty, in conjunction with the lords and commons of Great Britain, has, by a late act of Parliament, excluded the inhabitants of these United Colonies from the protection of his crown. . ..[66]

In this preamble John Adams remained faithful to the Vattel-Adams argument—the nexus between the ascertainment that the British Parliament had excluded the colonists from the protection of the crown and the claim that each colony should dissociate from British authority and set up their own governments. This premise and its conclusion were now no longer confined to the frame of a theoretical pamphlet, but became operational in an institutionally endorsed political document destined to have political consequences. According to Merrill Jensen, "the preamble John Adams wrote provided the theoretical foundation for revolution that Jefferson was to elaborate in the DI a few weeks later, but its immediate purpose was to justify a revolution in Pennsylvania."[67] Jensen's remark brings out very nicely John Adams's double role as theoretician and strategist. However, if the position elaborated so far is valid, Jensen's assertion must be complemented with evidence that the Vattel-Adams argument played a significant role in theoretically vindicating the separation from Britain.

May 15th, 1776, the date of the adoption of Adams's preamble, was also a decisive day for the discursive and political advancement of the revolutionary cause for a second reason. On that day the Virginia Convention also adopted a resolution instructing Virginian delegates to the Continental Congress to "propose to that respectable body to declare the United colonies free and independent States, absolved from all allegiance to, or dependence upon, the Crown or Parliament of Great Britain."[68] In strong resemblance to Adams's preamble discussed above, the resolution subsequently invokes the Vattel-Adams argument:

> By a late act all these Colonies are declared to be in rebellion, and out of the protection of the British Crown [. . .] we have no alternative left but an abject submission to the will of those overbearing tyrants, or a total separation from the Crown and Government of Great Britain, uniting and exerting the strength of all America for defence, and forming alliances with foreign Powers for commerce and aid in war [. . .]. [It is, therefore,] [r]esolved, unanimously, that the Delegates appointed to represent this Colony in General Congress be instructed to propose to that respectable body to declare the United Colonies free and independent States [. . .]. [69]

65 John Adams to James Warren (May 15, 1776), *in* 4 The Adams Papers: Papers of John Adams 186 (Robert J. Taylor ed., 1979).

66 John Adams, Preamble to Resolution on Independent Governments, *in* 4 The Adams Papers: Papers of John Adams, *supra* note 65, at 11.

67 Merrill Jensen, The Founding of a Nation: A History of the American Revolution, 1763-1776, at 684 (1968).

68 Preamble and Resolution of the Virginia Convention, *supra* note 47.

69 *Id.*

In contrast with its original version in *Thoughts on Government*, the Vattel-Adams argument is now framed as an explicit vindication of "a total separation," declaring the colonies "free and independent States" capable of "forming alliances with foreign Powers." Perhaps for the first time, a representative body of a colony deploys the terms *separation* and *free and independent States.* The language of the Resolution of the Virginia Convention is admittedly richer than the Vattel-Adams argument, but it is no less Vattelian in temper. Lexemes such as *free and independent States* lie at the very core of Vattel's *Law of Nations* and of his theory of an international society whose constituents are emphatically free and independent.[70]

It seems to us that David Armitage's remarks regarding the influence of Vattelian language on the American DI are also consistent with the spring 1776 documents at hand:

> No writer on the law of nations before Vattel had so consistently—and persistently—emphasized freedom, independence, and interdependence as the condition of states in their relations with one another. The authors of the American Declaration would soon adopt his repeated insistence that states were "free and independent" as the conception of their own states' condition.[71]

The direct political outcome of the May 10 resolution with Adams's preamble and of the May 15 Virginia Resolution was the *Lee Resolution* introduced in the Continental Congress by Richard Henry Lee on June 7th, 1776:

> *Resolved*, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.
>
> That it is expedient forthwith to take the most effectual measures for forming foreign Alliances.
>
> That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.[72]

With its wording, its institutional logic, and the rationalization of cutting all ties with Great Britain, Lee's resolution reiterates the Vattel-Adams argument. However, Kevin Philipps's assessment of the "pivotal Lee Resolution"[73] is accurate insofar as this resolution goes beyond the Vattel-Adams argument in one crucial respect. While the May 15 Virginia Resolution committed the Congress to declaring the colonies "free and independent states," Lee's Resolution brought the "plan of confederation" onto the political agenda. Now, the Whig ideology of an internal revolution was to be replaced by the ambition to become a unitary actor on the international stage.

