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Articles

THE THREE TIERS OF FEDERAL LAW

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INTRODUCTION

According to the Constitution's Supremacy Clause, there are only three kinds of federal law: the Constitution, laws, and treaties.[1] Each of these kinds of federal law preempts inconsistent state law.[2] Chief Justice Marshall reminds us in *Marbury v. Madison* that "[i]t is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is *first mentioned*."[3] There is no question that the Constitution trumps both statutes[4] and treaties[5] in the event of conflict.[6] The superiority of the Constitution to statutes and treaties isn't just a point about the lexical ordering of the three kinds of federal law in the Supremacy Clause. The Constitution is higher law, made by We the People of the United States; statutes and treaties are not.

What about statutes and treaties in the event of conflict? It is a well-established canon of statutory interpretation that courts will construe a statute so as to not conflict with a treaty, if at all possible.[7] What if this isn't

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[1] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ."); *see also id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . ."). In the interest of precision, I will refer to the "Laws of the United States" as "statutes" wherever possible.

[2] *See* U.S. CONST. art. VI, cl. 2 ("[A]nd the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824) (stating that a federal statute preempts inconsistent state law); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435–36 (1819) (stating that the Constitution preempts inconsistent state law); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236–37 (1796) (explaining that a treaty preempts inconsistent state law).

[3] 5 U.S. (1 Cranch) 137, 180 (1803) (third emphasis added).

[4] *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 180; THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Debates of the Pennsylvania Convention, *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 517 (Merrill Jensen et al. eds., 1976) [hereinafter DHRC] (remarks of James Wilson, Dec. 7, 1787). For additional sources, see generally Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354 (2003); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

[5] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 16–17 (1957); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736–37 (1836); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a (1987) [hereinafter RESTATEMENT (THIRD)]; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1502, at 355–56 (1833) [hereinafter STORY'S COMMENTARIES].

[6] Whether an otherwise unconstitutional treaty would also be void as a matter of international law depends on the international law of treaties. *See* Vienna Convention on the Law of Treaties arts. 46, 47, May 23, 1969, 1155 U.N.T.S. 331, 343–44. For a useful discussion, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 188 (2d ed. 1996); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 814 n.47, 844–45, 902 n.464 (1995).

[7] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible

possible? If the lexical ordering of the Supremacy Clause is any clue, statutes are second, treaties are third, and statutes therefore enjoy superiority—"superior hierarchical status" or "lexical priority"[8]—to treaties as a matter of constitutional law. The critic might argue that this is making too much of a textual tidbit. Perhaps so. But it is worth asking the question, if only as a matter of constitutional curiosity, whether (i) statutes are superior to treaties; (ii) treaties are superior to statutes; or (iii) statutes and treaties are created equal, in which case we will need some rule of interpretation to give effect to one over the other in case of conflict.

According to the Supreme Court, statutes and treaties are created equal and, in case of conflict, the one last in time controls the other.[9] This so-called "last-in-time rule," set forth in a trinity of cases in the late nineteenth century, is a restatement of the legal maxim *lex posterior derogat priori*.[10]

In theory, the last-in-time rule operates in two directions.[11] In one direction, a later-enacted statute is superior to a prior treaty, and in the other, a later-enacted self-executing treaty[12] is superior to a prior statute. In prac-

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construction remains. . . ."); RESTATEMENT (THIRD), *supra* note 5, at § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). For a superb discussion, see Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1997). It is a less well-established canon of statutory (treaty) interpretation that courts will construe a treaty so as to not conflict with a statute, if at all possible. For traces of this converse-*Charming Betsy* canon, see Johnson v. Browne, 205 U.S. 309, 321 (1907); Bradley, *supra*, at 488 n.48 (listing other cases).

[8] These phrases come from a prior debate on the constitutional relationship between statutes and treaties. *See* Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524 (1987); Peter Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511, 512 (1987).

[9] *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam); *Reid*, 354 U.S. at 18; The Chinese Exclusion Cases, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Head Money Cases, 112 U.S. 580, 599 (1884); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870); RESTATEMENT (THIRD), *supra* note 5, at § 115(1)(a).

[10] *See* BLACK'S LAW DICTIONARY 931 (8th ed. 2004) (defining the term as the principle that "a later statute negates the effect of a prior one if the later statute expressly repeals, or is obviously repugnant to, the earlier law").

[11] The last-in-time rule also operates between laws of the same tier—e.g., between statutes and statutes and between treaties and treaties. This Article is concerned with the constitutional status of the last-in-time rule as applied to laws of different tiers—namely, between statutes and treaties. In the interest of concision, I will refer to the "last-in-time rule" instead of the "last-in-time rule between statutes and treaties."

[12] The Supreme Court has long distinguished between self-executing treaties (which have the status of domestic law when made by the President and Senate) and non-self-executing treaties (which have the status of domestic law only after Congress implements the treaty by statute). What is underappreciated in the literature, however, is that the line depends on matters of statutory (treaty) interpretation (as in whether the treaty purports to be self-executing or non-self-executing), as well as matters of constitutional law which impose constraints on self-execution. *See, e.g.*, Terlinden v. Ames, 184 U.S. 270, 288 (1902); *Whitney*, 124 U.S. at 194; Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); *see also* RESTATEMENT (THIRD), *supra* note

tice, however, the rule has operated almost entirely in one direction in the courts: later-enacted statutes are often superior to prior treaties, but it is the rare case where later-enacted treaties are superior to prior statutes.[13]

The last-in-time rule should be deeply troubling to both camps of foreign affairs scholars, "internationalists" and "nationalists."[14] Internationalists, as the label suggests, believe in the primacy of the international obligations of the United States, and that treaties should be superior to statutes as a matter of constitutional law.[15] This is the case in many European countries.[16] Internationalists would argue that the last-in-time rule risks harmonious international relations (or even war) if our most solemn international commitments may simply be broken as a matter of domestic law by later-enacted statutes whenever Congress so chooses.[17] As one internation-

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5, at § 111; HENKIN, *supra* note 6, at 198–204; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) [hereinafter Vázquez, *Four Doctrines*].

[13] *See, e.g.*, Cook v. United States, 288 U.S. 102, 118 (1933). Apart from judicial cases, the extent to which the last-in-time rule influences the practice of lawmaking and treaty-making is unknown.

[14] Alternatively, one might refer to "monists" and "dualists." The distinction is well-captured by Professor Henkin:

> Monists see national and international law as parts of a common legal system, with international law supreme. Dualists see national and international law as discrete legal systems, and national law determines whether to incorporate international law into national law in some ways and the place of international law in the hierarchy of the national legal system.

Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 415 n.19 (1989) [hereinafter Henkin, *Treaties in a Constitutional Democracy*]; *see also* Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530–31 (1999) [hereinafter Bradley, *Dualist Constitution*] (explaining differences between "monist" and "dualist" approaches to the relationship between international and domestic law).

[15] *See, e.g.*, Henkin, *Treaties in a Constitutional Democracy*, *supra* note 14, at 425–26; Pitman B. Potter, *Relative Authority of International Law and National Law in the United States*, 19 AM. J. INT'L L. 315, 316 (1925); Howard Tolley, Jr., *The Domestic Applicability of International Treaties in the United States*, 17 REV. JUR. U.I.P.R. 403, 404 (1983); Westen, *supra* note 8, at 516.

[16] *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 319–21 (1992). The French Constitution, for example, explicitly provides that "[t]reaties or agreements duly ratified or approved, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party." 1958 FR. CONST. art. 55 (William Pickles trans., 1960). However, certain treaties, including, for example, treaties touching legislative powers, require ratification or approval by Parliament before they can take effect. *See id.* art. 53.

[17] A prime example is *Breard v. Greene*, 523 U.S. 371, 373 (1998) (per curiam). Angel Breard, a national of Paraguay, challenged his death sentence on the ground that the State of Virginia had violated the Vienna Convention on Consular Relations, a treaty to which the United States and Paraguay are both parties. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The Vienna Convention provides in pertinent part that a national of one country "arrested or committed to prison or to custody pending trial or . . . detained in any other manner" by the authorities of another country has the right to confer with the consul of his country, if he so requests, and that "said authorities shall inform the person concerned without delay of his rights under this [provision]." *Id.* art. 36(1)(b), at 101. The treaty thus required Virginia to inform Breard upon his arrest that he had a right to consult with his consul, something Virginia did not do. Lower American courts rejected Breard's habeas corpus petition because it was procedurally barred, but the International Court of Justice found that sufficient grounds existed to hear the case and ordered the United States to "'take all measures at its disposal'" to stay the execution. *Breard*, 523 U.S. at 374. The Supreme Court refused to issue a stay of the execu-

alist scholar put it, "[i]t would mean that the United States regards its international commitments as having the force of [domestic] law only as long as it wishes to honor them."[18]

Nationalists, on the other hand, believe in the primacy of the domestic obligations of the United States, and that statutes should be superior to treaties as a matter of domestic law. They would point to the important structural differences between the processes of lawmaking and of treaty-making. It should go without saying that the lawmaking process is more democratic than the treaty-making process because the former requires the participation of all three political branches—the House of Representatives, the Senate, and the President—whereas the latter only requires the participation of the President and a two-thirds supermajority of the Senate.[19] Nationalists would argue that the last-in-time rule risks democratic illegitimacy if Congress's considered judgment in making statutes (possibly the entire United States Code) may be trumped by later-enacted treaties made by only the President and the Senate whenever they so choose. Isn't there something disturbing in allowing a few extra Senators, seventeen to be precise, to substitute for a majority of the entire House of Representatives in order to repeal an existing statute?

Curiously, no scholar, internationalist or nationalist, has seriously questioned the Supreme Court's last-in-time rule at length.[20] Professor Lobel, an internationalist, has written that the rule is "weakly reasoned," and that the birth of the rule in the nineteenth-century historical context of "absolute sovereignty, nationalism, congressional supremacy, and positivism . . . suggests the limitations on the rule."[21] Professor Paust, an internationalist, has painstakingly identified judicially created exceptions to the judicially

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tion, holding that Breard's treaty rights under the Vienna Convention were subject to the later-enacted Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, and that Breard's treaty rights were therefore procedurally barred. *See id.* at 376–77. For a good discussion of the case, its international implications, and its criticism by the international law academy, see Bradley, *Dualist Constitution*, *supra* note 14, at 532–38, 556–61.

[18] Westen, *supra* note 8, at 513.

[19] *See* U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . .").

[20] This Article began with a conversation with my first teacher of constitutional law during my third year of law school. In staring at the text of the Supremacy Clause, we wondered if the doctrine really was consistent with the document. Since that time, he has said a few words about the last-in-time rule and the legal relationship between statutes and treaties, consistent with this Article's thesis, in a short chapter on the Supremacy Clause that has come into print first. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 302–07 (2005). In just six pages on the subject, Professor Amar skillfully distinguishes the "horizontal effect" of treaties upon federal statutes and the "vertical effect" of treaties upon state law. After reviewing some of the principal historical evidence, including an "influential analysis" by James Wilson at the Pennsylvania ratifying convention, Amar suggests that treaties trump state law but not federal statutes, and that the legal superiority of statutes to treaties is the basis for a doctrine of non-self-execution. This Article is a constitutional proof for this shared proposition.

[21] *See* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1110 (1985).

created rule, but has failed to question the validity of the rule itself.[22] Professor Henkin, the doyen of internationalists, has observed that "the constitutional foundations of the 'equality' doctrine are not sturdy,"[23] and that the rule is based on a "misconstruction"[24] of the Supremacy Clause. He has nevertheless accepted the rule because "the consequences of that doctrine have not been disastrous,"[25] and because it "appear[s] to be firmly established."[26] Likewise, Professor Vázquez, also an internationalist, has reluctantly accepted the rule because it is "entrenched,"[27] although he claims that "there is strong (though not conclusive) evidence that the Framers intended that treaties be lexically superior to statutes."[28] Professor Westen, a super-internationalist, has written that treaties are (or should be) lexically superior to statutes.[29] Professor Yoo, perhaps the lone nationalist foreign-affairs scholar to write on this question, has recently suggested that, "[v]iewed in *Chadha*'s[[30]] light, the last-in-time rule violates the Constitution's structural principles of lawmaking, because it allows the treaty-makers to counteract an earlier action by the President, Senate, and House."[31] It is fair to say that neither internationalists nor nationalists would create such a rule if drafting a Constitution from scratch.[32]

Professor Henkin's fundamental observation is deeply correct: the last-in-time rule is poorly grounded as a matter of constitutional law. As a matter of text, history, and structure, the equality of statutes and treaties is, at best, dubious. We should be open to the possibility that the Supreme Court's last-in-time rule is, in a word, wrong.

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[22] *See* Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393 (1988).

[23] Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 872 (1987) [hereinafter Henkin, *A Century of* Chinese Exclusion *and Its Progeny*].

[24] Henkin, *Treaties in a Constitutional Democracy*, *supra* note 14, at 425.

[25] Henkin, *A Century of* Chinese Exclusion *and Its Progeny*, *supra* note 23, at 872.

[26] HENKIN, *supra* note 6, at 211.

[27] Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2204 n.206 (1999) [hereinafter Vázquez, *Laughing at Treaties*]; *see also* Vázquez, *Four Doctrines*, *supra* note 12, at 696 n.9; Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1114 n.126 (1992) [hereinafter Vázquez, *Treaty-Based Rights*].

[28] Vázquez, *Treaty-Based Rights*, *supra* note 27, at 1114 n.126 (citing Lobel, *supra* note 21).

[29] *See generally* Westen, *supra* note 8.

[30] INS v. Chadha, 462 U.S. 919, 951–59 (1983) (invalidating as unconstitutional a one-House legislative veto that "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch").

[31] John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2243 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*].

[32] One recent commentator defends the last-in-time rule on historical and normative grounds. *See* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

We should pay attention to this possibility now because the stakes are higher than ever before. The Founding generation's world order has changed in the most profound ways. As a consequence of tremendous globalization, the domestic and international legal orders are converging at a rapid pace.[33] The United States is no longer an isolated hinterland across the pond, but is the world's economic and military superpower. Contrary to the Founding generation's expectations, treaties are no longer rare or infrequent. They are increasingly regulating matters of domestic concern (ordinarily the province of statutes), with recent human rights treaties as prime examples.[34] Meanwhile, the statute-making bureaucracy shows no signs of shrinking. As the sheer quantity of statutes and treaties continues to multiply, the conflicts between statutes and treaties are only bound to increase in the twenty-first century. Indeed, there is probably no treaty of any significance that can be made today that does not interfere with some existing federal statute (or even another treaty).[35]

This Article explores the constitutional relationship between statutes and treaties and debunks the accepted judicial doctrine of the last one hundred and twenty years concerning the last-in-time rule.[36] If statutes and treaties are not created equal, then one of the following must be true as a matter of law and logic: either (1) statutes are superior to treaties, or (2) treaties are superior to statutes.

As the title indicates, the thesis of this Article is the lexical priority of the three tiers of federal law. Under this thesis, the Constitution is superior

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[33] For an excellent overview, see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1956–58 (1999) [hereinafter Yoo, *Globalism and the Constitution*]; *see also* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2219 (noting that "the growing internationalization of life is blurring the lines between foreign and domestic affairs").

[34] *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (providing for equal rights, a right against arbitrary arrest, a right to marriage, and restricted use of the death penalty, and establishing Human Rights Committee); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3 (providing for rights to self-determination and non-discrimination, and to economic rights including economic assistance); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000) ("[M]any modern treaties do not regulate relations between nations and do not confer specific reciprocal benefits on the parties. Instead, they are multilateral instruments, open for ratification by all nations and designed to regulate the *intra*-national relations between nations and their citizens.").

[35] To be sure, it may not be easy to identify conflict between a treaty and existing statutory law, given the sheer number of statutes (or to identify conflict between a treaty and other treaties, given the sheer number of treaties).

[36] To say that the last-in-time rule is wrong but settled is not to say that it is any less wrong because it is settled. Whether a judicial precedent should be overruled is a different question. The answer to that question depends, in part, on considerations of stare decisis in constitutional law, which needs to be sensitively and contextually applied to the precedent in question. *See infra* note 730 (discussing stare decisis in constitutional law and the last-in-time rule).

to both statutes and treaties, and statutes are superior to treaties.[37] The superiority of statutes to treaties is manifested in two directions. In one direction, a later-enacted statute is superior to a prior treaty as a matter of domestic law.[38] This is consistent with the last-in-time rule, the doctrine of the status quo.[39] In the other direction, a prior statute is superior to a later-enacted treaty (or, equivalently, a later-enacted treaty is inferior to a prior statute). In such a case, the treaty must be non-self-executing as a matter of domestic law.[40] This is a necessary consequence of the principle of lexical priority. In order for the treaty to have the force of domestic law, Congress must remove the conflict by amending or repealing the existing statute(s) so as to conform to the treaty.

The three tiers of federal law thesis provides for the proper resolution of statute-treaty conflict, which is a subject of increasing importance. But

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[37] The legal maxim for lexical priority is *lex superior derogat legi inferiori*. Logically, the lexical priority of statutes to treaties in no way implies that the scope of the treaty-making power is somehow limited to that of the lawmaking power—an issue that has generated substantial debate as of late. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley, *The Treaty Power and American Federalism*]; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) [hereinafter Bradley, *The Treaty Power and American Federalism, Part II*]; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) [hereinafter Golove, *Treaty-Making and the Nation*]; Thomas Healy, Note, *Is* Missouri v. Holland *Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998); Robert Knowles, Comment, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U. L. REV. 735 (2001).

[38] The United States would still be obligated as a matter of international law. *See* Vienna Convention on the Law of Treaties, *supra* note 6, art. 11, at 335.

[39] *See, e.g.*, Vázquez, *Laughing at Treaties*, *supra* note 27, at 2200 (noting this point). In addition, the political branches of the federal government have the power to violate treaties as a matter of domestic law. On the President's power to alter or cancel the domestic law effect of a treaty, see Goldwater v. Carter, 617 F.2d 697, 708–09 (D.C. Cir. 1979) (explaining that President has unilateral executive power to terminate treaties); RESTATEMENT (THIRD), *supra* note 5, § 339 (same); HENKIN, *supra* note 6, at 214 (same). On Congress's power to alter or cancel the domestic law effect of a treaty, see U.S. CONST. art. I, § 8, cl. 11 (providing that Congress shall have Power to "declare War"); Act of July 7, 1798, ch. 67, 1 Stat. 578 (congressional declaration that the treaty of alliance between the United States and France was void); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 61 (1825) [hereinafter RAWLE'S COMMENTARY] (stating that Congress possesses the power to "qualify, alter, or annul" a treaty as incident to Declare War Clause); Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 929–30 (1959) (arguing that Congress has power to annul the domestic law effect of any treaty under a general congressional foreign affairs power). For a thoughtful discussion of treaty termination generally, see David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1848 n.180 (1998) [hereinafter Golove, *Against Free-Form Formalism*].

[40] Non-self-executing treaties do not have the force of domestic law without implementing legislation. *See* RESTATEMENT (THIRD), *supra* note 5, § 111(4)(a) & cmt. h; Vázquez, *Laughing at Treaties*, *supra* note 27, at 2173. Without such legislation, they do not preempt inconsistent federal law, including for example, earlier-enacted treaties, and, under the last-in-time rule, earlier-enacted statutes. However, certain non-self-executing treaties, when made, may nevertheless preempt inconsistent state law. *See infra* note 142.

the thesis's implications extend well beyond the necessary correction of accepted judicial doctrine. The thesis has enormous implications for the scope of the treaty-making power, which is a subject of even more importance.

One of the longstanding debates among foreign affairs scholars is whether and when treaties must be non-self-executing—that is, when they need implementing statutes in order to have the force of domestic law.[41] This debate is implicitly about the scope of the *self-executing* treaty-making power. The conventional wisdom is that treaties may be self-executing,[42] except when they touch certain subjects within Congress's ostensibly exclusive legislative powers, such as Congress's power to appropriate money, declare war, punish criminal conduct, or raise taxes.[43] In these cases, treaties must be implemented by statute before they have the force of domestic law. I will refer to this orthodoxy as the "total self-execution" thesis. This thesis implicitly denies the superiority of statutes to treaties because statute-treaty conflict is not one of the cases requiring non-self-execution.

Professor Yoo has recently challenged the conventional wisdom with a bold claim based on a lengthy originalist narrative of text, history, and structure.[44] According to Yoo, the President and Senate may make treaties (and thereby create commitments as a matter of international law) on any subject within the treaty-making power, but treaties touching any of Congress's legislative powers must be non-self-executing.[45] In other words, all

[41] Whether a treaty *may* be non-self-executing is a separate question, and also one that is the subject of debate by foreign affairs scholars. In other words, a treaty, by its terms, may stipulate that implementing legislation will be required before the treaty has the force of domestic law. This is within the treaty-makers' prerogative. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), discussed *infra* Part III.C.4. Alternatively, the United States treaty-makers may attach "non-self-execution" reservations, understandings, or declarations (RUDs) to a treaty. *See* discussion *infra* Part V.C.3.

[42] Treaties may have the force of domestic law, but may not be judicially enforceable. For example, they, like statutes, may not create a private cause of action. Or, they, like statutes, may not be justiciable for any number of standard reasons (standing, ripeness, mootness, etc.), but particularly because they, unlike statutes, inherently relate to the quintessential political question: foreign affairs. *See* Baker v. Carr, 369 U.S. 186, 211–14 (1962). Much of the existing scholarship is woefully imprecise in defining self-executing treaties as judicially-enforceable treaties, and, conversely, in defining non-self-executing treaties as judicially-unenforceable treaties unless and until implemented by statute. *See, e.g.*, Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587–95 (2003); Vázquez, *Treaty-Based Rights*, *supra* note 27, at 1117. Judicially enforceable federal law is just a subset of federal law. For a similar observation, see Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2249 n.119. Accordingly, this Article will not refer to self-executing and non-self-executing treaties in the context of judicial enforceability.

[43] The conventional wisdom has long been that treaties that (i) appropriate money, (ii) declare war, (iii) punish criminal conduct, and (iv) raise taxes are non-self-executing, and hence must be implemented by Congress before they have the force of domestic law. *See infra* notes 126–32 and accompanying text.

[44] *See* Yoo, *Globalism and the Constitution*, *supra* note 33; Yoo, *Treaties and Public Lawmaking*, *supra* note 31.

[45] *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2220 ("Treaties cannot receive judicial enforcement in areas that fall within Congress's Article I, Section 8 powers, without statutory im-

of Congress's legislative powers are presumed to be exclusive powers vis-à-vis the treaty-making power. Because virtually every treaty touches subjects within Congress's legislative powers, non-self-executing treaties become the rule and self-executing treaties the exception. This understanding of the treaty-making power has the practical result of making Congress[46] a necessary third wheel in the treaty-making process. I will refer to this view as the "total non-self-execution" thesis. This thesis implicitly affirms the superiority of statutes to treaties because no treaty could ever trump a statute.[47]

In separate responses to Professor Yoo's article, Professors Flaherty and Vázquez have carefully assailed Professor Yoo's bold claim, and have strongly defended the conventional wisdom of total self-execution.[48] According to Flaherty, who is no "law office historian,"[49] the pre-Founding and Founding history flatly contradicts Yoo's total non-self-execution thesis.[50] According to Vázquez, textual, doctrinal, and structural considerations all but rule out Yoo's total non-self-execution thesis.[51]

Unfortunately, despite over 300 pages of scholarly exchange on the subject of non-self-executing treaties, Professors Yoo, Flaherty, and Vázquez all fail to convince. If statutes are superior to treaties, as the three tiers of federal law thesis maintains, then treaties that conflict with statutes must be non-self-executing. Accordingly, the conventional wisdom of total self-execution defended by Flaherty and Vázquez is wrong because the

plementation by Congress. To do otherwise would allow an executive power—treatymaking—to trump Article I's vesting of the legislative power solely in Congress."). Under Yoo's view, only those treaties not touching any of Congress's legislative powers—arguably "purely executive" treaties and treaties addressing matters otherwise reserved to the states—may be self-executing. *See, e.g.*, Yoo, *Globalism and the Constitution*, *supra* note 33, at 2091–94; Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2220, 2223–24.

46 Statutory implementation of a treaty requires the consent of the House and Senate, and the President (absent supermajority override). For this purpose, the Senate and President may be different than the Senate and President who made the treaty.

47 Indeed, in many ways, Yoo's thesis is a stealth critique of the last-in-time rule. *Cf.* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2189–90, 2207. For Yoo's terse discussion of the last-in-time rule, see Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2242–43 & n.89.

48 *See* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) [hereinafter Flaherty, *History Right?*]; Vázquez, *Laughing at Treaties*, *supra* note 27.

49 *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 556–68 (1995) (criticizing scholars for sloppy historical scholarship in making claims about the meaning of constitutional provisions).

50 *See, e.g.*, Flaherty, *History Right?*, *supra* note 48, at 2151 ("Sometimes the conventional wisdom really is wise. Internationalist scholars who have assumed that the founding generation meant what it said in the Supremacy Clause have no reason to fear close historical scrutiny. What does not withstand such scrutiny is the revisionist account offered [by Professor Yoo]."); *id.* at 2099 n.19 ("[T]he more I have looked into this area the more I am convinced that a Founding understanding that treaties would be self-executing is about as clear as most matters in this period can be.").

51 *See* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2169–73 (textual analysis); *id.* at 2173–98 (doctrinal analysis); *id.* at 2199–2203 (structural analysis).

category of treaties that must be non-self-executing is incomplete. On the other hand, Yoo's revisionist claim of total non-self-execution is on to an important idea that statutes are superior to treaties—hence his requirement that a treaty touching any of Congress's legislative powers undergo the lawmaking process before having the force of law. But Yoo's thesis simply goes too far by denying virtually every treaty the force of domestic law without implementing statutes.

The rule of non-self-execution that is a necessary consequence of the three tiers of federal law thesis is what I will refer to as the "partial non-self-execution" thesis.[52] Under this thesis, treaties must be non-self-executing when they conflict with existing statutes. In this case, Congress has the power to amend (or not) existing statutory law so as to remove the conflict and bring the treaty to life as a matter of domestic law.[53] The partial non-self-execution thesis is a minimum rule of non-self-execution; it is to be added to other cases where non-self-execution is properly required as a matter of text, history, and structure, such as when treaties touch certain subjects within Congress's exclusive legislative powers (consistent with the conventional wisdom).[54] Importantly, in developing a theory of non-self-execution, the partial non-self-execution thesis affirms that treaties may be self-executing when they touch subjects within Congress's non-exclusive legislative powers (also consistent with the conventional wisdom). In other words, the scope of the self-executing treaty-making power is not completely limited by Congress's legislative powers, as Yoo's total non-self-execution thesis would have it.

Although the partial non-self-execution thesis is largely consistent with the conventional wisdom, it has the potential to revolutionize modern understandings of the scope of the treaty-making power. If statute-treaty conflict is all but unavoidable today, the partial non-self-execution thesis leads to the surprising conclusion that the power of the President and Senate to make self-executing treaties is considerably smaller than ever before and that Congress's implementation of treaties is generally required in order for treaties to have the force of domestic law.

In what follows, I fill in the details of the three tiers of federal law thesis and the partial non-self-execution thesis, two sides of the same coin.

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[52] This thesis might also be called the "partial self-execution" thesis, but I wish to stress the importance of the superiority of statutes to treaties generally—a point which seems to be best captured by emphasizing the concept of non-self-execution.

[53] An alternative conception would be that Congress has a constitutional duty to implement treaties made by the President and Senate that are non-self-executing for the reason described in the text. I reject this view, with one possible exception for a last-in-time treaty of peace, which is the highest grade of treaty, and which involves circumstances of necessity and the power of treaty-makers to make peace. *See* discussion *infra* Part IV.C.

[54] This Article does not propose to identify all of the cases where non-self-execution is constitutionally required.

Part I summarizes the rise of the last-in-time rule, revealing its utter weakness as a matter of constitutional law. As we shall see, the judicial doctrine arose in a trinity of cases involving later-enacted statutes and prior treaties—cases where the last-in-time rule and the three tiers of federal law thesis yield the same answer. Critically, none of these cases supplies any legal reasoning for the last-in-time rule. If the Supreme Court's rule is correct, it is in spite of its jurisprudential foundations.

The remainder of the Article sets forth the argument for the superiority of statutes to treaties under the Constitution. Parts II-IV present the originalist narrative in logical sections of text, history, and structure.[55]

Part II discusses the textual argument. This Part sets forth the three tiers of federal law thesis by parsing the Supremacy Clause and exploring other patches of constitutional text and structure to determine whether the ordering of the Supremacy Clause demonstrates a principle of lexical priority. It then briefly sets forth the textual foundation for the partial non-self-execution thesis, which is a necessary consequence of the principle of lexical priority. This Part concludes with a critical assessment of the textual arguments of Professors Vázquez and Yoo with respect to the doctrine of non-self-executing treaties, in order to demonstrate that their theories are not required by the constitutional text.

Part III turns to the historical argument. Because this Part challenges both the prevailing narrative defended by Professor Flaherty and Professor Yoo's revisionist narrative, it follows rigorous standards of historical proof, with a view to resolving the historical question. This argument is all the more important because it is history, more than text and structure, that does the yeoman's work in determining the constitutional relationship between statutes and treaties. This Part is not for the historical faint-of-heart: it presents the relevant evidence at length, shows how the history supports the partial non-self-execution thesis, and explains why Flaherty and Yoo each miss the mark when it comes to reading the history.

The argument is presented in three chronological sections, which build on each other: pre-Founding history, Founding-history, and post-Founding history. The first section on pre-Founding history reviews British constitutional history for possible use as a historical precedent supporting a rule of partial non-self-execution. The second section on Founding-history presents evidence from the Philadelphia Convention of 1787, commentaries during the ratification struggle by Federalists and Anti-Federalists, and debates from state ratifying conventions, where the Founders discussed the

[55] Because the debate between Yoo, Flaherty, and Vázquez has been waged almost completely in originalist terms, I take a similar tack here. Whether or not one believes in originalism as a methodology of constitutional interpretation, it is a good starting point for originalists and non-originalists alike. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1126 (2003) (discussing value of originalist inquiry for non-originalists); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 207–08 n.7 (1985) (similar).

treaty-making power and the doctrine of non-self-execution and specifically considered the relationship between statutes and treaties. The third section on post-Founding history canvasses the early experience under the Constitution for understandings about the doctrine of non-self-execution.

Part IV briefly considers the structural argument, showing how arguments from constitutional structure buttress arguments from text and history to demonstrate the superiority of statutes to treaties. Finally, Part V presents the modernist narrative—namely, the assumed superiority of statutes to treaties in our modern constitutional order by the courts and political branches alike.[56] As an empirical matter, the three tiers of federal law thesis helps to explain the following three modern phenomena: (a) the steady displacement of the treaty by the congressional-executive agreement as the dominant form of international agreement-making, (b) the increasing judicial presumption of non-self-execution in treaty interpretation, and (c) the recent practice by U.S. treaty-makers of attaching "non-self-execution" reservations, understandings, or declarations (RUDs) to treaties. Part V also offers some thoughts on codifying the three tiers of federal law thesis by statute and by treaty. Relative to the conventional wisdom and competing theories, the three tiers of federal law thesis best coheres with both the Constitution's original meaning as well as our modern constitutional experience.

I. THE RISE OF THE LAST-IN-TIME RULE

We begin with the accepted judicial doctrine. In order to appreciate the utter weakness of the last-in-time rule as a matter of constitutional law, it is necessary to examine its jurisprudential foundations. This is a particularly important exercise for those readers who believe that the Supreme Court's interpretations of the Constitution are entitled to heavy deference and should not be rejected without serious justification as a matter of first principles. Accordingly, this Part summarizes the Founding-era principle and the Supreme Court's (mis-)adoption of that principle to statutes and treaties.

A. The Founding-Era Principle

Alexander Hamilton laid the foundation for the last-in-time rule in his discussion of the federal judiciary in *The Federalist No. 78*,[57] a point that

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[56] As Professor Ackerman would say, this is my attempt "to clap with both hands." I am right-handed, and my right-hand in constitutional law is an originalist one. *See, e.g.*, Kesavan & Paulsen, *supra* note 55 (discussing project of determining the Constitution's original meaning). Nevertheless, I seek to persuade in this Article, and a left-handed (no pun intended) discussion of our modern constitutional experience adds much force to originalist conclusions.

[57] Hamilton's exposition of the last-in-time rule, in turn, tracks the work of seventeenth-century political theorist Samuel von Pufendorf, *see* 2 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO, ch. 17, at 83 (James Brown Scott ed., Frank Gardner Moore

has generally gone unnoticed by scholars who have addressed the rule. According to Hamilton, "[i]t not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression."[58] The judge's first step is to reconcile the two contradictory laws, if possible: "So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other."[59] In such a case, Hamilton explains, "[t]he rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first."[60]

Hamilton is quick to point out, however, that the last-in-time rule is a "mere rule of construction, not derived from any positive law but from the nature and reason of the thing."[61] It is a "rule not enjoined upon the courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law."[62] Most importantly, the last-in-time rule, as a rule of construction, only applies "between the interfering acts of an *equal* authority."[63] The rule for determining between two contradictory laws of *unequal* authority is quite different:

> But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. *They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority*; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.[64]

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trans., 1927) (1682), and the work of eighteenth-century lawyer William Blackstone, *see* WILLIAM BLACKSTONE, 1 COMMENTARIES *59 [hereinafter BLACKSTONE'S COMMENTARIES].

[58] THE FEDERALIST NO. 78, *supra* note 4, at 468 (Alexander Hamilton). Importantly, the last-in-time rule is a canon of statutory interpretation for the *implied* repeal of a prior statute, not *express* repeal. On the judicial presumption against the implied repeal of statutes, see Morton v. Mancari, 417 U.S. 535, 551 (1974); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1040–42 (1989).

[59] THE FEDERALIST NO. 78, *supra* note 4, at 468 (Alexander Hamilton).

[60] *Id.*

[61] *Id.*

[62] *Id.* Indeed, to the extent the legislature may fashion rules of statutory interpretation for the courts, as Hamilton explicitly suggests, it would seem that the legislature could fashion a so-called "first-in-time" rule to give preference to a prior law in the absence of any repealing clause or clear expression in the subsequent law. Such a rule would be a sort of clear statement rule, shifting the onus of repeal upon subsequent lawmakers, but would likely not be an unconstitutional restriction on their ability to repeal prior law.

[63] *Id.*

[64] *Id.* (emphasis added).

This explanation is an incisive legal argument for the judicial review of federal statutes (and, for that matter, treaties). But it is also an explanation with general application: the act of a superior is always to be preferred to the act of an inferior, irrespective of time. If statutes are superior to treaties, the last-in-time rule cannot apply.

B. The Supreme Court's Doctrine

The Supreme Court's last-in-time rule is set forth in a trinity of cases following Reconstruction: the *Head Money Cases*,[65] *Whitney v. Robertson*,[66] and *The Chinese Exclusion Case*.[67] As a matter of judicial doctrine, we should remember that the last-in-time rule articulated in these cases first surfaced some one-hundred years removed from the Founding, and is not entitled to the same deference as early congressional, executive, or judicial interpretations of the Constitution.[68] Because of the stakes involved for internationalists and nationalists alike, these cases merit close analysis to both facts and legal principles. Each of these cases involved later-enacted statutes and prior treaties—the precise circumstance where the last-in-time rule and the three tiers of federal law thesis yield the same answer. Only once, in *Cook v. United States*,[69] has the Supreme Court squarely applied the rule to the converse circumstance of a later-enacted treaty and a prior statute.[70] The question to ask in reading these four cases is whether the Supreme Court's last-in-time rule is constitutionally grounded.

1. Head Money Cases*.*—Decided in 1884, the *Head Money Cases*[71] involved customs duties collected pursuant to a federal statute regulating immigration. The plaintiffs objected to this statute as violating prior treaties. The Supreme Court disagreed, but did not decide the case on this ground. Instead, the Court concluded that, to the extent of conflict, a later-enacted statute is superior to a prior treaty.

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[65] 112 U.S. 580 (1884).

[66] 124 U.S. 190 (1888).

[67] 130 U.S. 581 (1889). In addition to these cases, the executive branch addressed the last-in-time rule in a number of opinions by the Attorney General to the President. These opinions consistently took the position that the last-in-time rule would apply and were given in the context of later-enacted treaties and prior statutes. These opinions suffer from the problem of executive branch bias in favor of treaty-making, one of the President's most important foreign affairs powers, and are hence not presented here. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 647 (1952) (Jackson, J., concurring) (declining to accept executive branch interpretations of executive power, in this case where the interpreter was the President himself). For the principal opinions, see 13 Op. Att'y Gen. 354 (1870); 6 Op. Att'y Gen. 440 (1854); 6 Op. Att'y Gen. 291 (1854); 5 Op. Att'y Gen. 333 (1851).

[68] *See* Kesavan & Paulsen, *supra* note 55, at 1164–68 (collecting sources for this proposition).

[69] 288 U.S. 102 (1933).

[70] For one possible exception involving special circumstances of war and peace, see *infra* note 695 (discussing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)).

[71] *Head Money Cases*, 112 U.S. at 580.

In its reasoning, the Court applied its then-recent precedent of *The Cherokee Tobacco*,[72] a case involving the supremacy of a later-enacted statute to a prior treaty with an Indian tribe, and referred to a series of cases from lower federal courts involving the supremacy of later-enacted statutes to prior treaties.[73] Turning to the issue at hand, the Court observed that treaties are in "the *same category* as other laws of Congress" according to the Supremacy Clause, quoting this Clause as support.[74] This was the full extent of the Court's analysis on this important point of constitutional law.

The consequence was that a treaty is no more "irrepealable or unchangeable" than a statute, which Congress could obviously amend or repeal at any later date.[75] According to the Court, there is nothing in a treaty's "essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity" with respect to amendment or repeal by a later-enacted statute.[76]

Notably, the Court buttressed these points by highlighting the different constitutional processes for lawmaking and treaty-making, concluding that the House of Representatives' participation in lawmaking "certainly does not render [the law] less entitled to respect in the matter of [the treaty's] repeal or modification than a treaty made by the other two."[77] But then the Court further observed that "[i]f there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate."[78] Although the Court stated that statutes and treaties are in "the same category," there is something related to the more democratic process of lawmaking versus treaty-making supporting the superiority of statutes to treaties, irrespective of time.[79]

2. Whitney v. Robinson.—Decided four years later in 1888, *Whitney v. Robinson*[80] also involved customs duties pursuant to a federal statute.

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[72] *Id.* at 597 (citing 78 U.S. (11 Wall.) 616 (1870)).

[73] *Id.* at 597–98 (citing *In re* Ah Lung, 18 F. 28 (C.C.D. Cal. 1883); Bartram v. Robertson, 15 F. 212 (C.C.S.D.N.Y. 1883), *aff'd*, 122 U.S. 116 (1887); Ropes v. Clinch, 20 F. Cas. 1171 (C.C.S.D.N.Y. 1871); *In re* Clinton Bridge, 5 F. Cas. 1060 (C.C.D. Iowa 1867), *aff'd*, 77 U.S. (10 Wall.) 454 (1870); Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1862)).

[74] *Id.* at 598 (emphasis added).

[75] *Id.* at 599.

[76] *Id.*

[77] *Id*.

[78] *Id*.

[79] For similar observations, see Golove, *Against Free-Form Formalism*, *supra* note 39, at 1851 n.184 (reading the *Head Money Cases* as "suggesting that if Supremacy Clause were absent from Constitution, lack of participation of House in treatymaking would militate in favor of according superior status to laws"); Henkin, *A Century of* Chinese Exclusion *and Its Progeny*, *supra* note 23, at 870 (stating that the *Head Money Cases* "might be construed as hinting that statutes also have supremacy over treaties generally, that an act of Congress would prevail over a treaty even if the treaty were later").

[80] 124 U.S. 190 (1888).

The plaintiffs, who sought to import sugar from the Dominican Republic, argued that the treaty with the Dominican Republic provided for the duty-free importation of sugar because it contained a most-favored-nation clause (the treaty with Hawaii provided for duty-free importation of Hawaiian sugar). The Court's decision in favor of the United States rested on dual grounds of treaty interpretation (which denied the plaintiff's interpretation) and the last-in-time rule (which assumed the plaintiff's interpretation and the resulting statute-treaty conflict).[81] Because the statute was passed after the treaty was made, the Court held that the statute must trump the treaty.

The Court's analysis on the constitutional relationship between statutes and treaties was simply the following: "By the constitution, a treaty is placed on the *same footing*, and made of *like obligation*, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and *no superior efficacy* is given to either over the other."[82] Once again, the Court's conclusion was based on the Supremacy Clause. Thus, in case of statute-treaty conflict, the "one last in date will control the other, provided always the stipulation on the subject is self-executing."[83] This is the Supreme Court's first use of the actual words of the last-in-time rule. Importantly, in stating that later-enacted (self-executing) treaties may trump prior statutes, *Whitney* went well beyond the *Head Money Cases*, where the Court simply sought to establish that treaties are not immune from amendment or repeal by later-enacted statutes.

3. The Chinese Exclusion Case.—Decided one year later in 1889, *The Chinese Exclusion Case*,[84] the most well-known of the last-in-time rule trinity of cases and a foundational case in immigration law, involved a writ of habeas corpus by Chae Chan Ping who alleged unlawful detention aboard a ship in the San Francisco harbor. Ping, a Chinese subject, was a laborer in the United States from 1875 to June 2, 1887. He left San Francisco for China on that day, having in his possession a certificate issued pursuant to statutes of 1882 and 1884 entitling him to return to the United States. On October 1, 1888, Congress amended these statutes to prohibit Chinese laborers from entering the United States, including those who had valid certificates entitling them to return.

One of the several delicate issues in the case involved the violation of prior treaties with China by the later-enacted statute. The Court held that

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[81] Given the alternative ground for the decision, the Court's analysis of the legal relationship between statutes and treaties is unnecessary.

[82] *Whitney*, 124 U.S. at 194 (emphasis added).

[83] *Id.* This aspect of the holding is dicta, since the treaty at issue was non-self-executing as a matter of treaty interpretation. *See id.* at 195 (stating that "when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed").

[84] 130 U.S. 581 (1889).

statute-treaty conflict did not render the statute void.[85] The Court observed that "[t]he treaties were of *no greater legal obligation* than the act of Congress" and that "*no paramount authority* is given to one over the other" according to the Supremacy Clause, quoting the Clause as support.[86] Like the *Whitney* Court, the Court concluded a treaty is subject to amendment or repeal by statute and that "the last expression of the sovereign will must control."[87]

4. Cook v. United States.—Decided in 1933 near the end of Prohibition, *Cook v. United States*[88] remains, surprisingly, the only Supreme Court case involving the last-in-time rule between a later-enacted treaty and a prior statute. Since then, it has only been applied in a small handful of cases in the lower courts.[89]

The case involved the Mazel Tov, a British vessel, and conflicts between three laws: a tariff statute of 1922, a treaty with Great Britain of 1924, and a tariff statute of 1930, which was a verbatim re-enactment of the first statute. The purpose of the first statute, enacted during Prohibition, was to stop the importation (smuggling) of liquors into the United States by foreign (especially British) vessels. The 1922 and 1924 statutes allowed the Coast Guard to stop and board any vessel within "four leagues" (twelve miles) of the nation's coast for inspection and forfeiture. The Coast Guard boarded the Mazel Tov at a point eleven and a half miles from the coast, found liquor that was not included in the vessel's manifest, fined Frank Cook, the vessel's master, and seized the goods and vessel.

Cook claimed that the seizure was unlawful because the treaty of 1924 modified the prior statute of 1922 by changing the Coast Guard's authority regarding British vessels from "four leagues" to "the distance which 'can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.'"[90] This meant that the Mazel Tov, with speed not exceeding ten miles per hour, was boarded illegally. Cook claimed that the statute of 1930, a verbatim re-enactment of the first statute, intended to keep the "one hour" provision in effect for British vessels.

In deciding the case, the Court first addressed the conflict between the treaty of 1924 and the prior statute of 1922. Finding the treaty provision to

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[85] *Id.* at 600.

[86] *Id.* (emphasis added).

[87] *Id*.

[88] 288 U.S. 102 (1933).

[89] *See* Ackermann v. Levine, 788 F.2d 830, 840 (2d Cir. 1986) (finding Rule 4 of Federal Rules of Civil Procedure superseded by later-enacted Hague Convention); United States v. Ray, 423 F.2d 16, 21 (5th Cir. 1970) (claiming that Outer Continental Shelf Lands Act is superseded by later-enacted Geneva Convention on the Continental Shelf, but finding no conflict); Power Auth. of N.Y. v. Fed. Power Comm'n, 247 F.2d 538, 548 (D.C. Cir. 1957) (declining to find later-enacted treaty reservation void on basis of conflict with existing statute).

[90] *Cook*, 288 U.S. at 110.

be self-executing (in that the treaty did not call for legislative action), the Court concluded that the later-enacted treaty "superseded" the prior statute.[91] The source for this conclusion? "Whitney v. Robertson, 124 U.S. 190, 194."[92] The Court then addressed the conflict between the treaty of 1924 and the later-enacted statute of 1930. Though this statute was a verbatim re-enactment of the first statute (and would hence have the same conflict with the treaty), the Court concluded that the prior treaty "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed," with doubts resolved by its pre-enactment practice.[93] Thus, the Court employed the last-in-time rule when faced with the conflict between a later-enacted treaty and a prior statute, but then discarded that rule in favor of a clear statement rule to resolve the same conflict with respect to the same treaty and a yet later-enacted statute.[94]

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In the two hundred and eighteen years since the adoption of the Constitution, there have been, remarkably, less than a dozen cases decided by the Supreme Court addressing the last-in-time rule between statutes and treaties.[95] Given tremendous globalization and the proliferation of treaties and statutes, conflicts between statutes and treaties are bound to sharply increase. What, then, of the juridical status of an infrequently applied rule that is of increasing importance?

As a rule of constitutional law, the last-in-time rule rests on the poorest of foundations. In establishing the rule, the Court merely repeated the Supremacy Clause for the proposition that statutes and treaties are created equal. But as we shall see in the next Part, as a matter of textual argument,

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[91] *Id.* at 118–19.

[92] *Id.* at 119.