70 Consider for example Prelim. § 4; § 15; § 23; bk.1, ch. I, § 4.

71 Armitage, *supra* note 20, at 40.

72 Resolution introduced in the Continental Congress by Richard Henry Lee (Virginia) proposing a Declaration of Independence (Lee Resolution) (June 7, 1776), http://avalon.law.yale.edu/18th_century/lee.asp (accessed May 25th, 2017).

73 Phillips, *supra* note 57, at 441.

For tactical reasons the final vote on Lee's resolution was postponed until July 1st, 1776.[74] However, the delegates agreed to establish a committee to draft a declaration of independence, appointing their colleagues Roger Sherman (Connecticut), Robert R. Livingston (New York), Benjamin Franklin (Pennsylvania), John Adams (Massachusetts), and Thomas Jefferson (Virginia) as committee members. The Virginian delegate, the youthful and promising Thomas Jefferson, was then designated to draft the declaration, and he soon began work in cooperation with his colleagues. On July 2nd, 1776, the Congress held the final vote on Lee's resolution and consequently on the definitive version of the DI.[75]

V. THOMAS JEFFERSON'S INTERTEXTUAL MASTERY

American historiography is replete with endeavors to identify the intellectual sources of the DI. Many historians, like Carl Becker and Ronald Hamowy, think that Locke exerted a dominant influence.[76] Garry Wills locates the DI's origins in Scottish philosophy of the first half of the eighteenth century.[77] According to Stephen E. Lucas, it is plausible that the Dutch *Plakkaat van Verlatinge* (1581) served as a template for Jefferson.[78] Pauline Maier settles the problem of sources by holding that "the sentiments Jefferson eloquently expressed were, in short, absolutely conventional among Americans of his time."[79] Finally, a few authors like Arthur Nussbaum, David Armitage, and Vincent Chetail indicate, albeit in rather general terms, the similarities between Vattel and the DI. Chetail, who rightly points out the immediate appeal the Lockean-Vattelian rationalization of the right to resistance had among the Founding Fathers, concludes that "[t]he Declaration of Independence echoes the ideas and even the words of Vattel."[80] Nussbaum, in his discussion of the influence of Continental *ius gentium* on English law and the American colonies, argues that the "spirit" of Vattel's work "was well in accordance with the principles of the Declaration of Independence."[81] And for Armitage, "it was no coincidence that the

74 For the sake of completeness, it should be added that a few days after the presentation of the Lee Resolution to the Continental Congress, another document with clearly Vattelian marks, the Virginia Declaration of Rights, drafted by George Mason, was adopted by the Virginia Convention on June 12th, 1776. At least two of its sixteen paragraphs contain Lockean and Vattelian hypotext. Paragraph I uses the Lockean lexemes "life," "liberty," "property" and the Vattelian ones "free and independent," "happiness," and "safety." Paragraph III also mixes Lockean and Vattelian lexemes: "happiness" and "safety," "government instituted for the common benefit of the people, nation or community." With Lee's Resolution and the Declaration of Rights, Virginia, along with Massachusetts, appears to have been a hotbed of recapitulating Vattel's language in spring 1776.

75 Phillips, *supra* note 57, at 433.

76 Carl Becker, The Declaration of Independence: A Study in the History of Political Ideas (1922); Hamowy, *supra* note 30.

77 Wills, *supra* note 30.

78 Stephen E. Lucas, *The "Plakkaat Van Verlatinge": A Neglected Model for the American Declaration of Independence, in* Connecting Cultures: The Netherlands in Five Centuries of Transatlantic Exchange 187 (Rosemarijn Hoefte & Johanna C. Kardux eds., 1994). In the *Plakaat* the United Provinces justified their independence from Spain. Lucas's argument is not in opposition to ours insofar as we do not analyze the whole Declaration.

79 Maier, *supra* note 48, at 135.

80 Chetail, *supra* note 7, at 283. *See also id.* at 258–62.

81 Nussbaum, *supra* note 7, at 160–61.

conception of statehood as independence found in the Declaration of Independence resembled Vattel's so closely."[82]

In the following, building on the comments of Chetail, Nussbaum, and Armitage regarding Vattel's role during the framing of the DI, we argue that the Swiss jurist was indeed one of its main inspirers as far as the first, second, and fifth paragraphs are concerned. We back our claim with textual analysis conducted as carefully as possible. In particular, we consider the DI a complex intertextual document that congenially reflects Jefferson's exceptional mastery of writing.

Jefferson used commonplace books to collect excerpts from various authors.[83] His most recent biographer, Kevin J. Hayes, indicates that he was anxious to condense every legal case and, accordingly, advised his students to "summarize legal theories and report of cases as briefly as possible."[84] The practice of summarizing and condensing, which constitutes a significant part of his mastery in the art of writing, was a source of enjoyment for him. He went so far as to develop a methodology for editing and organizing his legal commonplace books, which he was proud enough to propose, years later, to his grandson Thomas Jefferson Randolph:

> At first I could shorten it very little: but after a while I was able to put a page of a book into 2 or 3 sentences, without omitting any portion of the substance. Go therefore with courage and you will find it grows easier and easier. Besides obliging you to understand the subject, and fixing it in your memory, it will learn you the most valuable art of condensing your thoughts and expressing them in the fewest words possible. No style of writing is so delightful as that which is all pith, which never omits a necessary word, nor uses an unnecessary one.[85]

But beside his predilection for summarizing, Jefferson also displayed a remarkable ability in what Jay Fliegelman aptly calls "piecing-together,"[86] that is, the activity of penning a text from fragments of pre-existing texts.

His notebooks clearly were characteristic results of such compilation. Much later in his life, while he was President of the United States, Jefferson composed a book consisting of carefully chosen excerpts of the Gospels, which Fliegelman describes as "Jefferson's scissor-and-paste abridgement of the Gospels" and that gave rise to the book now known as the *Jefferson Bible.* The same can be said of another book by Jefferson entitled *Manuel of Parliamentary Practice* (1801), which, in Fliegelman's ironic phrase, is "an American work from a number of English works."[87]

Thus, the three distinctive stages in Jefferson's art of writing—choosing a fragment in a work, summarizing it, and finally inserting it into a set of other fragments picked from various authors—were a lifelong habit. It is hardly surprising that the DI itself appears to be a compilation, like the other works mentioned above. Jefferson's

82 Armitage, *supra* note 20, at 40–41.

83 "Commonplace books" denote a widespread student practise of keeping notebooks containing literary and legal quotations along with the owner's own annotations and comments.

84 Kevin J. Hayes, The Road to Monticello: The Life and Mind of Thomas Jefferson 89 (2008).

85 Thomas Jefferson to Thomas Jefferson Randolph (Dec. 7th, 1808), *in* Hayes, *supra* note 84, at 89.

86 *See* Jay Fliegelman, Declaring Independence: Jefferson, Natural Language, and the Culture of Performance 169 (1993).

87 *Id.* at 172–73.

writing habits earned him criticism and—as in the case of his countryman Richard Henry Lee—charges of plagiarism (of John Locke). David Armitage, referring to the DI, speaks of a remarkable "textual bricolage," using the famous expression coined by Claude Lévi-Strauss.[88] Jefferson's writing displays all the features of great mastery in using the resources of intertextuality.

What makes the DI such a fascinating document is its dual qualities of being simultaneously densely intertextual and, nonetheless, a masterly lyrical and passionate discourse fit to serve as the ultimate reference for a struggle of political liberation.

VI. THE DECLARATION OF INDEPENDENCE (I): FIRST PARAGRAPH

It is useful to begin reconstructing Vattelian hypotext in the DI by looking at an important connection between this document and the 1775 *Declaration by the Representatives of the United Colonies of North-America, Now Met in Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms* (hereafter DA). This latter document already bears Vattel's mark in its title:

July 6th, 1775 Declaration (DA)	Vattel
Declaration (. . .) Setting Forth the Causes and Necessity of Their Taking Up Arms	(. . .) to set forth the reasons which have induced us to take up arms (3, IV, § 52)

In the third book of *The Law of Nations*, which deals entirely with the law of war, Vattel dedicates a whole chapter (IV) to the problem of *declaring* war. There is little doubt that John Dickinson and Thomas Jefferson, the DA's drafters, were inspired by this chapter, as it fit their practical needs exactly: first, to warn British authorities that the colonists were determined to engage in an armed conflict, and second, to emphasize their unbroken hope in a reasonable settlement of the ongoing dispute. Vattel was inspired by the theory of declaring war along the tradition of "the Roman manner of proceeding" (3, IV, § 51). He greatly respected and admired the antique founders of this legal practice and its reaffirmation in the science of law, particularly by Hugo Grotius.[89] The ancient purpose of declaring war was to announce that war would soon be engaged and thus issue an ultimate warning. Accordingly, the DA hoped that "the supreme and impartial Judge and Ruler of the Universe (. . .) will dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war." The DA aspired to make clear that the American patriots were taking up arms in accord with the classical theory of Just War formulated by Gentili, Grotius, and Vattel. "Our cause is just," the authors of the DA claimed, specifying that "we esteem ourselves bound by obligation of respect to the rest of the world, to make known the justice of our cause." In so arguing, they closely followed Vattel's appeal for justificatory rigor: "(. . .) in order to be justifiable in taking up arms, it is necessary – 1. That we have a just cause of complaint (. . .)" (3, IV, § 51).