[93] *Id.* at 119–20. The case is often cited for this proposition of statutory interpretation. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 178 n.35 (1993); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).

[94] The political context of the case, decided just months before the end of Prohibition, should not be overlooked. *See, e.g.*, HENKIN, *supra* note 6, at 210 (stating that the tariff statute of 1930 "had notoriously low estate, was widely disregarded, and was about to be repealed"); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 424–25 (4th rev. ed. 1957) (stating that the case is a "prize example of judicial strong-arm methods, for which, I suspect, the Department of State was primarily responsible"). As a matter of statutory interpretation (not constitutional law), the Court's conclusion is perhaps not as hopelessly inconsistent as it may seem, given the judicial presumption against the implied repeal of statutes. *See supra* note 58.

[95] In addition to the several cases discussed in the text, there are a handful of other cases, mostly related to immigration in the late nineteenth century, and one recent per curiam decision, all involving later-enacted statutes and prior treaties. Although the last-in-time rule is repeated in this handful of cases, it has formed the basis of decision in an even smaller number of cases. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam).

the Supremacy Clause is far from clear that statutes and treaties are created equal. The only statute-treaty equality clearly established by the Supremacy Clause is that statutes and treaties are equally supreme over contrary state law. Indeed, there is much to suggest, in the Clause and elsewhere, that statutes and treaties are not created equal, and that statutes are superior to treaties irrespective of time, just as the Constitution is superior to both.

The last-in-time rule is judicial *ipse dixit*, with no textual, historical, structural, or other legal argument, which makes it about as satisfying as if the Supreme Court's opinion in *Marbury v. Madison* merely recited the Supremacy Clause in order to establish the supremacy of the Constitution to statutes.[96] If the rule is correct, it is in spite of its jurisprudential foundations. Unless the Supreme Court is an infallible interpreter of the Constitution, something beyond the mere recitation of the Supremacy Clause is necessary when the Constitution is at stake. A constitutional argument would even be proper given the growing importance of the rule. To this constitutional argument we now turn.

II. PARSING THE CONSTITUTIONAL TEXT

The logical starting point for the inquiry into the constitutional relationship between statutes and treaties is the text of the Constitution. The key clause is the Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[97]

In what follows, this Part first addresses the textual argument for the three tiers of federal law thesis—that statutes are superior to treaties. This is the principle of lexical priority. It then addresses the textual foundation for the partial non-self-execution thesis—that treaties conflicting with existing statutes do not have the force of domestic law unless and until implemented by Congress. This is a necessary consequence of the principle of lexical priority. This Part concludes with a critical assessment of the textual arguments of Professors Vázquez and Yoo with respect to the doctrine of non-self-execution, in order to demonstrate that their theories are not required by the constitutional text.

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[96] This is, of course, exactly what Chief Justice Marshall did not do in *Marbury*, where he elegantly addressed legal arguments for judicial review and (too) much else besides. For an amusing tale, see Michael Stokes Paulsen, Marbury's *Wrongness*, 20 CONST. COMMENT. 343 (2003).

[97] U.S. CONST. art. VI, cl. 2; *see also id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . .").

A. The Three Tiers of Federal Law Thesis

The Supremacy Clause identifies five classes of law, consisting of three classes of federal law (the "Constitution," the "Laws of the United States," and "Treaties") and two classes of state law (the "Constitution or Laws of any State"). The Clause explicitly indicates that federal law is supreme over contrary state law by making federal law the "supreme Law of the Land," and by providing that it shall be so "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Unsurprisingly, the purpose of the Supremacy Clause, as its name indicates, is to establish a "federal" rule of legal priority.[98]

When it comes to other important questions, though, including the various kinds and hierarchy of federal law, the Supremacy Clause is not so explicit. For example, the Supremacy Clause does not explicitly indicate whether certain kinds of federal law (administrative agency regulations, customary international law, executive agreements, executive orders, and federal common law, to name a few) are "Laws of the United States" which are the "supreme Law of the Land" under the terms of the Clause—important questions in our modern constitutional order. Remarkably, the Clause does not explicitly indicate that the Constitution is superior to treaties—a point left to necessary implication.[99] Most importantly for present purposes, the Clause does not explicitly indicate the hierarchical relationship between statutes and treaties.[100]

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[98] *See* THE FEDERALIST NO. 33, *supra* note 4, at 204–05 (Alexander Hamilton) (discussing supremacy of statutes to state law); THE FEDERALIST NO. 44, *supra* note 4, at 286–87 (James Madison) (discussing supremacy of federal law to state constitutions); 3 STORY'S COMMENTARIES, *supra* note 5, §§ 1830–34, at 693–98. It was not a particular innovation for treaties to purport to prevail over contrary state law; the innovation was to enshrine the principle of supremacy in a constitution ordained and established by the People. *See* THE FEDERALIST NO. 38, *supra* note 4, at 238 (James Madison). For a useful discussion of the background of the "federal" rule of legal priority, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 235–54 (2000).

[99] It is unnecessary for the Constitution to specify that it is superior to other law because it is higher law made by We the People—and the only such law. Federal Farmer, a leading Anti-Federalist, famously misread the Supremacy Clause to suggest that treaties are superior to the Constitution because the phrase "which shall be made in Pursuance thereof" does not modify the subsequent phrase "all Treaties made, or which shall be made, under the Authority of the United States." *See* Letter IV of Federal Farmer (Oct. 12, 1787), *reprinted in* 14 DHRC, *supra* note 4, at 43–44. But as Publius, the leading Federalist, pointed out in a different context, the former phrase was merely inserted for caution, and was unnecessary to express the superiority of the Constitution to laws—an argument that extends rather easily to the superiority of the Constitution to treaties as well. *See* THE FEDERALIST NO. 33, *supra* note 4, at 205 (Alexander Hamilton). In addition, the "in Pursuance" phrase could not logically apply given the supremacy specially granted to treaties made before the adoption of the Constitution and hence not pursuant to it. *See also* Reid v. Covert, 354 U.S. 1, 16–17 (1957) (Black, J.) (noting this obvious textual point).

[100] *See, e.g.*, Henkin, *A Century of* Chinese Exclusion *and its Progeny*, *supra* note 23, at 871 ("The supremacy clause does not address the hierarchy of various forms of federal law; it only declares the supremacy of every kind of federal law over state law."); Yoo, *Treaties and Public Lawmaking*, *supra* note

This is not to say, however, that the Supremacy Clause does not *implicitly* address the hierarchy of the three classes of federal law. Chief Justice Marshall relied on the implicit hierarchy of the Clause in *Marbury v. Madison*[101] in his argument for the doctrine of judicial review of federal law. He reminds us that "[i]t is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is *first mentioned*."[102] It is also worth observing that statutes are mentioned second and treaties third.

The implicit hierarchy of the Supremacy Clause is not limited to the three classes of federal law: the Clause similarly puts state constitutions before state laws.[103] Indeed, the entire Clause seems to have a hierarchical gradient. Of the five classes of law listed by the Supremacy Clause in order—the Constitution, statutes, treaties, state constitutions, and state laws—the legal superiority of the first ordered in every pair is beyond question, except for the statute-treaty pair.

It certainly does not follow from that fact that statutes and treaties are both classes of federal law that they are created equal with respect to each other. The only statute-treaty equality clearly established by the Supremacy Clause is that statutes and treaties are equally supreme over contrary state law. As Professor Henkin has aptly observed:

> That each kind of federal law is supreme over state law does not at all suggest that the different kinds of federal law are of equal stature. (Three and two are both supreme over one, but three does not equal two). In fact, our jurisprudence clearly negates the notion that all forms of federal law are of equal stature; although the supremacy clause lists the Constitution, laws, and treaties all as law of the land and supreme to state law, in our jurisprudence the Constitution prevails over other federal law.[104]

31, at 2249 ("What should be clear, upon a cursory reading of the [Supremacy] Clause, is that it fails to address the relationship of the treaty power and the legislative power.").

[101] 5 U.S. (1 Cranch) 137 (1803).

[102] *Id.* at 180 (emphasis added). Marshall completed the textual point from the Supremacy Clause by adding that it is "not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, [that] have that rank [of the supreme law of the land]." *Id.* Of course, the lexical priority of the Supremacy Clause is not the main reason why the Constitution is superior to statutes, but is one of many arguments in the arsenal. The point is apparent in *Marbury* itself, where Marshall illustrates the fundamental point with a number of other textual and structural arguments. *See id.* at 176–80.

[103] *Cf.* AMAR, *supra* note 20, at 303 ("Everywhere else in the supremacy clause, textual priority signified legal superiority.").

[104] Henkin, *A Century of* Chinese Exclusion *and Its Progeny*, *supra* note 23, at 871–72; *see also* Henkin, *Treaties in a Constitutional Democracy*, *supra* note 14, at 426 ("There is no evidence that, in that article [the Supremacy Clause], the Framers also addressed the equality of treaties and United States statutes.").

Unfortunately, Professor Henkin does not follow through with the full implications of his logic.[105] If the ordering of the Supremacy Clause is any clue, the Constitution is a "three," statutes are a "two," and treaties are a "one." As a matter of textual interpretation, the ordering of a clause may be a good (and sometimes strong) indication of legal hierarchy.[106] A few short constitutional examples are illuminating.[107]

Consider the Appointments Clause of Article II which provides for the appointment of "Ambassadors, other public Ministers and Consuls."[108] In *The Federalist No. 42*, James Madison explains that ambassadors come first because they are the "highest grade" of public ministers.[109] Although Madison does not explicitly address whether public ministers are superior to consuls, the plain import of his commentary is that they are.[110]

Consider also the Impeachment Clause of Article II which provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[111] It should go without saying that treason comes first in the list of impeachable offenses because it is the most serious crime against the polity, and that brib-

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[105] This is perhaps because he wishes that treaties would be legally superior to statutes as a matter of constitutional law. *See* Henkin, *Treaties in a Constitutional Democracy*, *supra* note 14, at 426 ("The equality of statutes and treaties, then, is not, in my view, what the Framers intended, and seems not to satisfy either democratic principle or international need. . . . If the Supreme Court could be persuaded to reconsider 100 years of jurisprudence, we ought to look hard at European constitutions, some of which provide for the supremacy of international law and of treaties.").

[106] The argument that follows is a species of textual argument known as "organization-chart textualism." *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 797 n.197 (1999) (discussing "[a]nother brand of holistic textualism [that] squeezes meaning from the Constitution's organization chart"); Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 696–98 (2002) (discussing "locational textualism" of John Marshall and Abraham Lincoln). This species of textual argument is the subject of work, first developed as a student and forthcoming eventually. *See* Vasan Kesavan, Organization-Chart Textualism (unpublished manuscript, on file with author).

[107] The principle is not limited to the text of the Constitution. For example, one might point to the ordering of other prominent texts familiar to the Founding generation, such as the Ten Commandments. *See Exodus* 20:3–17. The First Commandment arguably comes first because it is the most important: "Thou shalt have no other gods before me." The ordering of other commandments also suggests hierarchy. For example, "Thou shalt not kill" (Six) comes before "Thou shalt not commit adultery" (Seven) comes before "Thou shalt not steal" (Eight). For a prominent legal example, see THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.").

[108] U.S. CONST. art. II, § 2, cl. 2.

[109] *See* THE FEDERALIST NO. 42, *supra* note 4, at 264–65 (James Madison).

[110] *See id.* (stating that "[t]he term ambassador, if taken strictly, . . . comprehends the highest grade only of public ministers" but that "[u]nder no latitude of construction will the term comprehend consuls"); *see also* 3 STORY'S COMMENTARIES, *supra* note 5, § 1519, at 372–73.

[111] U.S. CONST. art. II, § 4.

ery comes second because it is a "lower" crime than treason but a "higher" one than "other high Crimes and Misdemeanors."[112]

In addition to these two clause-bound arguments, we might also consider the overall organization of the Constitution itself. The Constitution puts statutes before treaties in other ways that suggest the legal superiority of statutes to treaties. For example, statutes come before treaties, literally. The process of lawmaking is located in Article I and that of treaty-making in Article II. Of the three Articles creating the legislative, executive, and judicial departments, the Constitution's organization chart literally puts Congress *primes inter pares*—first among equals.

Other holistic textual and quasi-structural considerations also suggest the legal superiority of statutes to treaties. The Supremacy Clause has a "democratic gradient" in listing the three tiers of federal law.[113] The Constitution is higher law made by We the People—it is more democratic than any other law. So too, statutes are higher law than treaties because they are made by the House of Representatives, Senate, and President, whereas treaties are made by the President and Senate alone.[114] The House of Representatives, as the legislative branch standing closest to We the People, occupies a special place in our constitutional structure.[115] Indeed, of the several sections creating Congress, the Constitution places the House of Representatives first and before the Senate.[116]

Although these textual arguments do not conclusively establish the superiority of statutes to treaties, there is a distinct "plus," or thumb on the scale, in favor of the three tiers of federal law thesis as a matter of textual argument. Of course, it remains *possible* that statutes and treaties are created equal, which, if true, would justify the last-in-time rule. It would not be easy to express the legal equality of statutes and treaties in the Supremacy Clause without making it longer. One of these two classes of federal law must be listed first, and the two classes are listed in alphabetical order. Yet, *possible* meaning does not mean *probable* meaning. Based on multiple textual considerations ranging from clause-bound arguments to intratextual arguments to quasi-structural holistic arguments, the superiority of statutes

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[112] *Cf.* U.S. CONST. art. I, § 6, cl. 1 (referring to "Treason, Felony and Breach of the Peace"); *id.* art. IV, § 2, cl. 2 (referring to "Treason, Felony, or other Crime").

[113] *See* AMAR, *supra* note 20, at 300. Indeed, the Constitution's organization reflects a democratic gradient in listing the legislative, executive, and judicial departments in Articles I, II, and III, respectively. There is a logical gradient here as well, with legislation preceding execution preceding adjudication.

[114] The adoption of the Seventeenth Amendment in 1913 made the process of treaty-making more democratic by making the Senate the representatives of the People and not of the States, *see* U.S. CONST. amend. XVII, cl. 1. However, the process of treaty-making is still significantly less democratic than the process of statute-making. *See* discussion *infra* Part IV.A.

[115] On the special place of the House of Representatives in our constitutional structure, see AMAR, *supra* note 20, at 64–69.

[116] *See* U.S. CONST. art. I, § 2 (House of Representatives); *id.* art. I, § 3 (Senate).

to treaties is the *better answer* when choosing among the three logical possibilities of statute superiority, treaty superiority, or statute-treaty equality.[117]

B. The Partial Non-Self-Execution Thesis

1. Textual Foundation.—According to the partial non-self-execution thesis, treaties that conflict with existing federal statutory law do not have the force of domestic law unless and until implemented by Congress. Critically, this rule of non-self-execution is a necessary consequence of the principle of lexical priority. Professor Westen has defined this principle as providing that, "[a]s between two legal norms, A and B, A has lexical priority over B—or 'superior' hierarchical status—if a court with jurisdiction over both is required to give effect to A over B."[118] In this case, B, the legal norm with inferior hierarchical status, is "not law." If the conflict between A and B is removed, however, B is "law."[119]

If the three tiers of federal law thesis is correct, the text of the Constitution itself specifies a rule of partial non-self-execution. This would be a minimum rule of non-self-execution; it is to be added to other cases where non-self-execution is properly required, based on other considerations of text, history, and structure.[120] Q.E.D.

2. Textualism and the Non-Self-Execution Debate.—Unfortunately, in their recent debate on the doctrine of non-self-execution, Professors Yoo and Vázquez have paid no heed to the principles of lexical priority and their implications for the doctrine of non-self-execution as a matter of interpreting the constitutional text.[121] Their debate has focused on whether the text of the Supremacy Clause (and of the Constitution generally) permits *any*

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[117] Once we see that the Supremacy Clause does not require statute-treaty equality in the event of conflict, there is no textual support for the last-in-time rule; there is only textual possibility. At the very least, there is no textual support for the supremacy of treaties to statutes, irrespective of time. It would be a very odd construction, in the Founding generation's world as well as our own, for the first tier of federal law to be superior to the second and third tiers, but for the third to be superior to the second.

[118] Westen, *supra* note 8, at 512.

[119] An analogy to statutes helps to illustrate the point. If A is the Constitution and B is an unconstitutional statute, the statute is "not law." If, however, the conflict is removed (say by constitutional amendment), the statute is "law." This assumes that the ontological status of an unconstitutional statute is that it remains on the statute books, capable of coming to life. *Cf.* Jawish v. Morlet, 86 A.2d 96 (D.C. 1952) (affirming principle that "a law once declared unconstitutional and later held to be constitutional does not require re-enactment by the legislature in order to restore its operative force").

[120] For a possible exception to this minimum rule of non-self-execution, see *infra* Part IV.C (discussing possible exception for last-in-time treaties of peace).

[121] *But cf.* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1966 n.49 (passing footnote discussing supremacy of Constitution to treaties and stating that "the Constitution contemplates that treaties are subject to the Constitution, and to federal statutes as well, rather than vice versa"); Vázquez, *Laughing at Treaties*, *supra* note 27, at 2207 (identifying issue of "hierarchy of the forms of federal law" but distinguishing it from issue of "self-execution").

doctrine of non-self-execution.[122] A critical assessment of their textual arguments illustrates the weaknesses of their respective theories.

We begin with Professor Vázquez's textual arguments respecting the total self-execution thesis. In his view, the mandatory wording of the Supremacy Clause—that "*all* Treaties made, or which shall be made, under the Authority of the United States, *shall* be the supreme Law of the Land"—forecloses the possibility of non-self-executing treaties altogether. In his words, "[n]o interpretation is necessary to conclude that this clause proposes to give 'all' treaties the status of domestic law,"[123] which is a view embraced by internationalists who claim non-self-execution to be in tension with the constitutional text.[124]

The problem with Vázquez's conclusion is that the Supremacy Clause, which makes clear the *vertical* relationship between the three classes of federal law and the two classes of state law, is an extremely blunt tool with which to determine the *horizontal* relationship between two classes of federal law, statutes and treaties. As we have seen, the Supremacy Clause, upon careful textual analysis, may be said to *implicitly* address the legal hierarchy of federal law, with such conclusions buttressed by multiple textual, intratextual, and quasi-structural considerations; the Clause says *nothing* about the scope of the treaty-making power and which treaties have the force of domestic law with and without implementing legislation.[125]

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[122] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1962–67; Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2233–39; Vázquez, *Laughing at Treaties*, *supra* note 27, at 2169–73.

[123] Vázquez, *Laughing at Treaties*, *supra* note 27, at 2169.

[124] *See, e.g.*, HENKIN, *supra* note 6, at 201 ("[A] tendency in the Executive branch and the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history . . . of the Constitution."); *id.* at 119 (stating that the Supremacy Clause "mean[s] that treaties are law of the land of their own accord and do not require an act of Congress to translate them into law"); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 760 (1988) [hereinafter Paust, *Self-Executing Treaties*] ("The distinction found in certain cases between 'self-executing' and 'non-self-executing' treaties is a judicially invented notion that is patently inconsistent with the express language in the Constitution affirming that '*all* Treaties . . . shall be the supreme Law of the Land.'").

The critic might argue that the phrase "under the Authority of the United States" in the Supremacy Clause might provide a textual basis for a rule of non-self-execution, but such an interpretation belies the meaning of the phrase which is simply to clarify that treaties made by the Continental Congress are entitled to supremacy under the Constitution. *See, e.g.*, 4 ANNALS OF CONG. 549 (1796) (remarks of Rep. Bradbury, Jay Treaty debate); *id.* at 721 (remarks of Rep. Goodrich, Jay Treaty debate).

[125] On this point, Professor Yoo is undoubtedly correct in his critique of Vázquez's conclusions:

> The text of the Supremacy Clause, however, only declares that treaties, like the Constitution and federal statutes, are superior to state law. Article VI does not address how they are to be made supreme, nor does it require that the Constitution, treaties, and federal statutes always be justiciable in court. Instead, the Supremacy Clause simply makes clear the superiority of federal law to state law, without specifying how the branches of government are to make and implement that law.

Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2219–20. For an insightful critique of Vázquez's view of the Supremacy Clause and self-executing treaties, see Khaldoun A. Baghdadi, *Apples and Oranges—The Supremacy Clause and the Determination of Self-Executing Treaties: A Response to Professor Vazquez*, 20 HASTINGS INT'L & COMP. L. REV. 701 (1997).

Moreover, Vázquez's position, consistent with that of internationalists, simply proves too much. The same internationalists cannot explain why certain types of treaties are properly considered to be non-self-executing by internationalists and nationalists alike.[126] These include treaties that appropriate money,[127] declare war,[128] punish criminal conduct,[129] raise taxes,[130] as well as other legislative actions.[131] The theory behind these types of non-self-executing treaties must be that certain subjects are within Congress's exclusive legislative powers and hence raise separation-of-powers concerns

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[126] For the standard judicial doctrine, see, for example, The Over the Top, 5 F.2d 838, 845 (D. Conn. 1925); Edwards v. Carter, 580 F.2d 1055, 1058–59 (D.C. Cir. 1978). For the conventional wisdom, see, for example, RESTATEMENT (THIRD), *supra* note 5, § 111 cmt. i & reporters' n.6; HENKIN, *supra* note 6, at 203; CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. PRT. 103-53, at 48–49 (1st Sess. 1993) [hereinafter CRS STUDY].

[127] *See* U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause) ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). On Congress's special role in appropriations, see, for example, *id.* art. I, § 7, cl. 1 (Origination Clause) ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 154 (1966) (original draft of Appropriations Clause at the Philadelphia Convention providing for involvement of House of Representatives); *id.* at 568 (showing textual linkage between Appropriations Clause and Origination Clause); THE FEDERALIST NO. 58, *supra* note 4, at 359 (James Madison) (discussing "power over the purse").

[128] *See* U.S. CONST. art. I, § 8, cl. 11. On Congress's special role in declaring war, see, for example, 2 FARRAND, *supra* note 127, at 318–19, 548 (describing the Constitution's allocation of power to Congress and away from President, who has power to conduct war, and away from President and Senate, who have power to make peace by treaty); Edwards v. Carter, 580 F.2d 1055, 1058 n.7 (D.C. Cir. 1978) (discussing "sui generis" nature of declaration of war).

[129] *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812); Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 102, 344 n.85 (1998).

[130] *See* U.S. CONST. art. I, § 8, cl. 1. On Congress's special role in taxation, see AMAR, *supra* note 20, at 65 (referring to familiar cry of "No taxation without representation!"); *see also* THE FEDERALIST NO. 71, *supra* note 4, at 435 (Alexander Hamilton) (discussing the rise of the House of Commons "*from the mere power of assenting or disagreeing to the imposition of a new tax*"). *Cf.* Lidas, Inc. v. United States, 238 F.3d 1076, 1080 (9th Cir. 2001) (punting on question whether taxation is exclusive congressional power and resolving case involving treaty on other grounds).

[131] Two other easy examples would include treaties raising armies or admitting new states into the Union. Congress's power to raise armies is unique among its powers in containing a sunset requirement. *See* U.S. CONST. art. I, § 8, cl. 12. The sunset of two years is purposely tied to the biennial terms of Representatives and hence calls for their involvement. *See, e.g.*, THE FEDERALIST NO. 41, *supra* note 4, at 259–60 (James Madison); 2 FARRAND, *supra* note 127, at 509. Congress's power to admit new states into the Union relates to the structural composition of the House and Senate itself, which calls for the involvement of each House. *See* U.S. CONST. art. IV, § 3, cl. 1. In contrast, the Territory and Property Clause, U.S. CONST. art. IV, § 3, cl. 2, has been deemed a non-exclusive congressional power vis-à-vis the treaty-making power. *See* Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978). This Article does not propose to identify all of the clauses involving Congress's exclusive legislative powers, but merely to establish that some (but not all) of Congress's legislative powers impose constitutional constraints on self-executing treaties.

without implementation by statute.[132] According to Vázquez, such exceptions for non-self-executing treaties are "unproblematic" in principle because "the Constitution requires an act of Congress."[133] The Constitution, however, does not explicitly require congressional action before such treaties have the force of domestic law. In these circumstances, with one exception, the rule of non-self-execution is not based on constitutional text, but is one of necessary inference derived from constitutional history and structure.[134] So too, other rules of non-self-execution may be perfectly consistent with the constitutional text—whether this Article's partial non-self-execution thesis, Professor Yoo's total non-self-execution thesis, or some other.[135]

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[132] *Cf.* AMAR, *supra* note 20, at 592–93 n.38 (identifying "premise that certain treaties cannot be self-executing because the House must not be cut out of the loop in certain areas of special sensitivity—areas sometimes defined by the logic of particular patches of constitutional text, and other times marked out by more general considerations of constitutional history and/or constitutional structure"); Paust, *Self-Executing Treaties*, *supra* note 124, at 781 (arguing, incorrectly, that with exception of Congress's power to declare war, "no seemingly relevant congressional power is exclusive").

The separation-of-powers problem might initially be conceptualized as a bicameralism problem because the House of Representatives is the only branch of the bicameral legislature that has no share of the treaty-making power. Thus, a non-self-executing treaty requiring statutory implementation may only be missing the consent of the House of Representatives on the theory that the consent of the President and Senate to statutory implementation is implicit in their making of the treaty. This conceptualization is imprecise because the President and Senate who may participate in statutory implementation need not be the same President and Senate who made the treaty. The precise formulation therefore refers to congressional implementation by statute.

[133] Vázquez, *Four Doctrines*, *supra* note 12, at 718.

[134] The exception is with respect to appropriations. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). The word "Law" is properly understood to refer to a statute, which is how it is repeatedly used throughout Article I. *See, e.g.*, *id.* art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."). The Supremacy Clause introduces a minor textual ambiguity because it refers to "Treaties" as part of the "supreme Law of the Land." *See id.* art. VI, § 2.

[135] Indeed, Professor Vázquez's position and this Article's partial non-self-execution thesis may be easily reconciled by adding the case of statute-treaty conflict to the list of cases where treaties must be non-self-executing. The distance between Vázquez's position and Yoo's total non-self-execution thesis is considerably greater, though not unbridgeable. In the end, Vázquez's main objection to Yoo's thesis is that it reads the word "Treaties" out of the Supremacy Clause because too many treaties would lack "law of the land" status without implementing legislation. *See* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2170–71. This objection from quasi-redundancy is not persuasive in a document that by its very nature contains a number of redundancies and declaratory and clarifying clauses. *See generally* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998). Moreover, this objection overlooks reasons why the word "Treaties" in the Supremacy Clause retains meaning even in a world where non-self-execution is the absolute rule. The word "Treaties" makes clear that certain constitutional processes have been completed (both lawmaking and treaty-making) and highlights that a two-thirds supermajority of the Senate has been achieved (which would not otherwise be apparent). This might have constitutional value to the extent that the treaty-making power is not subject to the same federalism limitations as the lawmaking power, since the constitutional basis for implementing legislation is the treaty itself. In addition, the word "Treaties" may have operative effect in the Supremacy Clause even in the absence of implementing legislation to the extent that a treaty, when

We now turn to Professor Yoo's textual arguments respecting the total non-self-execution thesis. His argument is as structural as it is textual, and he delivers it with impressive force. The textual argument is as follows: Given its location in Article II, the treaty-making power is an executive power;[136] the executive power is the power to execute the laws, not the power to make them;[137] therefore, the treaty-making power is not an executive-legislative power.[138] The structural argument is as follows: If not limited by Congress's legislative powers, the treaty-making power would be potentially unlimited, free from the constraints of federalism and separation-of-powers.[139] The end result of this one-two punch is that treaties touching any of Congress's legislative powers must be non-self-executing—that is, they must be implemented by statute in order to have the force of domestic law. Yoo's thesis implicitly affirms the superiority of statutes to treaties because no treaty could ever trump a statute. In his words, his thesis "maintains a clear distinction between the power to make treaties and the power to legislate, between executive and congressional power, and between international and domestic law."[140]

Because Congress's legislative powers represent a considerable portion of the national subjects appropriate for treaty-making, particularly in today's world of sweeping congressional powers, Yoo's thesis means that the

made, preempts inconsistent state law (if there is any), even if it is not self-executing for federal law purposes. For a brief discussion, see *infra* note 142.

[136] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1966 ("The Treaty Clause's location [in Article II] suggests that treaties are executive, rather than legislative in nature."); Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2234 ("By its placement in Article II, therefore, treatymaking is clearly an executive power."); *see also id.* (using location of Veto Clause in Article I to make point that "[w]hen the Constitution grants the executive a power that is legislative in nature, such as the veto power, it does so in Article I, not in Article II").

[137] *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2234–35; *id.* at 2235 n.56 (quoting Justice Black's opinion for the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for proposition that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be lawmaker") (citation omitted).

[138] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1966 ("The Senate's participation alone does not convert treaties into legislation, just as the Senate's participation in appointments does not transform them into legislative acts."); Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2234 ("Section 2 [of Article II] defines the broad grant of executive power to the President—it does not create new executive-legislative powers.").

[139] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1977 (claiming that internationalists believe that treaties are not subject to federalism or separation of powers); Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2235–39 (similar). Despite his fears and what others may say, the self-executing treaty-making power is not free from the constraints of federalism and separation-of-powers. It is simply not necessarily subject to the *same* constraints as the lawmaking power. For an articulate expression of this point, see Golove, *Treaty-Making and the Nation*, *supra* note 37, at 1279–86.

[140] Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2220; *see also id.* at 2233 (stating that "[n]on-self-execution promotes political democracy by infusing foreign policymaking with House participation, without sacrificing secrecy and dispatch" and "ensures that the same lawmaking process applies to laws that have the same effect in regulating the domestic conduct of private parties").

treaty-makers may accomplish very little (if anything) without Congress.[141] It also means that the Senate's involvement in treaty-making serves no purpose other than to limit what international commitments are created by the United States and (perhaps) what state law is preempted.[142]

The problems with Yoo's thesis, as presented, are several. Arguments from location are not slam-dunks, especially given that the Constitution does not envision a neat separation of powers as Yoo recognizes,[143] and as he so perceptively recognized in earlier work on war powers and Congress's power to declare war.[144] The location of a clause in Article II does

[141] Under Yoo's thesis, the self-executing treaty-making power is slashed in scope to cover only that subject matter that may be regulated by treaty and not by statute. This would include treaties regulating matters reserved to the states beyond Congress's legislative powers and possibly "purely executive" treaties such as treaties of friendship and amity. *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2251 (linking non-self-execution requirement to treaties touching "Congress's Article I powers" and claiming that non-self-execution is "unnecessary when the treaty power involves matters within the jurisdiction of the states"); Vázquez, *Laughing at Treaties*, *supra* note 27, at 2190–91, 2211–13 (discussing this aspect of Yoo's thesis). Moreover, Yoo believes that Congress's involvement in implementing treaties is a matter of political discretion, not constitutional duty. *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2240–43. This truly makes Congress a necessary third wheel in the treaty-making process.

[142] The latter point depends on whether a non-self-executing treaty, though it lacks the force of domestic law, may nevertheless preempt contrary state law. This is an unsettled area of the law, in part because it is the intersection between two muddled doctrines: non-self-execution and preemption. Professors Yoo and Vázquez muddle through this issue in the non-self-execution debate, with a seemingly shared view that a non-self-executing treaty does not preempt contrary state law. *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2254 (stating that only treaties falling outside of Congress's legislative powers would preempt state law without congressional implementation, but suggesting "in the alternative" that all treaties could preempt state law "as a matter of federal common law, thereby leaving the field open for Congress to choose how to implement the treaty"); Vázquez, *Laughing at Treaties*, *supra* note 27, at 2207–08 & n.219 (stating that a "self-executing treaty is a treaty that preempts inconsistent state law without the need for action by the federal legislature, and a non-self-executing treaty is one that does not preempt state law without such action").

The answer to the question depends on *why* a treaty is non-self-executing. A treaty may be non-self-executing for statutory reasons or constitutional reasons. For example, the treaty, as a matter of treaty interpretation, may purport to not have the force of domestic law without implementation by statute. Or, the treaty may purport to have the force of domestic law, but be non-self-executing because of constitutional constraints imposed on self-execution (such as conflict with existing statutes). This latter class of non-self-executing treaties may preempt contrary state law when made. For such a view, see AMAR, *supra* note 20, at 305 (distinguishing between "horizontal" and "vertical" effects of treaties and asking why treaties made by the President and two-thirds of the Senate, which was the original representative of the States, would need statutory implementation before displacing state laws).

[143] *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2234 ("To be sure, the Constitution does not embody a pure separation of powers in which each branch solely exercises all functions peculiar to it.").

[144] *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242–50 (1996) [hereinafter Yoo, *The Original Understanding of War Powers*] (arguing that Congress's power "To declare War," *see* U.S. CONST. art. I, § 8, cl. 11, is properly understood as a judicial power, like impeachment, and not as a legislative power). As a textual matter, the inference of a judicial power from the Declare War Clause is complicated because the power "[t]o declare war" is just a "comma away" from legislative powers in the same clause (Congress's power to

not mean that it cannot partake of legislative or judicial character or effect. Although the essential meaning of Article II's Vesting Clause is the power to execute the laws,[145] Article II also grants the President powers and duties that are executive not in this sense, but in the sense that they traditionally belonged to, and were commonly associated with, the office of the executive. For example, the President's duties to report to Congress on the State of the Union and recommend legislation are more closely linked to lawmaking than law-execution,[146] and the President's power to grant pardons is a judicial function as much as it is a prosecutorial one.[147] Indeed, James Wilson, a leading Framer, commenting on the President's executive powers at the Philadelphia Convention, observed that the "only powers he conceived were strictly executive were those of executing the laws, and appointing officers."[148]

As a matter of organization-chart textualism, Yoo's "executive power" argument would have more force if the treaty-making power were granted solely to the President, but the involvement of the Senate—with a special supermajority consent requirement no less—makes this inference complicated.[149] It is hence far from clear that self-executing treaties, as Yoo puts it, "would allow the *executive branch* to wield legislative power and to directly regulate the domestic conduct of private parties,"[150] or that it would mean that an "independent, free-standing *presidential law-making authority* exists insofar as the rights of American citizens are concerned."[151]

"grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"), and is one of eighteen clauses in a section (Article I, Section 8) that constitutes the bulk of Congress's legislative powers. By comparison, as a textual matter, the inference of an executive-legislative power from the Treaty Clause seems easy given the hybrid grant of power to the President and Senate.

[145] *See generally* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701.

[146] *See generally* Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1 (2002) (parsing the State of the Union and Recommendation Clauses, U.S. CONST. art. II, § 3).

[147] *See* THE FEDERALIST NO. 74, *supra* note 4, at 447–49 (Alexander Hamilton). On the linkage between executive power and prosecutorial power, see generally Saikrishna Bangalore Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005).

[148] 2 FARRAND, *supra* note 127, at 116.

[149] Professor Yoo suggests that the Senate's participation in treaty-making is just like its participation in making appointments. Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2234. In his view, the Senate's participation "reflects the Framers' effort to dilute the unitary nature of the executive branch in those areas, rather than to transform these functions into legislative powers." *Id.* This presupposes similarities in making treaties and appointments, which the Constitution does not suggest. Clearly, treaties, unlike appointments, do not relate to the internal structure of the federal government. The constitutional text hints at other differences too: although the Treaty Clause and Appointments Clause are yoked together, they each provide for Senate participation and with different majorities. *See* U.S. CONST. art. II, § 2.

[150] Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2235 n.56 (emphasis added).

[151] *Id.* (quoting Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 4 (1993)) (emphasis added).

These conclusions based on the location of the Treaty Clause are even more complicated because there are good reasons why the Clause is located in Article II and not elsewhere. First, the President is the lead constitutional actor in the process of treaty-making, as the order and structure of the Clause make clear.[152] Second, treaties, as a matter of definition, involve foreign affairs: there is no such thing as a treaty made by the United States without a foreign nation. In at least one other clause of the Constitution, the President's role in foreign affairs is made clear: Article II, Section 3 provides that the President "shall receive Ambassadors and other public Ministers."[153] The Constitution explicitly recognizes the President's role as an "organ of intercourse" with foreign nations, which explains the logic of the Treaty Clause's location.[154] Thus, any inference that the treaty-making power is "executive" and not "executive-legislative" or "legislative" needs to take into account that it is executive in the context of *foreign affairs*—not in the context of *executing the laws*, which is contradistinguished from *making the laws*.[155] It does not follow that the President and Senate may not

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[152] *See* U.S. CONST. art. II, § 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . .").

[153] U.S. CONST. art. II, § 3.

[154] *See* Letter I of Pacificus, *reprinted in* LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 9 (J. & G.S. Gideon eds., 1845) [hereinafter LETTERS OF PACIFICUS AND HELVIDIUS]. It is unnecessary to resolve here whether the President is "an" or "the sole" organ of intercourse with foreign nations, or whether the President has residual foreign affairs powers pursuant to the Executive Vesting Clause, U.S. CONST. art. II, § 2. For an enlivening debate, compare Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) [hereinafter Prakash & Ramsey, *Executive Power over Foreign Affairs*] (arguing that the Executive Vesting Clause grants President residual foreign affairs powers) and Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005) (defending the Executive Vesting Clause thesis) with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (questioning the Executive Vesting Clause thesis).

[155] *See, e.g.*, Prakash & Ramsey, *Executive Power over Foreign Affairs*, *supra* note 154 (explaining unallocated foreign affairs powers as residual executive powers granted by the Executive Vesting Clause). Professor Yoo does not synthesize the Treaty Clause in this way, which leads him to conclude that "Section 2 [of Article II] defines the broad grant of executive power to the President—it does not create new executive-legislative powers." Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2234. He cites the work of Professors Calabresi and Prakash in support, but this work relates to the President's domestic affairs powers of law-execution, not foreign affairs powers. *See id.* at 2234 n.53 (citing Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 578–79 (1994)).

Yoo also cites the work of Alexander Hamilton as Pacificus during the constitutional debate on President Washington's Proclamation of Neutrality in 1793. *See id.* (citing Letter I of Pacificus, *reprinted in* LETTERS OF PACIFICUS AND HELVIDIUS, *supra* note 154). The appeal to Pacificus does not support Yoo's position that treaties, when made, lack the force of domestic law because the treaty-making power is not an executive-legislative power. Although Pacificus understood Article II, section 2 to make explicit the President's executive powers, powers that he claimed were implicit in the Executive Vesting Clause, Pacificus never claimed that the treaty-making power could not have legislative operation or effect; he argued that the President's explicit and implicit powers over foreign affairs implied that the President has the sole power of *interpreting* treaties, which justified President Washington's unilat-

do in foreign affairs what the President alone may not do in domestic affairs.

What the Constitution makes clear is that Congress has a monopoly on making the "Laws of the United States," which is the product of Congress's monopoly on "legislative Powers herein granted" by the Article I Vesting Clause.[156] In order to conclude that this monopoly is also a monopoly over the "power to legislate"[157] and everything that has the "force of law," one must understand what is meant by the "Power . . . to make Treaties." Whether a treaty, as a bona fide contract between nations containing stipulations for mutual benefit, has the force of law when made is not logically answered by the Article I Vesting Clause because a treaty is not an exercise of "legislative Powers" as the Constitution defines that term.[158] Professor Yoo, as a serious constitutional historian, would be among the first to appreciate that the answer to this question should turn as much upon considerations of history as upon text and structure.[159] In the end, he recognizes the treaty-makers' "power to legislate" on matters not reserved to Congress and otherwise reserved to the states,[160] but this has him dead to rights in his argument that the power to make treaties cannot be an executive-legislative power as a matter of textual argument.[161]

There is no reason why the treaty-making power may not be a "power to legislate" or a power that has the "force of law." There are reasons to think otherwise given some of the obvious differences between statutes and

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eral declaration of neutrality. *See* Letter I of Pacificus, *reprinted in* LETTERS OF PACIFICUS AND HELVIDIUS, *supra* note 154, at 8–15. Indeed, Alexander Hamilton, in anonymous writings before and after Pacificus, consistently maintained that treaties, when made, would have the force of domestic law. *See infra* text accompanying notes 386 (discussing THE FEDERALIST NO. 75, *supra* note 4, at 450–51 (Alexander Hamilton)) and 631–633 (discussing Camillus, *The Defence XXXVI* [hereinafter *Defence 36*], *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON: CONGRESSIONAL SERIES 3 (Harold C. Syrett ed., 1974) [hereinafter THE PAPERS OF ALEXANDER HAMILTON]).

[156] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[157] *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2220–21, 2240. The Supreme Court has described this power as one that has the "purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch." INS v. Chadha, 462 U.S. 919, 952 (1983).

[158] The *Chadha* Court recognized the "power to legislate" by treaty in its identification of exceptions to bicameralism and presentment. *See id.* at 955.

[159] This is powerfully apparent in Professor Yoo's prior work concerning war powers and the meaning of the Constitution's phrase "To declare War." *See* Yoo, *The Original Understanding of War Powers*, *supra* note 144, at 196–294.

[160] Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2251.

[161] Following Yoo's "power to legislate" principle to its logical conclusion means that state legislatures—not the President and Senate—would implement "non-Article I" treaties. Yet, he blinks when it comes to this idea, opting instead to allow treaties to have the force of domestic law in these areas without any legislative implementation. His hesitancy may be due to natural concerns about allowing state parts to determine compliance with the international obligations of the national whole. As a historical matter, the idea of treaty implementation by state legislatures was not unheard of at the Founding. *See infra* note 326.

treaties. Statutes are intended to regulate domestic conduct, whereas treaties regulate domestic conduct only because that is the "price paid" for promoting national interests with foreign nations.[162] Statutes have no legal force outside the United States (with precisely the same legal significance in foreign jurisdictions as greeting cards), whereas treaties bind nations to mutual performance in their respective jurisdictions. In other words, treaties do something that statutes can never do.[163]

It is therefore possible that the Constitution contains two separate tracks to "legislate" as a matter of domestic law consisting of "Laws" and "Treaties," granted to different constitutional actors, acting in different circumstances, for different purposes, and under different voting rules. These differences serve to accentuate, not undercut, the possibility of this constitutional design. The fact that the tracks may be overlapping—even in theory perfectly overlapping—does not mean that they cannot be independently valid processes for achieving the same end result of domestic regulation. Indeed, it would not be strange for the Constitution to specify different paths to the same end result—a point proved by the multiple paths to constitutional amendment in Article V,[164] the creation of statutes in Article I,[165] and the concurrent legislative powers of Congress and the several states in many regulatory fields.[166]

Of course, overlapping grants of power invite conflict. According to Yoo, "self-execution invites a conflict between the textual grants of the executive and legislative powers and resolves that clash by allowing the treatymaking authority to trump Congress's Article I powers."[167] The problem with this conclusion is that there is nothing inherent in the doctrine of self-execution that requires treaties to trump statutes: the legal relationship

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[162] *See* Golove, *Treaty-Making and the Nation*, *supra* note 37, at 1093 ("The purpose of a treaty is not to adopt domestic regulations at all; that is the *price* of a treaty. The national government enters into treaties in order to protect the rights of United States citizens abroad and to further our foreign policy interests more generally.").

[163] *See id.* at 1093–94 ("Although the subject matters of treaties and legislation overlap, treaties accomplish what legislation never can: an obligation in the nature of a binding promise on a sovereign, not subject to the legislative jurisdiction of another, to act, or forbear from acting, in ways that are beneficial to the national interests of that other sovereign."). For additional discussion, see *infra* notes 631–33 and accompanying text.

[164] *See* U.S. CONST. art. V (providing two paths to proposal and two paths to ratification, and thus four unique paths to adoption of constitutional amendment).

[165] *See id.* art. I, § 7, cl. 2 (providing two principal paths for the creation of statutes with and without the signature of the President).

[166] *See, e.g.*, THE FEDERALIST NO. 32 (Alexander Hamilton); Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 261 (1987) (Scalia, J., dissenting) ("Nor can one assume generally that Congress's Article I powers are exclusive; many of them plainly coexist with concurrent authority in the States.") (discussing power to regulate interstate commerce and citing cases involving patent power, copyright power, court-martial jurisdiction over the militia, and bankruptcy power).

[167] Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2235.

between the two powers may be easily maintained by a conflict-of-laws principle.

In order to eliminate conflict between two powers, Yoo interprets the enumeration of Congress's legislative powers as exceptions to the scope of the self-executing treaty-making power. He reaches this conclusion, in part, because he does not see "any principled distinctions" as to why some legislative powers (such as those involving appropriations, declaring war, punishing criminal conduct, or raising taxes) are restrictions on treaty self-execution, but others are not.[168] This "all or none" conclusion overlooks reasons for the enumeration of legislative powers and the possibility of concurrent powers between lawmaking and treaty-making.

The purpose of the enumeration of Congress's legislative powers is to distinguish the legislative powers of the federal government from the legislative powers retained by the several states, not to separate lawmaking from treaty-making.[169] This is not to say that the enumeration of Congress's legislative powers has no implications for the treaty-making power. As we have seen, some of Congress's legislative powers contain separation-of-powers norms that call for the special involvement of Congress, and hence exclusivity with respect to the treaty-making power.[170] But not all of Congress's legislative powers must be exclusive powers in this way—just as not all of these powers are exclusive powers with respect to the legislative powers retained by the several states.[171] Indeed, Yoo's total non-self-execution thesis would strangely permit concurrent powers to the states in lawmaking, but deny concurrent powers to the President and Senate in treaty-making.[172]

As a matter of text and structure, Yoo's total non-self-execution thesis is a *possible* interpretation of the treaty-making power, but it is not a *necessary* one. It is an *improbable* interpretation if the purpose of the treaty-making power is to provide the President and Senate with any meaningful power independent of Congress.

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[168] *Id.* at 2236. Representative James Madison made the same argument during the Jay Treaty debate in 1796. *See infra* note 625.

[169] *See, e.g.*, Golove, *Treaty-Making and the Nation*, *supra* note 37, at 1091 ("The very purpose of the enumeration is to divide the whole of the legislative powers of the government between Congress and the states.").

[170] *See supra* notes 127–31 and accompanying text. This principle is apparent in the lawmaking process itself, with one key clause providing exclusivity to the House of Representatives with respect to certain subject matter. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

[171] *See supra* note 166 and accompanying text.

[172] *See* AMAR, *supra* note 20, at 304 n.38 (making this point).