88 Armitage, *supra* note 20, at 50. *See also* Claude Lévi-Strauss, The Savage Mind 16–22 (George Weidenfeld & Nicholson Ltd. trans., 1966) (1962).

89 *See* Hugo Grotius, The Rights of War and Peace, bk. 3, ch. 3 (A.C. Campbell trans., 1901) (1625).

In spite of these efforts, the British were not impressed by the threat of war expressed in the DA. Instead of striving for an agreement with the colonists, the king and Parliament declared the colonies to be in rebellion and expedited their military preparations. With the rejection of the requests of the Continental Congress, the situation soon escalated to the point where the radical colonists saw no alternative to separation. In the DI the colonists' commitment to legal rigor, as embodied in the DA, combines with Jefferson's writing style to yield an interesting intertextual pattern. This conjunction is manifest in the first paragraph of the DI, which can be broken down into three distinct fragments, each possessing a specific hypotext. The first fragment reads:

> When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume. . .

Here, Jefferson silently quotes John Adams's sentence in *Thoughts on Government* discussed above. Consider first the most visible similarities between hypertext and hypotext. To be sure, Jefferson omits an important part of this argument, namely the reference to the late Act of Parliament and the ensuing loss of protection. Some lexemes are, however, identical:

DI 1st paragraph, 1st fragment (hypertext)	Vattel-Adams argument as in *Thoughts on Government* (hypotext)
when in	when by
it becomes necessary	it has become necessary
to dissolve the political bands	[we are] discharged from our allegiance
and to assume	to assume government

This fragment embodies the continuity between the DI and the political documents of spring 1776. It reintroduces a justificatory strategy that, by July 1776, had become fairly conventional.

The second fragment reads as follows:

> among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them,. . .

Here the comparison with Vattel's *Law of Nations* provides the following similarities:

DI 1st paragraph, 2nd fragment (hypertext)	Hypotext
among the powers of the earth	among the universal society of human race (Preliminaries § 11) among the powers of Europe (3, IV, § 52)
the separate and equal station	in whatever stations they are placed (. . .) for the purpose of forming a separate state or nation (Preliminaries § 11)
the laws of nature (. . .) entitle them	according to the laws of natural society (Preliminaries § 11)

In this second fragment, the hypotext is mainly located in § 11 of the Preliminaries of *The Law of Nations* entitled "[Society established by nature] and between nations." In the preceding § 10 Vattel examined the situation of individuals who leave the state of nature and commit themselves to form a society of men with rights and duties towards each other. In § 11, the Swiss jurist translates the same reasoning to nations, arguing that each free and independent nation enjoys rights and has compelling duties towards other nations. It is fully consistent with the very core of the DI's aspiration, that is, to justify the creation of a new state, fully recognized by the members of the community of free states and determined to enjoy the rights and perform the duties such membership entails.

The third fragment of the first paragraph reads:

> a decent respect to the opinion of mankind requires that they should declare the causes which impel them to the separation.

The similarities between the third fragment and Vattel's treatise are:

DI 1st paragraph, 3rd fragment (hypertext)	Hypotext
A decent respect to the opinions of mankind	to sight justice and the opinion of mankind (DA)
requires that they should declare the causes	it ought (. . .) to set forth the reasons (3, IV, § 52)
which impel them to the separation	which have induced us to take up arms (3, IV, § 52)

This third fragment, and eventually the whole first paragraph, contains a clear intertextual reference to the procedure of the declaration of war, as developed by Vattel (3, IV) and the classical school of the law of nations. On this point the DI also follows the DA, which is itself a declaration of war in the classical sense. Jefferson and the Continental Congress wanted to follow the established rules of the law of war and the law of nations, since their avowed goal was to be admitted as a nation among the nations, a state among the states. To gain admission, the colonists had to demonstrate readiness to comply with those rules, since, as Vattel has it, "[t]his is at present the constant practice among the powers of Europe" (3, IV, § 52). In the DI, it is no longer a question of reconciling with the British Crown. Rather, the priority is now the prospect of belonging to the society of free and independent states on an "equal station," with the same rights, obligations and dignity as any other. Vattel's *Law of Nations* and the DI stand in a dialogical, intertextual relationship. The voice of legal tradition infused revolutionary discourse and gave it desperately needed respectability.