As a matter of textual argument, the partial non-self-execution thesis rests on a solid foundation. It is a necessary consequence of the principle of the lexical priority, which is the *better answer* when it comes to determining the relationship between statutes and treaties under the Constitution. In other words, if the three tiers of federal law thesis is correct, the partial non-self-execution thesis is required by the constitutional text. The partial non-self-execution thesis also has relative appeal, given the weaknesses of the total self-execution thesis and the total non-self-execution thesis, neither of which is required by the constitutional text.

At the same time, faithful interpretation of the Constitution requires that care be taken not to overstate textualist conclusions. The text of the Constitution does not resolve the non-self-execution debate. The total self-execution thesis remains possible as a matter of textual argument, given that statute-treaty equality remains possible. The total non-self-execution thesis also remains possible, given that Congress's legislative powers may be exceptions to the scope of the self-executing treaty-making power. In order to develop a more complete theory of non-self-execution, we must turn to other constitutional arguments which shed light on the nature of the treaty-making power and whether and when treaties must be non-self-executing.

III. (RE-)READING THE ANNALS OF HISTORY

The historical argument does the yeoman's work in determining the constitutional relationship between statutes and treaties and identifying the contours of the doctrine of non-self-execution. This argument in the non-self-execution debate has been well traversed by Professors Yoo, Flaherty, and Vázquez, with nearly 200 pages of collective writing.[173] No "law office historians," Yoo and Flaherty each credit one another with a job well done, methodologically speaking that is.[174] Their methodological agreement, however, should not be mistaken for consensus as to the meaning of history, or even for what weight the historical argument should bear in the overall non-self-execution debate.[175] Yoo and Flaherty each powerfully

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[173] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1982–2091; Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2221–33; Flaherty, *History Right?*, *supra* note 48; Vázquez, *Laughing at Treaties*, *supra* note 27, at 2158–68.

[174] *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2221–22; Flaherty, *History Right?*, *supra* note 48, at 2098–99.

[175] *Compare* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2218 ("I read [Flaherty] as admitting that the original understanding concerning the presence of treaties in domestic law is no longer settled."), *with* Flaherty, *History Right?*, *supra* note 48, at 2099 n.19 ("[T]he more I have looked into this area the more I am convinced that a Founding understanding that treaties would be self-executing is about as clear as most matters in this period can be."); *compare also* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2218 ("If the original understanding . . . is no longer conclusive, then other [textual and structural] arguments become more probative.") *with* Flaherty, *History Right?*, *supra* note 48, at 2099 ("More than constitutional text, structure, or precedent, Professor Yoo's project flourishes or fails on its history.").

"spin"[176] the "well-worn"[177] historical sources to support their respective and opposite theses. Can these historical sources bear yet another interpretation that has been ignored by these scholars and nearly all others heretofore as well?[178]

This Part aims to convince the reader that the partial non-self-execution thesis is the *single best reading* of the historical evidence—that it is "history right," to borrow a phrase from Flaherty—with *more* explanatory power than the competing theories of Yoo and Flaherty. Because this Part seeks to prove a historical proposition, it follows rigorous standards of historical proof, which requires a comprehensive treatment of the relevant history. In advancing a new interpretation of the history, this Part presents the primary evidence, offers an interpretation of that evidence, and where possible, identifies alternative interpretations, so that the reader may directly assess the strength of the partial non-self-execution thesis. In addition, because this Part simultaneously challenges the conventional wisdom defended by Flaherty and the (literally) unconventional interpretation advanced by Yoo, it takes care to explain how each of these scholars misses the mark when it comes to reading the history, in order to demonstrate the relative appeal of the partial non-self-execution thesis. Indeed, as we shall see, the partial non-self-execution thesis provides the best account of the history precisely because it is situated *between* two poles of the non-self-execution debate, and hence makes sense of the evidence denying both extremes.

This Part presents the historical arguments in three chronological sections, tracking the presentations of Yoo and Flaherty: pre-Founding history, Founding history, and early post-Founding history.

A. Pre-Founding History

The Founding generation framed and adopted the Constitution with some implicit understandings as to the fundamental nature of government. As former subjects of the British empire, it should come as no surprise that British history was a focal point for constitutional analysis during the Founding because it was a significant part of their knowledge and experience with government.[179] This history therefore furnishes an important

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[176] *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2222; Flaherty, *History Right?*, *supra* note 48, at 2106, 2108.

[177] *See* Flaherty, *History Right?*, *supra* note 48, at 2120.

[178] *Cf.* AMAR, *supra* note 20, at 302–07 (suggesting that statutes are superior to treaties and that this superiority is the basis for a doctrine of non-self-execution).

[179] *See, e.g.*, Yoo, *Globalism and the Constitution*, *supra* note 33, at 1997 ("While drafting and discussing different constitutional provisions, the delegates to the Constitutional Convention, the writers in the press, and the Federalists and Anti-Federalists in the state ratifying conventions often turned to British examples to predict how different governmental arrangements would work out in practice."); Flaherty, *History Right?*, *supra* note 48, at 2108 (stating that "experience furnished the most important source for the generation that established the Constitution" and that "[f]or many Founders, that experi-

foundation for understanding the treaty-making power under the Constitution.[180]

The question is to what extent British history provides a basis for a doctrine of non-self-execution under the Constitution, particularly a rule of partial non-self-execution. To answer this question, we must first determine the British practice of treaty-making and then determine how this practice applies to the Constitution. This Section addresses the former, with the next Section taking up the latter.

The relevant British history is that of the time of the Constitution's adoption in the late eighteenth century. The historical exercise is made difficult by the evolving constitutional relationship between the Crown and Parliament forged over nearly a thousand years in a struggle for power. At some early point in time, the Crown had complete dominance over governmental affairs. Since at least the nineteenth century, British treaty-making practice has been decidedly "dualist" with treaty-making by the executive followed by legislative implementation.[181] Indeed, British legal historian

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ence began with the history and customs they shared with England"). The Framers, many of whom were among the most well-read lawyers of their day, were even more familiar with British legal history given the publication of William Blackstone's *Commentaries on the Laws of England*. On the canonicity of this work during the Founding, see, for example, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 501 (Jonathan Elliot ed., 1881) [hereinafter ELLIOT'S DEBATES] (remarks of James Madison, Virginia ratifying convention) ("I will refer you to a book which is in every man's hand—*Blackstone's Commentaries*.").

[180] More generally, seventeenth- and eighteenth-century political and legal theory—including the writings of key theorists such as Grotius, Vattel, Locke, Montesquieu, and Blackstone, among others—is relevant to how the Founders would have thought about the treaty-making power and the doctrine of non-self-execution. With the exception of Blackstone, this evidence does remarkably little to resolve the non-self-execution debate in one direction or another. The point is compounded by the difficulty of projecting any understanding from European regimes of monarchies or aristocracies to the American regime where treaty-makers are democratically accountable and include half of the legislature. Thus, this Article will not burden the presentation with a review of the work of theorists other than Blackstone. For discussion, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 1987–94 (reviewing Grotius, Vattel, Locke, and Montesquieu); Flaherty, *History Right?*, *supra* note 48, at 2105–08 (same).

[181] For the standard judicial doctrine, see, for example, Attorney-Gen. for Can. v. Attorney-Gen. for Ont., [1937] P.C. 326, 347 ("Within the British empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law."). For academic commentary, see, for example, 2 SIR WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION, PART II 142 (1935) ("[W]here a treaty involves (1) a charge upon the people, or (2) a change in the general law of the land, it may be made, and be internationally valid, but cannot be carried into effect without the consent of Parliament."); Arnold D. McNair, *When Do British Treaties Involve Legislation?*, *in* THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 59–60 (1928) ("When a treaty involves for its enforcement in England any change in the law administered by any English court of law (other than the law affecting the belligerent rights of the Crown, which demands separate treatment), it is necessary in order to give effect to the treaty that Parliament should enact such legislation as may be required to make that change in the law."); *id.* at 67 ("Treaties which for their enforcement by British courts of law require some addition to or alteration of the existing law cannot be carried into effect with-

Frederic Maitland would claim that by the nineteenth century the doctrine of non-self-execution was so clear that, "[s]uppose the queen contracts with France that English iron or coal shall not be exported to France—until a statute has been passed forbidding exportation, one may export and laugh at the treaty."[182]

As one may expect, a review of British constitutional history as of the Founding begins with William Blackstone's *Commentaries on the Laws of England*. In this canonical treatise, Blackstone discusses the "King's Prerogative" which is the King's executive powers, and consists of both domestic and foreign affairs powers.[183] With respect to the King's power to make treaties, in a passage quoted extensively by treaty scholars, Blackstone observed:

> II. It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding on the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul.[184]

Although this passage has been misappropriated in the service of arguments relating to self-execution,[185] the passage, placed in proper context, is not about the relationship between treaties and the domestic law.[186] It is

out legislation. Therefore the King will not be advised to ratify them unless and until such legislation has been passed or Parliament has given the necessary assurance that it will be passed."); *id.* at 67 (stating that parliamentary sanction may be "(1) mere approval, usually in the form of a statute, or (2) legislation changing the law"); The Right Honourable The Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 459 (1991) ("An understanding of how treaties are entered into and implemented in British law depends on an appreciation of the division between the international aspects of treaty-making and the domestic aspects of implementation. Parliament has very little involvement in the former but almost complete control of the latter aspect."); *id.* at 464 ("Similarly, treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods or extradition treaties which confer on the executive the power to seize, take up, and hand over to a foreign state persons who have committed crime there and taken refuge here, cannot be made operative without legislation.").

[182] F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 425 (1908); *see also id.* at 426 (stating that "the king has here a very substantial power, though it does not operate directly on the law").

[183] *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 57, at *252 ("The prerogatives of the crown . . . respect either this nation's intercourse with foreign nations, or its own domestic government and civil polity); *id.* at *252–61 (discussing foreign affairs); *id.* at *262–80 (discussing domestic affairs).

[184] *Id.* at *257.

[185] *See* Flaherty, *History Right?*, *supra* note 48, at 2109.

[186] How this passage was understood and used by the Founders is another matter. For references to this passage in the ratification struggle to support a doctrine of self-execution and deny legislative implementation of treaties as a general matter, see *infra* text accompanying notes 372 (discussing THE FEDERALIST NO. 69 (Alexander Hamilton)), 408 (James Wilson, Pennsylvania ratifying convention), 458 (Charles Cotesworth Pinckney, South Carolina legislature), and 494 (James Madison, Virginia ratifying convention).

about the King's management of foreign affairs and his power to make treaties binding the nation under international law.

The organization of Blackstone's treatise supplies the needed context to see this point. The sections relating to the King's prerogative in foreign affairs begin and end with the recognition of the King's role as the nation's "delegate or representative of his people" either "[w]ith regard to foreign concerns" or "respecting this nation's intercourse with foreign nations."[187] The immediately preceding prerogative (prerogative I) relates to the King's "sole power" of sending and receiving ambassadors, and the immediately succeeding prerogative (prerogative III) relates to the King's "sole prerogative" of making war and peace.[188] So too, the King's prerogative to make treaties was a sole power that "no other power in the kingdom can legally delay, resist, or annul."[189] The King, who was the sovereign of "England," could make treaties to bind the "kingdom," which as any subject knew, consisted not only of England but also Wales, Scotland, Ireland, and much more.[190] Blackstone's primary concern with foreign affairs is further confirmed by the remainder of the passage which discusses the lone constitutional safeguard of impeachment.[191] Thus, Blackstone's passage, properly understood, is consistent with doctrines of both self-execution and non-self-execution.

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[187] *See* 1 BLACKSTONE'S COMMENTARIES, *supra* note 57, at *252 ("With regard to foreign concerns, the king is the delegate or representative of his people."); *id.* at *261 ("These are the principal prerogatives of the king respecting this nation's intercourse with foreign nations; in all of which he is considered as the delegate or representative of his people.").

[188] *See id.* at *253, *257–58.

[189] *Id.* at *257. Other passages confirm the obvious point. *See id.* at *252 (stating that "the king may make a treaty with a foreign state, which shall irrevocably bind the nation," but that "when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded"); *id.* at *257 ("III. Upon the same principle [as the treaty-making power] the king has *also* the sole prerogative of making war and peace.") (emphasis added). Another lengthy passage confirms the King's power to bind the kingdom in the name of the people:

> It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strengths to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates; *who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly.* What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men.

Id. at *252 (emphasis added).

[190] *See id.* at *93–120 (defining the "Countries Subject to the Laws of England"). Special thanks to Professor Flaherty for bringing this point to my attention.

[191] *See id.* at *257 ("And yet, lest his plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) has here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.); *see also id.* at *252 (discussing impeachment in case of "pernicious" treaties).

This is not to say that Blackstone was unaware of Parliament's supreme power over domestic affairs (paradigmatically, the making of the laws),[192] which may also bear on Parliament's power over foreign affairs. This power would suggest a strong doctrine of non-self-execution with respect to the King's prerogative to make treaties. For example, with respect to the King's power to make war, Blackstone, in the same chapter discussing the King's power to make treaties, observed that the King's "sole power of raising and regulating fleets and armies" is subject to constraints,[193] which as another chapter makes clear are constraints imposed by Parliament's statutes.[194] The question is whether the King's power to make treaties was also subject to parliamentary constraints. The problem is that Blackstone did not discuss any such constraints in this central area of foreign affairs,[195] much less identify any limitations with respect to the scope of the power. Based on Blackstone's treatise, Parliament's exclusive control over the power of taxation[196] might be one limitation to the King's power to make treaties as a matter of domestic law.[197] But Parliament's exclusive control over domestic law in other regulatory fields is unclear in the context of treaties, which are "contracts" with foreign nations, where the King's power is necessarily subject to the concurrence of another sovereign, in contrast to the King's other foreign affairs prerogatives.[198]

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[192] *See id.* at *161 (stating that Parliament has "sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms").

[193] *Id.* at *262.

[194] *See id.* at *408–21 (discussing the "Military and Maritime States").

[195] As the title of his treatise suggests, Blackstone was focused on the domestic law. *See also id.* at *274 (discussing King's prerogative over commerce) ("By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, its privileges, regulations, and restrictions; and would be also quite beside the purpose of these commentaries, which are confined to the laws of England.").

[196] *See id.* at *169–70.

[197] *Cf. infra* notes 202, 204 and accompanying text (discussing taxation and treaty-making before and after the Glorious Revolution of 1688).

[198] Professor Yoo's discussion of Blackstone is engaging but unconvincing. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1994–97. Recognizing that Blackstone does not provide an answer to the question at hand—namely, the relationship between treaties and the domestic law—Yoo nevertheless concludes that "Blackstone's declaration of parliamentary supremacy over taxation and domestic legislation would suggest that only the legislature could implement treaties that required such action." *Id.* at 1995. This begs the question whether Parliament's supremacy over domestic affairs applies in the context of treaty-making which involves foreign affairs. He then suggests that "Blackstone's categorization of the treatymaking power as part of the royal prerogative suggests that he too thought of treaties as separate from domestic lawmaking." *Id.* at 1996. This is contradicted by Blackstone's discussion, in the same chapter, of the King's prerogatives respecting "domestic affairs." *See* BLACKSTONE'S COMMENTARIES, *supra* note 57, at *262–80. It is also in tension with Yoo's functionalist account of why the treaty-making power is part of the King's prerogative over foreign affairs: because only the King could treat on behalf of the nation. Yoo*, Globalism and the Constitution*, *supra*

Happily, a review of British constitutional history does not end with Blackstone's brief passage on the King's prerogative to make treaties. The works of other British legal historians, focusing on the British treaty-making power, provide important insights into the nature of this power and its relationship with Parliament's lawmaking power as of the eighteenth century.[199] These works reveal that, although the Crown possessed near complete control in making treaties as a matter of international law,[200] Parliament had an important role in implementing the Crown's treaties as a matter of domestic law, at least in some cases. What were those cases?

The eminent British legal historian Professor Holdsworth, in an important article reviewing the British treaty-making power, identified two cases of parliamentary participation in treaty-making as of the eighteenth century.[201] The opening paragraph of Holdsworth's article begins with the following discussion of the famous passage from Blackstone:

> Blackstone's statement to the effect that there were no limitations on the treaty-making power of the Crown was not an accurate statement of the law of the eighteenth century. Two very definite limitations upon it were then and are now recognized. *Though the Crown and the Crown alone can make a treaty, if the terms of the treaty involve the imposition of any charge on the subject, or an alteration in the rules of English law, they cannot take effect without the sanction of Parliament*. These two limitations are the result of the constitutional settlement effected by the Great Rebellion and the Revolution. If that

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note 33, at 1994. In a footnote, Yoo suggests that the King's prerogative with respect to treaties is limited to international affairs: "[B]oth the war power and the treaty power involved the declaration of Great Britain's relationship with another nation under international law, rather than the domestic actions necessary to carry out those relationships, or the regulation of domestic activity between private parties. The latter would be the subject of legislation by Parliament." *Id.* at 1996 n.195. This was truly a novel concept given a long tradition of treaties of commerce which would necessarily implicate domestic trade. Finally, Yoo projects the separation-of-powers maxims of Locke and Montesquieu onto Blackstone, suggesting that Blackstone "implicitly shared their distinction between treatymaking and lawmaking." *Id.* at 1997. The problem with this conclusion is that Blackstone was not theorizing; he was reporting, as faithfully as he could, the state of the law. Blackstone's mere categorization of the treaty-making power as part of the King's prerogative—because that power was a "sole" power of the King—is a thin reed on which to rest any theory of non-self-execution in the British constitutional law of the time.

[199] The ensuing discussion draws upon the work of two historians—namely W.S. Holdsworth and G.C. Gibbs—who I assume have paid more attention to the history than a modern lawyer could. The relationship of the Crown to Parliament in treaty-making as of the late eighteenth century is a topic that deserves more scholarly attention, from historians and lawyers, in Great Britain and elsewhere, than what is permitted here.

[200] With the question of territorial cession being the primary issue as to why the Crown's treaty-making power may not have been absolute. *Compare* W.S. Holdsworth, *The Treaty-Making Power of the Crown*, 58 L. Q. REV. 175, 177–79 (1942) (claiming that the "better opinion" is that the Crown could cede territory by treaty without the consent of Parliament in the eighteenth century) *with* G.C. Gibbs, *Laying Treaties Before Parliament in the Eighteenth Century*, *in* STUDIES IN DIPLOMATIC HISTORY 124–28 (Ragnhild Hatton & M.S. Anderson eds., 1970) (suggesting that the Crown could not cede territory by treaty without the consent of Parliament in the eighteenth century).

[201] Holdsworth, *supra* note 200, at 175.

> constitutional settlement had been otherwise, if the King and not the Parliament had prevailed, it is probable that no such limitations on the treaty-making power of the Crown would have been recognized.[202]

Holdsworth's discussion is notable for three reasons. First, he characterizes Blackstone's passage as "not accurate," if read with a sweeping tone in favor of the King's prerogative. Second, he addresses the treaty-making power as of the "eighteenth century," which is the relevant time period for historical inquiry, thereby avoiding the "presentist pitfall"[203] of projecting the present doctrine of non-self-execution onto the past. Third, he specifically considers the relationship between treaties and the domestic law: though the "Crown alone" can "make" a treaty, some of these treaties may not take "effect" as a matter of domestic law without Parliament's "sanction." Interestingly, he identifies the Glorious Revolution of 1688 as the magic moment in time for Parliament's participation in implementing treaties as a matter of domestic law; he suggests that prior to this time, Parliament had no involvement in implementing treaties, not even with respect to treaties involving taxation.[204]

Holdsworth's commentary supports some non-self-execution as of the eighteenth century, but seems to lean in the direction of self-execution—consistent with the notion of the "constitutional settlement" reached during the Glorious Revolution. The identification of "two very definitive limitations" to the treaty-making power implies that other treaties made by the Crown may take effect as a matter of domestic law without parliamentary sanction (though perhaps there are other "limitations" that are less than "very definitive"). The first limitation—involving the "imposition of any charge on the subject"—relates to taxation and is immediately clear. However, the second limitation—involving the "alteration in the rules of English law"—is unclear. This second limitation is important because its scope bears on the breadth of the rule of non-self-execution in the British treaty-making practice of the time.

Holdsworth provides needed context in his discussion of the second limitation. At times, he refers to a treaty "altering the rights of English sub-

[202] *Id.* at 175 (emphasis added).

[203] *See* Flaherty, *History Right?*, *supra* note 48, at 2109 (praising Professor Yoo "for avoiding the presentist pitfall of assuming that British practice of that era [the seventeenth and eighteenth centuries] always reflected the clear doctrine of non-self-execution that applies today").

[204] Holdsworth discusses *Bates's Case* of 1606, which he claims established the important proposition that the Crown, in the exercise of its foreign affairs prerogative to make treaties, could do without Parliament what it could not otherwise do as a matter of domestic affairs: "[T]hough the Crown could not impose a tax without the consent of Parliament, an exercise of his absolute power over foreign affairs, which incidentally involved a charge on the subject, was valid, because that was merely an incidental effect of the exercise of an undoubted prerogative." Holdsworth, *supra* note 200, at 175. The case involved the King's prerogative to regulate commerce and is discussed in 6 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 43–45 (1924) [hereinafter HOLDSWORTH, A HISTORY OF ENGLISH LAW].

jects" or "trench[ing] upon the legal rights of private persons, and thus alter[ing] the law applicable to them," or in later discussion, "changing the law."[205] These characterizations might support a doctrine of total non-self-execution in that a treaty could not effect an alteration of the body of domestic law without parliamentary sanction. This has been the case since at least the nineteenth century in Great Britain.[206] Yet, at other times, Holdsworth clearly refers to this limitation involving "an alteration in the rules of English law" as a treaty that changes existing laws. This characterization would support a doctrine of partial non-self-execution in that a treaty could not effect an alteration of the laws already on the statute books without parliamentary participation.

Importantly, Holdsworth provides historical examples of treaties to illustrate the limitation. These examples are most consistent with the doctrine of partial non-self-execution. He first refers to an admiralty case in 1689, the year after the Glorious Revolution, where the Crown unsuccessfully sought to divest the existing legal rights of English subjects respecting the arrest of foreign privateers and claims for goods in prizes.[207] He also refers to the interpretation in 1728 of a treaty of peace and neutrality of 1686 between Great Britain and France where the Crown's lawyers advised against the enforcement of the treaty, which provided for the seizure by Great Britain of the goods and ships of its own subjects without parliamentary approval, presumably to avoid the contravention of existing laws.[208] He next refers to an aborted treaty in 1764 between Great Britain and France regarding the Newfoundland fishery, which the Crown's lawyers advised against on the grounds that it would have contravened an existing statute of William III's reign.[209] Finally, he refers to the grant of statutory powers by Parliament to the Crown to make the treaties of Paris and Versailles because "the terms of the treaty involved an alteration of the law affecting the American colonies."[210]

Similarly, the historian G.C. Gibbs, who also studied British treaty-making practice, observed that the King's power to make treaties was not

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[205] Holdsworth, *supra* note 200, at 175 n.2; *see also* 11 HOLDSWORTH, A HISTORY OF ENGLISH LAW, *supra* note 204, at 268 ("[T]he Crown, by an exercise of its treaty making power, cannot affect the legal rights of its subjects, because the law cannot be changed by the prerogative.").

[206] *See supra* notes 181–82 and accompanying text.

[207] Holdsworth, *supra* note 200, at 176.

[208] *Id.* at 176–77.

[209] *Id.* at 177.

[210] *Id.*; *see also id.* (stating that these treaties involved "many changes in English statute law" and perhaps also the common law of allegiance, *nemo potest exuere patriam*). The grant of statutory powers with respect to the Treaty of Paris avoided the constitutional question whether the King could cede territory by treaty without the consent of Parliament. *See* Gibbs, *supra* note 200, at 124 (noting this point and referring to "an act of the previous session enabling the king to conclude a peace or truce with the American colonies notwithstanding 'any Law, Act or Acts of Parliament, Matter or Thing to the contrary'").

absolute as of the eighteenth century.[211] Like Holdsworth, he identifies the Glorious Revolution of 1688 as the turning point for Parliament's participation in foreign affairs, and disapproves of an absolutist account of Blackstone's summary of the King's prerogatives in that area.[212] Although Gibbs states that the "strict constitutional position" and "orthodoxy" was that the Crown had absolute power in foreign policy in the eighteenth century, he suggests that the practice was different than the doctrine in the execution of foreign policy.[213] According to Gibbs, "[i]n practice, the crown's prerogative in foreign affairs was seriously limited . . . by parliament's function as the provider of supply and as the sole source of legislation," which meant that the "crown was obliged in certain circumstances to lay certain treaties before parliament."[214] What did Gibbs mean by this certain obligation?

He introduces Lord Chancellor Hardwicke's summary in 1755 of the paradigm cases for laying treaties before Parliament:

> 'The King,' he said, 'is not obliged by our constitution to ask either the consent or the approbation of parliament to any treaty he makes, nor even to communicate it to parliament, *unless it requires a grant or an act of parliament*, and even then he is obliged to communicate the treaty only when he applies for the grant or the act thereby required.'[215]

Hardwicke's summary identifies limitations on the Crown's power to "make[]" treaties, which suggests that some treaties require Parliament's "consent" or "approbation" before they may be executed as a matter of international law. Alternatively, even if these treaties are complete as a matter of international law, Hardwicke's summary suggests that Parliament's consent is required in order for these treaties to be complete as a matter of domestic law.

Gibbs elaborates on each of Hardwicke's limitations to the execution of the Crown's foreign policy. In discussing the class of treaties requiring a "grant" for their execution, Gibbs observes that "treaties attended with expense," consisting of "not only subsidy treaties and treaties with a money clause but also treaties containing military commitments whose execution required a grant of supply," needed to be laid before Parliament.[216] However, this was not an absolute rule: it was true "only if they were to be financed at the public expense, and even then only when the supply was actually required."[217] In discussing the class of treaties requiring an "act of

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[211] *See* Gibbs, *supra* note 200, at 116.

[212] *See id.* at 117.

[213] *Id.* at 117–20.

[214] *Id.* at 119.

[215] *Id.* (emphasis added).

[216] *Id.* at 119–20.

[217] *Id.* at 119–20. Gibbs illustrates these points with reference to treaties financed out of the Crown's private purse and financed out of residual funds appropriated by Parliament to the Crown for another purpose. *See id.* at 121–22.

parliament" for their execution, Gibbs admits that "[i]t was not always clear in the eighteenth century, indeed it was sometimes a matter of dispute, which treaties required parliamentary legislation."[218] Although this class of treaties does not define itself, Gibbs identifies a core meaning: "Commercial treaties clearly came within the category, though only where these involved the imposition or alteration of domestic tariffs: other commercial treaties might be laid, but at the discretion of the crown, and usually upon the addresses of either house."[219] Importantly, Gibbs' reference to the "imposition or alteration" of tariffs supports a doctrine of non-self-execution and partial non-self-execution, respectively. But this too was not an absolute rule, since not all commercial treaties needed to be laid before Parliament. Gibbs also indicates that this class of treaties included treaties providing for territorial cession.[220]

According to Gibbs, eighteenth-century British treaty-making practice closely fit Hardicke's rule.[221] Treaties were laid before Parliament (in some cases, one House at a time) at the Crown's initiative and sometimes upon address by either House.[222] Much of this took place after ratification, which underscores differences between the making of a treaty by the Crown and the implementation of a treaty by Parliament.[223] Gibbs also observes that by the time of George II (1727–1760) the Crown's practice of laying treaties before Parliament began to venture beyond Hardwicke's rule.[224] The Crown increasingly sought Parliament's support in foreign policy, including consultation and advice in treaty-making, but these were, strictly speaking, extra-legal developments.[225]

Thus, according to Holdsworth and Gibbs, the Crown's power to make self-executing treaties was limited in the eighteenth century. What is clear—as clear as a modern lawyer's reading of the historians' reading of the history can be—is that Parliament's participation was necessary in order for *certain* treaties to take effect as a matter of domestic law. This class of treaties included, paradigmatically, those involving matters of revenue and conflicts with existing statutes. At the same time, (some) other treaties did not require Parliament's participation in order to take effect as a matter of

[218] *Id.* at 123.

[219] *Id.*

[220] *Id.* at 123–24.

[221] *See id.* at 122–23 (surveying treaties made by Anne, 1702–14), 129–31 (surveying treaties made by George I, 1714–27).

[222] *See id.* at 122–23, 129–32.

[223] *See id.* at 130–31.

[224] *See id.* at 136.

[225] *See id.* at 132–37; *see also id.* at 137 (stating that "in general, parliament was ready both to concede the initiative to the crown and to accept that initiative where it could be shown to be consistent with what parliament held to be the national interest" and that "in accepting the need to obtain parliament's backing for its foreign policy, the crown accepted the need to do much more than the constitution strictly required—which was simply the communication to parliament at a certain point of certain decisions").

domestic law, which suggests that Parliament's role in executing treaties was limited and not general. The relevant British treaty-making practice seems to be one of partial non-self-execution. As we shall see in the next Section, this conclusion matches the Founders' interpretation of British practice, which has special weight as contemporaneous exposition of the law.[226] Whether Parliament had any discretion in implementing the Crown's treaties as a matter of domestic law is a separate question altogether.

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What does British practice mean for the non-self-execution debate? The interpretive stakes are high because Professors Yoo, Flaherty, and Vázquez force British practice to carry significant weight in determining whether and when the treaty-making power under the Constitution must be non-self-executing.[227] Yet, their disagreements run large and their story is hardly neat.

First, they disagree on the description of British practice. Yoo believes that the "British rule" is of "executive treaty-making followed by legislative implementation," in other words, total non-self-execution.[228] Though he disagrees with almost everything else, Vázquez agrees with Yoo's description of the British rule.[229] Flaherty, disagreeing with both Yoo and Vázquez, claims that "British doctrine actually points toward self-

[226] The legal maxim is *contemporanea expositio est fortissimo in lege*: contemporaneous exposition is the strongest in the law. For Founding-era references to British practice supporting this thesis, see *infra* text accompanying notes 275 (James Wilson, Philadelphia Convention), 278 (James Madison, Philadelphia Convention), 286 (John Mercer, Philadelphia Convention), 324–325 (Anti-Federalist An Old Whig), 335–337 (Anti-Federalist Federal Farmer), 347 (THE FEDERALIST NO. 47 (James Madison)), 373 (THE FEDERALIST NO. 69 (Alexander Hamilton)), 410 and 413–414 (Anti-Federalist John Smilie, Pennsylvania ratifying convention), 421 (Federalist James Wilson, Pennsylvania ratifying convention), 453 (Federalist John Rutledge, South Carolina legislature), 504 (Federalist Francis Corbin, Virginia ratifying convention); *see also infra* note 450 (Anti-Federalist Rawlins Lowndes, South Carolina legislature).

[227] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1997–2004; Flaherty, *History Right?*, *supra* note 48, at 2108–12; Vázquez, *Laughing at Treaties*, *supra* note 27, at 2158–59.

[228] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2038; *see also id.* at 2004 ("While the Crown formally enjoyed an absolute monopoly over treatymaking, Parliament retained the authority to make any changes in the domestic law or to raise the revenue needed to comply with the agreement."); Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2229 (describing British rule as state of affairs whereby "Parliament's authority over legislation and funding gave it a check on the Crown's treatymaking powers" and stating that "the British constitution did not allow treaties to exercise legislative powers"); *id.* at 2230 (describing British rule as a rule of non-self-execution).

[229] Vázquez, *Laughing at Treaties*, *supra* note 27, at 2158 (stating that he "does not doubt[] that the British distinguished sharply between treaties and laws, or that treaties in Great Britain lacked the force of domestic law unless implemented by Parliament"); *see also id.* at 2158 n.14; *id.* at 2159.

execution," or at least that there was not a "clearly settled British commitment to non-self-execution."[230]

They also disagree on the application of British practice to the treaty-making power. Yoo claims that the Constitution continues or inherits the British practice of total non-self-execution,[231] whereas Vázquez claims that the Constitution rejects it in favor of self-execution.[232] Given his description of British practice as vectoring toward self-execution, Flaherty suggests that the Constitution is consistent with it.[233] These scholars are literally all over the map with respect to British practice, with no two scholars agreeing on both issues.

The historical debate is waged by Yoo and Flaherty. Given this Section's summary of British practice, it is surprising that these scholars go so far off course in distilling the "British rule." They seem to agree that Parliament's participation in treaty-making was necessary with respect to treaties involving money matters, though they seem to disagree whether this participation was direct or indirect.[234] Critically, neither scholar mentions any role for Parliament with respect to implementing treaties involving *conflicts with existing laws.*

Yoo's historical presentation is characteristically elaborate. However, only a small part of his presentation is devoted to the eighteenth-century history that is most relevant to the inquiry at hand.[235] Much of this presentation is devoted to the political history of foreign affairs generally, which is helpful in establishing background context, but which offers limited guidance in determining the constitutional relationship between the Crown and Parliament in treaty-making.[236] Yoo's account of parliamentary participa-

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[230] Flaherty, *History Right?*, *supra* note 48, at 2112 n.81.

[231] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2038; Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2229–30.

[232] *See* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2193.

[233] Flaherty, *History Right?*, *supra* note 48, at 2112 n.81.

[234] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 1998–2004; Flaherty, *History Right?*, *supra* note 48, at 2110.

[235] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2002–04 (discussing post-1688 historical developments).

[236] *See id.* at 1997–2004 (discussing foreign affairs generally, especially relating to war and peace). Much of Yoo's narrative focuses on the work of British diplomatic historian Jeremy Black. *See id.* at 2001 n.219 (listing monographs of Black). One of the key sources is JEREMY BLACK, A SYSTEM OF AMBITION? BRITISH FOREIGN POLICY, 1660–1793, at 12–58 (1991). Professor Black is a historian, whose work focuses on British foreign policy in the eighteenth century. His conclusions are remarkably consistent with that of the legal historians discussed in the text: Parliament's role in foreign policy sharply increased after the Glorious Revolution; the Crown turned to Parliament for *financial support*, whether related to treaties (particularly commercial treaties or treaties involving subsidies) or war; the Crown increasingly disclosed its foreign policy to Parliament; and Parliament's *political power* resulted in more indirect influence over British foreign policy than ever before. *See id.* at 43–58. However, Professor Black cautions that Parliament's role was indirect and episodic, not direct and continuous. *See id.* at 46, 56–58; *see also id.* at 54 ("Reality was otherwise. Secret diplomacy was practised by British

tion in treaty-making primarily relates to Parliament's control over money, which is not subject to dispute, and which only became more apparent with time. He extrapolates from this "funding check"[237] to support Parliament's general power to implement treaties as a matter of domestic law, which means that British practice is one of total non-self-execution. In his words, "While the Crown formally enjoyed an absolute monopoly over treatymaking, Parliament retained the authority to make any changes in the domestic law or to raise the revenue needed to comply with the agreement."[238] The only historical proof for this conclusion is from Gibbs.[239]

The problem with this conclusion is that the legal history does not clearly support it. As we have seen, the historical accounts of Holdsworth and Gibbs support some non-self-execution, but seem to lean in the direction of self-execution. Gibbs recognized that Parliament's role in executing treaties was limited, not general, and did not even embrace all commercial treaties.[240] Similarly, Holdsworth, who neither Yoo nor Flaherty cite, suggested that Parliament's implementation of treaties, apart from money matters, was necessary only when treaties resulted in the "alteration" of existing laws.[241]

There does not appear to be any clearly settled understanding that the Crown's treaties could not have the force of domestic law without Parliament's sanction, which is what Yoo's conclusion requires. It is surprising that neither Holdsworth nor Gibbs refers, in simple terms, to Parliament's control over the making of laws, which was well understood in the eighteenth century,[242] as the reason for Parliament's participation in implementing treaties made by the Crown. Rather, Parliament's participation may have been driven by the conflict between treaties and existing laws, and not by the separation of powers between lawmaking and treaty-making. If most treaties made by the Crown altered existing laws, it would appear that Parliament's participation was generally necessary in order for treaties to take

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monarchs and ministers; Parliament could be ignored, particularly if peace prevailed and controversial subsidy treaties or commercial arrangements were not being considered.").

[237] Yoo, *Globalism and the Constitution*, *supra* note 33, at 2003.

[238] *Id.* at 2004; *see also id.* at 1998 ("After the struggles of the seventeenth and eighteenth centuries, the British constitution did not permit treaties to regulate domestic conduct, nor did it require Parliament to fund or implement treaty obligations.").

[239] *See id.* at 2004 n.234.

[240] *See supra* text accompanying notes 211–225.

[241] *See supra* text accompanying notes 201–210. In identifying the line between treaty-making and lawmaking in British constitutional law, Yoo claims that by the eighteenth century "according to Holdsworth, international agreements involving foreign trade had fallen outside the prerogative, as well as treaty provisions that involved revenues, such as tariff measures." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2004 n.235 (citing 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 401 (1938)). The latter point is true, but the former point is not—at least not according to Holdsworth. He wrote that only treaties of commerce providing for an incidental tax (as in *Bates's Case*) had fallen outside the King's prerogative. *See* 10 HOLDSWORTH, *supra*, at 401.

[242] *See supra* note 192 and accompanying text.

effect as a matter of domestic law. It is worth pausing for a moment to let this point sink in. In the end, Yoo's characterization of British practice may be correct, but it is far from proven.

On the other hand, Flaherty relies on the "sweeping tone"[243] of Blackstone's passage and a brief consideration of practice to sustain his conclusion that "the eighteenth-century world offers little clear evidence for the non-self-execution thesis and undermines it as often as it provides assistance."[244] To be sure, Flaherty has Yoo's total non-self-execution thesis and its separation-of-powers principles in mind. The practice that Flaherty investigates—Parliament's role in influencing the Crown's foreign affairs—is "largely indirect" as he describes it,[245] but it is also largely irrelevant in determining the British constitutional law of treaty-making. The problem is that Flaherty does not come to terms with Parliament's participation in any cases other than matters of revenue.[246]

What is more important than any precise description of British treaty-making practice as of the eighteenth century is how that practice applies (or not) to the Constitution's treaty-making power. On this point, none of Yoo, Flaherty, or Vázquez offers any guidance. The analytical task of "translating" a power given to a hereditary monarch alone to a power given to a President and a two-thirds supermajority of the Senate, who are each democratically accountable, is not exactly straightforward.[247] Given these critical differences in constitutional actors, the limitations imposed on the Crown in treaty-making might not apply to the President and Senate jot-for-jot. In other words, if every treaty made by the Crown was non-self-executing without parliamentary participation, it would not necessarily follow that every treaty made by the President and Senate is non-self-executing without congressional participation.

However, as a *presumptive* matter, the limitations to the British treaty-making power might be thought to apply to the treaty-making power under the Constitution, on the theory that the President and Senate do not possess more power than the Crown (and relatedly on the theory that Congress does not possess less power than Parliament). In other words, British practice provides a general background understanding or interpretive baseline for the treaty-making power. Therefore, given this Section's summary of British practice as one of partial non-self-execution, the partial non-self-execution thesis presumably applies to the treaty-making power. The actual application of British practice to the treaty-making power is the subject of

[243] Flaherty, *History Right?*, *supra* note 48, at 2109.

[244] *Id.* at 2112.

[245] *See id.* at 2110.

[246] This is surprising given Flaherty's characteristically rigorous historical scholarship, but particularly given his citations to the monograph of G.C. Gibbs. *See id.* at 2110 nn. 71, 73, 76. Flaherty does not discuss Holdsworth.

[247] None of these scholars makes this obvious point in the non-self-execution debate.

detailed historical inquiry of the framing and ratification of the Constitution, to which we now turn.[248]

B. Founding History

As a matter of historical argument, it should go without saying that the Founding history deserves the greatest interpretive weight.[249] This Section addresses traditional sources of Founding history in three sub-sections. It first considers the recorded proceedings of the Philadelphia Convention of 1787, then considers the writings of the Federalists and Anti-Federalists during the ratification struggle, and finally considers the recorded debates at the state ratifying conventions.[250]

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[248] Before turning to the framing and ratification of the Constitution, Professor Yoo discusses the early American experience under the Articles of Confederation at significant length, *see* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2009–24, to which Professor Flaherty responds, *see* Flaherty, *History Right?*, *supra* note 48, at 2112–20. The purpose of Yoo's discussion is to demonstrate that treaty-making during this period continued British practice by separating the executive power to make treaties from the legislative power to implement them (which he argues was also continued with the adoption of the Constitution). *See, e.g.*, Yoo, *Globalism and the Constitution*, *supra*, at 2009 ("Treaty-making under the Articles of Confederation did not metamorphose into a legislative function, but remained an executive function subject to the traditional legislative check of funding and implementing laws [held by state assemblies.]"). The principal historical evidence underlying this claim is the Continental Congress's reliance upon state legislatures to implement treaties (including the repeal of conflicting state statutes). *See id.* at 2010–24.

I do not wish to tax the readers' patience with a discussion of history that is distinctly less relevant than that presented in the text. Suffice it to say that the problem with Yoo's claim is that it seriously conflates two issues: treaty self-execution and the power of the Continental Congress to legislate and enforce its measures (which included *statutes* as well as *treaties*). The federal government under the Confederation was notoriously weak and hardly worth the moniker of government; like Rodney Dangerfield, it got no respect. *See, e.g.*, THE FEDERALIST NO. 15, *supra* note 4, at 108 (Alexander Hamilton) ("[T]hough in theory their resolutions concerning those objects [requisitions] are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option."); THE FEDERALIST NO. 21, *supra* note 4, at 138 (Alexander Hamilton) (discussing "the total want of a SANCTION to its laws" as enforcement problem under the Confederation). These issues defeat any inference of the treaty-making power under the Confederation as an executive power without any legislative effect.

[249] *See* Kesavan & Paulsen, *supra* note 55, at 1180–83.

[250] Before doing so, it is important to briefly discuss the interpretive methodology of originalism which is the primary form of constitutional argument in the non-self-execution debate between Professors Yoo, Flaherty, and Vázquez. They discuss originalist methodology at some length because some of the well-worn historical sources (purportedly) lean more strongly in one direction than another, and the weight to be assigned to these various sources affects the "best" reading of the historical evidence and the conclusions that ought to surface. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2039–40, 2069–74; Flaherty, *History Right?*, *supra* note 48, at 2097–2105; Vázquez, *Laughing at Treaties*, *supra* note 27, at 2161–68; Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2221–33. Yoo maintains that originalists "should give primary weight to the ratification and secondary attention to Philadelphia" and that "[t]he understandings of the state ratifiers, not those of the Philadelphia drafters, should receive the greatest attention." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2039–40; *see id.* at 2026 n.328 (similar); *see also* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2222 n.17, 2231–32 (similar). In lengthy discussions of historical method, Flaherty seemingly accepts this conclusion, *see* Flaherty, *History Right?*, *supra* note 48, at 2102 n.34, while Vázquez discusses the evi-

1. The Philadelphia Convention of 1787.—We begin the review of Founding history with the recorded proceedings of the Philadelphia Convention of 1787, where the treaty-making power was debated by the Framers of the Constitution. The records of the Philadelphia Convention have been well-traversed by Professors Yoo, Flaherty, and Vázquez in the non-self-execution debate.[251] Yoo reads the Philadelphia debates as establishing a separation of powers between treaty-making and lawmaking as a matter of domestic law (consistent with his description of British practice), thereby

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dentiary problems with Yoo's emphasis, *see* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2162–63. Within the ratification debates, Yoo stresses the understandings of particular ratifying conventions given the importance of the states involved (e.g., Pennsylvania and Virginia) and their role as "veto-gates" (e.g., Virginia) in the ratification struggle, while dismissing the weight given to others (e.g., North Carolina). *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2043–48, 2059–68, and 2069–72. Alarmingly, he maintains that the Constitution's meaning changed (evolved?) throughout the ratification struggle. *See id.* at 2025 n.328. Flaherty and Vázquez criticize Yoo's "contractual theory" of privileging the debates of some ratifying conventions while ignoring others. *See* Flaherty, *History Right?*, *supra* note 48, at 2149–50; Vázquez, *Laughing at Treaties*, *supra* note 27, at 2166–68. Vázquez further takes Yoo to task for using "nonpublic evidence," while dismissing the significance of the secret proceedings of the Philadelphia Convention. *See id.* at 2163 n.37.

All of this ink is wasteful because Yoo's originalist methodology is not the originalism endorsed by today's leading originalist jurists (such as Justice Scalia) and originalist scholars (such as Professor Gary Lawson). Properly conceived, originalism is not about anyone's "intent" or "understanding," whether of the "Framers" or the "Ratifiers," and whether made in public or in private. It is about the original meaning of the text—the words, phrases, and even punctuation marks—of the Constitution. This is the project of determining the meaning the text of the Constitution would have had to the hypothetical, reasonably well-informed Ratifier, reading a document of its type, at the time of its adoption. *See generally* Kesavan & Paulsen, *supra* note 55, at 1118 (explaining the original meaning approach to constitutional interpretation); GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 7–12 (same); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997) (same).

Under this approach, whether a statement is made by a Framer or Ratifier, in public or in private, is pretty much immaterial. The reason why the actual mental states of Framers and Ratifiers are relevant is because they shed light on the plausible original meaning of the text of the Constitution. In practice, the subjective intentions and understandings of the Framers and Ratifiers (collectively, the Founders) and the objective meaning of the text tend to converge, especially when the actual mental states are those of Founders who were reasonably well-informed, capable of processing the relevant information at hand, and willing to provide reasons in favor of a particular meaning. Private commentary may be more probative of original meaning than public commentary if made in environments where bias runs less deep. Nonetheless, the determination of original meaning is not about counting the number of actual mental states in favor of a particular meaning. Actual mental states provide evidence of the linguistic plausibility of a particular meaning; they may in the end provide the most satisfying account of a particular meaning. But the project of determining the original meaning of the Constitution is the project of a hypothetical, not historical inquiry of summing up actual mental states of the Founders. *See* Kesavan & Paulsen, *supra* note 55, at 1143–44 (discussing Professor Gary Lawson's project of original meaning); *id.* at 1146–47, 1189–91 (discussing public/private distinction and interpretive virtue of secrecy). For further discussion of the admissibility and weight of actual mental states of the Framers and Ratifiers, see Gary Lawson & Guy Seidman, *The First "Establishment" Clause: Article VII and the Post-Constitutional Confederation*, 78 NOTRE DAME L. REV. 83, 90–93 (2002); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. (forthcoming 2006).