VII. THE DECLARATION OF INDEPENDENCE (II): SECOND AND FIFTH PARAGRAPHS

Whereas the first paragraph of the DI was resolutely "Vattelian" in character and anchored in the law of nations, the second appears to be ideologically "Lockean." It has attracted most of the public and scholarly attention and has provided the textual basis for the position that Locke was the principal intellectual source of the DI.

We share the view that Locke's political philosophy imbues the second paragraph. However, there is strong textual evidence that the influence of the *Second Treatise of Government* (hereafter STG) on the framers of the DI was not immediate, but materialized in important ways through a rewriting of Locke's political philosophy from the vantage point of Vattel's treatise on the law of nations. The DI's second paragraph is the locus of an intertextual transformation in at least two respects: first, the transformation of a set of STG paragraphs by Vattel and, second, Jefferson's invocation of Vattel's interpretation of Locke ("Vattel's Locke").[90] Our task is now to substantiate three claims: first, that Jefferson was influenced by the STG; second, that Vattel was influenced by John Locke's political philosophy; third, that Jefferson, when drafting the DI, employed a Vattelian recast of Locke's philosophy. Table 2 provides a general synopsis of this intertextual interplay. It breaks up the second paragraph into seven distinct ideological themes, listing them in the same order as they appear in the DI and displaying for each the underlying Lockean and Vattelian hypotext.

Jefferson began drafting the second paragraph based on a selection of relevant passages from Locke's STG.[91] The details of this influence are listed in the second column of Table 2. It becomes apparent, on the one hand, that Jefferson borrowed all the themes of the second paragraph from the STG and, on the other hand, that these themes appear in the DI in the same order as in Locke's text.

Another noteworthy fact is that in more than half of these themes Jefferson drew on Chapter XIX, entitled *Of the Dissolution of Government*. In this chapter Locke develops at length his theory of resistance to tyranny, thus furnishing Jefferson with a valuable theoretical resource in his effort to indict King George III for being an absolute despot.

As for the relationship between Emer de Vattel and John Locke, new insights have recently emerged in legal history. Emmanuel Jouannet has highlighted Vattel's enthusiasm for the British constitution and his admiration for Locke's work. Our analysis fully confirms these points. Moreover, Vattel followed Locke not only in constitutional matters and regarding the right to resist tyranny, but also on the issue of colonization and on the theory of agricultural labor as a vindication of property.[92]

For his own needs as an author, Vattel succeeded in the task that Jefferson valued so highly, namely in summarizing Locke's long and sometimes difficult philosophical

90 Recall the connection between the Swiss jurist and the British philosopher established *supra*, when we presented the invocations of Vattel by various patriots between 1762 and 1776.

91 This claim is in line with a common strand of historical opinion regarding the significance of the STG for the young Thomas Jefferson. *See, e.g.,* Becker, *supra* note 75; Hamowy, *supra* note 30.

92 Jouannet, *supra* note 5, at 319–28. *See also* Alexis Keller, *Vattel, la tradition du droit des gens et la question des peuples autochtones*, 56 Rev. Suisse d'Histoire 387 (2006). All these Lockean themes appear in distinct places in Vattel's *Law of Nations*. For instance, bk. 1, ch. VII is devoted to the "Cultivation of Soil" and includes an explicit approval of the colonial establishment of North America; bk. 1, ch. XVIII, § 210 deals with the status of colonies in their relationship with the mother country; bk. 1, ch. IV, § 51 deals copiously with the problem of tyranny and echoes the three last chapters of the STG. We have already noted that a passage in bk. 1, ch. III, § 34 ("Of the legislative power, and whether it can change the constitution"), discussing the extent of the legislative power, directly draws on the STG ch. XI ("Of the Extent of the Legislative Power") and aroused great interest among the American patriots. *See also* Barbara Arneil, John Locke and America: The Defence of English Colonialism 187–94 (1996).