[251] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2026–40; Flaherty, *History Right?*, *supra* note 48, at 2120–26.

preserving a role for Congress in implementing treaties made by the President and Senate.[252] According to Flaherty and Vázquez, however, "'the framers were virtually of one mind'"[253] in their views that treaties would always be self-executing, and according to Flaherty, "the last, best hope for any interpretation pointing toward non-self-execution becomes the ratification debates."[254]

All three scholars overstate the case. Critically, their presentations of the Philadelphia debates are incomplete, which leads each of them to miss important evidence denying their "totalist" conclusions and supporting the partial non-self-execution thesis. The Philadelphia debates are important because they provide a contemporaneous understanding of British treaty-making practice and how that practice might apply to the treaty-making power—with specific reference to the case of statute-treaty conflict. The following presentation of the Philadelphia debates summarizes the relevant history in three parts: the Framers' initial debate on the Treaty Clause, the Framers' debate on an ancillary clause which sheds light on the treaty-making power, and the Framers' final debate on the Treaty Clause.

We begin with the Framers' initial debate of August 23, 1787, on the Treaty Clause as reported by the Committee of Detail. The early draft of the Clause vested the treaty-making power solely in the Senate: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."[255] The debate focused on the Clause's allocation of power. James Madison urged that "it was proper that the President should be an agent in Treaties" because "the Senate represented the States alone."[256] Gouverneur Morris, also expressing his concerns regarding the Senate's power monopoly, had a different idea. He moved to amend the Clause to provide that "[t]he Senate of the United States shall have power to make treaties but no Treaty shall be binding on the U.S. which is not ratified by a law."[257] Morris's amendment related to the binding force of treaties under international law, as his next statement makes clear. When Madison objected to Morris's amendment by noting "the inconvenience of requiring a legal ratification of treaties of alliance for

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[252] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2024–25.

[253] Flaherty, *History Right?*, *supra* note 48, at 2126 (quoting Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty Making Clause as a Case Study*, 1 PERSP. AM. HIST. 233, 264 (1984)); Vázquez, *Laughing at Treaties*, *supra* note 27, at 2159 (quoting Flaherty quoting Rakove).

[254] Flaherty, *History Right?*, *supra* note 48, at 2126.

[255] 2 FARRAND, *supra* note 127, at 183. The Committee of Detail's draft illustrated the three paradigm cases of treaties—peace, alliance, and commerce:

> The Senate (shall be empowered) *of the United States shall have Power* to make Treaties of (Peace, of Alliance, and of Commerce,) to send Ambassadors, and to appoint the Judges of the Supreme national Court.

Id. at 155 (Committee of Detail, VI draft).

[256] *Id.* at 392.

[257] *Id*.

the purposes of war,"[258] Morris responded that "[i]n general he was not solicitous to multiply & facilitate Treaties. . . . The more difficulty in making treaties, the more value will be set on them."[259] Thus, Morris sought to add Congress as a necessary wheel in the machinery of treaty-making before a treaty could be "made" in the constitutional sense.[260]

At this point, James Wilson entered the debate, observing that "[i]n the most important Treaties, the King of G. Britain being obliged to resort to Parliament for the execution of them, is under the same fetters as the amendment of Mr. Morris will impose on the Senate."[261] This was the first reference to British treaty-making practice during the drafting of the Treaty Clause.[262] According to Wilson, *some* (but not all) of the King's treaties, namely, the "most important" ones, would not bind the nation under international law without "execution" by Parliament.[263] This interpretation is consistent with Lord Chancellor Hardwicke's summary in 1755 of the limitations on the Crown's power to make certain treaties.[264] Wilson was justifying Morris's amendment (which applied to all, not some treaties) based upon his understanding of British practice.

To illustrate the point, he considered the operation of the draft Clause without Morris's amendment. "It was refused yesterday," said Wilson, "to permit even the Legislature to lay duties on exports. Under the clause, without the amendment, the Senate alone can make a Treaty, requiring all

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[258] *Id.* Madison's objection related to a special class of treaties relating to war and peace, not all treaties. Nathaniel Gorham also objected to Morris's amendment with specific reference to treaties of peace. He noted the potential embarrassment to the United States if the negotiations of the American ambassadors—who would be appointed by the Senate and presumably take instruction from them—were not "previously ratified" by the "same Authority . . . which is to ratify their proceedings" (i.e., Congress). *See id.*; *see also id.* at 395 (McHenry's notes).

[259] *Id.* at 393.

[260] Morris's amendment highlights a distinction between the making of a treaty and its ratification. Indeed, an early draft of the Supremacy Clause provided, "Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants . . . ." *Id.* at 22. Morris's amendment suggests that the power to "make" a treaty is the power to make it valid or effective in the absence of any further requirement. The original Constitution uses the word "make" in this sense in various clauses. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 2; *id.* art. I, § 4, cl. 1; *id.* art. I, § 8, cls. 11, 14, 18; *id.* art. I, § 10, cl. 1; *id.* art. III, § 2, cl. 2; *id.* art. IV, § 3, cl. 2; *see also* SAMUEL JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE 447 (Alexander Chalmers ed., 1994) [hereinafter SAMUEL JOHNSON'S DICTIONARY] (defining "To Make" as "To bring into any state or condition" and "To form; to settle; to establish"). Indeed, the word "make" is also the past participle of the word "made" which appears thrice in the Supremacy Clause, U.S. CONST. art. VI, cl. 2.

[261] 2 FARRAND, *supra* note 127, at 22.

[262] For an earlier reference to British treaty-making practice in a discussion involving a different constitutional provision, see *infra* text accompanying note 286 (remarks of John Mercer).

[263] The meaning and significance of the word "some" will become apparent shortly. *See infra* text accompanying note 275 (presenting McHenry's notes of this statement by Wilson).

[264] *See supra* text accompanying note 215.

the Rice of S. Carolina to be sent to some one particular port."[265] Although Wilson was addressing the creation of commitments as a matter of international law, his statement suggests that a treaty, when made, requires no further "execution" by the legislature in order to have the force of domestic law. This is consistent with a doctrine of self-execution.

Alternatively, Wilson may only have been referring to a "requirement" under international law and not domestic law, assuming that a treaty, when made, would nevertheless require legislative implementation in order to have the force of domestic law. This is consistent with a doctrine of non-self-execution. Either interpretation is possible. The better interpretation, favoring the doctrine of self-execution, becomes clearer with Wilson's subsequent remarks at the Philadelphia Convention, where he explains that treaties, when made, have the operation of laws.[266]

William Samuel Johnson disagreed with Wilson's representation of British practice. According to Johnson, "[t]he Example of the King of G. B. was not parallel. Full & compleat power was vested in him—If the Parliament should fail to provide the necessary means of execution, the Treaty would be violated."[267] Like Wilson before him, Johnson recognized Parliament's role in the "execution" of the Crown's treaties. Whereas Wilson claimed that Parliament's failure to execute a treaty resulted in no treaty being made, Johnson claimed that this failure only resulted in a treaty being violated.[268]

Despite Wilson's strong endorsement, Morris's motion failed by a vote of eight to one with one divided.[269] The recorded notes show that Madison then "hinted for consideration, whether a distinction might not be made between different sorts of Treaties—Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms—and requiring the concurrence of the whole Legislature in other Treaties."[270] Madison was suggesting that some treaties (namely, treaties of commerce, which along with treaties of peace and treaties of alliance, were the three paradigm classes of treaties at the Founding)[271] would be "made" in the constitutional sense only with the concurrence of Congress.[272] Although the Framers' initial debate

[265] 2 FARRAND, *supra* note 127, at 393.

[266] *See infra* text accompanying notes 295–298.

[267] 2 FARRAND, *supra* note 127, at 393.

[268] Professor Yoo correctly reaches this conclusion. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2033.

[269] *See* 2 FARRAND, *supra* note 127, at 394.

[270] *Id*.

[271] *See supra* note 255.

[272] Earlier in the Philadelphia Convention, Madison recognized that a treaty might require legislative ratification. In discussing the differences between a *Confederation* and a *Constitution*, he observed that under the latter: "A law violating a treaty ratified by a preexisting law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the

on the Treaty Clause focused on the issue of the making of commitments as a matter of international law, the assumption that Morris, Wilson, Johnson, and Madison seemed to share is that a treaty, when made, would have the force of domestic law.[273]

McHenry's notes of the same debate of August 23, 1787 reveal a clearer picture of the discussion by Wilson and Madison of British treaty-making practice.[274] According to these notes, ignored by Yoo, Flaherty, and Vázquez, Wilson's discussion of the "most important" treaties requiring parliamentary "execution" was as follows:

> [A]ll treaties which contravene a law of England or require a law to give them operation or effect are inconclusive till agreed to by the legislature of Great Britain.
>
> Except in such cases the power of the King without the concurrence of the parliament conclusive.[275]

The first part of the first sentence relating to treaties that "contravene a law of England" strongly supports the description of British practice given in the previous Section, favoring a doctrine of partial non-self-execution: treaties conflicting with existing laws are without effect as a matter of domestic law without parliamentary sanction.[276] Wilson presumably meant that such treaties were "inconclusive" as a matter of international law, which meant that they were also without "operation or effect" as a matter of domestic law.

The second part of the first sentence relating to treaties that "require a law to give them operation or effect" is somewhat ambiguous. There are three possible interpretations. Wilson may be referring to treaties that require an implementing statute because they (i) stipulate that laws shall be made in the future to carry out the treaty's provisions, as in executory contracts; (ii) touch the exclusive powers of the legislature, such as the legislature's power over the purse, which is consistent with a doctrine of partial non-self-execution; or (iii) touch any of the powers of the legislature, which implies a complete separation between treaty-making and lawmaking, and which is consistent with a doctrine of total non-self-execution.

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people themselves, would be considered by the Judges as null & void." 2 FARRAND, *supra* note 127, at 93.

[273] If treaties always require congressional implementation in order to have the force of domestic law, the entire debate was only about ensuring the nation's compliance with treaties by obtaining Congress's approval ex ante. This was surely a concern, but probably not the only one. The better account of the debate is that the Framers sought to include Congress in the treaty-making process because treaties, when made, would have the force of law.

[274] *See* 2 FARRAND, *supra* note 127, at 394–95.

[275] *Id.*

[276] *See supra* Part III.A.

The better answer is that Wilson was referring to the second possibility, which favors a doctrine of partial non-self-execution. This interpretation makes the most sense of the first part of the sentence. If all treaties touching the legislature's powers require an implementing statute, why refer to the specific case of treaties contravening existing laws, which necessarily touch the legislature's powers? This interpretation is also consistent with the description of British practice given in the previous Section and Wilson's subsequent statement regarding British practice at the Pennsylvania ratifying convention.[277] Moreover, to the extent that Wilson was addressing the relationship between treaties and the domestic law (and not just between treaties and international law), the final part of his statement suggests that some treaties, when made, would be conclusive as a matter of domestic law without parliamentary sanction. Thus, Wilson's summary of British practice supports (and is otherwise consistent with) a doctrine of partial non-self-execution. The question left unanswered by Wilson's statement regarding British practice is how this practice applies to the Constitution.

Similarly, McHenry's notes elaborate upon Madison's suggestion that certain treaties, namely treaties of commerce, should require legislative ratification before they are made in the constitutional sense. According to McHenry's notes, Madison, referring to British practice, stated that "the Kings [sic] power over treaties final and original except in granting subsidies or dismembering the empire. These required parliamentary acts."[278] Madison was denying the King's absolute power to make treaties binding the nation as a matter of international law without Parliament's consent. His description of Parliament's participation in treaty-making excludes, or perhaps omits, the case of treaties contravening existing laws.[279] However, in referring to "granting subsidies or dismembering the empire," his description sheds light on what Wilson may have had in mind when he referred to treaties that "require a law to give them operation or effect." Unless Madison was only concerned with the creation of commitments as a matter of international law, his description of British practice suggests that, apart from the identified cases, the King's treaties would also be "final and original" as a matter of domestic law without Parliament's sanction. As with Wilson's summary of British practice, the question left unanswered is how this practice applies to the Constitution.[280]

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[277] *See infra* text accompanying note 421.

[278] 2 FARRAND, *supra* note 127, at 395.

[279] It is possible that treaties contravening existing laws may be "made" in the constitutional sense without Parliament's sanction, thereby binding the nation as a matter of international law, but that these treaties remain inconclusive as a matter of domestic law without Parliament's sanction.

[280] McHenry's notes of Wilson's and Madison's statements are conveniently reprinted in Professor Farrand's *Records of the Federal Convention*, but curiously none of Professors Yoo, Flaherty, or Vázquez mentions either one in their otherwise elaborate discussions of the Philadelphia debates. More importantly, these omissions lead these scholars seriously astray. Yoo's neglect of Wilson's statement,

Wilson and Madison are not the only Framers to have considered British treaty-making practice and its implications for the doctrine of non-self-execution. Just over a week earlier, the Framers considered the draft of the Origination Clause, which in final form provides the House of Representatives with the right of originating money bills.[281] The Framers' consideration of the draft clause brought forth sentiments in favor of reduced Senate power.[282] George Mason supported the draft clause because "[h]e was extremely earnest to take this power from the Senate, who he said could already sell the whole Country by means of Treaties."[283] This was a not-so-subtle observation on the scope of the treaty-making power and the possible cession of territory.[284] Mason seemed to assume that treaties, when made, would have the force of domestic law.[285] John Mercer remarked that

> the Senate ought not to have the power of treaties. This power belonged to the Executive department; adding that Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority. This was the case of Treaties in Great Britain; particularly the late Treaty of Commerce with

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particularly his elaboration of the "most important" treaties and the crucial "except" proviso, leads Yoo to erroneously conclude that Wilson understood Parliament to have the power to implement "all" treaties, which he then stretches to suggest that Wilson thought that Congress would have a similar role before a treaty would take effect as a matter of domestic law. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2033 (reading Madison's notes of Wilson's remarks as stating that "Parliament had to approve implementing legislation for a treaty to take effect in domestic British law"); *id.* (stating that Madison's notes of Wilson's remarks "suggest that [he] thought that Congress's legislative powers gave it sole control over a treaty's domestic implementation"). Flaherty's neglect of Wilson's and Madison's statements leads him to erroneously conclude that "the last, best hope for any interpretation pointing toward non-self-execution becomes the ratification debates." Flaherty, *History Right?*, *supra* note 48, at 2126. And when it comes to the ratification debates, Flaherty characterizes Wilson's similar statement at the Pennsylvania ratifying convention as an "ambiguous and perhaps contradictory performance," *id.* at 2134, when Wilson was simply restating his Philadelphia position. Vázquez's neglect of Wilson's and Madison's statements leads him to erroneously conclude that "after the convention voted to adopt the provision declaring treaties to be law, *no one*—least of all the defenders of the House's prerogatives—proposed to deny treaties the force of law unless implemented by statute." Vázquez, *Laughing at Treaties*, *supra* note 27, at 2159. Presumably Wilson and Madison thought to deny some treaties the force of domestic law unless and until approved by Congress.

[281] *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

[282] *See* 2 FARRAND, *supra* note 127, at 297.

[283] *Id.*

[284] Mason was undoubtedly concerned with navigational rights on the Mississippi River, which was the lifeblood of the larger, southern states, and which might be ceded by the Senate where the smaller, northern states had superior relative representation. On the importance of the Mississippi River issue for the Treaty Clause, see *infra* note 300 (discussing impetus for Treaty Clause's supermajority consent requirement) and *infra* notes 465–68 and accompanying text (discussing debates of the Virginia ratifying convention).

[285] Mason's assumption regarding self-execution would be made clearer in his "Objections to this Constitution of Government," which was widely circulated after the close of the Philadelphia Convention. He therein described the treaty-making power as "an exclusive Power of Legislation." *See infra* text accompanying note 310.

France.[286]

Mercer's statement crisply reflects a doctrine of non-self-execution, explicitly linking British treaty-making practice to the Constitution. His use of the word "final" echoes Madison's use of the same word[287] and Wilson's use of the related word "inconclusive" in discussing British practice during the initial drafting of the Treaty Clause.[288] What did Mercer mean by treaties that "alter the laws of the land," which require legislative ratification in order to be "final" as a matter of domestic law?

The phrase is subject to two interpretations. It could refer to a treaty that literally alters the laws of the land, as in laws already on the statute books.[289] This interpretation supports the doctrine of partial non-self-execution. Alternatively, the phrase could refer to a treaty that alters the laws of the land with the "making" of a new law, as in adding something to the body of law that did not exist before. This interpretation supports the doctrine of total non-self-execution.

The former interpretation is more likely. It is consistent with the description of British practice given in the previous Section, and with Wilson's description of British practice during the initial drafting of the Treaty Clause.[290] It is also consistent with the definition of the word "alter," which implies changing or modifying an existing thing.[291] The former interpretation is even more likely given Mason's immediate response to Mercer's remarks: "[He] did not say that a Treaty would repeal a law; but that the Senate by means of treaty might alienate territory &c. without legislative sanction. The cessions of the British Islands in W– Indies by Treaty alone were an example . . . ."[292] Thus, the exchange between Mercer and Mason,

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[286] 2 FARRAND, supra note 127, at 297.

[287] *See supra* text accompanying note 278.

[288] *See supra* text accompanying note 275.

[289] There is no doubt that Mercer was referring to federal law given the natural meaning of the phrase "laws of the land" and his reference to the singular "legislative authority."

[290] *See supra* text accompanying note 275.

[291] *See* SAMUEL JOHNSON'S DICTIONARY, *supra* note 260, at 24 (defining "To alter" as "To change"); 1 THE OXFORD ENGLISH DICTIONARY 365 (J.A. Simpson & E.S.C. Weiner eds., 1989) [hereinafter OED] (defining "alter" as "To make (a thing) otherwise or different in some respect; to make some change in character, shape, condition, position, quantity, value, etc. without changing the thing itself for another; to modify, to change the appearance of"). The word "alter" is contradistinguished from the word "make," which does not presuppose an existing thing. *See supra* note 260 (presenting definition of the word "make"). This point is perhaps best illustrated by the Constitution's Times, Places, and Manner Clause, which employs both of these words in the same clause. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."). For other linkages of the word "alter" in connection with British practice, see *infra* text accompanying notes 324–326 (remarks of Anti-Federalist An Old Whig), and 504 (remarks of Federalist Francis Corbin, Virginia ratifying convention).

[292] *See* 2 FARRAND, *supra* note 127, at 297–98.

unreported by Yoo, Flaherty, and Vázquez, demonstrates that at least two Framers understood treaties to be legally inferior to statutes by reference to British treaty-making practice, which means that treaties would be non-self-executing in case of statute-treaty conflict.[293]

We now finally turn to the Framers' drafting of the Treaty Clause on September 7, 1787, near the end of the Philadelphia Convention.[294] James Wilson moved to amend the Treaty Clause, which by this point included the President in a share of the power, as follows: "The President by & with the advice and consent of the Senate and House of Representatives shall have power to make Treaties &c."[295] The rationale for this amendment, according to Wilson, was that "[a]s treaties . . . are to have the operation of laws, they ought to have the sanction of laws also."[296] This leaves little doubt that Wilson believed that treaties, when made, would have the force of domestic law without legislative sanction. Otherwise, it does not make sense to say that "they ought to have the sanction of laws also." Furthermore, Wilson's explanation for the amendment should be interpreted in light of his earlier remarks at the Philadelphia Convention regarding British practice: treaties, when made, would have the operation or effect of laws, except in certain cases.[297]

Wilson recognized the obvious point that "[t]he circumstance of secrecy in the business of treaties formed the only objection; but this he thought, so far as it was inconsistent with obtaining the Legislative sanction, was outweighed by the necessity of the latter."[298] Ever the populist and defender of the House's prerogatives, Wilson sought to harmonize the processes of treaty-making and lawmaking because treaties, when made,

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[293] Curiously none of Professors Yoo, Flaherty, or Vázquez mentions Mercer's statement or Mason's reply in their otherwise elaborate discussions of the Philadelphia debates. Mercer's statement may be read to lend support to arguments for Yoo's total non-self-execution thesis, but Yoo does not mention it. At the other end of the non-self-execution debate, Vázquez is simply wrong to claim that "[t]here is not a shred of evidence that anyone wanted to give the House [of Representatives] the power to block compliance with treaties already in force." Vázquez, *Laughing at Treaties*, *supra* note 27, at 2161. And if we drop the "already in force" qualifier, there is more evidence supporting a role for the House in implementing certain treaties. The statements of Wilson and Madison related to the legislature's role in bringing certain treaties *into force*. *See supra* text accompanying notes 275, 278.

[294] *See* 2 FARRAND, *supra* note 127, at 538.

[295] *Id.*

[296] *Id.*

[297] *See supra* text accompanying note 275. It is Professor Yoo who seeks to interpret Wilson's remarks at variance with each other. He relies on Wilson's earlier remarks on British practice to support the total non-self-execution thesis, but dismisses Wilson's later remarks on the operation of treaties as laws—remarks supporting a doctrine of self-execution. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2033, 2036. This partial (no pun intended) interpretation of Wilson's remarks must yield to an interpretation that makes sense of the whole.

[298] *See* 2 FARRAND, *supra* note 127, at 538; *see also id.* (remarks of Roger Sherman) (objecting to Wilson's amendment because he thought that the treaty-making power rested safely in the Senate and "that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature").

would have the operation of laws. The legislative "sanction" to which Wilson appeals—not once, but twice—is that which validates the operation of treaties as laws.

Wilson's amendment lost by a vote of ten to one, and the treaty-making power remained vested in the President and the Senate alone.[299] Upon additional debate, the Treaty Clause was amended to be in its final form with a two-thirds supermajority consent requirement in the Senate.[300]

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[299] *See id.* The rejection of Wilson's amendment has no bearing on Wilson's main point that treaties, when made, would have the operation of laws—it simply reflects a decision not to include the House in the treaty-making process. *See also* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2036 (correctly reaching this conclusion, but trivializing the force of Wilson's words on his main point). The relevant point is not that the *Framers* rejected Wilson's amendment, but that *Wilson*, in proffering his amendment, explained *why* it was important.

Another debate among the Framers, predating the first debate on the Treaty Clause, also bears on the question whether treaties, when made, would have the operation of laws. On August 23, 1787, before taking up debate on the Treaty Clause, the Framers took up the drafting of the precursor to the Militia Clause, U.S. CONST. art. I, § 8, cl. 15. The draft clause provided that Congress shall have power "[t]o call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions." 2 FARRAND, *supra* note 127, at 389. Gouverneur Morris moved to strike the phrase "enforce treaties" as "being superfluous since treaties were to be 'laws,'" which was agreed to without dissent. *Id.* at 389–90. The Framers unanimously agreed to do so because they understood the phrase "enforce treaties" to be subsumed by the phrase "execute the laws of the Union." *Id.* at 390. In other words, treaties were "laws of the Union" which would be "execute[d]" just like federal statutes. This might be taken, naturally, to suggest that treaties, when made, would have such status. But this interpretation is not inevitable. The debate on the Militia Clause and the Framers' decision to strike the phrase "enforce treaties" as superfluous does not indicate *how* treaties come to have the status of the "laws of the Union," much less *which* treaties have that status. And it certainly does not address the hierarchical relationship between statutes and treaties, which is a key aspect of the doctrine of non-self-execution. Professors Flaherty and Yoo burden the debate on the Militia Clause with more weight than it can bear. *See* Flaherty, *History Right?*, *supra* note 48, at 2123–24; Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2231 n.48. Flaherty reads the passing of Morris's motion as evidence that the Framers thought that treaties would be self-executing. In his words, "[t]he only plausible interpretation of this change is that Morris, and the delegates who approved the motion, agreed that federal laws and treaties were to have the same status, just as the Supremacy Clause already stated." Flaherty, *History Right?*, *supra* note 48, at 2124 n.131. This is not the only interpretation at all. It is one thing to say that statutes and treaties are both species of the genus of federal law; it is quite another to say that statutes and treaties are of the same species. To compensate for Flaherty's extreme conclusion, Yoo goes to great lengths to dismiss any inference of self-execution from the passing of Morris's motion. *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2231 n.48.

[300] *See* 2 FARRAND, *supra* note 127, at 540–41 (adopting proposal for two-thirds supermajority consent requirement and exception for treaties of peace, but rejecting exception for treaties of peace to be made without concurrence of the President); *id.* at 547–50 (striking out exception for treaties of peace and rejecting proposals to remove two-thirds supermajority consent requirement, add higher quorum requirement, and prohibit treaties from being made without notice and time for travel by Senators to the seat of government). Other history indicates that the two-thirds supermajority consent requirement owes its existence to a paradigm case: the cession of navigation rights by the Continental Congress to Spain in the failed Jay-Gardoqui Treaty of 1786, supported by seven northern states (who stood to gain) and opposed by six southern states (who stood to lose). Framer Hugh Williamson would later write to James Madison at the beginning of the Virginia ratifying convention:

> Your Recollection must certainly enable you to say that there is a Proviso in the new Sistem which was inserted for the express purpose of preventing a majority of the Senate or of the States which

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What do the debates from the Philadelphia Convention mean for the non-self-execution debate? When read with care, the Philadelphia debates strongly support the partial non-self-execution thesis. No less than four Framers—James Wilson, James Madison, John Mercer, and George Mason—addressed the doctrine of non-self-execution with reference to British treaty-making practice, whether non-self-execution would result in no treaty being "made," or whether it would result in it being made, but without operation or effect as a matter of domestic law. Of these Framers, Wilson, Mercer, and Mason understood British practice to require non-self-execution in the specific case of statute-treaty conflict. Each of them presumably thought that this limitation would apply to the Constitution; Mercer and Mason unambiguously claimed that it would apply.

At the same time, the Philadelphia debates support a doctrine of self-execution as a general matter. The summary of British practice by Wilson and Madison suggests that treaties, when made, would have the force of domestic law, except in certain cases. Wilson clearly understood that treaties, when made, would have the force of domestic law, which is why he maintained that treaties ought to have legislative sanction. In reviewing the Philadelphia records, Professors Flaherty and Vázquez unfortunately go just a little too far with the total self-execution thesis because they fail to take account of the statements of several Framers who discussed limitations to the doctrine of self-execution based on British practice, particularly with respect to the conflict between treaties and existing statutes.[301]

> is considered as the same thing from giving up the Mississippi. It is provided that two thirds of the Members present in the senate shall be required to concur in making Treaties . . . .

Letter from Hugh Williamson to James Madison (Jun. 2, 1788), *reprinted in* 3 FARRAND, *supra* note 127, at 306–07; *see also* SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 79–80 (4th ed. 1955); Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271 (1934); R. Earl Clendon, *Origin of the Two-thirds' Rule in the Senate Action Upon Treaties*, 36 AM. HIST. REV. 768 (1931).

[301] Professors Flaherty and Vázquez place too much faith in Professor Rakove's work on the treaty-making power in claiming that treaties are self-executing. *See* Flaherty, *History Right?*, *supra* note 48, at 2126; Vázquez, *Laughing at Treaties*, *supra* note 27, at 2159. According to Rakove:

> Whatever uncertainty might have persisted about the precise allocation of the authority to make treaties, the framers were virtually of one mind when it came to giving treaties the status of law. . . . The imperative need to make treaties legally binding on both the states and their citizens was widely recognized by 1787. The major consequence of this perception was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts.

Rakove, *supra* note 253, at 264 (1984). The problem is that Rakove's article did not address the doctrine of non-self-execution, much less the hierarchical relationship between statutes and treaties. *See also* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2225 n.24 (making similar claim).

In addition, Professor Vázquez places emphasis on the Philadelphia Convention's rejection of the "Virginia Plan" and adoption of the Supremacy Clause instead, which he claims supports a doctrine of

On the other hand, there is no direct evidence supporting Professor Yoo's total non-self-execution thesis. The Framers did not establish any separation of powers between treaty-making and lawmaking as a matter of domestic law, much less by reference to Congress's legislative powers, which is precisely what Yoo's thesis requires. The summary of British treaty-making practice by Wilson and Madison is of no help either. These Framers suggested that British practice was one of self-execution with limited non-self-execution, not vice versa. This implies that Parliament did not have complete (or even significant) control over the implementation of the Crown's treaties as a matter of domestic law. Yoo reads the Philadelphia debates for the proposition that the Framers rejected a role for Congress in the making of treaties as a matter of international law, but understood that Congress would retain control over the implementation of treaties as a matter of domestic law.[302] This is a most strained reading of these debates because it is in tension with the Framers' assumption that treaties, when made, would have the operation of law—an assumption that one leading Framer, James Wilson, brought to light. In the end, after Flaherty's lengthy response, Yoo seems to admit that the Philadelphia debates do not support his total non-self-execution thesis.[303]

2. The Writings of the Federalists and Anti-Federalists.—The writings of the Federalists and Anti-Federalists are valuable extra-textual sources of the original meaning of the Constitution because they provide evidence of how constitutional provisions were understood by reasonably well-informed members of the political community who participated in the ratification of the Constitution.[304] Of course, some of these writings may be entitled to less respect than others as evidence of original meaning. For example, the Anti-Federalists, by the very nature of their agenda, had incen-

self-execution because it is evidence that the Framers excluded Congress from the process of enforcing treaties as federal laws against the states. *See* Vázquez, *Treaty-Based Rights*, *supra* note 27, at 1101–10. The Virginia Plan would have given Congress the power to sit as a state legislature of last resort in negativing state statutes thought to interfere with the Constitution, federal statutes, and treaties. *See* 2 FARRAND, *supra* note 127, at 27–28. It would take too much space to unpack the weakness of Vázquez's claim here, but suffice it to say that the Virginia Plan and Supremacy Clause relate to the preemption of state law by all three tiers of federal law and the enforcement thereof, and have nothing to do with the issue of whether a treaty has the force of law (beyond the mere preemption of state law) with or without congressional implementation, which is properly an issue of enactment, not enforcement.

[302] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2037–40.

[303] *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2231 ("'Globalism' does not dispute that the drafters of the Constitution rejected a formal role for the House in treatymaking, or that the events of the Federal Convention do not support a thesis of non-self-execution.") (referring to his thesis).

[304] For more extensive documentation of this claim, see Kesavan & Paulsen, *supra* note 55, at 1146–47, 1150–59, 1181. For other discussions, see John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1342–45, 1365 (1998); David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 825–35 (2001).

tives to misrepresent constitutional meaning. However, this was not necessarily so, and even if the Anti-Federalists reached the wrong conclusions, their reasons and reasoning might be illuminating.[305] Importantly, much of the writings by the Federalists and Anti-Federalists were part of an extended back-and-forth debate, with arguments and contentions, responses and rebuttals, and some shared understandings.[306]

Accordingly, in this Section, we review these writings as a debate. We begin with the Anti-Federalist writings, which sets the stage for understanding the Federalist writings, which were responses to Anti-Federalist misinterpretations in some cases and careful concessions in others. When read with care, these writings shed considerable light on the nature of the treaty-making power and the doctrine of non-self-execution. The Federalists and Anti-Federalists described the treaty-making power as a legislative power in character or effect. This shared understanding strongly supports a doctrine of self-execution. At the same time, the Federalists and Anti-Federalists discussed British treaty-making practice with specific reference to the issue of statute-treaty conflict, and considered the application of this practice to the treaty-making power. As we shall see, this discussion strongly supports a doctrine of partial non-self-execution.

a. The Anti-Federalists.—The Anti-Federalists said much about the treaty-making power because they feared it. They disliked the intermixture of legislative and executive powers in an aristocratic Senate, and the potential for abuse of the treaty-making power by a monarchical President and aristocratic Senate.[307] They feared that the treaty-making power would endanger individual liberty by repealing freedoms guaranteed by state constitutions, which made the absence of a federal bill of rights even more glaring.[308] The root of this fear is that they understood the treaty-making power to be a legislative power in character or effect. In expressing this understanding, the writings of three leading Anti-Federalists deserve attention: George Mason, An Old Whig, and Federal Farmer.

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[305] For more on the potential value to be extracted from Anti-Federalist writings, see Kesavan & Paulsen, *supra* note 55, at 1152 & n.147.

[306] For a modern illustration of the technique of reading Anti-Federalist and Federalist writings as part of an extended debate, see William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776–1806, 101 COLUM. L. REV. 990 (2001); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001).

[307] *Cf.* George Mason, Objections to the Constitution (Oct. 7, 1787) [hereinafter Mason's Objections], *reprinted in* 13 DHRC, *supra* note 4, at 350 ("This Government will commence in a moderate Aristocracy; it is at present impossible to foresee whether it will, in it's Operation, produce a Monarchy, or a corrupt oppressive Aristocracy; it will most probably vibrate some years between the two, and then terminate in the one or the other.").

[308] Indeed, the Constitution's omission of a bill of rights was the Anti-Federalists' single most important and repeated objection to the document. *See, e.g.*, *id.* at 348.

Shortly after the close of the Philadelphia Convention, George Mason, one of three Framers who did not sign the Convention's proposal for a new plan of government, published his reasons for withholding his signature in his *Objections to the Constitution*, which was circulated widely during the ratification struggle.[309] With respect to the treaty-making power, Mason wrote:

> By declaring all Treaties supreme Laws of the Land, the Executive & the Senate have, in many Cases, an exclusive Power of Legislation; which might have been avoided, by proper Distinctions with respect to Treaties, and requiring the Assent of the House of Representatives, where it cou'd be done with Safety.[310]

The characterization of the treaty-making power as an "exclusive" legislative power—which Mason found objectionable because of the exclusion of the House of Representatives from the power—strongly supports a concept of self-execution. This characterization would be true "in many Cases," which is why he had hoped for "Distinctions with respect to Treaties," by which he seemed to be referring to the three paradigm classes of treaties (peace, alliance, and commerce), not all of which involved "an exclusive Power of Legislation." Mason's objection is also consistent with a concept of partial non-self-execution. One of the "Cases" where the treaty-making power would not be an "exclusive Power of Legislation" could be the case of conflict with existing statutes. This was the same Mason who thought at the Philadelphia Convention that the treaty-making power would not "repeal a law."[311] Other Anti-Federalists echoed Mason's characterization of the treaty-making power as a legislative power.[312]

The specific Federalist response to Mason's objections respecting the treaty-making power is telling. In short, Federalists either admitted Mason's point or did not deny it, and sought to deflect its force by turning to other arguments. Landholder, who was probably Oliver Ellsworth,[313] claimed that the Constitution's allocation of the treaty-making power was better than in other countries, including Great Britain.[314] Marcus, who was

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[309] *See id.*

[310] *Id.* at 350.

[311] *See supra* text accompanying note 292.

[312] For example, this understanding led Many Customers, a group of Pennsylvanians, to propose an amendment respecting the "legislative power, so far as it is independent of the House of Representatives." Many Customers (Dec. 1, 1787), *reprinted in* 2 DHRC, *supra* note 4, at 307. Many Customers proposed to amend the Supremacy Clause thus: "After the word 'notwithstanding,' insert, 'provided that every such treaty which shall hereafter be made shall have been laid before the House of Representatives and have obtained the approbation of so many of the members of that House as shall be a majority of the whole number elected.'" *Id.* at 309. The use of the word "laid" with respect to the House is a reminder of the historical connection to the Crown's practice of "laying" treaties before Parliament. *See, e.g.*, *supra* text accompanying note 215 (presenting historian G.C. Gibbs' summary of Lord Hardwicke's rule in 1755 for laying treaties before Parliament).

[313] *See* A Landholder I (Nov. 5, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 561.

[314] Landholder wrote:

James Iredell,[315] in a comprehensive review of *Mason's Objections*, maintained that the operation of treaties as laws was justified as an exercise of sovereign authority, and emphasized the improvement in the Constitution's allocation of the treaty-making power over the Articles of Confederation by praising the inclusion of the President.[316]

Other leading Anti-Federalists elaborated on Mason's characterization of the treaty-making power as a legislative power and, importantly, provided insights on the doctrine of non-self-execution by reference to British treaty-making practice. An Old Whig, thought to be George Bryan, James Hutchinson, and John Smilie writing together or George Bryan writing by himself,[317] addressed the treaty-making power at length in a letter written before any of the ratifying conventions convened. Quoting the Supremacy Clause, he claimed that treaties, when made, would have the force of domestic law without the involvement of Congress: "The power of making treaties is vested in the president, with the concurrence of two thirds of the senators present; so that the president and two thirds of the senate have power to make laws in the form of treaties, independent of the legislature itself."[318] Notably, he interpreted the Supremacy Clause as the basis for this understanding of the treaty-making power. He appreciated the differences between *form* and *effect*: treaties were not laws in form, but they would be laws in effect.[319] This was dangerous and unwise because the consent of the

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> Mr. Mason deems the president and senate's power to make treaties dangerous, because they become laws of the land. If the president and his proposed council had this power, or the president alone, as in England and other nations is the case would the danger be less? or is the representative branch suited to the making of treaties which are often intricate, and require much negotiation and secrecy?

Letter VI of Landholder (Dec. 10, 1787), *reprinted in* 14 DHRC, *supra* note 4, at 402.

315 *See* Introductory Note to Letter I of Marcus, *in* 16 DHRC, *supra* note 4, at 161.

316 *See* Letter III of Marcus (Mar. 5, 1788), *reprinted in* 16 DHRC, *supra* note 4, at 324–25 (referring to "the very sensible letter of Mr. Jay [as Secretary of Foreign Affairs in 1786], that a treaty when once made pursuant to the sovereign authority, *ex vi termini* became immediately the law of the land" and stating that "[i]t seems to result unavoidably from the nature of the thing, that when the constitutional right to make treaties is exercised, the treaty so made should be binding upon those who delegated authority for that purpose. If it was not, what foreign power would trust us?"); *id.* at 325 (stating that the treaty-making power under the Articles of Confederation lacked the "additional check under the new system of a President of high personal character, chosen by the immediate body of the people").

317 *See* Introductory Note to Letter I of An Old Whig, *in* 13 DHRC, *supra* note 4, at 376.

318 Letter III from An Old Whig (Oct. 20, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 426 [hereinafter An Old Whig III].

319 An Old Whig's acuity in articulating the form-effect distinction was not always apparent in the writings of other Anti-Federalists, where the treaty-making power was variously described as legislative or executive, neither, or both—but generally with the understanding that it would have legislative effect. Some Anti-Federalists understood it to be an exercise of legislative power and therefore to have legislative effect. *See, e.g.*, Mason's Objections, *supra* note 307, at 350; Hampden (Feb. 16, 1788), *reprinted in* 2 DHRC, *supra* note 4, at 666 (invoking Article I Vesting Clause, Treaty Clause, and Supremacy Clause as a triad and stating that "[t]reaties may be extended to almost every legislative object of the general government"); Letter II of Centinel (Oct. 24, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 461 ("The jurisdiction of the federal court goes, likewise, to the laws to be created by treaties, made by the

President and Senate to a destructive treaty "will give such a treaty the validity of a law."[320] He lamented, "What power will there be anywhere to prevent this?—None."[321]

The basis for An Old Whig's lament was his strong belief that the lawmaking power—the legislature—should be involved in anything that has the operation of a law. He continued, "Where all power legislative and executive is vested in one man or one body of men, treaties are made by the same authority which makes the laws; but where the legislature is extinct [sic] from the executive, the approbation of the legislature ought to be had, before a treaty should have the force of a law."[322] As his use of the word "ought" suggests, he was describing a state of affairs that does not exist under the Constitution: the "approbation" of Congress is not required in order for a treaty to have the force of domestic law.[323]

President and Senate, (a species of legislation) with other nations."); Letter from Joseph Jones to James Madison (Oct. 29, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 508–09 ("[T]he President and the Senate too may in some instances legislate for the Union, withot. the concurrence of the popular branch as they may make treaties and alliances which when made are to be paramount the law of the land."); Letter VI of Cato (Dec. 13, 1787), *reprinted in* 14 DHRC, *supra* note 4, at 431 ("Complete acts of legislation, which are to become the supreme law of the land, ought to be the united act of all the branches of government; but there is one of the most important duties may be managed by the senate and executive alone, and to have all the force of the law paramount without the aid or interference of the house of representatives; that is the power of making treaties.").

Some Anti-Federalists understood it to be an exercise of executive power, but understood it to have legislative effect (at least in some circumstances). *See, e.g.*, Letter III of Federal Farmer (Oct. 10, 1787), *reprinted in* 14 DHRC, *supra* note 4, at 33 ("The senate is an independent branch of the legislature, a court for trying impeachments, and also a part of the executive, having a negative in the making of all treaties, and in appointing almost all officers."); The Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787), *reprinted in* 15 DHRC, *supra* note 4, at 29 ("And the senate has, moreover, various and great executive powers, viz. in concurrence with the president-general, they form treaties with foreign nations, that may controul and abrogate the constitutions and laws of the several states."). Federal Farmer's views on the treaty-making power are discussed presently. *See infra* text accompanying notes 328–341. For the Dissent's views on the treaty-making power, see *infra* text accompanying notes 429–434.

Others understood it to be an exercise of either legislative or executive power, neither, or both. *See, e.g.*, Letter XVI of Brutus (Apr. 10, 1788), *reprinted in* 17 DHRC, *supra* note 4, at 68 ("They are a branch of the executive in the appointment of ambassadors and public ministers, and in the appointment of all other officers, not otherwise provided for; whether the forming of treaties, in which they are joined with the president, appertains to the legislative or the executive part of the government, or to neither, is not material."); Letter from Richard Henry Lee to Gov. Edmund Randolph (Oct. 16, 1787), *reprinted in* 14 DHRC, *supra* note 4, at 367 ("In the new constitution, the president and senate have all the executive and two thirds of the legislative power. In some weighty instances (as making all kinds of treaties which are to be the laws of the land) they have the whole legislative and executive powers.").

[320] An Old Whig III, *supra* note 318, at 426.

[321] *Id*.

[322] *Id*.

[323] Other Anti-Federalists shared this view, generally with reference to the Supremacy Clause. *See, e.g.*, Hampden, *supra* note 319, at 666 ("And from this power of making treaties, the House of Representatives, which hath the best chance of possessing virtue and public confidence is entirely excluded."); Letter I of Cincinnatus (Nov. 1, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 532 (responding to James

Importantly, this state of affairs was not only bad, but it was worse than what he understood to be British treaty-making practice. "[E]ven in England," says Old Whig, "the parliament is constantly applied to for their sanction to every treaty which tends to introduce an innovation or the slightest alteration in the laws in being."[324] By the "laws in being," he was obviously referring to existing statutes. The consequence, according to An Old Whig, is that "the law there is not altered by the treaty itself; but by an act of parliament which confirms the treaty, and alters the law so as to accommodate it to the treaty. The King in council has no such power."[325] An Old Whig clearly understood British practice to be one of partial non-self-execution, but bemoaned that this practice would not apply to the Constitution, concluding that Congress's consent is not required before a treaty could "alter the law of the land."[326] As we shall soon see, leading Federalist Alexander Hamilton, writing as Publius, had a few words to say about Old Whig's (mis-)understanding of British practice.[327]

Federal Farmer also addressed the treaty-making power at length, and provided important reflections on the doctrine of non-self-execution and British treaty-making practice.[328] He doubted the propriety of the Senate's share of the treaty-making power, given the accumulation of other legislative, executive, and judicial powers in the aristocratic Senate. But the treaty-making power could not be vested in the President alone,[329] and he, unlike other Anti-Federalists, appreciated that "the house of representatives is too numerous to be concerned in treaties of peace and of alliance."[330] He concluded that the Senate could probably be trusted with the treaty-making power, and impeachment would provide an added check.[331] Yet, he believed that "[o]n a fair construction of the [C]onstitution" that "the legisla-

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Wilson's State House speech and worrying about abridgement of the freedom of the press by treaty) ("And this may be, even without the concurrence of the representative of the people; because the president and senate are empowered to make treaties, and these treaties are declared the supreme law of the land."); Letter from Joseph Spencer to James Madison (Feb. 28, 1788), *reprinted in* 16 DHRC, *supra* note 4, at 253 ("[T]he House of Representatives is the only free, direct Representative of the body of the people, & yet in Treaties which are to be some of the Supreme Laws of the Land, this House has no Voice . . . ."); Letter VI of Cato, *supra* note 319, at 431 (stating that a treaty is "to have all the force of the law paramount without the aid or interference of the house of representatives").

324 An Old Whig III, *supra* note 318, at 426.

325 *Id.* Old Whig's comments address domestic law, not international law. He does not address whether the King alone binds the realm as a matter of international law.

326 *Id.* Old Whig appreciated that "[b]y no means" could treaties "be sent to all the different state legislatures for their approbation," which is why the "consent of the continental legislatures" was all the more important. *Id.* There were others who suggested treaties should be ratified by state legislatures. *See, e.g.*, 14 DHRC, *supra* note 4, at 331 (discussing "Many," who was Arthur Campbell of Virginia).

327 *See infra* text accompanying notes 371–373 (discussing THE FEDERALIST NO. 69).

328 *See* Letter XI of Federal Farmer (Jan. 10, 1788), *reprinted in* 17 DHRC, *supra* note 4, at 308–10.

329 *Id.* at 308.

330 *Id.* at 308–09.

331 *Id.* at 309.

ture has a proper controul over the president and senate in settling commercial treaties."[332] The question is: why?

Federal Farmer's constitutional analysis is classic. Invoking the Foreign Commerce Clause and the Treaty Clause as a textual pair, he set forth the accepted interpretive principle that "[t]hese clauses must be considered together, and we ought never to make one part of the same instrument contradict another, if it can be avoided by any reasonable construction."[333] Congress could regulate foreign commerce by statute; the President and the Senate could do the same by treaty. Listing the three paradigm classes of treaties (peace, alliance, and commerce), he posited that "the words to 'make treaties,' may be consistently construed, and yet so as it shall be left to the legislature to confirm commercial treaties."[334] In other words, treaties of peace and of alliance would be self-executing, but treaties of commerce would be non-self-executing unless and until "confirm[ed]" by Congress.