Table 2 Lockean and Vattelian hypotext in the 2nd paragraph of the Declaration of Independence

Declaration of Independence, 2nd paragraph (hypertext)	Locke's *Second Treatise of Government* (hypotext 1)	Vattel's *Law of Nations* (hypotext 2)
We hold these truths to be self-evident, that all men are created equal	This equality of men by nature (. . .) as so evident in itself (II, § 5)	Since men are naturally equal, and a perfect equality prevails in their rights and obligations (Preliminaries § 18)
that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness	the mutual preservation of their lives, liberties, and estates, which I call by the general name, property (IX, § 123)	the *end* or *object* of civil society is to procure (. . .) whatever constitutes happiness, —with the peaceful possession of property, (. . .) justice with security, (. . .) a mutual defence against all external violence (1, II, § 15)
That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed	the consent of the society; over whom nobody can have the power to make laws, but by their own consent (XI, § 134) The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society (XI, § 134)	Government is established only for the sake of the nation, with a view to its safety and happiness (1, III, § 31)
That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to	when the government is dissolved, the people are at liberty to provide for themselves, by erecting a new legislative, differing from the other, by the change of persons, or form, or both, as they shall find	a nation has an indisputable right to form, maintain, and perfect its constitution,—to regulate at pleasure every thing relating to the government (1, III, §31) If it happened then that the order established in this

(*Continued*)

Table 2 (continued)

Declaration of Independence, 2nd paragraph (hypertext)	Locke's *Second Treatise of Government* (hypotext 1)	Vattel's *Law of Nations* (hypotext 2)
them shall seem most likely to effect their Safety and Happiness	it most for their safety and good (XIX, § 220)	respect became destructive to the state, the nation would certainly have a right to change it by a new law (1, V, § 61)
Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed	People are not so easily got out of their old forms (XIX, § 223)	a people ought to be very circumspect (. . .), and never be inclined to make innovations without the most pressing reasons, or an absolute necessity (1, III, § 35)
But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism	But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people (XIX, § 225)	But we overlook the changes that insensibly happen by a long train of steps that are but slightly marked (1, III, § 30)
it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security	this doctrine of a power in the people of providing for their safety anew, by a new legislative, when their legislators have acted contrary to their trust (XIX, § 226)	[a free nation's] duty towards itself obliges it to take fresh methods to provide for its own security (1, XVII, § 200)

explanations into brief sentences, legal rules, and practical procedures. In this respect it was sometimes more convenient for Jefferson to turn his attention to Vattel, who had already summarized Locke,[93] but not slavishly. At times Jefferson followed the

93 Pauline Maier rightly emphasizes the weight of certain provisions of the *Virginia Declaration of Rights* for the DI's preamble. *See* Maier, *supra* note 48, at 133–34. As Mason's Declaration, as we have noted above, likewise exhibits a conglomerate of Lockean and Vattelian hypotext, it is possible that Jefferson's attention to Lockean and Vattelian themes may have been partly aroused by this document.

Lockean text more closely than the Vattelian one. The young Virginian delegate brilliantly "pieced together" fragments from either Locke or "Vattel's Locke."

Remarkably, Jefferson retained in the DI only two of the three rights mentioned by Locke, namely, life and liberty. He left aside the fundamental pillar of Locke's political philosophy—the right to property—but borrowed from Vattel the concept of *happiness*, typical of contemporary European philosophy and of the Swiss school of natural law. Jefferson, following a similar expression by George Mason in the June 12, 1776 Virginia Declaration of Rights, used the syntagma *pursuit of happiness*, enshrining it as a substantial fundamental right. Furthermore, he borrowed a number of stylistic formulas alternately from Locke and Vattel. Distinctly Lockean language ("*consent* of the governed," "a *long train of abuses*") is often immediately followed by formulations that are clearly Vattelian in tone ("Governments are *instituted*," "Government becomes *destructive*," "prudence (. . .) will dictate," "provide new Guards"). The three voices of Locke, Vattel, and Jefferson frequently meet and meld together as exemplified in the *long train* syntagma, where Jefferson, after having introduced a Lockean conditional clause ("when a long train of abuses") rejoins Vattel in the main clause ("it is their right, it is their duty (. . .) to provide new Guards").

The second paragraph of the DI establishes the conformity of American revolutionary ideology with Whig philosophy as expressed by John Locke in the STG, which, almost a century before, had provided the Glorious Revolution with strong theoretical justification. By reproducing its main arguments, the DI could claim to be in line with the ideological and political legacy of the revolution that brought William and Mary to the throne of England.

Towards the end of the last chapter of the STG, Locke raises the problem of who is entitled to judge whether a prince (or the legislature) is acting contrary to his mission. Locke answers that "[t]he people shall be judge" (XIX, § 240). In the subsequent paragraph (XIX, § 241), the English philosopher adds that, if it is not possible to find a legitimate "judicature" on earth, then "God in Heaven is judge." In the fifth paragraph of the DI, these Lockean elements reappear in a reformulated version that, once again, bears distinctively Vattelian marks.

> We, therefore, the *Representatives of the united States of America, in General Congress, Assembled*, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be *Free and Independent States*; that *they are Absolved from all Allegiance* to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as *Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do*. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.[94]

94 (Emphasis added).