His reasons for this rule of non-self-execution for one class of treaties are fascinating. Treaties of peace and of alliance "generally require secrecy," they "but very seldom . . . interfere with the laws and internal police of the country," and are "properly the exercise of executive powers," and Congress has "no power, directly or indirectly, respecting these treaties."[335] But treaties of commerce are quite the opposite: "they do not generally require secrecy, they almost always involve in them legislative powers, interfere with the laws and internal police of the country."[336] He observed that treaties of commerce "operate immediately on persons and property, especially in the commercial towns: (they have in Great-Britain usually been confirmed by parliament;)"[337] and concluded that, on the best reading of the Constitution, the President and Senate make all treaties, "but all commercial treaties shall be subject to be confirmed by the legislature."[338]

Federal Farmer's conclusion that every commercial treaty is non-self-executing because it touches Congress's power to regulate commerce provides reasonably strong support for Professor Yoo's total non-self-execution thesis;[339] it is as close as anyone, Anti-Federalist or Federalist, would come during the Founding to identifying a line between self-

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[332] *Id*.

[333] *Id*.

[334] *Id*.

[335] *Id.* This understanding of treaties of peace and of alliance is consistent with Mason's objection to the treaty-making power in his *Objections to the Constitution*, where Mason indicated that the treaty-making power was not an exclusive legislative power in *all* cases. *See supra* text accompanying note 310.

[336] *Id*.

[337] *Id*.

[338] *Id.* at 310.

[339] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2055–56; *see also* Flaherty, *History Right?*, *supra* note 48, at 2140 (downplaying Federal Farmer's comment as not representative of the views of leading Federalists such as Alexander Hamilton and John Jay).

executing and non-self-executing treaties by reference to Congress's legislative powers.[340] Yet, it is important to note that the animating concern for this conclusion seems to be the "interfer[ence]" between certain classes of treaties and existing statutes. Whereas treaties of peace and of alliance would "very seldom" interfere with the existing statutes, treaties of commerce would "almost always" do so. It is not clear whether Federal Farmer's conclusion is based upon the legislative character of treaties of commerce or their assumed interference with existing statutes. His conclusion strongly resonates with the principles of the partial non-self-execution thesis, even though it may not be completely consistent with it.[341]

In sum, leading Anti-Federalists uniformly characterized the treaty-making power as a legislative power, or more accurately, a power that was legislative not in form, but in operation or effect. Two leading Anti-Federalists, An Old Whig and Federal Farmer, agreed that British practice required non-self-execution if treaties altered or interfered with existing statutes, but disagreed whether this practice would apply to the treaty-making power under the Constitution. How the Federalists responded to these arguments and contentions is telling, and to this subject we now turn.

b. The Federalists.—The leading work of the leading Federalists in both responding to the outpouring of Anti-Federalist criticism of the Constitution and making the case for its ratification is, of course, the eighty-five essays of *The Federalist*, authored by Alexander Hamilton, James Madison, and John Jay under the pseudonym Publius. A chronological tour of these essays, author by author, sheds considerable light on the issues at hand. These leading Federalists not only acknowledged the Anti-Federalist characterization of the treaty-making power as a legislative power, but justified a doctrine of self-execution. Importantly, however, this was not absolute. Two of these Federalists, James Madison and Alexander Hamilton, discussed the doctrine of non-self-execution with specific reference to British treaty-making practice, with Hamilton providing an answer to An Old Whig's claims. This commentary provides strong support for a doctrine of partial non-self-execution.

We begin with James Madison. In *The Federalist No. 53*, Madison defended the biennial term of Representatives based on the need for experienced federal legislators.[342] After referring to "foreign trade" as one of the

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[340] Even here, Federal Farmer's line respecting non-self-execution was with respect to the classes of treaties, not Congress's legislative powers; he seemed to admit the self-executing nature of treaties of peace and of alliance when they interfered with Congress's legislative powers, which he claimed was "very seldom."

[341] The focus of his analysis was the interference of the treaty-making power, as a legislative power, with Congress's legislative powers—not the precise contours of the doctrine of non-self-execution.

[342] *See* THE FEDERALIST NO. 53, *supra* note 4, at 332–33 (James Madison).

"principal objects of federal legislation,"[343] by which he means Congress's power to regulate foreign commerce, he observes:

> A branch of knowledge which belongs to the acquirements of a federal representative and which has not been mentioned is that of foreign affairs. In regulating our own commerce, he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations; for that, as far as it is a proper object of municipal legislation, is submitted to the federal government. And although the House of Representatives is not immediately to participate in foreign negotiations and arrangements, yet from the necessary connection between the several branches of public affairs, those particular branches will frequently deserve attention in the ordinary course of legislation *and will sometimes demand particular legislative sanction and co-operation*.[344]

This discussion of the treaty-making power provides strong support for partial non-self-execution. Representatives should pay attention to foreign affairs, including treaties and the commercial codes of other nations, so as to better exercise Congress's legislative powers, particularly the powers to regulate foreign commerce and to define and punish offences against the law of nations.[345] Although the House of Representatives is "not immediately to participate in foreign negotiations and arrangements," by which Madison is referring to the creation of treaties, the House may eventually participate in the treaty-making power because treaties "will sometimes demand particular legislative sanction and co-operation." This participation, expressed in the form of "legislative sanction and co-operation," would be "sometimes," not always or frequently, and it would be "particular," not general.[346]

Although Madison did not elaborate on the "particular" circumstances of non-self-execution, he seemed to have British treaty-making practice in mind. Just a few essays earlier, in *The Federalist No. 47*, Madison described British practice as follows: "The executive magistrate forms an in-

[343] *Id.* at 333.

[344] *Id.* at 334 (emphasis added).

[345] *See* U.S. CONST. art. I, § 8, cls. 3 (commerce), 10 (law of nations).

[346] Professor Yoo interprets Madison's statement as "suggest[ing]" that the House has the right to participate in the implementation of treaties, Yoo, *Globalism and the Constitution*, *supra* note 33, at 2052, which under his thesis means that this right extends to all treaties touching Congress's legislative powers. Madison's statement, in context, is an odd way to express this rule of non-self-execution. If all treaties of commerce require congressional implementation, Representatives should be much more knowledgeable about foreign affairs than Madison let on. On the other hand, Professor Flaherty maintains that "Madison not only failed to suggest an alternative to self-executing treaties, he soft-pedaled the informal influence the House would exert. Representatives . . . would at times be called upon to offer legislative confirmation of foreign policy measures with domestic implications and to cooperate in foreign affairs generally." Flaherty, *History Right?*, *supra* note 48, at 2139. Flaherty misses the importance of the word "sanction," which is anything but informal, and that the relevant "foreign policy measures with domestic implications" are treaties.

tegral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns which, when made, have, under certain limitations, the force of legislative acts."[347] This description of British practice as one of partial non-self-execution is consistent with his earlier remarks at the Philadelphia Convention concerning the same.[348] Thus, Madison understood that treaties, when made, would have the force of law, subject to some limitations likely based on British practice.

We now turn to John Jay, who discussed the treaty-making power at length in *The Federalist No. 64*. In this essay, Jay responded to a large portion of the Anti-Federalist criticism of the treaty-making power. He praised the allocation of the power to the President and the Senate, who could be trusted with the power given their qualifications for office-holding and modes of appointment.[349] He justified the exclusion of the House of Representatives from a share of the treaty-making power by stressing the need for "perfect *secrecy* and immediate *dispatch*"[350] in negotiating treaties, and the need for foreign affairs information and experience, which was not possible in the House but which was possible in the President and Senate given their longer terms of office.[351] Interestingly, in discussing the Senate's powers, Jay praised the Senate's involvement in making both statutes and treaties. In discussing the need for regulating "trade and navigation" in a manner that is "cautiously formed and steadily pursued," where "correspondence and conformity [would] be carefully maintained," he observed that this is "well provided for by making the concurrence of the Senate necessary both to treaties and to laws."[352] Although he proposed no answer as to what

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[347] THE FEDERALIST NO. 47, *supra* note 4, at 302 (James Madison). In this essay, Madison was responding to Anti-Federalist criticism that the Constitution's allocation of legislative, executive, and judicial powers violated the Montesquieuian maxim of the separation of powers and therefore risked tyranny. In dismissing this criticism, Madison impressively reviewed the constitutions of Great Britain and all thirteen states. His point in discussing the British constitution was that it did not embody any strict separation of powers. Indeed, the immediately preceding sentence to that quoted in the text is: "On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other." *Id.* The first example given is the treaty-making power. Professor Yoo makes hash of Madison's comment on the treaty-making power by interpreting Madison's use of the phrase "under certain limitations" as referring to "the passage of implementing legislation by Parliament," which under Yoo's understanding of British practice, is required whenever there is any change in the domestic law. Yoo, *Globalism and the Constitution*, *supra* note 33, at 2053 n.467. If Yoo's interpretation is correct, Madison's choice of this power to illustrate the point was incredibly poor.

[348] *See supra* text accompanying note 278.

[349] *See* THE FEDERALIST NO. 64, *supra* note 4, at 390–92 (John Jay); *see also id.* at 395–96 (praising oaths).

[350] *See id.* at 392.

[351] *See id*.

[352] *Id.* Indeed, Jay's point is stronger than he admits because the concurrence of the President is also required for the making of statutes and treaties. The President could also promote consistency of statutes and treaties by threatening the use of his veto pen in lawmaking to make statutes consistent with

would happen in case of statute-treaty conflict, it is nonetheless interesting that he may have had this concern in mind.[353]

Jay then turned to the most important Anti-Federalist criticism of the treaty-making power: their characterization of the treaty-making power as a legislative power, which is why the exclusion of the House of Representatives was so problematic. As he framed the point, "Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority."[354] Jay's response to this point leaves no doubt that he too believed the treaty-making power to be a legislative power and, importantly, that he believed this to be justified. He explained that Congress's lack of involvement in treaty-making in no way means that treaties may not have the force of laws. In his view, "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature."[355] He concluded that "whatever name be given the power of making treaties, or however obligatory they may be when made," the People could allocate the power as they wished, and that it did not follow from the People's allocation of the lawmaking power to Congress that Congress therefore has the "power to do every other act of sovereignty by which the citizens are to be bound and affected."[356]

Jay finally turned to the Anti-Federalists' fear that the treaties would repeal state laws, particularly freedoms guaranteed by state constitutions,[357] given the status of treaties as the supreme laws of the land under the Su-

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treaties whenever possible, or by using his power in treaty-making to make treaties consistent with statutes whenever possible.

353 Jay almost undoubtedly had other issues in mind: Congress's negotiations with Spain concerning the cession of navigational rights on the Mississippi River, which Secretary of Foreign Affairs Jay had led, and which was one of the most explosive issues of the day given the divergent sectional interests of the North and South. *See supra* note 300; *infra* notes 465–68 and accompanying text. Thus, Jay's praise of the Senate's involvement in statutes and treaties is most relevant in the context of protecting state sovereignty.

354 THE FEDERALIST NO. 64, *supra* note 4, at 390–92 (John Jay).

355 *Id.* at 394 (proving this point by giving examples of other legal norms such as court judgments and commissions which are "as valid and binding on all persons whom they concern as the laws passed by our legislature").

356 *Id.*

357 For the basic Anti-Federalist fear, see, for example, Letter IV of Federal Farmer, *supra* note 99, at 43 ("The president and two thirds of the senate will be empowered to make treaties indefinitely, and when these treaties shall be made, they will also abolish all laws and state constitutions incompatible with them. This power in the president and senate is absolute, and the judges will be bound to allow full force to whatever rule, article or thing the president and senate shall establish by treaty . . . ."); Letter II of Brutus (Nov. 1, 1787), *reprinted in* 13 DHRC, *supra* note 4, at 529 ("The power to make treaties, is vested in the president, by and with the advice and consent of two thirds of the senate. I do not find any limitation, or restriction, to the exercise of this power. The most important article in any constitution may therefore be repealed, even without a legislative act.").

premacy Clause.[358] In justifying treaty supremacy on the basis that no nation would otherwise bargain with the United States,[359] Jay observed:

> They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.[360]

Jay's claim that treaties may only be altered or cancelled by the United States with the consent of the other contracting parties is best described as irrational exuberance.[361] As Secretary of Foreign Affairs for the Continental Congress, he was particularly knowledgeable about the violations by the states of the Treaty of Paris of 1783, which established the peace between Great Britain and the United States.[362] Although the quoted passage has been seized by internationalists as evidence of the supremacy of treaties to federal statutes,[363] such a conclusion misses crucial context: Jay was responding to Anti-Federalist criticism concerning state law, not federal law.[364] Whether Jay truly understood treaties to be superior to federal statutes in the event of statute-treaty conflict is at least unclear and is at most unlikely.

Last but not least, we turn to Alexander Hamilton, the most prolific of the three authors, who addressed the treaty-making power and the doctrine

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[358] *See* THE FEDERALIST NO. 64, *supra* note 4, at 394 (John Jay) ("Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure.").

[359] *See id.* ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.").

[360] *Id.*

[361] On the multiple paths to treaty alteration or cancellation as a matter of domestic law, see *supra* note 39.

[362] For Secretary Jay's detailed report to the Continental Congress, see 31 JOURNALS OF THE CONTINENTAL CONGRESS 797–874 (John Fitzpatrick ed., 1934) [hereinafter JCC].

[363] *See, e.g.*, Lobel, *supra* note 21, at 1096–97; Paust, *supra* note 22, at 398–99.

[364] In addition, Secretary Jay's report to the Continental Congress on state violations of the Treaty of Paris of 1783 highlighted the structural logic of the whole and the parts in making the point that the act of the whole nation is beyond the reach of any state part. *See* 31 JCC, *supra* note 362, at 797–99; 32 *id.* at 177–80. This does not mean that the act of the whole nation is beyond the reach of the whole nation. The internationalists' conclusion also misses Jay's claim that the Constitution "has not in the least extended the obligation of treaties," which means that if treaties were not superior to federal statutes irrespective of time under the Confederation, they would not be so under the Constitution. Given Jay's structural claims, it is hard to believe that he understood treaties to be unalterable or uncancellable by the Continental Congress itself.

of non-self-execution in two of the later essays, *The Federalist No. 69* and *75*.[365]

In *The Federalist No. 69*, Hamilton defended the President's executive powers by comparing and contrasting them to those of the King in Great Britain and the Governor of New York. Hamilton's objective in this essay was to deflate Anti-Federalist criticism of the Presidency by proving that the President has less power than the King in many cases (and in as many cases as possible) and no more power than the Governor in others. One of the many examples to prove this point is the treaty-making power, which he could do only with reference to the King since the Governor had no such sovereign power.

Hamilton began this comparative exercise with the observation that "[t]he king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description."[366] This is point one in Hamilton's favor: "The one can perform alone what the other can do only with the concurrence of a branch of the legislature."[367] However, in order to score this easy point, Hamilton is forced to come to terms with An Old Whig's description of British treaty-making practice, who claimed that Parliament's concurrence was often necessary to the Crown's treaties.[368] Hamilton understood An Old Whig as "insinuat[ing] that [the King's] authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament."[369] If "every treaty" in Great Britain required Parliament's sanction, it would not be true that the President has *less* power than the King.[370]

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[365] In addition, Professors Yoo and Flaherty discuss a preceding essay, written by Hamilton, where in discussing the defects of the Confederation and the "want of a judiciary power," Hamilton stated that "[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." THE FEDERALIST NO. 22, *supra* note 4, at 150 (Alexander Hamilton); *see also* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2056–57; Flaherty, *History Right?*, *supra* note 48, at 2135. Yoo maintains that Hamilton's remarks have no bearing on the question of self-execution, whereas Flaherty maintains the opposite. It is sufficient to say that although Hamilton does not indicate in *this* essay how a treaty is to have the force of law—whether "when made" or pursuant to implementing legislation—Hamilton seems to assume that treaties, when made, would have bite. This assumption becomes clear in the subsequent essays discussed in the text.

[366] THE FEDERALIST NO. 69, *supra* note 4, at 419 (Alexander Hamilton). Again, we see the three paradigm classes of treaties at the Founding.

[367] *Id.* at 420; *see id.* at 422 ("The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the *sole possessor* of the power of making treaties.").

[368] *See* An Old Whig III, *supra* note 318, at 426 ("[E]ven in England, the parliament is constantly applied to for their sanction to every treaty which tends to introduce an innovation or the slightest alteration in the laws in being . . . .").

[369] THE FEDERALIST NO. 69, *supra* note 4, at 419 (Alexander Hamilton).

[370] Hamilton was concerned with the domestic law. If the King alone could bind the realm as a matter of international law, the President would have less power than the King in this instance.

Hamilton, referring to "this doctrine" as literally "never heard of,"[371] dismissed it with lawyerly dexterity, made easy by reference to the key passage from William Blackstone. "Every jurist* of that kingdom," said Hamilton, "and every other man acquainted with its Constitution knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction."[372] This appeal to Blackstone, however, was not sufficient to dismiss An Old Whig's description of British practice. Hamilton was forced to explain Parliament's role in treaty-making, which was no secret. Hamilton's discussion of British practice bears emphasis:

> The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder.[373]

Hamilton did not deny Parliament's participation in treaty-making, which he called an "interposition." Nor did he deny that it related to "altering the existing laws to conform them to the stipulations in a new treaty."[374] He disputed its frequency: whereas Old Whig claimed that it was "constant[],"[375] Hamilton suggested that it was only "sometimes." He disputed the "cause" of its necessity: whereas Old Whig claimed that it was necessary for the operation of the treaty as domestic law,[376] Hamilton maintained that it was not "necessary to the obligatory efficacy of the treaty,"[377] and that it was only required "to keep the machine from running into disorder."

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[371] *Id.* at 419.

[372] *Id.* at 419–20. Hamilton's footnote is to "Blackstone's *Commentaries*, Vol. I., p. 257." *Id.* at 419.

[373] *Id.* at 420.

[374] *Cf.* An Old Whig III, *supra* note 318, at 426 (stating that Parliament "alters the [existing] law so as to accommodate it to the treaty").

[375] *See id*.

[376] *See id.* (referring to Parliament's "sanction" and stating that "the law there is not altered by the treaty itself; but by an act of parliament which confirms the treaty").

[377] Hamilton took issue with An Old Whig's claim that Parliament's consent was very often necessary to the obligatory efficacy of the King's treaties; Hamilton did not identify what limitations, if any, existed with respect to the King's power to make treaties without Parliament's consent. *Cf.* THE FEDERALIST NO. 47, *supra* note 4, at 302 (James Madison) (stating that the "[the King] alone has the prerogative of making treaties with foreign sovereigns which, when made, have, *under certain limitations*, the force of legislative acts") (emphasis added).

Thus, Hamilton's description of British practice is, in the end, one of self-execution.

Was lawyerly Hamilton right about British practice? Hamilton had some incentives to stretch the truth given his objective in this essay: the more power the King had, the less power the President would have by comparison, and the easier it would be to defend the President's powers.[378]

What is more relevant to the present inquiry than comparing the power of the King to that of the President in treaty-making is comparing the power of the King to that of the President and Senate in the same. On this point, Hamilton suggested equality: "The one can perform alone what the other can do only with the concurrence of a branch of the legislature."[379] As Hamilton's answer to An Old Whig indicates, Hamilton believed that the power to make treaties was the power to give them "obligatory efficacy" without further ratification by the legislature. The consequence of this supposed equality is that the treaty-making power in Great Britain and America (under the Constitution) would be similar. If British practice was one of self-execution, as Hamilton maintained, American practice would be too.

What about the doctrine of non-self-execution under the Constitution? Unfortunately, Hamilton did not address whether Congress would have a similar role to Parliament in implementing treaties made by the President and Senate (a subject that would have taken him far afield of the Presidency). We are left to extrapolate from his commentary on British practice. Hamilton did admit the necessity of statute-treaty conformity (at least in the context of treaties of commerce) as a general matter, which was important in order "to keep the machine from running into disorder." This point would seem to apply with equal force to any governmental machine. Moreover, Hamilton's references to "altering the existing laws" and Parliament's "co-operation" shed considerable light on James Madison's observation in *The Federalist No. 53* that treaties *under the Constitution* would "sometimes demand particular legislative sanction and co-operation."[380] Perhaps Congress's participation would not be necessary to the "obligatory efficacy" of treaties as domestic law, as Hamilton seemed to suggest, but it would still be necessary. Even if Hamilton's description of British practice is correct, it remains possible that Congress could have *more* power in implementing treaties than Parliament, which would mean that the President and Senate have *less* power in treaty-making than the King. In the end, Hamilton's observation on the treaty-making power in this essay implies a strong doctrine of self-execution.

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[378] *Cf.* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2052 & n.462 (noting Hamilton's incentives to distort the King's powers and claiming that Hamilton "clearly misrepresent[s]" the British system with respect to war powers).

[379] THE FEDERALIST NO. 69, *supra* note 4, at 420 (Alexander Hamilton).

[380] THE FEDERALIST NO. 53, *supra* note 4, at 334 (James Madison).

Hamilton said more about the treaty-making power in *The Federalist No. 75*, which is dedicated to this topic. In this essay, he responded to Anti-Federalist criticism of the power related to the "trite topic of the intermixture of powers" and the "small number of persons by whom a treaty may be made."[381] Hamilton's responses to these criticisms confirm his understanding that treaties, when made, have the force of laws.

With respect to the first topic, Hamilton noted his satisfaction with the "explanations already given in other places," which presumably was a cross-reference to Madison's elaborate arguments in *The Federalist No. 47* on the intermixture of powers, and observed that the allocation of the treaty-making power to the President and Senate is "no infringement of that [Montesquieuian] rule."[382] He quickly added that the "particular nature of the power of making treaties indicates a peculiar propriety in that union" of the President and Senate.[383] In other words, Hamilton maintained that the intermixture of legislative and executive powers was good. The reasoning had to do with the "particular nature" of the power itself. Disputing its "executive" classification by theoretical writers as "evidently an arbitrary disposition," Hamilton stated that "if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them."[384] Hamilton's characterization of the treaty-making power as "legislative" in "operation" (and "more" legislative than executive), implies that treaties, when made, have the force of laws.

We need not rely on implication because Hamilton, at this point, offered a detailed explanation of the legislative and executive character of the treaty-making power to further justify the intermixture of these powers. Because this explanation has been subject to much misinterpretation in the non-self-execution debate,[385] it bears quoting in its full length:

> The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It

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[381] THE FEDERALIST NO. 75, *supra* note 4, at 449–50 (Alexander Hamilton).

[382] *Id.* at 450.

[383] *Id.*

[384] *Id.* Professor Flaherty interprets Hamilton as denying the intermixture of powers on the theory that the treaty-making power is a distinct power and hence does not mix anything. *See* Flaherty, *History Right?*, *supra* note 48, at 2137. The better account is that Hamilton did not (and could not) deny the intermixture, but simply denied that *every* intermixture violated the classic rule on the separation of powers. *See* THE FEDERALIST NO. 47, *supra* note 4, at 302–03 (James Madison) (interpreting Montesquieu's rule as allowing "partial agency" and providing several examples from the Constitution itself, including intermixture of executive powers in the Senate).

[385] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2053–54; Flaherty, *History Right?*, *supra* note 48, at 2138–39.

> relates neither to the execution of the subsisting laws nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.[386]

Hamilton's points in this long paragraph may be summarized as follows:

(1) The power to make treaties is neither the power to make laws (and hence belonging to the legislative authority) nor the power to execute the laws (and hence belonging to the executive authority), but is something different and "seems . . . to form a distinct department."

(2) Treaties and laws are different in form. Laws are "rules for the regulation of society" that are "prescribed by the sovereign to the subject" and derive their force of law from the consent of the governed. Treaties are "CONTRACTS" between "sovereign and sovereign" and derive their force of law from "the obligations of good faith," by which Hamilton meant mutual observance.[387] In distinguishing treaties and laws, Hamilton did not imply that treaties, as agreements between nations, could not contain stipulations providing "rules for the regulation of society," but merely that treaties and laws originate and terminate differently. For example, Hamilton understood that treaties of commerce, made between sovereigns, would affect individuals transacting commerce.[388]

(3) Treaties and laws are similar in effect. Treaties have "the force of law" and "operat[e] . . . as laws," which is why "the participation of the whole or a portion of the legislative body" is both necessary and proper. In the case of treaty-making, the Senate's participation, as a "portion" of the legislature, is sufficient for this purpose.[389]

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[386] THE FEDERALIST NO. 75, *supra* note 4, at 450–51 (Alexander Hamilton).

[387] *Cf.* THE FEDERALIST NO. 43, *supra* note 4, at 279–80 (James Madison) (identifying the well-accepted law of nations regarding the willful breach of a treaty).

[388] *See* THE FEDERALIST NO. 11, *supra* note 4, at 84–96 (Alexander Hamilton) (discussing commerce).

[389] Hamilton's reference to the participation of the "whole . . . legislative body" might be taken to suggest that treaties would not have the force of laws without such participation. This interpretation is

(4) Finally, given the inherent foreign affairs requirements in making treaties, the President's share of the treaty-making power is both necessary and proper, which was a point that Hamilton elaborated upon in the same essay.[390]

Taken as a whole, Hamilton's explanation of the intermixture of legislative and executive powers in treaty-making supports a doctrine of self-execution, with Hamilton referring to the "force" or "operation" of treaties as laws not once, but twice. To read Hamilton's comments otherwise is to make hash of them.[391]

With respect to the second Anti-Federalist criticism concerning the allocation of the treaty-making power to the exclusion of the House of Representatives, Hamilton observed that "remarks made in a former number"—which presumably was a cross-reference to Jay's extensive comments in *The Federalist No. 64* on this topic—"will apply with conclusive force against the admission of the House of Representatives to a share in the formation of treaties."[392] Hamilton's discussion of the House's exclusion from treaty-making literally related to the making of treaties as a matter of international law.[393]

Of course, the Anti-Federalists were as concerned (if not more) about the making of treaties as a matter of domestic law. As we saw earlier, the

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mistaken because it fails to take account of the word "or" in Hamilton's discussion of legislative participation in treaty-making. Further, this portion of Hamilton's essay is about the intermixture of legislative powers of the Senate and executive powers of the President.

[390] *See* THE FEDERALIST NO. 75, *supra* note 4, at 451–52 (Alexander Hamilton) (justifying the participation of the President in the treaty-making power); *cf.* THE FEDERALIST NO. 70, *supra* note 4, at 423–31 (Alexander Hamilton) (highlighting qualities of the executive important to "good government").

[391] Professor Yoo claims that "Hamilton suggests that treaties may be given 'the operation of laws,' without having the effect of laws." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2054. How this is logically possible is mysterious. *Cf.* SAMUEL JOHNSON'S DICTIONARY, *supra* note 260, at 505 (defining "To operate" as "To act; to have agency; to produce effects"). Yoo further claims that Hamilton suggests that treaties "would 'have the force of law' between sovereign nations under international law." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2054. The derivation of the "under international law" limitation is even more mysterious, given that Hamilton is plainly concerned with the intermixture of powers under the Constitution and that he makes the point that the operation of treaties as laws "plead[s] strongly" for the Senate's participation in the treaty-making power, which is completely irrelevant "under international law." Finally, Yoo claims that Hamilton, following James Wilson at the Pennsylvania ratifying convention, seems to "assum[e] that the treaty power would be dependent on subsequent action by the branches . . . to be made meaningful." *Id.* Executive enforcement aside, there is nothing in the passage to suggest that subsequent legislative action is necessary in order for a treaty to have the force of domestic law. It strains reason to think that Hamilton assumed that treaties made by the President and Senate would be non-self-executing because he uses the operation of treaties as laws to justify the Senate's participation in treaty-making. Whether there might be particular circumstances where legislative implementation of a treaty is required is another matter, and one that Hamilton does not address in this essay.

[392] THE FEDERALIST NO. 75, *supra* note 4, at 452 (Alexander Hamilton).

[393] *Cf. id.* at 452–53 (concluding that "to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project").

Anti-Federalists objected to the treaty-making power because they understood it to be a species of legislative power not involving the House of Representatives. Tellingly, Hamilton did not indicate that the House (as the House, or as part of Congress) would have any role in implementing treaties made by the President and Senate, much less any control over such treaties as a matter of domestic law. This point, in context, would have diminished a large part of the Anti-Federalist criticism on the exclusion of the House from the process of treaty-making. Given Hamilton's earlier remarks supporting a doctrine of self-execution, it is not surprising that he did not do so.[394]

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What do the writings of the Federalists and Anti-Federalists mean for the non-self-execution debate? These writings strongly support a doctrine of self-execution as a general matter. When Anti-Federalists such as George Mason, An Old Whig, and Federal Farmer objected to the treaty-making power as a legislative power, or more accurately, a power with legislative effect, Federalists such as John Jay and Alexander Hamilton responded by explaining that the treaty-making power must be so. In other words, Federalists and Anti-Federalists *agreed* that treaties, when made, would have the force of laws, but disagreed on whether this effect was desirable, as Federalists maintained, or objectionable, as Anti-Federalists maintained.

It is also important to consider what the Federalists did not say. Remarkably, the Federalists did not defend a doctrine of non-self-execution as a general matter, which would give the House of Representatives, as part of Congress, a necessary role in the implementation of treaties as domestic

[394] In addition to the writings of Publius, one other Federalist writing is noteworthy, but must be resigned to a footnote. Anti-Cincinnatus, responding to Cincinnatus's fears that the President and Senate would restrain the freedom of the press by treaty, set forth his understanding of the treaty-making power:

> These public treaties become the law of the land in that being made by constitutional authority, i.e. among us, by those whom the people themselves have authorized for that purpose, are in a proper sense their own agreements, and therefore as laws, bind the several states, as states, and their inhabitants, as individuals to take notice of and govern themselves according to the articles and rules which are defined and stipulated in them: as the law of the land they bind to nothing but a performance of the engagements which they contain.

Anti-Cincinnatus (Dec. 19, 1787), *reprinted in* 15 DHRC, *supra* note 4, at 38. This is as good a contextual definition of the self-executing nature of treaties as any: treaties, "as laws," would be binding on the states qua states and the individuals qua individuals (and presumably on the federal government as well). Anti-Cincinnatus, concluded, correctly or not, that there was nothing to fear because foreign nations would have no interest in the freedom of our press. Professor Yoo dismisses Anti-Cincinnatus because there is no evidence his writing received popular attention. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2057. More to the point, Anti-Cincinnatus did not discuss the doctrine of non-self-execution because he too did not understand the action of any other constitutional authority to be necessary as a *general* matter.

law. In a robust debate where the major (if not the single most important) Anti-Federalist concern was the exclusion of the People's House from a share of the "legislative" treaty-making power, this Federalist response would have been the single most important (not to mention obvious) argument to take the wind out of Anti-Federalist sails. The Federalist response and non-response to Anti-Federalists cast heavy doubt on Professor Yoo's total non-self-execution thesis as a historical matter. Even more to the point, there is no indication that anyone other than the leading Anti-Federalist Federal Farmer suggested any doctrine of non-self-execution by reference to Congress's legislative powers, which is precisely what Yoo's thesis requires.

At the same time, these writings, when read with care, support a doctrine of partial non-self-execution. Although treaties, when made, would be self-executing as a general matter, leading Federalists and Anti-Federalists appreciated that treaties might require legislative implementation in order to have the force of domestic law in *particular cases*. It is hence not surprising that the specific issue of statute-treaty conflict was discussed with reference to British treaty-making practice, which was a focal point of constitutional analysis. Two leading Anti-Federalists, An Old Whig and Federal Farmer, understood British practice to require Parliament's consent to treaties in the event of statute-treaty conflict, consistent with the description of British practice discussed previously.[395] Whereas An Old Whig claimed that this British practice would not apply to the treaty-making power under the Constitution, Federal Farmer claimed that it would. Although leading Federalist Alexander Hamilton claimed that An Old Whig's understanding of British practice was wrong, Hamilton had some incentives to stretch the truth. Fellow Federalist James Madison suggested that British limitations on self-execution would apply to the treaty-making power, but unfortunately did not elaborate.

In evaluating the partial non-self-execution thesis, it is important to remember that the debate between Federalists and Anti-Federalists was waged at a general level of whether the treaty-making power was self-executing or non-self-executing—the issue on which the character of the power as a legislative or executive power turned; the debate was not about identifying particular cases of non-self-execution. At the very least, the issue of statute-treaty conflict as a particular case of non-self-execution was put on the table for consideration. The debates in the state ratifying conventions would bring the partial non-self-execution thesis into sharper focus.

3. *The State Ratifying Conventions.*—The debates of the state ratifying conventions provide an ample basis upon which to test the understandings of the Ratifiers with respect to the nature of the treaty-making power

[395] *See supra* Part III.A.

and the doctrine of non-self-execution in general and the partial non-self-execution thesis in particular.

This Section presents in chronological order the recorded debates of four ratifying conventions where the treaty-making power was an important subject of debate: Pennsylvania, South Carolina, Virginia, and North Carolina. In addition, within each ratifying convention, the history is presented in chronological order so as to best illustrate what claims the Anti-Federalists made and how the Federalists responded to these claims.

These debates share two common themes, which shed light on the key questions at hand. First, the single most important issue in the debate on the treaty-making power was whether treaties made by the President and Senate would have the force of domestic law without implementation by Congress. The Ratifiers understood treaties would be self-executing as a general matter, with leading Federalists defending the doctrine of self-execution.

Second, the debates on the treaty-making power were waged in the context of British treaty-making practice, which brought forth a discussion of particular cases of non-self-execution, namely the conflict between treaties and existing statutes. The Ratifiers clearly understood treaties in Great Britain to require Parliament's consent in the event of statute-treaty conflict. The only question was whether this British practice would apply to the treaty-making power. When leading Anti-Federalists claimed that it would not (and was hence a reason to reject the Constitution), leading Federalists such as James Wilson in Pennsylvania and Francis Corbin and James Madison in Virginia assured them that it would. As we shall see, these debates provide remarkably strong support for the partial non-self-execution thesis.

a. Pennsylvania.—We begin the story with Pennsylvania, which set the stage for the ratification struggle as the first major state to consider the new plan of government. The Pennsylvania convention, meeting at the birthplace of the Constitution, gathered in late November 1787 and ratified the Constitution shortly thereafter by a vote of forty-six to twenty-three on December 12, 1787.[396]

The Pennsylvania debates provide some of the strongest evidence among the ratifying conventions in favor of the partial non-self-execution thesis.[397] In these debates, the Anti-Federalists squarely laid on the table the issue of British treaty-making practice with specific reference to statute-

[396] Introduction to the Pennsylvania Convention, *in* 2 DHRC, *supra* note 4, at 322–24. According to the records, only a fraction of the sixty-nine delegates took part in the debates: James Wilson, Thomas McKean, Benjamin Rush, and six others for the Federalists, and William Findley, John Smilie, and Robert Whitehill for the Anti-Federalists. *Id.* at 323. Their statements are presented herein.

[397] Indeed, there must be something that supports non-self-execution given that Professor Flaherty concedes that Pennsylvania "is in many ways the arena which provides [Yoo's] non-self-execution thesis its best evidence." Flaherty, *History Right?*, *supra* note 48, at 2129. This is not to say that the best evidence for Yoo's thesis is strong evidence.

treaty conflict. When they complained that this practice would not apply to the treaty-making power, James Wilson, Pennsylvania's leading Federalist, responded in a key speech that it would. The following presentation of the Pennsylvania ratification debates reviews the relevant history in three parts: the Ratifiers' initial debate on the Treaty Clause, Federalist James Wilson's key speech on the treaty-making power, and the Anti-Federalists' response to Wilson's speech.[398]

On December 3, 1787, the Ratifiers began their consideration of the Treaty Clause. Anti-Federalist William Findley declared that the treaty-making power is legislative in nature and therefore inconsistent with the Constitution's grant of all legislative powers to Congress in the Article I Vesting Clause.[399] Federalist Timothy Pickering immediately disagreed, responding that "[a]ccording to common acceptation of words, treaties are not part of the legislative power," and made an abrupt, if confusing reference to "[t]he king of Great Britain."[400] Findley then interjected with his understanding of British treaty-making practice. "The king of Great Britain makes laws ministerially, and the legislature confirms them."[401] In other words, the King makes treaties under his executive authority, which are subject to Parliament's ratification.[402]

Federalist James Wilson responded to Findley by turning to the Constitution. "The President and Council in this Constitution makes [sic] the treaty ministerially," said Wilson.[403] By "Council," Wilson presumably was referring to the Senate, in contrast to the President's ministers in the executive branch, who might properly constitute a "Privy Council." Anti-Federalist John Smilie understood Wilson as referring to the Senate. "If it is *ministerial*, the Senate are not here a legislature,"[404] said Smilie. He con-

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[398] For discussion of these debates by Professors Yoo and Flaherty, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 2043–48; Flaherty, *History Right?*, *supra* note 48, at 2129–34.

[399] *See* Debates of the Pennsylvania Convention, *reprinted in* 2 DHRC, *supra* note 4, at 459 ("Notwithstanding the legislative power in Article I, section 1 the power of treaties is given to the President and Senate. This is a branch of legislative power."). Anti-Federalist Robert Whitehill also noted the "inconsistency" between the treaty-making power and the Article I Vesting Clause, fearing that the treaty-makers "may make treaties to abolish the legislature of the United States as the section [Article VI] makes those treaties the supreme law of the land in the *nature of things*." *See id.* at 460. William Findley later remarked that "[a] treaty is not constitutionally guarded. It may be superior to the legislature itself. The House of Representatives have nothing to do with treaties." *Id.* at 522.

[400] *Id.* at 459.

[401] *Id.*

[402] Another version of the day's debate confirms Findley's understanding: "The king makes treaties ministerially and the legislature find difficulty in making *laws* to confirm them." *Id.* at 460. *Cf.* 9 OED, *supra* note 291, at 819 (defining "ministerial" as "[p]ertaining to, or entrusted with, the execution of the law, or the commands of a superior; pertaining to or possessing delegated executive authority").

[403] *See* Debates of the Pennsylvania Convention, *reprinted in* 2 DHRC, *supra* note 4, at 460.

[404] *Id.* If true, other British practices might follow, such as the impeachment of Senators for improper conduct in making treaties. *See, e.g.*, *id.* (remarks of Anti-Federalist John Smilie) ("If the ministers of Great Britain make an inglorious conduct; they may be impeached and punished, but can you impeach the Senate before itself?").

cluded that "[s]upreme laws cannot be made ministerially, but legislatively."[405] When Federalist Pickering claimed that the King's treaties are "obligatory" when made,[406] Smilie maintained that in Great Britain "a law is frequently necessary for the execution of a treaty."[407] Who, then, would make treaties legislatively under the Constitution, giving them the status of supreme laws?

The Federalist responses to these Anti-Federalist criticisms are telling. James Wilson answered that "[t]reaties in all countries have the force of laws. 1st. Blackstone," citing the key passage from Blackstone's treatise to make the point that treaties do not require laws in order to be carried into effect.[408] Benjamin Rush sought to deflect Anti-Federalist criticisms by praising the Constitution's grant of the treaty-making power with reference to Great Britain. "In Great Britain the king alone makes the treaty. In the present Constitution the President and Senate make the treaty, *therefore* it is the act of the *states*, therefore the act of the whole people."[409] Curiously, neither Wilson nor Rush turned the basic Anti-Federalist criticism on its head by explaining that Congress would implement treaties made by the President and Senate, just as Parliament, according to the Anti-Federalists, would implement treaties made by the King.

Importantly, at this point in the debate, Anti-Federalist Smilie turned his attention to this Article's concern: the constitutional relationship of treaties to existing statutes. "If the king of Great Britain makes a treaty contrary to act of Parliament, it cannot be executed till the law is repealed. We have not the same security here."[410] This was a strong statement, expressly linking British practice to the treaty-making power. He added "[i]f the Senate could be impeached as the British ministers may be; we would have more security."[411] He repeated the point the next day in a speech containing criticisms of the Constitution, particularly the Senate. "To the legislative power of the Senate are added some judicial power and an alarming

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405 *Id*.

406 *See id*.

407 *Id.*; *see also id.* (remarks of Anti-Federalist Robert Whitehill) ("When a treaty is made in Great Britain it binds not the people, if unreasonable. Treaties are binding by acts of Parliament and the consent of the people."). The Anti-Federalist position on British practice was not unclear. *See, e.g.*, *id.* at 461 (remarks of Federalist Jasper Yeates) (noting that during the day's debate "[i]t was contended that an act of Parliament is necessary in England to confirm a treaty").

408 *Id.* (citing 1 BLACKSTONE'S COMMENTARIES, *supra* note 57, at *252–57).

409 *Id.* at 461. Wilson clarified that it is "[t]he power of the President and 2/3 of the Senate to *concur*." *Id*.

410 *Id*.

411 *Id.* Later in the convention, James Wilson would admit the force of Smilie's observation. *See id.* at 491–92 ("I confess . . . that by combining those powers, of trying impeachments, and making treaties, in the same body, it will not be so easy as I think it ought to be, to call the Senators to an account for any improper conduct in that business."). This begs the question whether impeachment is applicable to Members of Congress. For a short answer in the negative, see Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 133 n.46 (2001).

share of the executive. They are to concur with the President in making treaties, which are to be the supreme *law of the land*."[412] Smilie bemoaned, "In Great Britain if treaties interfere with subsisting laws; they must be confirmed,"[413] pointing to the "Treaty of commerce between France and England, Article 14."[414]

James Wilson, on behalf of the Federalists, carefully answered these criticisms in several speeches given near the end of the convention. His principal answer to the Senate's share of the treaty-making power was to demonstrate that the Senate could do nothing without the President and that the division of power between the President and Senate would check its abuse.[415] He addressed the other criticisms in a lengthy speech on December 11, 1787. This speech deserves close attention because it contains Wilson's understanding of the nature of the treaty-making power and the doctrine of partial non-self-execution. In this speech, recorded as one long paragraph, he made three key points, roughly in the following order:

First, he explained why treaties, when made, ought to have the force of laws. "There is no doubt, sir, but under the Constitution, treaties will become the supreme law of the land; nor is there any doubt but the Senate and President possess the power of making them. But though treaties are to have *the force of laws*, they are in some important respects very different from *other acts of legislation*."[416] Wilson proceeded to explain the key difference between treaties and "other acts of legislation," by which he meant statutes, in order to allay Anti-Federalist fears that treaties would have pernicious force. "In making laws, our own consent alone is necessary. In

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[412] *See* Debates of the Pennsylvania Convention, *reprinted in* 2 DHRC, *supra* note 4, at 466. Other Pennsylvania Anti-Federalists echoed this sentiment and expressed their fears. For Robert Whitehill, see *id.* at 512 ("The power of the Senate to make treaties is dangerous."); *id.* at 514 ("Treaties may be so made as to absorb the liberty of conscience, trial by jury, and all our liberties."); *id.* at 527 ("All our constitutions may be altered by treaties made by a few Senators."). For William Findley, see *id.* at 512–13 (observing that Senate's intermixture of powers is dangerous to liberty); *id.* at 514 ("Treaties may be so made as to absorb the liberty of conscience, trial by jury, and all our liberties."); *id.* at 527 ("All our constitutions may be altered by treaties made by a few Senators.").

[413] *Id.* at 466. By "subsisting," Smilie meant "existing." *See* SAMUEL JOHNSON'S DICTIONARY, *supra* note 260, at 712 (defining "To Subsist" as "To be; to have existence").

[414] Debates of the Pennsylvania Convention, *reprinted in* 2 DHRC, *supra* note 4, at 466. The recorded notes show that Smilie cited the first volume of Blackstone's treatise at pages 252 to 257, but for what proposition is unclear. *See id*.

[415] *See, e.g.*, *id.* at 561–62 ("We are told that the share which the Senate have in making treaties is exceptionable; but here they are also under a check, by a constituent part of the government, and nearly the immediate representative of the people, I mean the President of the United States. They can make no treaty without his concurrence."); *see also id.* at 480, 491, 563.

[416] *Id.* at 562 (emphasis added). Wilson's immediately preceding remarks, introducing the subject of treaty-making, provide additional context for a doctrine of self-execution. Wilson proposed to justify the intermixture of legislative and executive powers. *See id.* ("[T]his power is denominated a blending of the legislative and executive powers in the Senate. It is but justice to represent the favourable, as well as unfavourable side of a question, and from thence determine, whether the objectionable parts are of a sufficient weight to induce a rejection of this Constitution.").

forming treaties, the concurrence of another power becomes necessary."[417] One implication is that the President and Senate could be trusted with the treaty-making power because they could do nothing without a foreign nation and because they would be presumed to act in our best interests when making a treaty with a foreign nation. There would be even less to fear about injurious treaties being made since treaties are "made by equal parties, and each side has half of the bargain to make; they will be made between us and the powers at the distance of three thousand miles."[418]

Second, Wilson justified the exclusion of the "legislature at large" from a share of the treaty-making power on classic grounds related to secrecy, dispatch, and logistics of treaty formation which would often require lengthy congressional sessions.[419]

Third, and most importantly, Wilson discussed what role the House of Representatives would have in making treaties by directly answering Smilie's claim that British treaty-making practice would not apply to the treaty-making power in the event of statute-treaty conflict. Given the importance of this discussion and because Professors Yoo and Flaherty force it to bear considerable weight in the non-self-execution debate,[420] it is best quoted at its full length:

> It well deserves to be remarked, that though the House of Representatives possess no active part in making treaties, yet their legislative authority will be found to have strong restraining influence upon both President and Senate. In England, if the king and his ministers find themselves, during their negotiation, to be embarrassed, because an existing law is not repealed, or a new law is not enacted, they give notice to the legislature of their situation and inform them it will be necessary, before the treaty can operate, that some law be repealed or some be made. *And will not the same thing take place here?* Shall less prudence, less caution, less moderation, take place among those who negotiate

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[417] *Id.*; *see also id.* ("But in their nature treaties originate differently from laws.").

[418] *Id.* Professor Yoo interprets these remarks as Wilson's suggestion that "treaties were not really laws at all because of their status as international agreements." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2047. This is belied by Wilson's immediately prior reference to treaties having the "force of laws" and being in the same genus as "acts of legislation," as well as Wilson's purpose in this paragraph: to show why the blending of powers in the Senate is not objectionable. Professor Flaherty correctly captures Wilson's theme: "The nation should not worry that treaties, which will have the force of laws, are made in this unusual way since a treaty must meet the additional requirement of receiving the assent of another sovereign nation." Flaherty, *History Right?*, *supra* note 48, at 2132.