The paragraph does not claim to speak in the name of the *people*. The signatories of the DI just claim to be the "Representatives of the united States of America, in General Congress, Assembled." In so doing, they recall Vattel:

> But it is of the utmost importance to observe, that this judgment [to withdraw itself from a tyrant's obedience] can only be passed by the nation, or by a body which represents it. . .. (1, IV, § 51).

The representatives of the colonies "solemnly publish and declare, That these United Colonies are, and of Right ought to be, Free and Independent States." In his third book on the law of war, Vattel, as mentioned above, includes a chapter on the necessity of declaring wars. He wrote that "it is necessary for a nation to publish the declaration of war" (3, IV, § 56), while Jefferson maintains the two dimensions of *publishing* and *declaring*, making only a slight stylistic transformation.

Further, the fifth paragraph invokes the core of Lee's Resolution, which Jefferson and the Continental Congress inserted in the DI along with its Vattelian language ("Free and Independent States" that are "Absolved from all Allegiance"). This final fragment canonizes Lee's postulations in the foundational document of the United States. Old and venerable British formulas that the king would use ("are, and of Right ought to be" or "is and ought to be") are also employed, formulas that conflate facts (*is*) and norms (*ought*). Insofar as these formulas connote the official language used by public power, the DI subtly aims to assert its authority. Finally, the representatives of the colonies assume the prerogatives and powers that are commonly due to any sovereign nation ("Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do").[95] Here they once again follow John Locke who, in the STG § 146, enumerates the "federative powers" of the commonwealth that enable it to interact with the surrounding world, namely the "power[s] of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the commonwealth." Vattel developed a similar theory quite in the tradition of Jean Bodin's classical political philosophy:

> If the nation has plainly and simply invested [the prince] with the sovereignty without limitation or division, he is supposed to be invested with all the prerogatives, without which the sovereign command or authority could not be exerted in the manner most conducive to the public welfare. These are called *royal prerogatives* or *the prerogatives of majesty* (1, IV, § 45, original emphasis).

Again, the DI displays a will to comply with international law and, in particular, with the law of war. As war (or separation from the mother country) necessarily entails legal consequences, the acts of "declaring" and "publishing" are instruments to notify people about changes to their legal status. This is one of the arguments put forth by Vattel to sustain a nation's obligation to "publish" its declaration of war "for the instruction and direction of her [its] own subjects, in order to fix the date of the rights

95 It is surprising that the lexemes *sovereign* and *sovereignty* are not used in the DI.

which belong to them from the moment of this declaration, and in relation to certain effects which the voluntary law of nations attributes to a war in form" (3, IV, § 56).

VIII. CONCLUSION: VATTEL'S UNSUSTAINABLE THEORY OF SECESSION

The Vattel-Adams argument was a central feature of the legal vindication of the American Revolution. It was based on *The Law of Nations* (1, XVII, § 200-202), where Vattel postulates a conditional right to separation. As examples of such a separation, the Swiss author proffered, on the one hand, the case of two Swiss cantons (Zug and Zurich) that had chosen to separate from the Habsburg Empire in the mid-fourteenth century, thus becoming independent members of the Helvetic Confederacy and, on the other hand, the case of the separation of the Helvetic Confederacy as a whole from the Habsburg Empire. These examples sounded all the more congenial to American patriots because Vattel presents them as successful gambits for nations to be taken seriously on the international level.

> The same reason has authorized the Swiss in general to separate themselves entirely from the empire, which never protected them in any emergency: they had not owned its authority for a long time before their independence was acknowledged by the emperor and the whole Germanic body, at the treaty of Westphalia (1, XVII, § 202).

The Swiss strategy of separating from the Habsburg Empire proved highly rewarding, since it brought the Helvetic Confederacy international recognition, which was exactly what the American colonists sought for themselves.[96] Such a strategic conception of separation flourished in times of medieval and feudal law when relations between the Empire and its parts were quite loose anyway. The American colonists applied this conception to their relationship with the British Empire. However, in post-Westphalian international society—what Onuf and Onuf call the "Vattelian world"[97]—where states are free, equal, and sovereign, a right to separation was no longer sustainable since sovereignty and territorial integrity are intimately linked. Coevally with the DI, when the patriots were beginning to build a sovereign state made of several sovereign states, when they initiated confederation to unite the colonies, when they were striving for international recognition, the Vattel-Adams argument became obsolete. It proved to be a single-shot weapon rather than a new legal principle, a theoretical instrument useful to vindicate severance from the British Crown, but not adapted to the needs of a newborn nation.