[419] Debates of the Pennsylvania Convention, *reprinted in* 2 DHRC, *supra* note 4, at 562. These arguments were subsequently set forth in more detail by John Jay as Publius in early 1788. *See* THE FEDERALIST NO. 64, *supra* note 4, at 391–93 (John Jay).

[420] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2047–48; Flaherty, *History Right?*, *supra* note 48, at 2133–34; *see also* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2165–66. For discussion of their interpretations of this critical speech, see *infra* text accompanying notes 437–446.

treaties for the United States, than among those who negotiate them for the other nations of the earth?[421]

Wilson's discussion of the House's role in the treaty-making power strongly supports the partial non-self-execution thesis, especially when considered in light of his remarks, at the beginning of the same paragraph, that treaties, when made, have the force of laws. The House's "legislative authority" having a "strong restraining influence" on the President and Senate in "making treaties" is that related to British practice. There, it is "necessary, before the treaty can operate" for Parliament to repeal "an existing law" or enact a "new law." Wilson's description of British practice at the Pennsylvania ratifying convention echoes perfectly his description of British practice at the Philadelphia Convention, where he observed that "all treaties which contravene a law of England or require a law to give them operation or effect are inconclusive till agreed to by the legislature of Great Britain."[422]

Wilson's rhetorical question—"And will not the same thing take place here?"—was his direct answer to Smilie's claim, lamenting the inapplicability of this British practice to the treaty-making power—"We have not the same security here."[423] In assessing this answer, it is useful to remember that Wilson, in this long paragraph, was addressing the formation of treaties by the President and Senate and the exclusion of the House of Representatives (and Congress) from that international process. The necessity of congressional action in the two prescribed cases would operate as a "strong restraining influence" on the President and Senate, who would be solicitous of Congress in negotiating treaties.[424]

The two prescribed cases of legislative action are fully consistent with the partial non-self-execution thesis. While it is clear what Wilson meant for an "existing law" to be "repealed," it is not clear what he meant for a "new law" to be "enacted." Both are equally "necessary, before the treaty can operate" as a matter of domestic law. There are three possible circumstances where a treaty could require a "new law."

First, the treaty could itself specify that new laws be enacted to carry it into effect. This is almost certainly not what Wilson meant because this would not be a case where treaty-makers would "find themselves, during their negotiation, to be embarrassed."

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[421] Debates of the Pennsylvania Convention, *reprinted in* 2 DHRC, *supra* note 4, at 562–63 (emphasis added).

[422] 2 FARRAND, *supra* note 127, at 395. For discussion of this statement, see text accompanying *supra* notes 275–77.

[423] 2 FARRAND, *supra* note 127, at 461.

[424] An analogy may be the President's qualified negative in lawmaking, *see* U.S. CONST. art. I, § 7, cl. 2. The threat of its exercise shapes Congress's exercise of the lawmaking power, given the difficulty of obtaining a two-thirds supermajority in each House of Congress to override the President's veto. *See generally* Charles L. Black, Jr., *Some Thoughts on the Veto*, LAW & CONTEMP. PROBS., Spring 1976, at 87.

Second, the treaty could involve certain subjects within the legislature's exclusive powers, such as the power of appropriations or taxation. This Article's review of British practice strongly supports this interpretation,[425] and this interpretation is fully consistent with the partial non-self-execution thesis as a minimum rule of non-self-execution.

Third, the treaty could involve any subject within the legislature's legislative powers, as Professor Yoo's total non-self-execution thesis would have it,[426] or perhaps sweep more broadly in a rule of non-self-execution. Yet, there are a few problems with this interpretation. If every such treaty requires the enactment of a new law, why refer to the specific case of the repeal of an existing law? The treaty-makers would find themselves constantly "embarrassed" and the House's "strong restraining influence" in treaty-making would turn into a de facto share of the treaty-making power. Most importantly, this interpretation is in serious tension with Wilson's comments, in the same paragraph, that treaties, when made, would have the force of laws, at least in many cases. The better answer is that Wilson was referring to some limited cases, based on British practice, where new laws are required in order to execute a treaty as a matter of domestic law.

Did Wilson's key speech persuade the Anti-Federalists on the applicability of British practice to the treaty-making power? On December 12, 1787, the date of ratification, Anti-Federalist Robert Whitehill proposed a number of amendments,[427] which became the articles offered by the Dissent of the Minority of the Convention.[428] Amendment thirteen provided:

> That no treaty which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed, or made conformable to such treaty; neither shall any treaties be valid which are in contradiction to the constitution of the United States, or the constitutions of the several states.[429]

The purpose of this amendment, judging from its text, structure, and location among the fourteen amendments, was to amend the Supremacy Clause. The first clause codifies the partial non-self-execution thesis, almost exactly as set forth by James Wilson in his key speech just the day before.[430] This clause also supports a doctrine of self-execution because it

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[425] *See supra* Part III.A.

[426] This is his interpretation. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2047–48.

[427] Debates of the Pennsylvania Convention, *reprinted in* 2 DHRC, *supra* note 4, at 597.

[428] *See* The Dissent of the Minority of the Convention, *reprinted in* 2 DHRC, *supra* note 4, at 617–40. The Dissent was signed by twenty-one of the twenty-three delegates who voted against the ratification of the Constitution in Pennsylvania. *Id.* at 617.

[429] *Id.* at 624–25.

[430] The amendment does not address the legislative implementation of a treaty by enactment of a "new law." As both clauses of the amendment indicate, the amendment's principal concern is the relationship between treaties and other existing law (federal statutes, the Constitution, and State Constitutions), not the identification of all circumstances where non-self-execution is required by the Constitution.

implies that a treaty not "directly opposed" to existing statutes would be "valid" when made. The second clause makes clear that treaties are inferior to the Constitution, which is implicit in the Supremacy Clause, but expresses some wishful thinking by providing that treaties are also inferior to state constitutions, which is contrary to the Supremacy Clause.[431]

The Dissent explained the amendment as follows:

> It is the unvaried usage of all free states, whenever treaties interfere with *the positive laws of the land*, to make the intervention of the legislature necessary to give them operation. This became necessary, and was afforded by the parliament of Great Britain in consequence of the late commercial treaty between that kingdom and France.[432]

This explanatory paragraph provides additional support for the partial non-self-execution thesis as set forth in the amendment's text. The phrase "positive laws of the land" refers to laws already on the statute books.[433] Importantly, the paragraph also mentions the treaty of commerce between Great Britain and France of 1786, which was a paradigm case of statute-treaty conflict requiring parliamentary implementation.[434]

Only a handful of scholars have mentioned the amendment or the explanatory paragraph.[435] The amendment and explanatory paragraph are important because they provide a contemporaneous interpretation by Anti-Federalists of what James Wilson claimed with respect to the treaty-making power. The Anti-Federalists did not draft an amendment de novo, but were

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[431] The successor version of this amendment, in the *Proceedings of the Meeting at Harrisburg, in Pennsylvania* held on September 3, 1788, reflected even more wishful thinking:

> Provided always that no treaty, which shall hereafter be made, shall be deemed or construed to alter or affect any law of the United States, *or of any particular state,* until such treaty shall have been laid before and assented to by the House of Representatives in Congress.

Proceedings of the Meeting at Harrisburg, in Pennsylvania (Sept. 3, 1788), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 179, at 546 (emphasis added). Again, we see the reference to the relationship between treaties and existing statutes (in this case, federal and state) and the importance of laying treaties before the legislature for its assent.

[432] The Dissent of the Minority of the Convention (Dec. 18, 1787), *reprinted in* 2 DHRC, *supra* note 4, at 634–35 (emphasis added).

[433] *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 147 (Gateway ed., Henry Regnery Co. 1955) (1690) (referring to "antecedent, standing, positive laws").

[434] For similar interpretations of this treaty, see *supra* text accompanying notes 413–414 (remarks of Anti-Federalist John Smilie, Pennsylvania ratifying convention) and *infra* text accompanying notes 504–505 (remarks of Federalist Francis Corbin, Virginia ratifying convention); for a contradictory one, made nearly a decade after the Founding, see *infra* note 572 (remarks of Justice Iredell in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)).

[435] *See, e.g.*, Yoo, *Globalism and the Constitution*, *supra* note 33, at 1984 n.131 (amendment), 2049 (explanatory paragraph). A search for the relevant texts in the Westlaw Law Review and Journal (JLR) database on September 15, 2005 yielded three other results.

codifying James Wilson's argument that treaties would be inferior to existing statutes, just as they were in Great Britain.[436]

In sum, the records of the Pennsylvania ratifying convention strongly support a doctrine of partial non-self-execution. Both Federalists and Anti-Federalists understood British practice as one of partial non-self-execution. The question was whether this British practice would apply to the treaty-making power. On this point, James Wilson claimed that it would, and the Anti-Federalists sought to make this claim an explicit textual commitment in their amendment thirteen.

* * *

Given the foregoing, it is surprising, if not shocking, that Professors Yoo, Flaherty, and Vázquez reach much different conclusions. They each interpret Wilson's key speech on the treaty-making power in ways consistent with their respective theses, but in ways that the speech, upon careful analysis, does not withstand. Only Flaherty even mentions the issue of statute-treaty conflict as a possible limitation on the doctrine of self-execution.[437] None of these scholars discusses amendment thirteen or the Dissent's explanatory paragraph, particularly as potential Anti-Federalist interpretations of Wilson's key speech.

Remarkably, Flaherty and Vázquez interpret Wilson's argument and his remark "And will not the same thing take place here?" as pure political prophesy—literally a "prediction"—and not the articulation of a legal rule.[438] This becomes possible if we ignore the literary device known as a

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[436] The critic might argue that the amendment implies that statutes are not superior to treaties without the amendment. This argument cannot do all of the work required of it. The same amendment makes clear that treaties are inferior to the Constitution, a point left to necessary implication in the Supremacy Clause. Moreover, as St. George Tucker reminds us in his treatise on the Constitution, some of the proposed amendments submitted by the ratifying conventions were merely declaratory and clarifying, and inserted for greater caution. *See* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, app. at 372 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803) [hereinafter TUCKER'S COMMENTARIES] ("[A]mong the amendments proposed by the several state conventions, some appear to have been proposed only for greater precaution, and security against misconstruction, or an undue extension of the powers vested in the federal government; whilst others seem to have been calculated to remedy some radical defects in the system."); *see also* Amar, *supra* note 135, at 15–21 (discussing declaratory and clarifying amendments in Bill of Rights); Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511 (1999) (similar). Amendment thirteen may be such an amendment. This is, in any case, the question we are trying to answer.

[437] *See* Flaherty, *History Right?*, *supra* note 48, at 2133.

[438] *See id.* at 2132 (Wilson's remarks are about "the role that the House will most likely play"); *id.* at 2132 n.171 (Wilson's remarks "appear as predictions of institutional behavior rather than as strictures on the legal status of treaties"); Vázquez, *Laughing at Treaties*, *supra* note 27, at 2165–66 (Wilson's remarks are "nothing more than *predictions* of how things might develop"); *id.* at 2166 & nn.47–49 (similar).

rhetorical question and the figure of speech known as understatement.[439] In dubbing Wilson's speech a prediction, these scholars overlook Wilson's predicate statement that the House's "legislative authority will be found to have strong restraining influence upon both President and Senate." The House's authority would neither be "strong" nor particularly "restraining" if the British practice Wilson described is only of political significance.[440]

In his historical presentation, Flaherty downplays the force of Wilson's speech, describing Wilson's discussion of the House's legislative authority as its ability "to influence treatymaking informally" and suggesting that the House would only exercise this authority "ex ante."[441] But Wilson clearly stated that the legislature's authority is formal, irrespective of time: it is "necessary, before the treaty can operate." Wilson appropriately focused on the ex ante scenario because the speech's purpose was to demonstrate why the President and Senate may be trusted with the sovereign power to form treaties without the House of Representatives.

Importantly, when it comes to the issue of a treaty's repeal of existing statutory law, Flaherty observes that "treatymakers would consult the legislature not because treaties would not subsequently be law, but because consciously concluding a treaty provision contrary to a statute would neither be prudent, cautious, nor moderate," but admits that this interpretation is "against" Wilson's words given Wilson's use of the phrase "'before the treaty can operate.'"[442] Flaherty reaches this conclusion, in part, because he believes Wilson's speech is an "ambiguous and perhaps contradictory performance."[443] The problem with this conclusion is that Wilson's speech is neither ambiguous nor contradictory in the context of Wilson's earlier remarks on British practice at the Philadelphia Convention[444] (which Flaherty fails to notice), or of the Pennsylvania Anti-Federalists' contemporaneous interpretations of Wilson's speech[445] (which Flaherty also fails to notice).

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[439] *Cf.* MCI Telecomm. Corp. v. Am. Tel. & Tel., 512 U.S. 218, 228 (1994) (Scalia, J.) (referring to a "figure of speech called understatement and a literary device known as sarcasm"). Rhetorically, Wilson's question elegantly tracks the language of Smilie's statement, "We have not the same security here." Debates of the Pennsylvania Convention (Dec. 3, 1787), *reprinted in* 2 DHRC, *supra* note 4, at 461. Smilie alleged that treaties would repeal existing statutes in contravention of British practice. For his remarks, see *supra* text accompanying note 410. In his speech, Wilson was undoubtedly answering Smilie. Flaherty and Vázquez fail to notice this critical point.

[440] If Wilson's summary of British practice is correct, the conclusion of Flaherty and Vázquez means that the House of Representatives has *less* power than the House of Commons when it comes to the issue of statute-treaty conflict and the treaty-making power. This is possible, but not to be lightly presumed if the Constitution is meant to provide strong popular safeguards in a new form of government.

[441] Flaherty, *History Right?*, *supra* note 48, at 2133.

[442] *Id.*

[443] *Id.* at 2134; *see also* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2166 (stating that Wilson's speech displays "an almost Clintonian talent for studied ambiguity").

[444] *See supra* text accompanying note 275.

[445] *See supra* text accompanying notes 429, 432.

On the other hand, Professor Yoo overplays the force of Wilson's speech. Yoo recognizes, correctly, that Wilson's point in this speech "was that even without a formal role the House would still enjoy the same power over treaties as that of Parliament," but goes astray when he concludes that "[a]nalogizing to the British system, Wilson admitted that no treaty could have direct legislative effect without the participation of Congress."[446] The problem with this conclusion is that Wilson admitted no such thing. Indeed, this is precisely what Wilson (or his fellow Federalists) did not admit to those Anti-Federalists who were beseeching someone to tell them that Congress (just like Parliament, in their view) would implement all treaties before they could have the force of domestic law. Yoo's interpretation only becomes possible if Wilson's veiled reference to the enactment of a "new law" in British practice is stretched to cover all of the cases where a treaty touches subjects within Congress's legislative powers. There is no support for this separation-of-powers interpretation in the Pennsylvania ratification debates. Rather, Yoo's interpretation is in serious tension with the Federalists' repeated statements that treaties, when made, would (and ought) to have the force of laws.

Although overlooked by Yoo and Flaherty in their historical presentation, the Pennsylvania debates provide ample discussion of the issue of statute-treaty conflict by Federalists and Anti-Federalists alike. As far as Pennsylvania is concerned, the partial non-self-execution thesis stands on solid ground.

b. South Carolina.—The South Carolina ratifying convention met in May 1788 and ratified the Constitution by a vote of 149 to 73 on May 23, 1788.[447] Earlier in the ratification struggle, the state legislature debated the Constitution in voting to call the convention. One of the many subjects of debate was the treaty-making power.[448] These debates, generally ignored by treaty scholars, are important because they provide a contemporaneous understanding of British treaty-making practice and its significance for a doctrine of self-execution. Although the issue of statute-treaty conflict was not addressed as much as it was in Pennsylvania, these debates do contain a few valuable references to British practice in the event of statute-treaty conflict.

In the debate on the treaty-making power, Anti-Federalists expressed characteristic concerns. Leading Anti-Federalist Rawlins Lowndes feared the power because he believed that treaties made by the President and Senate would be self-executing. Quoting the Supremacy Clause, he worried that treaties made by "so small a body of men" would "supersede every ex-

[446] Yoo, *Globalism and the Constitution*, *supra* note 33, at 2047.

[447] General Ratification Chronology, 1786–91, *in* 4 DHRC, *supra* note 4, at xxi–xxii [hereinafter General Ratification Chronology].

[448] *See* 4 ELLIOT'S DEBATES, *supra* note 179, at 263–65, 269–70, 277–80.

isting law in the Union," which was worse than everywhere else "in the history of the known world."[449] Lowdnes explained that French treaties required parliamentary registration and that British treaties—at least those contrary to existing statutes—required parliamentary sanction before they could have the force of law.[450] He was particularly concerned with the relationship between treaties and the state's existing installment law, which addressed debtor-creditor relationships and likely conflicted with Article IV of the Treaty of Paris of 1783;[451] he was not focused on the relationship between treaties and existing federal statutes. Importantly, it was this "vertical" relationship between treaties and existing state law, implicated by the Supremacy Clause, that framed the debates on the treaty-making power.

Federalist and Framer John Rutledge directly answered Lowndes by observing that "every treaty was law paramount, and must operate,"[452] denying Lowndes' claim that non-self-execution was a uniform practice in other nations and supporting an inference of self-execution under the Constitution. Rutledge then addressed Lowndes' claim about British practice and its supposed rule of non-self-execution:

> In England, treaties are not necessarily ratified, as was proved when the British parliament took up the last treaty of peace. A vote of disapprobation dispossessed Lord Shelburne, the minister, of his place; the Commons only addressed the king for having concluded a peace; yet this treaty is binding in our courts and in England. . . . *There was an obvious difference between treaties of peace and those of commerce, because commercial treaties frequently clashed with the laws upon that subject; so that it was necessary to be ratified in Parliament.*[453]

Like Lowndes, Rutledge recognized that Parliament ratified (some of) the King's treaties. Importantly, he explained the *reason* for parliamentary ratification: conflict between a treaty made by the King and existing statutes made by Parliament, which would occur "frequently" with respect to treaties of commerce and less so with respect to other treaties.[454] Rutledge's

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[449] *Id.* at 265; *see also id.* at 266 ("Even the most arbitrary kings possessed nothing like it.").

[450] *See id.* at 265. On British treaties, see *id.* at 266 ("In England, the ministers proceed with caution in making treaties: far from being considered as legal without parliamentary sanction, the preamble always stated that his majesty would endeavor to get it ratified by his Parliament."); *id.* at 271 ("He explained his position relative to treaties to be, that no treaty concluded *contrary to the express laws of the land* could be valid. The king of England, when he concluded one, did not think himself warranted to go further than to promise that he would endeavor to induce his Parliament to sanction it." (emphasis added)).

[451] *See id.* at 266 ("He observed, that the clause entirely did away the instal[l]ment law; for, when this Constitution came to be established, the treaty of peace might be pleaded against the relief which that law afforded."). For Secretary of Foreign Affairs John Jay's discussion of treaty violations by South Carolina, see 31 JCC, *supra* note 362, at 834–55.

[452] 4 ELLIOT'S DEBATES, *supra* note 179, at 267.

[453] *Id.* (emphasis added).

[454] If it did occur with treaties of peace, a different rule might obtain. *See id.* at 312 (remarks of Federalist John Rutledge) (stating that the Treaty of Paris of 1783 was "contrary to the Declaratory Act,

description of British practice was sufficient to dismiss Lowndes' claim that all treaties in Great Britain, including treaties of peace, required parliamentary ratification. Unfortunately, Rutledge did not indicate whether this British rule of non-self-execution would apply to the treaty-making power, which was beyond his concern in responding to Lowndes.

Three other Federalists addressed British practice in order to demonstrate that treaties, when made, would have the force of laws, just as they would under the Constitution. Ralph Izard explained that:

> [e]ven the kings of England had power to make treaties of peace or war. In the congress held at Utrecht, two treaties were agreed upon, one relative to peace, the other of commerce; *the latter was not ratified, being found to clash with some laws in existence*; yet the king's right to make it was never disputed.[455]

Izard's description of British practice highlights the issue of statute-treaty conflict as a case for parliamentary ratification, but does not squarely address the status of the unratified treaty as a matter of domestic (as opposed to international) law. John Julius Pringle suggested, strangely, that British treaties "are discussed by Parliament, not for ratification, but to discover whether the ministers deserve censure or approbation."[456] Though he overstated the case with respect to British practice, Pringle supplied an answer to the question of whether treaties would be self-executing under the Constitution: "Although the treaties [the President and Senate] make may have the force of laws when made, they have not, therefore, legislative power."[457] Finally, Federalist and Framer Charles Cotesworth Pinckney concluded the debate on the treaty-making power by quoting the familiar passage from *Blackstone's Commentaries* and less familiar passages from international law treatises of Vattel and Burlamaqui in order to prove that treaties, when made, would have (and ought to have) the force of laws.[458]

Taken as a whole, the South Carolina debates strongly support a doctrine of self-execution. The Federalists and Anti-Federalists agreed that treaties, when made, would have the force of laws, at least as a general matter. The debate was whether this *should* be so. When Lowndes claimed that self-execution was anomalous in the history of the world (which made the treaty-making power exceptionally objectionable), the Federalists denied the empirical claim with reference to British practice (which served to justify a doctrine of self-execution). These debates also strongly support a

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and a great number of other acts of Parliament" but "[y]et who ever doubted its validity?"). On the special status of last-in-time treaties of peace and their possible relationship with conflicting prior statutes, see *infra* Part IV.C.

[455] 4 ELLIOT'S DEBATES, *supra* note 179, at 268 (emphasis added). As for French practice, Izard claimed that the King's edicts were "legal without that ceremony" of parliamentary registration. *Id*.

[456] *Id.* at 269. As for French treaties, he stated that "[t]he king of France registers his edicts on some occasions, to facilitate the execution, but not his treaties." *Id*.

[457] *Id*.

[458] *Id.* at 277–79.

description of British practice as one of partial non-self-execution.[459] Although the issue of *federal* statute-treaty conflict was not discussed with respect to the treaty-making power (because it was beyond the main subject of debate), the Federalists' use of British practice to justify a doctrine of self-execution leans in the direction of the partial non-self-execution thesis, or is at least consistent with it.

c. Virginia.—The Virginia ratifying convention met in June 1788 and barely ratified the Constitution by a vote of eighty-nine to seventy-nine on June 25, 1788.[460] From the start, the vote in Virginia was thought to be close and the outcome uncertain.[461] The vote was critical: no one could imagine a Union without Virginia.[462] Among the ratifying conventions, Virginia witnessed the most extensive debate on the Constitution's provisions, producing the most voluminous records. Virginia also witnessed the most extensive debate on the treaty-making power, which occupies some 10% of its records.[463]

Not surprisingly, this debate was sharp with respect to British practice and its implications for the doctrine of self-execution, including the constitutional relationship between statutes and treaties. Together with the Pennsylvania debates, the Virginia debates provide some of the strongest evidence among the ratifying conventions in favor of the partial non-self-execution thesis. In Virginia, the Anti-Federalists claimed that the treaty-making power, as a self-executing power, departed from the British practice of non-self-execution. The Federalists responded that treaties, when made, would have the force of laws under the Constitution, just as in Great Britain. Two Federalists, Francis Corbin and James Madison, explained that treaties would be inferior to existing statutes. The following presentation of the lengthy Virginia debates summarizes the relevant history in two parts:

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[459] Accordingly, the South Carolina debates strongly militate against Professor Yoo's description of British practice as one of total non-self-execution.

[460] General Ratification Chronology, *supra* note 447, at xxii.

[461] *See, e.g.*, Letter from James Madison to George Washington (Jun. 13, 1788), *reprinted in* 22 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 134 (Robert A. Rutland & William M.E. Rachal eds., 1975) [hereinafter THE PAPERS OF JAMES MADISON] ("There is reason to believe that the event may depend on the Kentucky members, who seem to lean more against than in favor of the Constitution. The business is in the most ticklish state that can be imagined."); Letter from James Madison to Alexander Hamilton (Jun. 16, 1788), *reprinted in* 5 THE PAPERS OF ALEXANDER HAMILTON 9 (Harold C. Syrett ed., 1962) ("If we lose [Virginia's ratification] Kentucke will be the cause; they are generally if not unanimously against us."); 3 ELLIOT'S DEBATES, *supra* note 179, at 502 (remarks of Federalist George Nicholas) ("Gentlemen recurred to their favorite business again—the scuffle for Kentucky votes.").

[462] *See, e.g.*, Yoo, *Globalism and the Constitution*, *supra* note 33, at 2059 (stating that "Virginia was perhaps *the* critical state in the ratification effort" given its geographic position in linking North and South and its political leadership).

[463] *See* Warren, *supra* note 300, at 297. For the key debates, see 3 ELLIOT'S DEBATES, *supra* note 179, at 311–13, 316, 325–26, 331–66, 499–516, 609–10.

general debate and the specific debate on the treaty-making power on the eighteenth and nineteen of June 1788.[464]

We begin with the general debate on the treaty-making power which helps to identify the basic context and contours of the debate. In reading the Virginia debates, it is important to remember that the power was the subject of substantial attention because it was inextricably tied to the most important geopolitical issue of the day: the Mississippi River. Just two years before, the Continental Congress attempted to surrender navigation rights to Spain in the Jay-Gardoqui Treaty of 1786, supported by seven northern states (who stood to gain) and opposed by six southern states (who stood to lose).[465] The Mississippi River was (and still is) the lifeblood of the South and reflected divergent geopolitical interests.[466] With the failed Jay-Gardoqui Treaty fresh on their minds,[467] Virginia's Anti-Federalists feared that treaties would be made by the President and Senate surrendering their most important navigational and territorial interests.[468]

Given these geopolitical considerations, the Anti-Federalists attacked the lack of procedural safeguards to the treaty-making power. Their chief concern was that a simple majority of the Senate is the quorum to make treaties.[469] Because a quorum was fourteen Senators (assuming thirteen states in the Union), Anti-Federalists feared that ten Senators (two thirds of fourteen), which might be Senators from as few as five states—perhaps small, northern states—could make a ruinous treaty concerning the Mississippi, which was worse than the nine state rule for treaty-making under Ar-

[464] For discussion of these debates by Professors Yoo and Flaherty, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 2059–68; Flaherty, *History Right?*, *supra* note 48, at 2140–49.

[465] The two-thirds supermajority consent requirement in the Treaty Clause owes its existence to this paradigm case. *See supra* note 300.

[466] Leading Anti-Federalist Patrick Henry declared that "[t]o preserve the balance of American power, it is essentially necessary that the right of the Mississippi should be secured." 3 ELLIOT'S DEBATES, *supra* note 179, at 352. For another expression in stark geopolitical terms, see *id.* at 365 (remarks of Anti-Federalist William Grayson) (referring to the "contest for empire").

[467] *See, e.g.*, *id.* at 141–42 (remarks of Anti-Federalist Patrick Henry) ("The honorable gentleman cannot be ignorant of the *Spanish transactions*. A treaty had been nearly entered into with Spain, to relinquish that navigation.").

[468] *See, e.g.*, *id.* at 221 (remarks of James Monroe) ("Two thirds of those who may *happen* to be present, may, with the President, make treaties that shall sacrifice the dearest interests of the Southern States—which may relinquish part of our territories—which may dismember the United States."); *id.* at 500 (remarks of Patrick Henry) ("[I]f two thirds of a quorum would be empowered to make a treaty: they might relinquish and alienate territorial rights, and our most valuable commercial advantages. In short, if anything should be left us, it would be because the President and senators were pleased to admit it.").

[469] *See* U.S. CONST. art. I, § 5, cl. 1 ("[A] Majority of each [House] shall constitute a Quorum to do Business."); *id.* art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . .").

ticle IX of the Confederation.[470] In addition, some Anti-Federalists conceived of the President's role in treaty-making as a trivial check.[471]

Of course, the Federalists vigorously disputed these notions, urging that Senators from most states would be present for the most important business, and that the President, as the representative of the People, would protect national interests.[472] At a minimum, they argued that the new (and strong) regime under the Constitution would better protect the Mississippi River than the old (and weak) regime under the Confederation.[473] They also argued that territorial rights would not be relinquished given the actual political alignment of the states, and that it would be contrary to the law of nations for the treaty-makers to do so.[474]

Most importantly for present purposes, the Federalists also pointed to another check securing the Mississippi: the House of Representatives (which would be controlled by large, southern states). George Nicholas observed that "[a]lthough the representatives have no immediate agency in treaties, yet, from their *influence* in government, they will direct every thing. They will be a considerable check on the Senate and President."[475]

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[470] *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 179, at 292–93 (remarks of William Grayson) ("Ten members are two thirds of a quorum. Ten members are the representatives of five states. The Northern States may then easily make a treaty relinquishing this river."); *id.* at 499 (remarks of George Mason) (making similar remarks and worrying that Senators from "distant states" or those states "injured by the treaty" might not attend or be called to attend ratifying session). *Cf.* 2 FARRAND, *supra* note 127, at 549–50 (failed motion at Philadelphia Convention providing that "no Treaty should be made without previous notice to the members, & a reasonable time for their attending").

[471] *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 179, at 502 (remarks of William Grayson) ("The consent of the President he considered as a trivial check, if, indeed, it was any, for the election would be so managed that he would always come from a particular place, and he would pursue the interest of such place."). Grayson was wrong to discount the check afforded by the Presidency for the southern states: the Apportionment Clause's inclusion of slaves as "three fifths of all other Persons," *see* U.S. CONST. art. I, § 2, cl. 3, and the spillover effect of House representation in the Electoral College, *see id.* art. II, § 1, cl. 2, would ensure that the Presidency would tilt decidedly in favor of the South for many of the early years of the Republic. *See* AMAR, *supra* note 20, at 156–59.

[472] *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 179, at 302 (remarks of Edmund Pendleton) ("It must be supposed that, on occasions of great moment, the senators from all the states will attend. If they do, there will be no difference between this Constitution and the Confederation in this point."); *id.* at 499 (remarks of George Nicholas) ("The approbation of the President, who had no local views, being elected by no particular state, but the people at large, was an additional security."); *id.* at 500 (remarks of James Madison) (stating that foreign nations would not be "solicitous to get a treaty only ratified by the senators of a few states" and that the President would be subject to impeachment if he were "to commit any thing so atrocious as to summon only a few states" to ratifying session); *id.* at 511–12 (stating that Anti-Federalist fear is founded on the supposition of non-attendance and conclusively refuting Anti-Federalist math by working through interesting possibilities).

[473] *See, e.g.*, *id.* at 239, 357 (remarks of George Nicholas); *id.* at 331 (remarks of James Madison).

[474] *See, e.g.*, *id.* at 331–32 (remarks of James Madison) (noting that New Jersey and Pennsylvania would join the southern states in protecting the Mississippi River); *id.* at 345–46 (denying right to relinquish navigational interests by "mere commercial regulations" as opposed to "emergencies of safety in time of war").

[475] *Id.* at 240 (emphasis added).

James Madison stated that "the House of Representatives will have a *material influence* on the government, and will be additional security in this respect [of the treaty-making power]."[476] When Anti-Federalist Patrick Henry stated that he found it "incomprehensible" that the House "might interfere, and prevent the Mississippi from being given away"[477] as these Federalists maintained, Federalist Francis Corbin responded to Henry with a specific example of the House's "influence in the formation of treaties."[478] According to Corbin, "[t]reaties are generally of a commercial nature, being a regulation of commercial intercourse between different nations. In all commercial treaties, it will be necessary to obtain the consent of the representatives."[479] Corbin linked the House's "influence" with congressional implementation of a certain class of treaty. His subsequent remarks at the convention would make clear *why* Corbin believed commercial treaties to require congressional implementation: they would frequently clash with existing statutes.[480]

Other history provides clues on what the Federalists may have meant by the House's "influence"—clues which shed light on the doctrine of partial non-self-execution called for by Francis Corbin. James Madison's letter to George Nicholas on the Mississippi River issue, written before the convention began at Nicholas's request, outlined the Federalists' principal arguments on the issue, which Madison recognized likely would determine victory or defeat.[481] On the specific issue of the House's role in treaty-making, Madison observed:

> I consider the House of Reps. as another ob[s]tacle afforded by the new Constitution. It is true that this branch is not of necessity to be consulted in the forming of Treaties. *But as its approbation and cooperation may often be necessary in carrying treaties into full effect*; and as the support of the Government and of the plans of the President & Senate in general *must* be drawn from the purse which they hold, the sentiments of this body cannot fail to have very great weight, even when the body itself may have no constitutional authority. . . . So that under the new System every Treaty must be made by [1] the *authority* of the Senate in which the States are to vote equally[,] [2] that of the Presi-

[476] *Id.* at 347 (emphasis added).

[477] *Id.* at 354–55; *see also id.* ("Will the honorable gentlemen say that the House of Representatives will break through their balances and checks, and break into the business of treaties? They have no power to do this by the Constitution.").

[478] *Id.* at 365.

[479] *Id.* At this point, the convention records indicate: "[Here a storm arose, which was so violent as to compel Mr. Corbin to desist, and the committee to rise.]" *Id.*

[480] *See infra* text accompanying notes 504–507. Federalist George Nicholas also responded to Henry's bewilderment that the House would afford a check to the treaty-making power. Nicholas discussed the influence of the House of Commons on treaties made by the King, principally with reference to the power of impeachment. *See* 3 ELLIOT'S DEBATES, *supra* note 179, at 359.

[481] *See* Letter from George Nicholas to James Madison (May 9, 1788), *reprinted in* 9 DHRC, *supra* note 4, at 793; Letter from James Madison to George Nicholas (May 17, 1788), *reprinted in* 9 DHRC, *supra* note 4, at 804.

dent who represents the people & the States in a compounded ratio[,] and [3] under the *influence* of the H. of Reps. who represent the people alone.[482]

In this letter, Madison contextually defines the House's "influence" in the formation of treaties in two distinct roles: (1) the House's "approbation and cooperation . . . in carrying treaties into full effect" and (2) the House's power over the purse. The first role echoes Madison's remarks in *The Federalist No. 53*, reviewed earlier, that treaties "will sometimes demand particular legislative sanction and co-operation."[483] It clearly involves a doctrine of non-self-execution: it is "often . . . necessary" for "carrying treaties into full effect." Taken together, the House's two roles provide the House with "very great weight, even when the body itself may have no constitutional authority [in the formation of treaties]." Although Madison, once again, did not elaborate on the particular circumstances where the House's "approbation and cooperation" are necessary, it is sufficient to note for present purposes that Madison's reference to the House's "influence" supports some rule of non-self-execution, as Corbin properly understood in responding to Henry.[484]

We now turn to the convention's debate on the Treaty Clause, which brought the particular circumstances of non-self-execution into sharp focus. The debate officially began on June 18, 1788, and occupied the convention for most of two days.[485] The critical issue in this debate, which included speeches by nearly all of the state's leading Federalists and Anti-Federalists, was British treaty-making practice and its relevance to the treaty-making power.

The Anti-Federalist position was all too familiar. Taking up the familiar issue of the potential alienation of territorial rights by treaty, Patrick Henry bemoaned that the treaty-making power, as a self-executing power, was exceptionally objectionable because "treaties were to have more force here than in any part of Christendom."[486] He stated his belief that "[t]o say that they are municipal is, to me, a doctrine totally novel," and proposed to

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[482] Letter from James Madison to George Nicholas (May 17, 1788), *supra* note 481, at 808–09.

[483] THE FEDERALIST NO. 53, *supra* note 4, at 334 (James Madison). For discussion of this statement, see *supra* text accompanying notes 345–346.

[484] Professor Yoo interprets the "tripartite" formulation in Madison's letter to Nicholas as evidence of the separation between lawmaking and treaty-making. *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2066 ("In fact, this system was not unlike the ordinary process that would govern the passage of domestic statutes. . . . [A]s Madison was well aware, his arrangement appealed to the distinction between treatymaking and lawmaking that had governed under the British Constitution and the Articles of Confederation."). These conclusions are not to be derived from Madison's letter defining the House's "influence" in treaty-making unless "influence" is a reference to lawmaking or legislative power. Madison's letter provides no basis for such an inference.

[485] *See* 3 ELLIOT'S DEBATES, *supra* note 179, at 499–516.

[486] *Id.* at 500; *cf. id.* at 504 (discussing treaty-making in France) ("In the time of Henry IV., a treaty with Sigismund, king of Poland, was ratified by the Parliament. You have not even as much security as that. You prostrate your rights to the President and Senate. This power is therefore dangerous and destructive.").

"give them the same force and obligation they have in Great Britain, or any other country in Europe."[487] In expressing these concerns, Henry was most concerned with the relationship between treaties and state constitutions, which would protect the very rights he claimed would be given up by treaties.[488]

Also taking up the issue of territorial rights and potential territorial dismemberment, George Mason declared that the treaty-making power was not "sufficiently guarded."[489] His principal concern was with respect to the power's procedural safeguards. Importantly, the procedural safeguard Mason sought was the legislative ratification of treaties, based upon his understanding of British practice.[490] He observed that treaties respecting territorial dismemberment and alien land ownership required an "express act of Parliament" in Great Britain, but that these treaties would not require Congress's consent under the Constitution.[491]

By stating that they would take British practice instead of the Constitution, Henry and Mason set themselves up for a fall. The Federalist response was led by none other than James Madison. He emphatically denied that the Constitution made "great innovations in extending the force of treaties,"[492] and asked matter-of-factly, "Are not treaties the law of the land in England?"[493] His proof beat Henry on his own terms. "I will refer you to a book which is in every man's hand—*Blackstone's Commentaries*. It will inform you that the treaties made by the king are to be the supreme law of the land. If they are to have any efficacy, they must be the law of the land: they are so in every country."[494] Madison concluded by denying the King's power to dismember the empire by treaty and assuring Henry that similar limitations existed under the Constitution.[495] Similarly, George Nicholas in-

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[487] *Id.* at 500.

[488] *See id.* ("To make them paramount to the Constitution and laws of the states, is unprecedented."); *id.* at 502–04 (discussing treaties and individual rights guaranteed by state constitutions).

[489] *See id.* at 507–08.

[490] *See id.* at 508–09.

[491] *See id.* at 508. He subsequently proposed an amendment requiring the consent of a three-fourths supermajority in each House of Congress to treaties respecting territorial dismemberment. *See* Letter from George Mason to John Lamb (Jun. 9, 1788), *reprinted in* 18 DHRC, *supra* note 4, at 45 (Mason's original draft); 3 ELLIOT'S DEBATES, *supra* note 179, at 660 (amendment seven as proposed by Virginia ratifying convention).

[492] 3 ELLIOT'S DEBATES, *supra* note 179, at 501.

[493] *Id*.

[494] *Id*.; *see also id.* (stating that "as far as the king of Great Britain had a constitutional power of making a treaty, such a treaty was binding").

[495] *See id.* (stating that the King has no power to dismember the empire by treaty "in time of peace" and suggesting exception for treaty of peace); *see also id.* at 514–15 (explaining necessity for exception). Similarly, Anti-Federalist-turned-Federalist Governor Randolph attempted to curb Henry's concerns by claiming that treaties made by the President and Senate would not—and could not—interfere with territorial or individual rights. *See id.* at 504 ("I conceive that neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty. The lives and properties of

sisted that treaties, when made, were the "supreme law of the land" under the Constitution, just as they were in Great Britain.[496] When Henry and Mason claimed that British practice was one of non-self-execution and that the Constitution departed from it, Madison and Nicholas answered that British practice was one of self-execution and that the Constitution continued it. Curiously, in the face of specific Anti-Federalist criticism on the point, neither Federalist mentioned any role for Congress in ratifying treaties made by the President and Senate.

It was Federalist Francis Corbin,[497] responding to Mason's comments, who offered the most sustained reflection on the doctrine of non-self-execution, specifically partial non-self-execution. According to Corbin, the Anti-Federalists maintained that treaties "are to be the supreme law of nations; that is, in their way of construction, paramount to the Constitution itself, and the laws of Congress."[498] This was the first time in the debate on the Treaty Clause that the Ratifiers considered the constitutional relationship between statutes and treaties.[499] Corbin skillfully disposed of any misconstruction on the relationship of treaties to existing federal statutes with literally mathematical precision: "It is as clear as that two and two make

European subjects are not affected by treaties, which are binding on the aggregate community in its political, social capacity."). This was a unique position and one not supported by other Virginia Federalists; if true, it would have reduced the treaty-making power to a virtual nullity. Randolph also suggested that the Territory and Property Clause—specifically its proviso that "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State," U.S. CONST. art. IV, § 3, cl. 2—would "secure against dismemberment[.]" 3 ELLIOT'S DEBATES, *supra* note 179, at 504. This was a novel argument of its own. *See id.* at 505 (remarks of Anti-Federalist William Grayson) (taking issue with Randolph's argument); Golove, *Treaty-Making and the Nation*, *supra* note 37, at 1144 n.206 (discussing Randolph's argument).

[496] *See* 3 ELLIOT'S DEBATES, *supra* note 179, at 502 ("He compared the king of England's power to make treaties to that given by this clause. He insisted they resembled each other. If a treaty was to be the supreme law of the land here, it was so in England. The power was as unlimited in England as it was here."); *id.* at 506 (stating that "the power of the king in Great Britain and that of Congress [sic], with respect to making treaties . . . were on the same foundation, and that every possible security which existed in the one instance was to be found in the other."); *id.* (quoting *Blackstone's Commentaries* and asking, "How does this apply to the Constitution? The President and Senate have the same power of making treaties; and when made, they are to have the same force and validity. They are to be the supreme law of the land here. This book shows us they are so in England."). Fellow Federalist Francis Corbin moved beyond recitation of Blackstone to provide an example of a treaty disapproved of by Parliament, but that was nevertheless considered to be binding on the nation. *See id.* at 510, 516 (referring to the Treaty of Paris of 1783 establishing the peace between Great Britain and the United States). *But see id.* at 513 (remarks of Patrick Henry) (referring to Corbin's misinterpretation of the "treaty of peace with Great Britain").

[497] Corbin is perhaps better known among legal scholars for his comments on the militia. *See id.* at 112 ("Who are the militia? Are we not militia?").

[498] *Id.* at 510.

[499] For Corbin's earlier remarks regarding the House's involvement in treaties of commerce, see *supra* text accompanying note 479.

four, that the treaties made are to be binding on the states *only*."[500] He then proceeded to explain that treaties are to be paramount with respect to state law based on the structural logic of the parts and the whole.[501] Corbin's "axiom" of constitutional law is an articulation of the three tiers of federal law thesis: the Constitution is superior to statutes which are superior to treaties.[502] All three tiers of federal law are supreme with respect to contrary state law.

Corbin's axiom, of itself, leaves the principal question unaddressed: Do treaties have the force of law if they do not conflict with statutes? Corbin looked to British practice for answers. Previously in the speech, in responding to Henry, Corbin embraced the Federalist claim that treaties in Great Britain would sometimes have the force of law without Parliament's ratification.[503] At this point, Corbin proceeded to explain that treaties in Great Britain would sometimes not have the force of law without Parliament's ratification, thereby providing a historical basis for his lexical priority argument:

> The honorable gentleman on the other side tells us that this doctrine [of treaties as binding on the states] is not founded, because, in England, it is declared that the consent of Parliament is necessary. Had the honorable gentleman used his usual discernment and penetration, he would see the difference between a *commercial treaty* and *other treaties*. A commercial treaty must be submitted to the consideration of Parliament, because such treaties will render it necessary to alter some laws, add new clauses to some, and repeal others. If this be not done, the treaty is void, quoad hoc.[504]

Treaties of commerce would be non-self-executing because they would inevitably clash with existing statutes, which means that Parliament would need to remove the conflict by "alter[ing] some laws, add[ing] new clauses

[500] 3 ELLIOT'S DEBATES, *supra* note 179, at 510 (emphasis added). For Henry's response, see *id.* at 513–14.

[501] Corbin observed:

> Is it not necessary that they should be binding on the states? Fatal experience has proved that treaties would never be complied with, if their observance depended on the will of the states; and the consequences would be constant war. For if any one state could counteract any treaty, how could the United States avoid hostility with foreign nations? Do not the gentlemen see the infinite dangers that would result from it, if a small part of the community could drag the whole confederacy into war?

Id. at 510.

[502] *Cf*. Flaherty, *History Right?*, *supra* note 48, at 2147 (interpreting Corbin's statement on the relationship between statutes and treaties) ("Treaties could not, however, trump the Constitution or subsequent federal statutes—the Supreme Court's modern position—nor federal laws already on the books, the important wrinkle that departs from current doctrine.").

[503] *See* 3 ELLIOT'S DEBATES, *supra* note 179, at 510 (referring to remarks of James Madison or George Nicholas) ("The honorable gentleman [Patrick Henry] said that treaties are not the supreme law of the land in England. My honorable friend proved the contrary by the Commentaries of Blackstone."); *see also supra* note 496 (discussing Corbin's further proof of this point by reference to the Treaty of Paris of 1783).

[504] 3 ELLIOT'S DEBATES, *supra* note 179, at 510–11 (emphasis added).

to some, and repeal[ing] others" before these treaties could have the force of law.[505]

The upshot of this description of British practice was obvious. Corbin linked this British practice to the treaty-making power to quell Anti-Federalist fears about territorial dismemberment by treaty under the Constitution. "The Mississippi cannot be dismembered but in two ways—by a common treaty, or a commercial treaty," said Corbin. He concluded that it could not be done by a "common treaty," by which he evidently meant a treaty of alliance (in contrast to a treaty of peace or of commerce), because such a treaty would be repugnant to the law of nations.[506] Asking whether it could be done by a commercial treaty, Corbin concluded, "If it should, the consent of the House of Representatives would be requisite, because of the correspondent alterations that must be made in the laws. . . . This . . . secures legislative interference."[507] This was the doctrine of partial non-self-execution. Corbin's message to the Anti-Federalists could not be clearer: the consent of the House would provide the necessary procedural safeguard, desperately sought by Anti-Federalists, against a commercial treaty ceding the Mississippi.