As a matter of fact, a theory of secession justifying the separation of part of a state could satisfy neither a young nation nor the Vattelian world. International law, consequently, has never codified Vattelian doctrine on this point, and a *right to separation* has never found either doctrinal or jurisprudential recognition. Instead, international

96 In his inaugural address of March 4th, 1797, John Adams declared: "The Confederation which was early felt to be necessary was prepared from the models of the Batavian and Helvetic confederacies, the only examples which remain with any detail and precision in history, and certainly the only ones which the people at large had ever considered." *See* 9 The Works of John Adams, *supra* note 51, at 105.

97 Onuf & Onuf, *supra* note 18.

law has incorporated, since the beginning of the 20th century, a *right to the self-determination of peoples*. Although notions of *loss of protection* or *separation* vanished from the language of American public law after July 1776, this did not mark the end of Vattelian influence on legal and political discourse in the United States.

Soon after the DI, the patriots set out to elaborate a charter to consolidate and organize the young confederation of the thirteen former colonies. The *Articles of Confederation* were long in the making; framing the thirteen articles lasted until November 1777, when the Congress agreed to them, and the document was not effective until Maryland ratified it on March 1st, 1781. What is important for our purpose is to underline the vitality of Vattelian language in the *Articles of Confederation*. Consider, for example, Article II, which is highly reminiscent of the Lee Resolution:

> Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.[98]

It easy to recognize the basic language of Vattel, with lexemes such as *sovereignty, freedom*, and *independence*. In the *Law of Nations* the Swiss jurist gives the following definition of the state:

> Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature, – nations or sovereign states are to be considered as so many free persons living together in the state of nature. (. . .) But the body of the nation, the state, remains absolutely free and independent with respect to all other men, all other nations, as long as it has not voluntarily submitted to them (Preliminaries §4).

With regards to confederations, Vattel, following a long tradition and ideas formulated by Samuel Pufendorf,[99] gave the following definition:

> Several sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil engagements which he has voluntarily contracted (1, I, § 10).

The *Articles of Confederation* severely impeded the development of a stable and well-ordered legal and political system, not least because the concept of sovereignty turned out to be deficient in a confederacy as conceived by Vattel and endorsed by the American states in the *Articles*. The decision to frame a new constitution was driven in important ways by the aspiration to clarify this basic question. Accordingly,

98 Articles of Confederation and Perpetual Union (Mar. 1, 1781), http://avalon.law.yale.edu/18th_century/artconf.asp. (accessed May 25, 2017).

99 Samuel Pufendorf, De jure naturae et gentium libri octo, bk. 4, ch. V, § XVIII (Carnegie ed. 1934) (1688).

the 1787 federal constitution offered a radical solution: it no longer spoke of freedom, sovereignty, and independence of the state (or the states). The Vattelian language of the Revolution and of the *Articles* disappeared from constitutional discourse. Instead, the political genius of the Federalists brought about a novel, sophisticated conception of *dual sovereignty*.

Indeed, the persistence of Vattelian notions of state sovereignty has been a lingering difficulty in American political life even after the adoption of the federal constitution. It is on the basis of concepts such as sovereignty, freedom, and independence—in the direct legacy of the Enlightenment thought that undergirds the DI and the *Articles of Confederation*—that the Southern states increasingly turned against the federal conception of the Union and ultimately proclaimed their secession from the Union. The advent of Continental ideas of the *self-determination of peoples* in the second half of the 19th century only exacerbated this conversion of Vattel's vindication of robust sovereignty into a highly centrifugal force, which, as Peter S. Onuf remarks, found expression in the fact that during the Civil War, "southern secessionists saw themselves as the true legatees of their Revolutionary fathers."[100]

Vattel provided American revolutionary discourse with the language and the conceptual tools to think of the colonies no longer as subordinate entities of the Crown, but as free and independent members of a global society of free and equal nations. After the Revolution, the Swiss jurist remained an important author in the United States, offering successive governments and the Supreme Court guidance on many sectorial problems in international law. This story is now well documented. But Vattel, unrecognized inspirer of the DI, deserves to be credited for his historical role in the American Revolution and its aftermath.

100 Peter S. Onuf, Jefferson's Empire: The Language of American Nationhood 75 (2000). On this point, *see also* Peter S. Onuf, *Federalism, Republicanism, and the Origins of American Sectionalism*, *in* All over the Map: Rethinking American Regions 11 (Edward L. Ayers ed., 1996); *cf.* Andrew Lenner, The Federal Principle in American Politics, 1790-1833 (2001).