Finally, James Madison, in the last long speech on the treaty-making power, pursued similar themes, which support a doctrine of partial non-self-execution. He made an effort to lessen Anti-Federalist paranoia about the Mississippi by denying the power of treaties to dismember territory in the absence of necessity.[508] He noted that treaty-makers, as the constitutional representatives of the nation, could be trusted with the exercise of the power because it is "presumable they will, as far as possible, advance the interest

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[505] The records indicate that Corbin "illustrated his position by reading the last clause of the treaty with France, which gives certain commercial privileges to the subjects of France; to give full effect to which, certain correspondent alterations were necessary in the commercial regulations." *Id.* at 511. Corbin's description of British practice as one of partial non-self-execution is remarkably consistent with that given by other Founders who also appreciated the importance of Parliament's participation in carrying treaties of commerce into effect. *See supra* text accompanying notes 335–338 (Anti-Federalist Federal Farmer), 373 (Alexander Hamilton, *The Federalist No. 69*), 413–414 (Anti-Federalist John Smilie, Pennsylvania ratifying convention), 432 (Dissent of the Minority of the Convention, Pennsylvania), and 453 (Federalist John Rutledge, South Carolina legislature). *Cf. supra* text accompanying note 344 (James Madison, *The Federalist No. 53*, discussing foreign commerce), 482 (Letter from James Madison to George Nicholas, discussing the Mississippi River issue).

[506] *See* 3 ELLIOT'S DEBATES, *supra* note 179, at 511 ("If the interest of Congress will lead them to yield it by the first, the law of nations would justify the people of Kentucky to resist, and the cession would be nugatory."). Corbin's reference to Congress, if not inadvertent, may suggest that treaties respecting territorial dismemberment would need the consent of Congress. This position was suggested by other Federalists at the convention. *See, e.g.*, *id.* at 514–15 (remarks of James Madison). Corbin's conclusion that the cession would be void is unnecessary to consider here.

[507] *Id.* at 511.

[508] *Id.* at 514. Madison urged the rejection of Mason's amendment respecting territorial dismemberment because he thought it improvidently and unnecessarily implied that the federal government had the power to dismember the empire. *Id.* Near the end of the convention, Governor Randolph repeated a similar argument. *See id.* at 602.

of their own country," and not that of a foreign nation—a point he reinforced by reference to British practice.[509] Most importantly, turning to Corbin's axiom, Madison observed:

> I think the argument of the gentleman [Francis Corbin] who restrained the supremacy of these to the laws of particular states, and not to Congress, is rational. Here the supremacy of a treaty is contrasted with the supremacy of the laws of the states. It cannot be otherwise supreme. If it does not supersede their *existing laws*, as far as they *contravene its operation*, it cannot be of any *effect*. To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.[510]

Madison seconded Corbin's axiom, characterizing it as "rational." Madison's language superbly illustrates the doctrine of partial non-self-execution, with its references to "existing laws" that "contravene" the "operation" or "effect" of a treaty.[511] There is no doubt that a treaty that contravenes existing federal statutes is without operation or effect; otherwise, the supremacy of a treaty would not be "restrained" to state law.[512] In endorsing Corbin's axiom, Madison presumably also endorsed its necessary consequence, which Corbin explained with care: treaties conflicting with existing statutes would need to be implemented by Congress before they could have the force of domestic law. Taken as a whole, Madison's speech supports a doctrine of partial non-self-execution under the Constitution.[513] This interpretation has the virtue of coherence with Madison's previous statements made during the ratification struggle where he alluded to particu-

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[509] *Id.* at 515. In reference to British practice, Madison observed:

> Would it not be considered as a dangerous principle in the British government were the king to have the same power in internal regulations as he has in the external business of treaties? Yet as, among other reasons, it is natural to suppose he will prefer the interest of his own to that of another country, it is thought proper to give him this external power of making treaties.

Id. By linking the lawmaking power and the treaty-making power in this way, Madison seemed to justify a doctrine of self-execution.

[510] *Id.* at 515 (emphasis added).

[511] *Cf.* 2 FARRAND, *supra* note 127, at 395 (remarks of James Wilson at the Philadelphia Convention) ("[A]ll treaties which contravene a law of England or require a law to give them operation or effect are inconclusive till agreed to by the legislature of Great Britain.").

[512] Madison's description of the doctrine of partial non-self-execution posits that a treaty, though of no effect with respect to contrary federal statutes, would still be supreme with respect to contrary state law. For additional discussion, see *supra* note 142.

[513] Professor Flaherty characterizes Madison's "endorsement of Corbin's distinction" as "lukewarm" because of Madison's use of the word "rational" which seems unemotional to the modern reader. *See* Flaherty, *History Right?*, *supra* note 48, at 2147; *but cf.* 13 OED, *supra* note 291, at 218 (defining "rational" as "[b]ased on, derived from, reason or reasoning"). Flaherty overlooks the force of Madison's other words examining and elaborating upon Corbin's axiom. These are the words that do the work of "endorsement."

lar circumstances requiring "legislative sanction" or "approbation" in order to carry a treaty into effect as a matter of domestic law.[514]

In sum, the records of the Virginia ratifying convention strongly support a doctrine of partial non-self-execution. When the Anti-Federalists claimed that British practice was one of non-self-execution and that the Constitution departed from it, the Federalists maintained that British practice was one of self-execution and that the Constitution continued it. They did so by consistently making the claim that treaties, when made, would have the force of laws. Importantly, in discussing British practice, two Federalists, Francis Corbin and James Wilson, identified the British rule of partial non-self-execution and explicitly linked this practice to the treaty-making power to support congressional participation in treaty-making in the event of statute-treaty conflict.[515]

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Although the records of the Virginia ratifying convention are well-traversed by Professors Flaherty and Yoo,[516] they each miss the mark (to varying degrees) when it comes to drawing conclusions about the doctrine of non-self-execution in Virginia.

For his part, Professor Flaherty presents the evidence faithfully and reviews it with his characteristic rigor. He is not far off the mark when it comes to his conclusions. He is correct that the records, when carefully read, strongly support a doctrine of self-execution as a general matter.[517]

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[514] *See supra* text accompanying note 344 (James Madison, *The Federalist No. 53*) (referring to "legislative sanction and co-operation") and 482 (Letter from James Madison to George Nicholas) (referring to "approbation and cooperation").

[515] The Virginia convention, like others before it, proposed amendments to the Constitution. Amendment seven provided:

> That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.

3 ELLIOT'S DEBATES, *supra* note 179, at 660. The amendment's primary concern is territorial dismemberment, evidenced in its lengthy second clause. The amendment addresses this concern with heightened procedural safeguards for the creation of such treaties, including the involvement of both Houses of Congress and a special three-fourths consent requirement of the whole number of Members. The amendment does not address *how* these treaties (or, commercial treaties referenced in its first clause) would be carried into effect as a matter of domestic law and is therefore consistent with doctrines of total self-execution, partial non-self-execution, and total non-self-execution.

[516] *See* Flaherty, *History Right?*, *supra* note 48, at 2140–49; Yoo, *Globalism and the Constitution*, *supra* note 33, at 2059–68.

[517] In his words:

> Madison and Nicholas resolutely defended self-execution, and literally brought in their copies of Blackstone to set the Antifederalists right about British doctrine, much as Hamilton had in New

Yet Flaherty goes astray because he smoothes over the few bumps in the road that contradict the total self-execution thesis he is trying to advance. These bumps relate to the statements of Federalists Francis Corbin and James Madison, who were the *only* delegates to comment on the constitutional relationship between statutes and treaties. Although Flaherty interprets their statements correctly and identifies the "important wrinkle that departs from current doctrine" (i.e., partial non-self-execution),[518] he makes light of both of them. He suggests that Corbin's statements about House implementation of commercial treaties are idiosyncratic.[519] But where Madison endorsed Corbin's "argument" as "rational," signifying that Corbin's remarks were not idiosyncratic, Flaherty interprets Madison's endorsement as ambivalent or contradictory.[520] Flaherty does so because "[n]owhere previously did Madison articulate this limitation [of partial non-self-execution], nor did he do so afterward."[521] This might be a fair point if true. The problem with Flaherty's conclusion is that Madison's statements—from the Philadelphia Convention to *The Federalist No. 53* to his letter to George Nicholas on the Mississippi River issue—are all consistent with the notion of partial non-self-execution.[522] Moreover, the comments of Corbin and Madison on partial non-self-execution are neither ambiguous nor contradictory with respect to the *historical baseline* of British practice. For the same reason that this baseline supports a doctrine of self-execution, as Flaherty correctly recognizes, it supports a doctrine of partial non-self-execution too.

> York. In the face of disjointed opposition, they instead emphasized the usual Federalist themes, stressing that the treatymaking process itself would be sufficiently difficult and representative that self-executing treaties need not be a concern.

Flaherty, *History Right?*, *supra* note 48, at 2149.

[518] *See id.* at 2147 (interpreting Corbin); *see also id.* at 2147–48 (interpreting Madison).

[519] *See id.* at 2146 ("Whether many other delegates held this view is another matter."). Professor Flaherty also suggests that Corbin's remarks of June 13, 1788, where he first indicated that the House of Representatives would implement "all" commercial treaties, *see supra* text accompanying note 479, were idiosyncratic by reference to the convention records which indicate that "'[h]ere a storm arose, which was so violent as to compel Mr. *Corbin* to desist, and the Committee to rise.'" Flaherty, *History Right?*, *supra* note 48, at 2146 (citation omitted). But *who* objected to Corbin's explanation? Anti-Federalists? Or Federalists and Anti-Federalists alike? The answer to this question bears on whether Corbin's understanding was idiosyncratic.

[520] *See* Flaherty, *History Right?*, *supra* note 48, at 2147 ("Madison's final speech cited Corbin as if the idea were novel, with apparent approval, or at least openness."); *id.* ("Madison's statement is potentially significant, yet neither is it clear nor free of contradictions. Whatever else, Madison's endorsement of Corbin's distinction, which he calls no more than 'rational,' is lukewarm.").

[521] *Id.* at 2148.

[522] *See supra* text accompanying notes 278 (Philadelphia Convention), 344 (*The Federalist No. 53*), 482 (Letter from James Madison to George Nicholas).

On the other hand, Professor Yoo, who places great emphasis on the Virginia debates in developing his theory of the treaty-making power,[523] interprets Virginia Federalists as endorsing the idea that the House of Representatives would be involved in the implementation of any treaty touching Congress's legislative powers.[524] In reaching this conclusion, Yoo principally relies on James Madison's letter to George Nicholas explaining the "House's influence" in treaty-making and Francis Corbin's statement explaining the House's "influence in the formation of treaties."[525]

The problem with this conclusion is that these statements, in context, do not support Yoo's total non-self-execution thesis. Neither Madison nor Corbin identified any line between treaty-making and lawmaking by reference to Congress's legislative powers, which is precisely what Yoo's thesis requires. Corbin's statement on the House's role in the formation of commercial treaties was motivated by the assumed *clash* between those treaties and existing statutes.[526] The problem is exacerbated by the fact that both Madison and Corbin identified statute-treaty conflict as the line separating self-execution from non-self-execution, with no broader role for Congress in treaty-making.

But even if these statements might somehow be taken to lean in the direction of Yoo's total non-self-execution thesis, the distance between Yoo's conclusion and the convention records as a whole is just too large to reconcile. In the official debate on the Treaty Clause on the eighteenth and nineteenth of June 1788, spanning seventeen pages of *Elliot's Debates*, the Federalists staunchly defended a doctrine of self-execution by reference to British practice. Astonishingly, in an otherwise elaborate historical presentation, Yoo does not come to terms with any of the convention's extensive debate on British practice and its relevance to the treaty-making power—the debate which sheds the most light on the issue. The records of this debate contradict the inference that treaties touching any of Congress's legislative powers need to be implemented by Congress in order to have the force of law.

Like the Pennsylvania debates, the Virginia debates provide ample discussion of British practice in the event of statute-treaty conflict and its implications for the treaty-making power. As far as Virginia is concerned, the partial non-self-execution thesis stands on solid ground.

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[523] *See, e.g.*, Yoo, *Globalism and the Constitution*, *supra* note 33, at 2068 ("As Virginia was the key state in the process of ratification, this evidence powerfully suggests what original meaning we should attach to the Treaty Clause.").

[524] *See id.* ("The necessity of the consent of the House of Representatives for any treaty, especially commercial treaties, by statute or by funding was subsequently repeated by other Federalists throughout the debates."); *id.* (stating that the "Federalists' reliance on the President's republican character and the House's control over implementing legislation and funding is significant for interpretive purposes").

[525] *See id.* at 2064 (interpreting Madison's letter); *id.* at 2068 n.550 (interpreting Corbin's statement of June 13, 1788).

[526] *See supra* text accompanying notes 504–507.

d. North Carolina.—We finally turn to North Carolina. The first North Carolina ratifying convention met in late July 1788, and rejected the Constitution by a vote of 184 to 84 on August 1, 1788.[527] The second convention met in November 1789, and ratified the Constitution by a vote of 194 to 77 on November 21, 1789.[528] Only the records of the first convention are available at this time, and we are left to examine debates in a state where the Constitution was not ratified. In addition, unlike others before it, this convention did not debate the Constitution behind a veil of ignorance as to whether it would be adopted.[529] Although the issue of statute-treaty conflict was hardly discussed, the North Carolina debates are important because they demonstrate the consistency of the Federalist position in support of a doctrine of self-execution.[530]

When Anti-Federalist William Lenoir, like others before him, criticized the treaty-making power as a legislative power by noting the Article I Vesting Clause "inconsistency,"[531] the Federalists responded in familiar fashion. They did not deny that treaties, when made, would have the force of laws. For example, James Iredell, North Carolina's leading Federalist, stated that "[w]hen treaties are made, they become as valid as legislative acts,"[532] and reiterated John Jay's explanation in *The Federalist No. 64* that treaties could have the force of law even though they do not originate from the legislature.[533] Others made similar observations.[534]

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[527] 4 ELLIOT'S DEBATES, *supra* note 179, at 1, 250–51.

[528] General Ratification Chronology, *supra* note 447, at xxii.

[529] *See, e.g.*, 4 ELLIOT'S DEBATES, *supra* note 179, at 15 (remarks of Federalist Gov. Johnston) ("We are not to form a constitution, but to say whether we shall adopt a Constitution to which ten states have already acceded.").

[530] For their presentations of the North Carolina debates, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 2069–72; Flaherty, *History Right?*, *supra* note 48, at 2149–51.

[531] *See* 4 ELLIOT'S DEBATES, *supra* note 179, at 27 ("I mean, sir, the legislative power [is] given to the President himself. . . . He, sir, with the Senate, is to make treaties, which are to be the supreme law of the land. This is a legislative power given to the President, and implies a contradiction to that part which says that all legislative power is vested in the two houses."); *see also id.* at 115 (remarks of Anti-Federalist William Porter) (stating that in treaty-making the President "voted rather in a legislative than in an executive capacity").

[532] *Id.* at 28.

[533] *See id.* (proving this point by example of executive pardon). For Jay's discussion of this point, see THE FEDERALIST NO. 64, *supra* note 4, at 393–94 (John Jay).

[534] *See* 4 ELLIOT'S DEBATES, *supra* note 179, at 28 (remarks of Federalist Archibald MacLaine) ("[T]reaties were the supreme law of the land in all countries, for the most obvious reasons—that laws, or legislative acts, operated upon individuals, but that treaties acted upon states—that, unless they were the supreme law of the land, they could have no validity at all[.]"); *id.* at 158 (remarks of Federalist William Davie) (discussing judicial power and stating that "[i]t was necessary that treaties should operate as laws upon individuals. They ought to be binding upon us the moment they are made. They involve in their nature not only our own rights, but those of foreigners."). Though these Federalists disagreed on the scope of the treaty-making power, they agreed that treaties, when made, would have the force of law.

The convention officially took up debate on the Treaty Clause on July 28, 1788.[535] In this debate, Anti-Federalists repeated familiar arguments about the intermixture of powers, the accumulation of power in the Senate, and the problems with Senate representation and the quorum requirement.[536] More importantly, they also repeated familiar arguments about the House's exclusion from the treaty-making process. "[A]s treaties were the supreme law of the land," said William Porter, "the House of Representatives ought to have a vote in making them, as well as in passing them."[537] In noting the "making" and "passing" of a treaty, Porter seemed to draw a distinction between the creation of international commitments and the incorporation of those commitments as a matter of domestic law. Samuel Spencer remarked, "If the whole legislative body—if the House of Representatives do not interfere in making treaties, I think they ought at least to have the sanction of the whole Senate."[538] As these comments make clear with their use of the word "ought," Porter and Spencer were describing a state of affairs that does not exist under the Constitution.

How did the Federalists respond to the Anti-Federalists' claims about the exclusion of the House from treaty-making? No one denied the obvious point of Congress's exclusion from treaty-making. William Davie extolled the importance of treaties, so as to justify their status as the supreme laws of the land without the participation of Congress. "[A]lthough treaties are mere conventional acts between contracting parties," said Davie, "yet, by the law of nations, they are the supreme law of the land to their respective citizens or subjects. All civilized nations have concurred in considering them as paramount to an ordinary act of legislation."[539] Though these lofty tones might be taken to suggest that treaties are superior to statutes, Davie was simply emphasizing the importance of treaties as an instrument for national advantage, as the rest of his commentary makes clear.[540]

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[535] *See id.* at 116–35. Immediately before this debate, Anti-Federalist William Porter, noting that "the House of Representatives has no power to intermeddle with treaties," openly worried whether treaties would be made for the benefit of the northern states at the expense of the southern states, involving paradigmatic issues such as navigational rights. *Id.* at 115. The Federalists did not respond that the House, controlled by the southern states, would have influence in these treaties. Instead, Richard Spaight and Governor Johnston touted the treaty-making power's procedural safeguards. *See id*.

[536] *See id.* at 116–19.

[537] *Id.* at 119.

[538] *Id.* at 131.

[539] *Id.* at 119.

[540] In his words:

> This concurrence is founded on the reciprocal convenience and solid advantages arising from it. A due observance of treaties makes nations more friendly to each other, and is the only means of rendering less frequent those mutual hostilities which tend to depopulate and ruin contending nations. It extends and facilitates that commercial intercourse, which, founded on the universal protection of private property, has, in a measure, made the world one nation.

Id.

Similarly, Richard Spaight touted the power's procedural safeguards, including the possibility of presidential impeachment.[541] This set off an extended debate about impeachments,[542] which begged the question whether there was another check to destructive treaties. Anti-Federalist Timothy Bloodworth, slouching towards an answer, "desired to be informed whether treaties were not to be submitted to the Parliament in Great Britain before they were valid."[543]

At this point, James Iredell provided a final lengthy response, addressing British practice. He observed that the King's treaties, when made, bound the nation. According to Iredell, "the power with whom a treaty is made considers it as binding, without any act of Parliament, unless an alteration by such is provided for in the treaty itself, which I believe is sometimes the case."[544] He observed that "[a]fter treaties are made, they are frequently discussed in the two houses," and that "[i]t is usual to move for an address of approbation" which "seldom hath been withheld."[545] Echoing Alexander Hamilton's comments in *The Federalist No. 69*, Iredell commented that "[s]ometimes they pass an act in conformity to the treaty made; but this, I believe, is not for the mere purpose of confirmation, but to make alterations in a particular system, which the change in circumstances requires."[546] If true, Parliament's sanction was unnecessary to give validity to the treaty, which meant that it would not be much of a check to destructive treaties.[547] Iredell intimated that Congress would have no greater role than Parliament in this respect.

The checking role that Iredell did admit, eventually, was the House's power over the purse, based on the House of Commons' similar power.[548]

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[541] *See id.* at 124.

[542] *See id.* at 124–28.

[543] *Id.* at 125.

[544] *Id.* at 128. Iredell noted that the Treaty of Peace of 1763 between Great Britain and France provided for territorial cession, which was completed without parliamentary sanction. *See id*.

[545] *Id*.

[546] *Id.* For Hamilton's discussion of this point, see THE FEDERALIST NO. 69, *supra* note 4, at 420 (Alexander Hamilton).

[547] Professor Yoo interprets Iredell's statement as an indication that, "[w]hile Parliament did not have a formal role in the approval of treaties . . . its cooperation was necessary when a treaty required domestic implementation." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2071 n.563. Iredell's statement does not support a general theory of non-self-execution because he denies the necessity of Parliament's cooperation for the treaty's *validity*. In this respect, Iredell seems to be echoing Hamilton's statement that Parliament's implementation of treaties "may have possibly given birth to the imagination that its co-operation was necessary to the obligatory efficacy of the treaty." *See* THE FEDERALIST NO. 69, *supra* note 4, at 420 (Alexander Hamilton).

[548] In his words:

> Yet the Commons have generally been able to carry every thing before them. Their circumstance of their representing the great body of the people, alone gives them great weight. This weight has great authority added to it, by their possessing the right (a right given to the people's representatives in Congress) of exclusively originating money bills. The authority over money will do every thing. A government cannot be supported without money. Our representatives may at any time

Importantly, Iredell made this point in the course of responding to Anti-Federalist criticisms of the Senate's excessive powers under the Constitution; only later in his lengthy response did he refer to the House's power over the purse with respect to treaty-making.[549] Iredell then justified the House's exclusion from treaty-making on grounds relating to the Senate's prerogatives in protecting state sovereignty.[550] He concluded his observations with the assurance that the division of power between the President and Senate and the "vast influence" of the House, by which he meant with respect to money, would provide security against the abuse of the treaty-making power.[551]

With this, the recorded debate on the Treaty Clause ended. The convention, like others before it, submitted amendments to the Constitution. These amendments were submitted without debate and largely tracked those submitted by Virginia. Of particular relevance, two amendments addressed the treaty-making power. Amendment seven tracked Virginia's amendment seven and its heightened procedural requirements for commercial treaties and treaties involving territorial rights.[552] Amendment twenty-three tracked Pennsylvania's amendment thirteen and its codification of the partial non-self-execution thesis.[553]

Overall, the records of the convention support a doctrine of self-execution as a general matter. The Federalists consistently maintained that treaties would have the force of laws when made. The House of Representatives, though not to interfere with the treaty-making power, would always have the power over the purse.

> compel the Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to.

4 ELLIOT'S DEBATES, *supra* note 179, at 129. At the Virginia ratifying convention, George Nicholas similarly observed:

> The House of Commons have succeeded also by withholding supplies; they can, by this power, put a stop to the operations of government, which they have been able to direct as they pleased. This power has enabled them to triumph over all obstacles; it is so important that it will in the end swallow up all others. Any branch of government that depends on the will of another for supplies of money, must be in a state of subordinate dependence, let it have what other powers it may. Our representatives, in this case, will be perfectly independent, being vested with this power fully.

3 *id.* at 17.

[549] *See* 4 *id.* at 132.

[550] *See id.* at 133.

[551] *See id.* at 134.

[552] For Virginia's amendment seven, see *supra* note 515.

[553] Amendment twenty-three provided:

> That no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed, or made conformable to such treaty; nor shall any treaty be valid which is contradictory to the Constitution of the United States.

3 ELLIOT'S DEBATES, *supra* note 179, at 246. The second clause of this amendment dropped the reference to state constitutions. For Pennsylvania's amendment thirteen, see *supra* text accompanying note 429.

However, caution should be taken before applying a general doctrine of self-execution to all circumstances. The issue of statute-treaty conflict was not a subject of debate in North Carolina, as it was in Pennsylvania, South Carolina, and Virginia. Only James Iredell came close in his lengthy response to discussing the issue. His brief comment, essentially echoing Hamilton's explanation of British practice in *The Federalist No. 69*, leans against the partial non-self-execution thesis—that is, if Iredell and Hamilton were correct in their description of British practice.[554] The issue of statute-treaty conflict presented itself in amendment twenty-three, but this amendment was submitted without debate. Thus, the records of the convention are only weakly consistent with a theory of partial non-self-execution.[555]

e. Conclusions.—A short scorecard of the ratification debates in Pennsylvania, South Carolina, Virginia, and North Carolina is useful. These debates strongly confirm that treaties, when made, would have the force of laws. When Anti-Federalists claimed that the power to make treaties is a legislative power and hence inconsistent with the Article I Vesting Clause, the Federalists did not deny these claims. They defended the treaty-making power as self-executing, often by recourse to *Blackstone's Commentaries*, and stressed its procedural safeguards. When Anti-Federalists alleged that British practice was non-self-execution and that the Constitution departed from it, Federalists answered that British practice was self-execution and that the Constitution was consistent with it. This was the approach taken by leading Federalists in the ratifying conventions surveyed: James Wilson in Pennsylvania, Charles Cotesworth Pinckney in South Carolina, James Madison in Virginia, and James Iredell in North Carolina. Remarkably, the Federalists never claimed that congressional implementation would be generally required in order for treaties to have the force of law.

At the same time, the partial non-self-execution thesis stands on very firm ground. When Anti-Federalists alleged that treaties would repeal ex-

[554] Based on this Article's review of British practice, Hamilton and Iredell were wrong. The historical evidence favors the understanding that Parliament's implementation of treaties contravening existing statutes was necessary in order to bring the treaty to life as a matter of domestic law. *See supra* Part III.A (reviewing British practice) and *supra* note 226 (collecting Founding-era references to this Article's description of British practice).

[555] Professor Yoo reaches different conclusions after reviewing the same evidence: "Federalist responses in North Carolina were consistent with the theme from the three significant ratification movements [Pennsylvania, New York, and Virginia] already reviewed: Because treaty-making is executive in nature, it cannot regulate matters that rest within the legislative authority, which requires the cooperation of Congress." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2072. Whatever might be said of the other ratifying conventions in support of this conclusion, the same cannot be said of North Carolina. Federalists in this state, led by James Iredell, steadfastly maintained that treaties, when made, would have the force of laws, brushing aside any Anti-Federalist notion of inconsistency with the Article I Vesting Clause. *See supra* text accompanying notes 544–547 (remarks of James Iredell). Moreover, Iredell pursued the theory of self-execution in his anonymous response to George Mason's *Objections*. *See supra* note 316.

isting statutes in violation of British practice, the Federalists denied these allegations. In Pennsylvania, James Wilson answered John Smilie's misconstruction on this very point by embracing British practice, which presumably led to Pennsylvania's amendment thirteen. In Virginia, Francis Corbin explained, with literally mathematical precision, that treaties would not repeal existing statutes. James Madison seconded "Corbin's axiom" and elaborated upon it. Other Federalists understood British practice to require parliamentary participation when treaties conflicted with existing laws. The clash between statute and treaties was the cause for Congress's role in implementing treaties made by the President and Senate, as Wilson, Corbin, and Madison so patiently explained.[556] In this respect, the treaty-making power adopts British treaty-making practice.

On the other hand, Professor Yoo's total non-self-execution thesis cannot lay claim to a strong fit with the records of the state ratification debates. Yoo's historical premise is that treaties in Great Britain were non-self-executing without parliamentary implementation.[557] This premise is not borne out by the state ratification debates, where the Federalists described British practice as one of self-execution with limited non-self-execution. But if Yoo's understanding of British practice is correct, the treaty-making power rejects his understanding of British practice. Otherwise, the distance between Yoo's thesis and Federalist explanations of treaties as having the force of laws is just too large to reconcile.[558] Moreover, the Federalists never explained the scope of the treaty-making power by reference to Congress's legislative powers or hinted at a division between the Article I power to make laws and the Article II power to make treaties. The fact that they did not do so casts heavy doubt upon the validity of the total non-self-execution thesis as a historical matter.

C. *Early Post-Founding History*

The Constitution's early post-Founding history illustrates how the Constitution was actually put into practice by the political community that

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[556] The debates also indicate that Congress would have a role in implementing treaties appropriating monies and that Congress's power over the purse would provide an important check to the treaty-making power. The debates do not, to my knowledge, discuss Congress's role in implementing treaties raising taxes, declaring war, and punishing criminal conduct, which are cases for non-self-execution according to the conventional wisdom. *See supra* notes 126–30 and accompanying text (discussing conventional wisdom). Unsurprisingly, the debates do not specify the full contours of the doctrine of non-self-execution. Thus, some limitations to self-execution are textual and structural, not historical.

[557] *See supra* note 228 and accompanying text.

[558] In his Rejoinder, Yoo suggests that much of the debates related to the supremacy of treaties to contrary state law. *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2224. But this does not mean that the debates were about treaties not touching any of Congress's legislative powers. Treaties would be *presumed* to touch at least some of these powers because they involve matters of national interest which are appropriate subject matter for treaties. Indeed, the topic du jour at the Virginia ratifying convention was treaties of commerce, involving navigational rights on the Mississippi River.

participated in its framing and ratification. Although early "precedents" are entitled to significant weight in constitutional interpretation, they are not conclusive of constitutional questions.[559] Moreover, the usefulness of the Constitution's early post-Founding history to determine original meaning is inherently limited by the number and nature of precedents, but is further limited by context: early precedents did not occur behind a veil of ignorance, but were often shaped, twisted, and even mangled by the political considerations of the day or by intervening events. Thus, as a source for determining original meaning, the Constitution's early post-Founding history has distinctly lower priority than its Founding history.[560]

Nonetheless, a lower priority category of evidence is worth studying because it may reinforce (or weaken) conclusions derived from a higher priority category. Accordingly, this Section inquires whether the Constitution's early post-Founding history reinforces the principles of partial non-self-execution which are strongly apparent in the Founding history.

The Section proceeds in four sub-sections. It first discusses the 1796 Supreme Court case of *Ware v. Hylton*,[561] which established the supremacy of a treaty to state law. The case does not address the issue of federal statute-treaty conflict and is therefore consistent with the partial non-self-execution thesis. This Section then considers the treatises of early constitutional commentators. This evidence supports the conventional wisdom of the last-in-time rule and denies the partial non-self-execution thesis, but is limited to the authority of a single commentator.

The Section then turns to the most important early precedent involving the treaty-making power and the doctrine of non-self-execution: the Jay Treaty debate of 1795 to 1796. The issue of statute-treaty conflict featured prominently in this debate, with participants advancing theories of total self-execution, partial non-self-execution, and total non-self-execution. The conclusions from this debate are complicated and lean in the direction of self-execution, but are severely limited by the context of their creation. Finally, the Section discusses the 1829 Supreme Court case of *Foster v. Neilson*,[562] which is commonly misunderstood by scholars as establishing the judicial doctrine of non-self-execution. The case, properly understood, does not address constitutional constraints to treaty self-execution, but contains dicta supporting the last-in-time rule and is therefore weakly inconsistent with the partial non-self-execution thesis.

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[559] For a discussion of early precedents within a project of original meaning, see Kesavan & Paulsen, *supra* note 55, at 1164–76. For five well-known examples of early precedents arguably contrary to the correct interpretation of the Constitution, see *id.* at 1170–71.

[560] *See id.* at 1175–76, 1180–83; *see also* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2074 (stating that post-ratification evidence is "not as relevant as the records of the ratification debates").

[561] 3 U.S. (3 Dall.) 199 (1796).

[562] 27 U.S. (2 Pet.) 253 (1829).

Taken as a whole, the Constitution's early post-Founding history neither supports nor weakens the partial non-self-execution thesis to any material extent. This history is generally consistent with principles of partial non-self-execution, in part because the issue of statute-treaty conflict did not present itself squarely with the exception of the Jay Treaty debate of 1795 to 1796.

1. Ware v. Hylton.—The Constitution's first major test case regarding the supremacy of a treaty to contrary state law came in the 1796 case of *Ware v. Hylton*.[563] The case involved a paradigmatic issue that had plagued the nation under the Confederation: the relationship between Article IV of the Treaty of Paris of 1783, which governed the treatment of pre-War debts owed by American debtors to British debtors,[564] and contrary state law, in this case a Virginia sequestration statute. The Justices, delivering their opinions seriatim, unanimously (and unsurprisingly) held that Article IV trumped the state statute and found in favor of the plaintiff-creditors.[565] In doing so, the Justices briefly discussed non-self-executing treaty provisions in determining the judicial enforceability of Article IV. The question for present purposes is whether this case is consistent with the partial non-self-execution thesis.

Unfortunately, these opinions address the concept that a treaty, by its terms, may require implementation in order to take effect as a matter of domestic law; they do not identify constitutional constraints to a treaty that purports to be self-executing. For example, Justice Chase, whose opinion is the most considered on the subject, observed that Article IV's "stipulation is direct" and "is obligatory on the parties contracting," and does not "depend on the will of another" (such as Congress) who might be under a "moral obligation" to carry the stipulation into effect.[566] He concluded that Article IV afforded relief in the courts because it accomplished its purpose of its own force.[567]

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[563] 3 U.S. 199. For Professor Yoo's presentation of the case, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 2075–80.

[564] Article IV provided: "It is agreed that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bonâ fide Debts heretofore contracted." Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Paris of 1783].

[565] *See Ware*, 3 U.S. at 245 (opinion of Chase, J.); *id.* at 256 (opinion of Paterson, J.); *id.* at 281 (opinion of Wilson, J.); *id.* at 284–85 (opinion of Cushing, J.). In the Circuit Court, Justice Iredell, riding circuit, wrote the majority opinion in favor of the debtor-defendants, with Chief Justice Jay in dissent. The Court allowed Justice Iredell to reprint his opinion. *See id.* at 256–80. Importantly, in what has been overlooked by scholars, he found for the debtor-defendants on only one, albeit sufficient, point: the debt was not owed by them (he suggested that it was owed by Virginia). *See id.* at 278–80.

[566] *Id.* at 240.

[567] *Id.* at 244. Chase attempted to make this clear with a counterexample from the Treaty of Paris of 1783. He continued, "No one can doubt that a treaty may stipulate, that certain acts *shall be done* by the Legislature; that other acts shall be done by the Executive; and others by the Judiciary." *Id.* (emphasis added). To illustrate, Chase referred to Article VI which, under his description, provided that "no future

However, Justice Iredell also addressed the topic of non-self-execution in his opinion for the Circuit Court, which the Supreme Court allowed him to reprint. Though the Circuit Court was reversed, Iredell agreed with the Court on the relationship between Article IV and contrary state law under the Constitution. His opinion provides a more relevant discussion of the possible constitutional constraints to self-executing treaties.

On the topic of non-self-executing treaties, Iredell drew an important distinction between "executed" treaty provisions, which require no further action to be done (and are hence self-executing), and "executory" treaty provisions, which require further action by the governmental department to which the treaty provision is addressed in order to be carried into effect (and are hence non-self-executing).[568] Iredell explained that executory provisions impose a "moral obligation" on the applicable governmental department (legislative, executive, or judicial) to implement them.[569]

Turning to the questions at hand, Iredell professed that, before the adoption of the Constitution, Article IV required implementation by the state legislatures in order to take effect as domestic law.[570] Interestingly, the necessary implementation was the "repeal of the statutes of the different States, constituting the impediments to [the creditors'] recovery, and the passing of such other acts as might be necessary to give the recovery entire efficacy, in execution of the treaty."[571] He buttressed these conclusions by reference to British practice, which he claimed was one of non-self-execution[572]—contrary to his brief description of British practice at the North Carolina ratifying convention.[573]

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prosecutions shall be prosecutions commenced against any person, for or by reason of the part he took in the war." According to Chase, the courts discharged the prosecutions "on receipt of the treaty, and the proclamation of Congress," which possessed executive authority at the time. *Id.* Unfortunately, Chase did not elaborate as to why Article VI was a non-self-executing provision for the courts. *See id.*

One other part of Chase's opinion is worth mentioning. He interpreted Article IV as removing any obstacle "arising from the common law, or acts of Parliament, or *acts of Congress*, or acts of any of the States, *then in existence*, *or thereafter to be made*, that would, in any manner, operate to prevent the recovery of such debts, as the treaty contemplated." *Id.* at 240 (emphasis added). To the extent that the qualifying phrase modifies all of its prior antecedents, Chase would seem to give Article IV self-executing effect over contrary federal statutes, present or future. This might be taken to suggest that treaties are superior to statutes, but here, like elsewhere, context is critical: Article IV is part of a treaty of peace, the highest grade of treaty, the violation of which risks the resumption of war. In his opinion, Chase displayed special sensitivity to this fact. *See id.* at 235–38.

568 *Id.* at 272.

569 *Id.*

570 *Id.* at 271; *see also id.* at 272 (stating that Article IV is addressed to the "Legislative authority" and that "[w]hen, therefore, a treaty stipulates for any thing of a legislative nature, the manner of giving effect to this stipulation is by that power which possesses the Legislative authority, and which consequently is authorized to prescribe laws to the people for their obedience, passing such laws as the public obligation requires").

571 *Id.* at 271.

572 Iredell observed:

Iredell then turned to the relationship between Article IV and contrary state law under the Constitution. Quoting the Supremacy Clause, Iredell concluded that

> so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for, and it was so before in a moral sense.[574]

In other words, Article IV is self-executing under the Constitution, but was non-self-executing under the Confederation, with the Supremacy Clause being the difference. This conclusion was a rejection of his immediately prior description of British practice, at least with respect to contrary state law. His dicta may be taken to suggest that treaties would also be self-executing with respect to contrary federal statutes, though Iredell was only concerned with state law.

In sum, *Ware* provides early judicial cognizance of the concept of non-self-execution by reference to a treaty's terms, and supports a doctrine of self-execution with respect to contrary state law, but does not identify any constitutional constraints on the doctrine of self-execution. Only Justice Iredell's lower court opinion discusses the relationship between treaties and conflicting statutes, but Iredell's conclusions are necessarily limited by the context of the case. Thus, *Ware* is consistent with the partial non-self-execution thesis.

2. Early Constitutional Commentators.—The treatises of early constitutional commentators—James Wilson (1791), St. George Tucker (1803), William Rawle (1825), Chancellor James Kent (1826), Justice Joseph Story (1833), and William Alexander Duer (1843)—provide information on how

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> The King of Great Britain certainly represents the sovereignty of the whole nation, as to foreign negociations [sic], as completely as the Congress of the United States ever represented the sovereignty of the Union, in that particular . . . . Yet, I believe it is an invariable practice in that country, when the King makes *any stipulation of a legislative nature*, that it is carried into effect by an act of Parliament. The Parliament is considered as bound, upon a principle of moral obligation, to preserve the public faith, pledged by the treaty, by passing such laws as its obligation requires; but until such laws are passed, the system of law, entitled to actual obedience, remains de facto, as before.

Id. at 273–74 (emphasis added). Iredell illustrated the principle with reference to the treaty of commerce between France and Great Britain in 1786, which he claimed was carried into effect by Parliament even though the treaty posed *no conflict* with existing statutes. *Id.* at 274–75; *but see supra* notes 432, 434 and accompanying text (Founding-era references to the clash between this treaty and existing statutes). Iredell's description of British practice is among the best historical evidence supporting Professor Yoo's view of British practice as one of total non-self-execution. *See supra* note 228 and accompanying text. It is nevertheless interesting that Iredell referred to the specific case of statute-treaty conflict in addressing Parliament's role in implementing treaties. *See also Ware*, 3 U.S. at 273 (referring to "executory" treaty provision and execution "in consequence . . . of an actual alteration in the law, by the Legislature, in conformity to the treaty, (where that was necessary)").

[573] *See supra* notes 544–46 and accompanying text.

[574] *Ware*, 3 U.S. at 277.

the treaty-making power was understood by intelligent individuals who were members of the political community within which the Constitution was adopted.[575]

With the exception of Wilson, each of these commentators addressed the treaty-making power at some length.[576] These discussions focused on the scope and allocation of the power, and taken as a whole, support a doctrine of total self-execution. Only Rawle and Story considered the constitutional relationship between statutes and treaties, and the doctrine of non-self-execution to any meaningful extent, with Story repeating some of Rawle's earlier commentary.[577] Accordingly, this presentation focuses on Rawle's commentary.

Rawle discussed the treaty-making power within a series of chapters on legislative powers because "[t]reaties being next to the constitution, the supreme law of the land, properly fall into this class."[578] He framed the issues of treaty self-execution and non-self-execution perfectly: "[t]hey are laws, in making which the house of representatives has no original share; whether their subsequent concurrence in any shape is necessary will hereafter be examined."[579]

After discussing the scope and allocation of the power, he observed that "[t]he legal effect of a treaty constitutionally made is, that next to the constitution itself, it prevails over all state laws, state constitutions, and acts of congress,"[580] and quoted the Supremacy Clause in support.[581] According to this statement, there are only two possibilities regarding the constitutional relationship between statutes and treaties: either (1) treaties are supe-

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[575] On using these treatises within a project of original meaning, see Kesavan & Paulsen, *supra* note 55, at 1176–80.

[576] *See* TUCKER'S COMMENTARIES, *supra* note 436, at 332–40; RAWLE'S COMMENTARY, *supra* note 39, at 56–70; 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 303–05 (O.W. Holmes, Jr. ed., Boston, Little, Brown & Co. 1873); A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 227–38 (William Alexander Duer ed., Lawbook Exchange, Ltd. 1999) (1843); 3 STORY'S COMMENTARIES, *supra* note 5, §§ 1499–1517, at 354–72 (discussing Treaty Clause), §§ 1831–1836, at 693–701 (discussing Supremacy Clause). James Wilson only mentions the treaty-making power in passing. *See* JAMES WILSON, *Lectures on Law*, *in* 1 THE WORKS OF JAMES WILSON 165 (Robert Green McCloskey ed., 1967).

[577] In addition, St. George Tucker discussed a particular case of non-self-execution related to territorial cession, not part of any state and paradigmatically the western territory. He suggested that such treaties conflicted with Congress's power under the Territory or Property Clause, U.S. CONST. art. IV, § 3, cl. 2, and were thus "unconstitutional" without the consent of the House of Representatives. *See* TUCKER'S COMMENTARIES, *supra* note 436, at 332–33 (referring to the "collision which may possibly arise between the several branches of the congress, in consequence of this modification of the treaty-making power").

[578] RAWLE'S COMMENTARY, *supra* note 39, at 56.

[579] *Id*.

[580] *Id.* at 59.

[581] *See id*.

rior to statutes, irrespective of time, or (2) statutes and treaties are equal, with the last-in-time controlling the other in the event of conflict.

However, nearly immediately, Rawle reconsidered the point:

> It has been observed, that it is not distinctly declared whether treaties are to be held *superior* to acts of congress, or whether the latter are to be *co-equal* with or *superior* to the former. The mere collocation of the words would tend to give the superiority to the laws, but higher ground must be taken for the decision of the question.[582]

Rawle correctly noted the three logical possibilities of statute superiority, treaty superiority, and statute-treaty equality. He also correctly noted that textual considerations alone favor the lexical priority of statutes to treaties.

Rawle's higher ground was not textualist, historical, or structural, but functionalist. According to Rawle, the reason for a doctrine of self-execution is that the Constitution represents to foreign nations that the President and Senate "could bind the nation in all legitimate compacts: but if pre-existent acts, contrary to the treaty, could only be removed by congress, this representation would be fallacious; it would be a just subject of reproach, and would destroy all future confidence in our public stipulations."[583] He therefore concluded that "[t]he immediate operation of the treaty must therefore be to overrule all existing legislative acts inconsistent with its provisions."[584] Rawle thus ruled out the doctrine of partial non-self-execution.

But Rawle made clear that statutes and treaties are created equal: the power of treaties to repeal existing statutes is "not inconsistent" with Congress's "power to pass subsequent laws, qualifying, altering, or even wholly annulling a treaty,"[585] whether pursuant to Congress's exclusive power to declare war or otherwise.[586] Importantly, Rawle distinguished these statutes from "laws to carry a treaty into effect, which suppose the treaty *imperfect*, till they are *passed*," which suggests that certain treaties require implementing statutes before having the force of domestic law.[587] Surveying precedents, including the Jay Treaty debate, Rawle concluded that treaties may

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[582] *Id.* at 60 (emphasis added).

[583] *Id.* at 60–61.

[584] *Id.* at 61. Rawle ignored the possibility that treaties made by the President and Senate would be non-self-executing when made but would place a constitutional duty on Congress to implement them (in this case, by removing statute-treaty conflict through the amendment or repeal of existing statutes). Rawle recognized the concept of constitutional duty in his discussion of the doctrine of non-self-execution, discussed presently.

[585] *Id.*

[586] *See id.* Rawle observed that "Congress alone possesses the right to declare war, and the right to qualify, alter, or annul a treaty being of a tendency to produce war, is an incident to the right of declaring war." *Id.*

[587] *Id.* (emphasis added).

be self-executing even when they touch subjects within Congress's legislative powers.[588]

Yet, he recognized that some of Congress's legislative powers furnish the basis for a doctrine of non-self-execution. Rawle concluded that treaties requiring an appropriation of money or taxation require implementing statutes in order to take effect as domestic law.[589] His reasoning suggests that these are the only cases where non-self-execution is required, at least other than the special case(s) where he claims that Congress has exclusive power such as with respect to the declaration of war.[590] However, when it comes to appropriations and taxation, Rawle believes that Congress has the constitutional obligation to carry the treaty into effect, which means that Congress's role in treaty-making is even more proscribed.[591] This view is not in accordance with the conventional wisdom, which presupposes that Congress has political discretion in these subject areas.

In sum, Rawle's view on the constitutional relationship between statutes and treaties—unfortunately, the only view expressed by early constitutional commentators—supports the conventional wisdom of the last-in-time rule and denies the partial non-self-execution thesis. The question remains as to whether this view was idiosyncratic or whether it commanded broader consensus.[592]

3. The Jay Treaty Debate.—In 1795, the United States ratified a Treaty of Amity, Commerce, and Navigation with Great Britain.[593] This treaty, negotiated by Chief Justice John Jay and hence known as the Jay Treaty, was the first treaty made by the United States with a foreign nation after the adoption of the Constitution. The Treaty brought forth one of the greatest constitutional debates of the early Republic and the greatest constitutional debate on the treaty-making power, occupying the nation for much of 1795 to 1796.

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[588] *See id.* at 61–63.

[589] *See id.* at 63–66.

[590] *See id.* at 66 ("On the whole, the conclusion seems to be, that in this single instance, the payment of money, the concurrence of the house of representatives is necessary to give effect to the treaty.").

[591] *Id.* at 67–68 (stating that "[t]he interference of congress in any shape is not warranted further than to afford the means of carrying on that intercourse to the extent which the president and senate hold to be required for the national interest, and of furnishing the means of effectuating treaties constitutionally made, when, as has been seen, their intervention is absolutely necessary," and that "those who are thus authorized, must be considered as bound to perform the duty").

[592] Rawle was a brilliant constitutional analyst and his work on the treaty-making power displays his acumen. Yet he made mistakes. For example, he wrote that a state could constitutionally secede from the Union based on the majority vote of the people of the state. *See id.* at 289–90. This view is not the accepted constitutional wisdom.

[593] *See* Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116. The leading historical work on the Jay Treaty is SAMUEL F. BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (1962). For Professor Yoo's discussion of the Jay Treaty debate, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 2080–86.

Notably, the great constitutional debate took place in the context of an enormous political controversy between Federalists and Republicans over the nation's foreign policy.[594] The Federalists, who favored the British, saw the Treaty as preventing war between the United States and Great Britain, which was a significant risk at the time; the Republicans, who favored the French, saw the Treaty as risking war between the United States and France.[595] In addition to a vigorous political attack on the Treaty, which included burning Jay in effigy,[596] Republicans mounted an equally vigorous constitutional attack, claiming that the Treaty (in particular, article nine, concerning alien land ownership) was unconstitutional because it infringed the legislative powers reserved to the states.[597]

After the Federalist-controlled Senate approved the Treaty by a party line vote of twenty to ten on June 24, 1795,[598] the debate moved to the Republican-controlled House of Representatives in March 1796. The Treaty, at a minimum, required appropriations in order to be carried into effect, thereby necessitating congressional consideration. By this point, the Republicans had retreated from their claims that the Treaty was unconstitutional.[599] The constitutional debate shifted to the familiar ground of the doctrine of non-self-execution.[600] The debate was extensive, occupying the House for nearly a month and spanning over 350 pages in the *Annals of Congress*.[601] In the end, after a lengthy debate on the Treaty's merits and

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594 *See* Golove, *Treaty-Making and the Nation*, *supra* note 37, at 1154 (describing "the great national debate of 1795–96 provoked by the Jay Treaty" as "one of the sharpest and most traumatic political controversies the nation has ever weathered").

595 *See id.* at 1155 ("To Republican eyes, the treaty was nothing less than a national humiliation and, even worse, a sure and calculated means of provoking a calamitous breach in relations with France, which would correctly see the treaty as forming a tacit alliance between the Americans and the British.").

596 *See id.* at 1155–56 (describing Republican response to Treaty).

597 For a valuable discussion of this aspect of the debate, see *id.* at 1157–93 (discussing the conflict between the nationalist and states' rights views of the Jay Treaty).

598 *See* 4 ANNALS OF CONG. 861–63 (1795).

599 *See* Golove, *Treaty-Making and the Nation*, *supra* note 37, at 1174–78.

600 Importantly, this debate included a rich sub-debate on the subject of the House's discretion with respect to appropriations for treaties already made by the President and Senate, with Representatives taking positions ranging from political discretion to constitutional obligation. This sub-debate is of secondary importance to the present inquiry and is omitted herein.

601 *See* 5 ANNALS OF CONG. 426–783 (1796). The debate arose as a result of a resolution by Representative Livingston requesting information from President Washington relative to the Treaty, including a copy of Jay's negotiating instructions, *see id.* at 426, which prompted the consideration of the constitutional grounds for such a request. Livingston's resolution passed by a vote of sixty-two to thirty-seven. *See id.* at 759–60. President Washington denied the House's request for such information on constitutional grounds, claiming that the House's consent to the Treaty was unnecessary because the Treaty was already the law of the land. *See id.* at 760–62 (reprinting President Washington's Message). In response, the House considered a resolution expressing a doctrine of total non-self-execution, *see id.* at 771, which passed by a vote of fifty-seven to thirty-five, *see id.* at 782–83. For the text of the House resolution, see *infra* note 606.

with a shift in public opinion in favor of the Treaty,[602] the House, in a defeat to Republicans, voted for appropriations by an exceedingly narrow vote of fifty-one to forty-eight.[603]

On the constitutional question, it should come of no surprise that the Republican-controlled House asserted its constitutional authority in favor of a doctrine of total non-self-execution, which provided the House with its best option to defeat the Treaty. Leading Republican Representatives Albert Gallatin and James Madison claimed that any treaty touching subjects within Congress's legislative powers would need to be implemented by Congress before having the force of domestic law.[604] A number of other Representatives supported this constitutional position.[605] The debate culminated with the passage of a resolution expressing the Republican position by a vote of fifty-seven to thirty-five.[606] As the vote indicates, this constitutional position was hardly one that commanded the assent of every Representative. A number of Representatives, with generally opposite political views, supported a doctrine of total self-execution.[607]

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[602] *See* Golove, *Treaty-Making and the Nation*, *supra* note 37, at 1156 & n.242; Yoo, *Globalism and the Constitution*, *supra* note 33, at 2086 & n.636.

[603] *See* 5 ANNALS OF CONG. 1291 (1796). For the statute, see Act of May 6, 1796, ch. 17, 1 Stat. 459.

[604] *See, e.g.*, 5 ANNALS OF CONG. 465 (1796) (remarks of Rep. Gallatin) ("[I]f a Treaty embraces objects within the sphere of the general powers delegated to the Federal Government, but which have been exclusively and specially granted to a particular branch of Government, say to the Legislative department, such a Treaty, though not unconstitutional, does not become the law of the land until it has obtained the sanction of that branch."); *id.* at 493 (remarks of Rep. Madison) (stating his support for a construction of the treaty-making power "which left with the President and Senate the power of making treaties, but required at the same time the Legislative sanction and co-operation, in those cases where the Constitution had given express and specific powers to the Legislature"). For Representative Gallatin's key speeches, see *id.* at 464–74, 726–46. For Representative Madison's key speeches, see *id.* at 487–95, 772–81.

[605] *See, e.g.*, *id.* at 448–52 (remarks of Rep. Swannick); *id.* at 482–87 (remarks of Rep. Havens); *id.* at 495–500 (remarks of Rep. W. Smith); *id.* at 500–14 (remarks of Rep. Giles); *id.* at 532–41 (remarks of Rep. Baldwin); *id.* at 543–48 (remarks of Rep. Holland); *id.* at 555–56 (remarks of Rep. Rutherford); *id.* at 556–65 (remarks of Rep. Page); *id.* at 575–84 (remarks of Rep. Brent); *id.* at 588–93 (remarks of Rep. Findley); *id.* at 601–09 (remarks of Rep. W. Lyman); *id.* at 628–42 (remarks of Rep. Livingston); *id.* at 650–53 (remarks of Rep. Milledge); *id.* at 653–54 (remarks of Rep. Kitchell).

[606] The resolution provided in pertinent part:

> [T]he House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.

Id. at 771. This resolution passed by a vote of fifty-seven to thirty-five. *See id.* at 782–83.

[607] *See, e.g.*, *id.* at 452–57 (remarks of Rep. N. Smith); *id.* at 475–82 (remarks of Rep. Griswold); *id.* at 514–30 (remarks of Rep. Sedgwick); *id.* at 530–32 (remarks of Rep. S. Lyman); *id.* at 541–43 (remarks of Rep. Cooper); *id.* at 548–54 (remarks of Rep. Bradbury); *id.* at 565–75 (remarks of Rep. Bourne); *id.* at 594–601 (remarks of Rep. J. Smith); *id.* at 612–21 (remarks of Rep. Tracy); *id.* at 626–28 (remarks of Rep. I. Smith); *id.* at 642–50 (remarks of Rep. Williams); *id.* at 654–60 (remarks of Rep.

There is, however, more to the story. What has gone unnoticed by scholars is that this Republican position was heavily influenced by the issue of statute-treaty conflict, which featured prominently in the House debate. The Jay Treaty clashed with a number of existing statutes, which provided even more reason to argue for a doctrine of non-self-execution.[608]

We may see this point in the key speeches of Representatives Gallatin and Madison. In his first lengthy speech on the subject, Representative Gallatin asked:

> Is [the power to make treaties] limited by any law past? If not, it must embrace every thing, and all the objects of legislation. If not limited by existing laws, or if it repeals the laws that clash with it, or if the Legislature is obliged to repeal the laws so clashing, then the Legislative power in fact resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of Treaty. Unless it is allowed that either the power of the House over the purse-strings is a check, or the existing laws cannot be repealed by a Treaty, or that the special powers granted to Congress limit the general power of Treaty-making, there are no bounds to it, it must absorb all the others, repeal all laws in contravention to it, and act without control.[609]

Gallatin then proceeded to parse the Supremacy Clause, observing that the Clause "does not compare a Treaty with the law of the United States, or either of them with the Constitution,"[610] and concluding that the Clause "by no means expresses that Treaties are equal or superior to the laws of the Un-

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Coit); *id.* at 660–76 (remarks of Rep. Hillhouse); *id.* at 676–84 (remarks of Rep. Gilbert); *id.* at 684–703 (remarks of Rep. Murray); *id.* at 703–17 (remarks of Rep. Buck); *id.* at 717–25 (remarks of Rep. Goodrich); *id.* at 747–59 (remarks of Rep. Harper).

[608] *See, e.g.*, *id.* at 473 (remarks of Rep. Gallatin) ("Existing laws declare, that goods shall not be imported by land into the United States, except in certain districts; the third article of the Treaty allows a general importation; the laws declare that foreign vessels trading with us shall pay an additional ten per cent[ ] upon the duties paid by our own vessels, the same article again interferes here; in other particulars, also, but these are sufficient to illustrate."); *id.* at 536–37 (remarks of Rep. Baldwin) ("[The Jay Treaty] appeared to assume the right of repealing laws. He supposed it not to be denied, that in not less than four instances it had repealed laws of the United States. He had not heard any reason assigned why it might not have been extended to the whole book, and repealed all the laws passed before that time."); *see also id.* at 624 (remarks of Rep. S. Smith). *But see id.* at 754–55 (remarks of Rep. Harper) (contending that the issue of the repeal of existing statutes by treaty is "perfectly unnecessary to the present discussion" because the Jay Treaty does not clash with existing statutes as alleged by Representatives Baldwin and Gallatin). Secretary of State Alexander Hamilton, writing as Camillus, acknowledged the issue of statute-treaty conflict posed by the Treaty in his defense of its constitutionality. *See infra* text accompanying note 637.

[609] 5 ANNALS OF CONG. 467 (1796); *see also id.* at 473 ("If a Treaty can repeal a law then the act of the President and Senate can repeal the act of the three branches; and although all Legislative powers be vested in Congress by the Constitution, yet Congress are controlled by two of its branches; those clauses of the Constitution vesting the Legislative powers in Congress are annihilated, and the President and Senate, by substituting a foreign nation for the House of Representatives, assume, in fact, an unlimited Legislative power; since, under the color of making Treaties, they may repeal laws, and may enact laws."); *id.* at 745 (similar).

[610] *Id.* at 468.

ion, or that they shall be supreme law when clashing with any of them."[611] Interestingly, this conclusion on the relative hierarchy of federal law propelled Gallatin in the direction of total non-self-execution, if only too far.[612]

He also supported his position on non-self-execution by reference to British practice, where he claimed that "the power given generally to the Executive of making contracts with other nations, does not imply that of making Legislative regulations, but that when the contract happens to embrace Legislative objects, the assistance of the Legislature becomes necessary to give it effect."[613] Once again, however, Gallatin turned to the principles of partial non-self-execution, endeavoring to show that "[i]t was always considered as discretionary with Parliament to grant money to carry Treaties into effect or not, and to repeal or not to repeal laws that interfere with them."[614] He elaborated on this point in his second and final lengthy speech by quoting James Wilson's key speech in the Pennsylvania ratifying convention discussing the British practice of partial non-self-execution and its applicability to the treaty-making power.[615]

Yet Gallatin went beyond the principles of partial non-self-execution. In his second speech, Gallatin correctly reasoned that the treaty-making power and lawmaking power "cannot operate on the same objects, unless one of the two be paramount and supersede the other, when they shall clash; or unless the consent of both be made necessary in such case."[616] Gallatin rejected the notion of concurrent jurisdiction because "there is nothing in the Constitution which decides which of the two powers shall be paramount; which supersedes the other."[617] He also explained the inapplicability of the last-in-time rule to the repeal of statutes by treaty, stating that only

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[611] *Id.* at 469. Other Representatives, who were in Gallatin's political and constitutional camp, made similar arguments based on the ordering of the Supremacy Clause. *See, e.g.*, *id.* at 450 (remarks of Rep. Swannick) ("It is also worth while to notice the gradation in the article. . . . How absurd the doctrine, then, that [treaties] last, third in order, can repeal the second: at that rate, all power whatever would remain vested in two branches only of the Government . . . ."); *id.* at 578 (remarks of Rep. Brent) ("If the manner in which the three words are placed in the Constitution is to have any force, it would not favor the construction of the gentlemen; they contend for the supremacy of Treaties, whereas Treaties are last named, and the true construction from this source would be the reverse, when there was clashing."); *id.* at 632 (remarks of Rep. Livingston) ("He had always considered the order in which this enumeration was made as descriptive of the relative authority of each.").

[612] *See id.* at 469 (concluding commentary on Supremacy Clause) ("[W]hen gentlemen ground their arguments on the position that Treaties are superior or equal to the laws of the Union, they take for granted the very thing which is to be proved. The natural construction of the Treaty-making power, was this, he contended, that, as far as a Treaty negotiated by the Executive embraced Legislative objects, so far it required the sanction of the Legislature.").

[613] *Id.* at 470.

[614] *Id.*; *see also id.* at 548 (remarks of Rep. Bradbury) (interpreting Gallatin as maintaining "that where any articles of a Treaty were repugnant to prior existing acts of Congress, those acts must first be repealed by Congress before such Treaty can become the law of the land").

[615] *See id.* at 736–37. For the text of Wilson's key speech, see *supra* text accompanying note 421.

[616] *See* 5 ANNALS OF CONG. 743 (1796).

[617] *Id.* at 742.

a statute could repeal a statute and only a treaty could repeal a treaty.[618] If neither power was paramount, the only construction remaining was to reconcile these two powers with a doctrine of total non-self-execution.

Likewise, Representative Madison, in his first lengthy speech, sought to reconcile the "necessary clash"[619] between the treaty-making and lawmaking powers. In reviewing the Supremacy Clause, he similarly observed that "[t]he term *supreme*, as applied to Treaties, evidently meant a supremacy over the State Constitution and laws, and not over the Constitution and Laws of the United States."[620] He proceeded to enumerate and evaluate five possible "constructions" with respect to the relationship between the treaty-making power and the lawmaking power.[621] In offering these constructions, Madison offered a more complete view of the subject than Gallatin, though one with the same conclusion.

The first construction sought to eliminate the clash between these powers by restricting the treaty-making power to subjects not within the lawmaking power; Madison rejected this construction as unduly constricting the treaty-making power.[622] The second construction sought to reconcile these powers by giving supremacy to one of the powers in case of conflict, much like the supremacy of federal statutes to state statutes in the concurrent regulatory field of taxation; Madison dismissed, too quickly, this construction because the conflict between the treaty-making power and lawmaking power was "unavoidable," in contrast to the conflict between federal and state power in the field of taxation which would be subject to "prudence and moderation."[623] This second construction, giving supremacy to one of two concurrent powers, would support the partial non-self-execution thesis. The third construction sought to reconcile these two powers by giving supremacy to the one "last exercised"; Madison dismissed this last-in-time construction as involving the absurdity of an "*imperium in imperio*, of two powers both of them supreme, yet each of them liable to be superseded by the other."[624] The fourth construction sought to reconcile these two powers by giving supremacy to the treaty-making power, irre-

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[618] *See id.* Gallatin explained that the last-in-time "principle is grounded upon another one, that an act may be undone by those who have made it; but never was it understood that an act done by a constituted authority could be abrogated by another constituted authority, unless it was positively expressed by the instrument which constituted both." *Id.*

[619] *Id.* at 488.

[620] *Id.*

[621] *See id.* at 488–89.

[622] *See id.*

[623] *See id.*; *see also id.* at 489 (stating that a "Treaty of Commerce, for example, would rarely be made, that would not trench on existing legal regulations, as well as be a bar to future ones").

[624] *See id.* at 488–89.

spective of time; Madison quickly dismissed this construction as unduly extending the treaty-making power.[625]

With these four constructions out of the way, the only construction that remained was that advanced by Representative Gallatin, whose argument Madison specifically referenced: Congress would carry into effect any treaty touching Congress's legislative powers.[626] This construction met Madison's objective of reconciling these two powers by eliminating the possibility of clash, if only too much so. In his second and final lengthy speech, Madison briefly elaborated on the subject of clash in reviewing amendments submitted by the state ratifying conventions which recognized the "fundamental, inviolable, and universal principle in a free Government, that no power could supersede a law without the consent of the Representatives of the people in the Legislature."[627]

Gallatin and Madison were not the only Representatives to consider the critical issue of statute-treaty conflict. A number of Representatives, who supported the Republican position, addressed the issue, claiming that later-enacted treaties would not repeal existing statutes.[628] A number of Representatives, who supported a doctrine of total self-execution, also addressed the issue, concluding that later-enacted treaties would repeal existing statutes because of the last-in-time rule.[629]

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[625] *See id.* at 488, 489–93. In rejecting this construction, Madison stated that "[i]t was an important, and appeared to him to be a decisive, view of the subject, that if the Treaty power alone could perform any one act for which the authority of Congress is required by the Constitution, it may perform every act for which the authority of that part of the Government is required." *Id.* at 490. This was the stepping stone to the fifth and final construction discussed presently.

[626] *See id.* at 489, 493–95. Importantly, Congress would do so as a matter of political discretion, not constitutional obligation. *See id.* at 493 ("It was to be presumed, that in all such cases the Legislature would exercise its authority with discretion, allowing due weight to the reasons which led to the Treaty, and to the circumstances of the existence of the Treaty. Still, however, this House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation.").

[627] *Id.* at 778. Madison referred to amendments proposed by the Virginia and North Carolina ratifying conventions which provided that laws ought not to be suspended by any authority without the consent of the representatives of the people in the legislature. *See id.* More interestingly, Madison also referred to North Carolina's amendment twenty-three which specifically addressed the treaty-making power and the doctrine of partial non-self-execution. *See id.* at 779. For the text of this amendment, see *supra* note 553.

[628] *See, e.g.*, 5 ANNALS OF CONG. 450 (1796) (remarks of Rep. Swannick); *id.* at 506–07 (remarks of Rep. Giles); *id.* at 577–81 (remarks of Rep. Brent); *id.* at 602–04 (remarks of Rep. W. Lyman); *id.* at 630–32 (remarks of Rep. Livingston); *id.* at 652 (remarks of Rep. Milledge). Notably, Representative Brent referred to the statements of Federalists Francis Corbin and James Madison at the Virginia ratifying convention and Anti-Federalist Federal Farmer's writings concerning the relationship between treaties (particularly treaties of commerce) and existing statutes. *See id.* at 579–81.

[629] *See, e.g.*, *id.* at 500 (remarks of Rep. W. Smith); *id.* at 550–51 (remarks of Rep. Bradbury); *id.* at 599–600 (remarks of Rep. J. Smith); *id.* at 660–61, 666, 670 (remarks of Rep. Hillhouse); *id.* at 680 (remarks of Rep. Gilbert); *id.* at 696 (remarks of Rep. Murray); *id.* at 712 (remarks of Rep. Buck); *cf. id.* at 531 (remarks of Rep. S. Lyman) (stating that a treaty "virtually repeals all laws which are repugnant to it"). Indeed, Representative Bradbury, though denying Gallatin's claims, observed that Gallatin's arguments "would afford the best reason yet for calling for the [Treaty] papers." *Id.* at 548.

In addition to the rich constitutional debate in the House of Representatives, the constitutional views of one other individual deserve brief attention. Secretary of State Alexander Hamilton, writing as Camillus, defended the constitutionality of the Treaty in the final three essays of a remarkable series of thirty-eight essays entitled *The Defence*.[630] These essays contain a valuable discussion of the doctrine of self-execution.

Camillus began with a refutation of the Republican position that Congress's legislative powers constitute limitations to the self-executing treaty-making power. According to Camillus:

> Two obvious considerations refute this doctrine. One that the power to make Treaties and the power to make laws are different things, operating by different means, upon different subjects, the other, that the construction resulting from such a doctrine would defeat the power to make Treaties; while its opposite reconciles this power with the power of making laws.[631]

In *The Defence No. 36*, Camillus elaborated on the point that treaties and statutes have fundamentally different ambits: statutes regulate domestic conduct and have no legal effect in foreign jurisdictions, whereas treaties regulate international conduct based on reciprocal promises.[632] Given this difference, it would not make sense for the treaty-making power to be completely limited by the lawmaking power.[633] In *The Defence No. 37*, Camillus explained at length that, if the Republican claim is true, the treaty-making power would become "essentially nugatory" because "[i]t is probable that on a minute analysis, there is scarcely any species of treaty which would not clash, in some particular, with the principle of those objec-

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[630] *See Defence 36*, *supra* note 155, at 3; Camillus, *The Defence No. XXXVII* [hereinafter *Defence 37*], *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 155, at 13; Camillus, *The Defence No. XXXVIII* [hereinafter *Defence 38*], *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 155, at 22.

[631] *Defence 36*, *supra* note 155, at 7.

[632] *See, e.g.*, *id.* at 8 ("Though a Treaty may effect what a law can, yet a law cannot effect what a Treaty may."); *id.* at 10 ("Laws are the acts of legislation of a particular Nation for itself. Treaties are the acts of the legislation of several nations for themselves jointly & reciprocally. The Legislative power of one State cannot reach the cases which depend on the joint legislation of two or more States. For this, resort must be had to the *pacticious* power or the power of Treaty.").

[633] *See, e.g.*, *id.* at 8 ("It follows that there is no ground for the inference pretended to be drawn, that the legislative powers of Congress are excepted out of the power of making Treaties. It is the province of the latter to do what the former cannot do.").

Not surprisingly, Hamilton's comments as Camillus echo his earlier comments as Publius on the important point that treaties, when made, would have the force of law. *Compare* THE FEDERALIST NO. 75, *supra* note 4, at 450–51 (Alexander Hamilton) ("[The objects of the treaty-making power] are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith."), *with Defence 36*, *supra* note 155, at 9 ("Thus the power of making Treaties is placed in the class of Executive authorities; while the force of law is annexed to its results. This agrees with the distribution commonly made by theoretical write[r]s—though perhaps the power of Treaty from its peculiar nature ought to form a class by itself.").

tions."[634] This absurdity, he argued, must yield to the construction that gives a sufficient field of action to both powers.[635]

Critically, after stating that "[t]he power of Treaty could not but be supposed commensurate with all those objects to which the legislative power of the Union extended,"[636] Camillus reflected on the relationship between later-enacted treaties and existing federal statutes, seeming to acknowledge the issue of statute-treaty conflict posed by the Jay Treaty:

> It is a question among some theoretical Writers—whether a Treaty can repeal *preexisting* laws? This question must always be answered by the particular form of Government of each Nation. In our constitution, which gives *ipso facto* the force of law to Treaties, making them equally with the Acts of Congress, the supreme law of the land, a Treaty must necessarily repeal an antecedent law contrary to it; according to the legal maxim that "*leges posteriores priores contrarias abrogant*."[637]

Though he recognized the delicate nature of the question, Camillus, motivated by the terms of the Supremacy Clause, embraced the last-in-time rule. However, in the very next paragraph, Camillus carefully hedged his bets, opening the door to another possibility:

> But even in those forms of government in which there may be room for such a question, it is not understood that a Treaty containing stipulations which require the repeal of antecedent laws is on that account unconstitutional and null. The true meaning is that the antecedent laws are not *ipso facto* abrogated by the Treaty. But the Legislature is nevertheless bound in good faith under the general limitation stated in another place to lend its authority to remove obstacles which previous laws might oppose to the fair execution of a Treaty.[638]

[634] *Defence 37*, *supra* note 630, at 18; *see also id.* at 17–18 (discussing treaties of commerce, treaties of alliance, and treaties of peace, and the interference between these classes of treaties and Congress's legislative powers).

[635] *See id.* at 19 (noting that "the construction which is combated would cause the legislative power to destroy the power of making Treaties," and that "[i]t is against the principles of sound construction; because these teach us that every instrument is so to be interpreted, that all the parts may if possible consist with each other and have effect").

[636] *Id.* at 16. The editorial note to the reprint of the essay observes that "[i]n the newspaper the following clause was added to this sentence: 'which are the proper objects of compacts with foreign nations.'" *Id.* at 16 n.7; *see also id.* at 20 (noting regulatory fields where "the power to make laws and the power to make treaties are concurrent and coordinate").

[637] *Id.* at 16.

[638] *Id.* Camillus's reference was to his earlier essay where he set forth a principle of constitutional obligation for Congress to implement treaties made by the President and Senate. *See Defence 36*, *supra* note 155, at 4 (quoting the Supremacy Clause and stating that "[a] law of the land till revoked or annulled by the competent authority is binding not less on each branch or department of the Government than on each Individual of the Society," and that "[e]ach house of Congress collectively as well as the members of it separately are under a constitutional obligation to observe the injunctions of a preexisting law and to give it effect").

Under this analysis, Congress would have the constitutional obligation—and not the political discretion—to amend or repeal existing federal statutes so as to carry into effect treaties made by the President and Senate.[639] The important point is that the constitutional equality of statutes and treaties was not beyond doubt.[640]

In sum, the Jay Treaty debate witnessed a fascinating discussion of theories of total self-execution, partial non-self-execution, and total non-self-execution. Although the issue of statute-treaty conflict featured prominently, it does not appear that Congress amended or repealed existing statutes to carry the Treaty into effect, somewhat militating against the partial non-self-execution thesis. It is not surprising, however, that the Republican-controlled House did not formally consider the amendment or repeal of existing statutes to carry the Treaty into effect, given that this House barely passed the necessary appropriations measure. Indeed, the overall usefulness of the Jay Treaty debate is severely limited by the enormous political stakes in the debate. On the doctrine of non-self-execution, Republicans would make the broadest arguments in favor of the House's constitutional authority in treaty-making, just as Federalists would make similar arguments in favor of the constitutional authority of the President and Senate, even if the result was to "overshoot" the correct constitutional position.[641] The important point is that, in the first major debate on the treaty-making power following the adoption of the Constitution, the relationship between treaties and existing statutes was a significant (if heretofore overlooked) component of the debate.[642]

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[639] According to Camillus, this injunction extended even to the appropriation of money. *See Defence* 37, *supra* note 630, at 20–21.

[640] In his next and final essay, Camillus, in a long footnote, pressed his claim of statute-treaty equality ever so slightly, observing that the Pennsylvania ratifying convention's amendment thirteen "shews that it was understood that the power of treaty in the constitution extended to abrogating even *pr*[*e*]*existing* laws of the United States which was thought exception[a]ble; while no objection was made to the idea of its controuling future exercises of the legislative power." *Defence 38*, *supra* note 630, at 24–25.

[641] Moreover, the constitutional position of the House of Representatives is further limited by institutional bias which favors an expansive view of its constitutional power.

[642] In his review of the same debate, Professor Yoo concludes that "Madison's efforts demonstrate that the post-ratification period cannot be shown, as internationalists would have it, to stand conclusively in favor of treaty self-execution." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2086. This much is correct. However, Yoo further states that "[i]f anything, the Jay Treaty confirms the Framers' belief that treaties that regulated areas within Congress's Article I powers required legislative implementation." *Id.* This much is correct only if we equate the House Republicans of 1796, particularly Madison, with the "Framers." It deserves brief mention that Madison was not exactly the touchstone of constitutional consistency following the adoption of the Constitution. In a private letter written in 1791, Madison seemed to take the opposite position with respect to the repeal of existing statutes by later-enacted treaties:

> Treaties as I understand the Constitution are made *Supreme* over the Constitutions and laws of the particular States, and, like a subsequent law of the U. S., over pre-existing laws of the U. S. provided however that the Treaty be within the prerogative of making Treaties, which no doubt has certain limits.

4. Foster v. Neilson.—In 1829, Chief Justice John Marshall delivered the opinion of the Supreme Court in *Foster v. Neilson*.[643] The case is widely cited as establishing the doctrine of non-self-execution in treaty jurisprudence.[644] The question for present purposes is whether this case is consistent with the partial non-self-execution thesis.

Unfortunately, the case is widely misunderstood. *Foster* is about whether a treaty purports to be self-executing or non-self-executing based on matters of treaty interpretation.[645] *Foster* is not about whether and when a treaty must be non-self-executing because of constraints imposed by the Constitution.[646] Thus, *Foster* merely establishes that a treaty, by its terms, may be non-self-executing, which has no implications for the partial non-self-execution thesis (or any other constitutional rule of non-self-execution for that matter). However, Marshall's opinion contains dicta refuting the superiority of statutes to treaties and endorsing their equality. To see these points we turn to the case itself.

The case involved land claims located in eastern Louisiana. The plaintiffs' title claim traced back to a land grant in 1804 with Spain. They claimed that the lands were part of West Florida, ceded by Spain in a treaty of 1819. The defendant claimed that the lands were part of Louisiana, ceded by France the year before in the Louisiana Purchase of 1803. Notably, this issue also presented a delicate political question involving the status of disputed territory between the United States and Spain,[647] with the United States insisting that it was part of Louisiana.[648] The Court could

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Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), *in* 6 THE WRITINGS OF JAMES MADISON 22, 23–24 (Gaillard Hunt ed., 1906); *see also* Kesavan & Paulsen, *supra* note 55, at 1175 & n. 282 (discussing shifts in Madison's views on important constitutional questions following the adoption of the Constitution).

[643] 27 U.S. (2 Pet.) 253 (1829). The opinion of the Court did not use the phrase "self executing" in reference to treaties, a phrase which did not appear until 1887, *see* Bartram v. Robertson, 122 U.S. 116, 120 (1887), and which was popularized a year later in *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

[644] *See, e.g.*, CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 339 (2003); HENKIN, *supra* note 6, at 198–200; Yoo, *Globalism and the Constitution*, *supra* note 33, at 1969 (citing *Foster* for proposition that "as early as 1829, the Marshall Court had rejected the idea that all treaties should be self-executing"); *id.* at 1984 (stating that *Foster* "introduced non-self-execution into American law").

[645] For example, a treaty addressing subject matter X might explicitly provide that "the legislature shall pass laws addressing X," in which case the treaty clearly would be non-self-executing. Sometimes the text of the treaty might not be so clear, in which case the court would need to determine whether the treaty is self-executing (or not) by studying the intent of its text.

[646] For a similar interpretation of the case, see Vázquez, *Laughing at Treaties*, *supra* note 27, at 2181–82.

[647] *See Foster*, 27 U.S. at 307. The controversy between the two nations was apparently still brewing in 1829. *See id.* at 306 (stating that "[t]he discussion has since been resumed between the two nations with as much ability and with as little success").

[648] This was based on the interpretation by the United States of the treaty of St. Ildefonso between Spain and France in 1800 and three decades of congressional legislation assuming that the disputed territory belonged to the United States. *See id.* at 300–09.

have deferred to the United States and decided the case for the defendants, but did not do so because there was an alternative basis for deciding the case. However, the Court, in classic Marshallian fashion, left little doubt as to how the political question would have been decided.[649]

The Court's holding rested on a matter of interpreting the treaty between the United States and Spain of 1819, which was the basis for the plaintiffs' title claim. The eighth article provided that

> [a]ll the grants of land made before the 24th of January 1818, by his catholic majesty, & c. *shall be ratified and confirmed* to the persons in possessions of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.[650]

The question of treaty interpretation was whether these words acted directly, in which case the treaty was self-executing and the plaintiffs could prevail, or whether they merely promised that Congress would make laws to execute the land grants, in which case the treaty was non-self-executing and the defendant would prevail.

Given the background of the case, the answer was all but certain. In interpreting the treaty provision, Marshall observed:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.[651]

This paragraph supports a strong presumption of non-self-execution. The only problem with this conclusion is that Marshall was not discussing the treaty-making power under the Constitution. In his next paragraph, he continued:

> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as the equivalent to an act of the legislature, *whenever it operates of itself without the aid of any legislative provision*. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[652]

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[649] Professor Yoo regards the Court's discussion of the political question as its holding and its discussion of the statutory (treaty) interpretation question as its "alternative holding" or "dicta." *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2088. On the first point, the Court's opinion is not clear, but strongly leans in the direction of dicta, not holding. *See Foster*, 27 U.S. at 309–10 (punting on the political question). On the second point, the Court's opinion is, at worst, an alternative holding as discussed presently.

[650] *Id.* at 314 (emphasis added).

[651] *Id.*

[652] *Id.* (emphasis added).

This paragraph supports a strong presumption of self-execution for treaties of a certain type—those that "operate[] . . . without the aid of any legislative provision."[653]

Marshall concluded that the treaty provision was non-self-executing because it was in the "language of contract" and "promised" future legislative action.[654] He declared that "[u]ntil such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject,"[655] which supported the United States' position concerning the disputed territory. In reaching this conclusion, he observed that the treaty provision, in describing the land grants, employed the phrase "shall be . . . confirmed" instead of the phrase "are hereby confirmed," in which case it "would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it."[656] This dicta supports the equality of statutes and treaties and the application of the last-in-time rule.

Marshall's interpretation of the treaty provision as requiring future legislative action was not inevitable, as he acknowledged four years later in *United States v. Percheman*.[657] The Spanish-language version of the same treaty provision stated that the land grants "shall remain ratified and confirmed,"[658] which implied that it was self-executing. He concluded that this construction was "proper, if not unavoidable," and that this question in *Foster* would have been decidedly differently had the Spanish-language version of the treaty provision been available to him.[659]

In sum, *Foster* is about matters of treaty interpretation and whether a treaty purports to be self-executing or non-self-executing based on the intent of its text; in this exercise, *Foster* shows special sensitivity to avoiding a political question and conflict with existing statutes. The case says nothing about the circumstances where the Constitution requires a doctrine of

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[653] *Id.* Marshall's statement has been misappropriated in the service of arguments that self-executing treaties would be the norm and non-self-executing treaties the exception. *See, e.g.*, HENKIN, *supra* note 6, at 200 (stating that "as Marshall recognized, treaty undertakings are generally, in principle, self-executing"); Vázquez, *Laughing at Treaties*, *supra* note 27, at 2194 ("*Foster* thus strongly supports a presumption that treaties are self-executing in the United States."). In context, it meant nothing of the sort. Marshall's statement makes no claim as to what presumption to apply to a treaty that does not unambiguously announce its intent on the subjects of self-execution and non-self-execution. For similar observations, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 2089–90 (discussing conventional wisdom and debunking its presumption of self-execution).

[654] *See Foster*, 27 U.S. at 315.

[655] *Id*.

[656] *Id.* at 314–15.

[657] 32 U.S. (7 Pet.) 51 (1833).

[658] *Id.* at 88.

[659] *Id.* at 88–89. This does not mean that *Foster* would have been decided differently. Even if the treaty provision was found to be self-executing, the Court would have had to determine whether the land claims were part of Louisiana or West Florida. This was the political question in the case, where the Court indicated that it would defer to the views of the political branches. This question was not present in *Percheman* because the lands in that case were part of East Florida, not the disputed territory.

non-self-execution. However, in dicta, *Foster* squarely supports the equality of statutes and treaties, thereby denying the partial non-self-execution thesis.[660]

IV. SOME STRUCTURAL CONSIDERATIONS

In addition to arguments from constitutional text and history, arguments from constitutional structure help to take account of the overall patterns and principles of the Constitution.[661] This Part briefly considers three structural considerations that assist in determining the constitutional relationship between statutes and treaties. The first two considerations present structural principles that militate against the constitutional equality of statutes and treaties assumed by the last-in-time rule. The democracy principle claims that statutes are superior to treaties because of the relative superiority of the process by which statutes are made. The supremacy principle suggests that the basic constitutional design rejects the notion of the co-supremacy of statutes and treaties within the same domain. The third structural consideration discusses a possible exception to the supremacy of statutes to treaties: the supremacy of a later-enacted treaty of peace to prior statutes.

A. The Democracy Principle

There are important structural differences between the processes of lawmaking and treaty-making. It should go without saying that lawmaking process has a "superior democratic pedigree"[662] because it requires the participation of the House of Representatives, Senate, and the President, whereas the treaty-making process only requires the participation of the President and the Senate. In other words, the treaty-making process cuts the House, the branch of government that stands closest to We the People,

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[660] Professor Yoo claims that Court concluded that the treaty provision was non-self-executing because of the separation of powers to legislate and to make treaties. In his own words, "Although *Foster* did not provide a more complete discussion of the line between self-executing and non-self-executing treaties, it is clear that the separation of powers was the animating principle for the difference." Yoo, *Globalism and the Constitution*, *supra* note 33, at 2089. The problem with this interpretation is that this is exactly what the case denies, explicitly and implicitly. Marshall draws no line respecting the powers of Congress in establishing whether the treaty provision is in the "language of contract." *Foster*, 27 U.S. at 315. Marshall recognizes that the treaty provision touches subjects within Congress's province—hence his reference to "the existing laws on the subject" and his invitation for Congress to legislate with respect to the treaty provision. *See id.* The final blow to Yoo's separation-of-powers interpretation is that Marshall explicitly states that the treaty provision could have been self-executing if it had used the proper language. *Id.* at 314–15.

[661] For classic expositions of structural argument, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74–92 (1982).

[662] *See* AMAR, *supra* note 20, at 303 (using this phrase to explain the Constitution's superiority and suggesting its application to support the superiority of statutes to treaties).

"out of the loop."[663] Thus, the lawmaking process may be justly characterized as more democratic than the treaty-making process.

The "democracy deficit"[664] of treaty-making is best put in historical terms. At the Founding, and for much of our nation's history prior to the adoption of the Seventeenth Amendment in 1913, the treaty-making process was decidedly undemocratic because the Senate was the representative of the States, not the People.[665] As we saw earlier, the principal part of the Anti-Federalist criticism of the treaty-making power related to the exclusion of the House from a share of the power.[666] The Founding generation would be shocked with any characterization of the treaty-making process as democratic, let alone equally democratic to the lawmaking process.[667]

The point may also be put in quantitative terms as a matter of counting heads. At the Founding, the lawmaking process was roughly three times more participatory than the treaty-making process;[668] today, it is roughly five times more participatory.[669] On this basis, the treaty-making process's two-thirds supermajority consent requirement (today, seventeen extra Senators) is a hopeless substitute for a majority of the entire House of Representatives (today, four hundred and thirty-five Representatives) when it comes to repealing an existing statute.

Notwithstanding this democracy deficit, the question is whether the treaty-making process is "sufficiently" democratic to justify the last-in-time rule's repeal of an existing statute by a later-enacted treaty. As Professor Henkin has written, "If both the legislative process and the treaty power are

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[663] *See id.* (using this phrase and stating that "[b]oth English and colonial tradition regarded the lower branch of a bicameral legislature as the people's house, the institution most closely in touch with the voters, thanks to direct election, wide membership, and short terms of service"); *cf.* 4 ELLIOT'S DEBATES, *supra* note 179, at 132 (remarks of James Iredell, North Carolina ratifying convention) (noting that House of Representatives "will be a genuine representation of the people").

[664] *See* Yoo, *Globalism and the Constitution*, *supra* note 33, at 2073.

[665] Some would say that even with the Seventeenth Amendment the Senate still isn't democratic given that puny Vermont and empty Wyoming have as much representation as California and Texas. *See, e.g.*, Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENT. 213, 213 (1995) (noting that "slightly over 17% of the population elects a majority of the members"); *see also* Vasan Kesavan & Michael Stokes Paulsen, *Let's Mess with Texas*, 82 TEX. L. REV. 1587, 1618–20 & n.127 (2004) (collecting scholarly criticism of Senate as undemocratic).

[666] *See supra* Parts III.B.2–3 (canvassing Anti-Federalist sentiment during the ratification struggle).

[667] Importantly, the point is not limited to the differences in constitutional actors. The Treaty Clause's two-thirds supermajority consent requirement is decidedly antidemocratic because it allows a minority of the Senate to block the will of a majority, thereby protecting minority interests. This was the very purpose of the original design. *See supra* note 300 (discussing Mississippi River issue as paradigm case for supermajority consent requirement).

[668] The original thirteen states countenanced by the Constitution, *see* U.S. CONST. art. I, § 2, cl. 3 (listing these states), provided for sixty-five Representatives, twenty-six Senators, and one President. *See id.*; *id.* art. I, § 3, cl. 1; *id.* art. II, § 1, cl. 1. The ratio of ninety-two to twenty-seven is 3.4.

[669] Currently, there are 435 Representatives, 100 Senators, and 1 President. The ratio of 536 to 101 is 5.3.

themselves democratic, democracy does not require the supremacy of either laws or treaties, nor does it require their equality."[670]

As a structural principle, the democracy principle means that statutes are superior to treaties because of the relative superiority of the process by which statutes are made. At a minimum, the democracy principle is a presumption, or thumb on the scale, in favor of the three tiers of federal law thesis. It means that statutes are superior to treaties in the absence of any clear indication by We the People in favor of statute-treaty equality.[671] As we have seen, such an indication is not clearly textual or historical.

It is not structural either. Other descriptions of constitutional structure support the presumption of the superiority of statutes to treaties and militate against their equality. For example, in *INS v. Chadha*, the Supreme Court observed that the circumstances where "one House . . . alone with the unreviewable force of law, not subject to the President's veto" may alter the "legal rights, duties, and relations of persons . . . outside the Legislative Branch" are "narrowly and precisely defined."[672] Although one of these circumstances is the Senate's "unreviewable power to ratify treaties negotiated by the President,"[673] the Constitution's strong presumption is that actions "essentially legislative in purpose and effect"[674] do not take effect without the involvement of the House of Representatives.[675] Indeed, the Constitution's strongest presumption is that these actions do not amend or repeal *existing statutes* without the involvement of the House.[676] Therefore, to read the Constitution as merely implying statute-treaty equality is to read it improvidently and without sensitivity to the special place occupied by the House in our constitutional structure. One should pause, long and hard, before concluding that the President and Senate may by treaty amend or repeal statutes made by the Congress and President.

In sum, the democracy principle supports the three tiers of federal law thesis and strongly militates against the last-in-time rule. The three tiers of federal law thesis promotes a constitutional rule of non-self-execution in

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[670] Henkin, *Treaties in a Constitutional Democracy*, *supra* note 14, at 426.

[671] To be clear, this is not an argument about majoritarianism. The Constitution permits minorities to block the will of majorities in the exercise of various powers, including the treaty-making power itself. *See generally* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002). Rather, this is an argument about the ability of constitutional actors to thwart the will of other constitutional actors who stand nearer to the People in the exercise of their respective powers.

[672] 462 U.S. 919, 952, 955 (1983).

[673] *Id.* at 955.

[674] *Id.* at 952.

[675] *See id.* at 956 (concluding that "narrow, explicit, and separately justified" exceptions from bicameralism and presentment support conclusion that authorization for one-House action is "not to be implied").

[676] *Cf. id.* at 954 & n.18 (reviewing one-House action at issue in context of amendment or repeal of existing law).

order to harmonize the important democratic differences in the processes of lawmaking and treaty-making. Professor Yoo's normative view is that "[n]on-self-execution responds to globalization by enhancing democratic safeguards."[677] As a matter of constitutional structure, he deserves much credit for this aim, even if he goes too far to that end.[678]

B. The Supremacy Principle

The relationship between statutes and treaties depends on the relationship between the lawmaking power and the treaty-making power. These powers, granted to different constitutional actors, stand in a unique position with respect to each other because they involve overlapping domains, inviting conflict between the two. How does the Constitution resolve the clash between overlapping powers given to different actors?

There are only two possible answers as a matter of law and logic: either the powers are each supreme, or one power is supreme over the other. If they are each supreme, then statutes and treaties are equal, in which case the last-in-time rule may apply. If one is supreme over the other, then statutes are superior to treaties, or treaties are superior to statutes, in which cases the last-in-time rule cannot apply.

There is no constitutional basis for a notion of co-supremacy among overlapping powers granted to different actors. There is constitutional basis otherwise. Two simple examples illustrate the principle. The first example involves judicial powers. Though federal (and state) courts may share jurisdiction on matters of federal law, one federal court, the Supreme Court, has the "last word" on matters of federal law.[679] The second example involves legislative powers. Congress and the state legislatures share legislative powers in certain domains,[680] yet Congress has the "last" word in the event of conflict.[681]

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[677] Yoo, *Globalism and the Constitution*, *supra* note 33, at 2093.

[678] *Cf.* Flaherty, *History Right?*, *supra* note 48, at 2153 (crediting Professor Yoo for "recaptur[ing] an important, even if not dominant, democratic theme in the evolution of the treaty power"). Much of the foregoing might be construed in support of a broader role for Congress in implementing treaties (including treaties touching any of Congress's legislative powers, which is Yoo's total non-self-execution thesis). This is more work than the democracy principle, as a structural consideration, can perform alone. The premise for Yoo's thesis is that treaties are executive, not legislative, and cannot have the force of law without legislative implementation. *See supra* notes 136–40 and accompanying text. This involves the historical question of whether a treaty, as a contract between sovereigns containing stipulations for mutual benefit, may have the force of law when made. Once we accept that a treaty has this definition, the democracy principle suggests that statutes are superior to treaties.

[679] *Cf.* THE FEDERALIST NO. 80, *supra* note 4, at 476 (Alexander Hamilton) (illustrating the need for "uniformity in the interpretation of the national laws" by pointing out that "[t]hirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed").

[680] *See, e.g.*, U.S. CONST. art. I, § 8, cls. 1, 3 (taxation and commerce); *see also id.* art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; . . . and all such Laws shall

As a structural principle, the supremacy principle is a presumption, or thumb on the scale, against the notion of co-supremacy of the lawmaking and treaty-making powers, and hence against the equality of statutes and treaties assumed by the last-in-time rule. The supremacy principle promotes a constitutional rule to resolve conflict between overlapping powers given to different actors.[682]

C. The Possible Supremacy of a Last-in-Time Treaty of Peace

There is one case where a later-enacted treaty may be supreme over prior statutes: when peace is at stake.[683] A treaty of peace is the highest grade of treaty, and as its name suggests, concludes war between nations.[684] This type of treaty paradigmatically involves circumstances of necessity, including the possible alienation or cession of territory belonging to the nation or the states.[685] More precisely, a treaty of peace may be supreme over prior statutes because it is last-in-time; it would not be supreme over future statutes because Congress, given its power to declare war, has the power to supersede the treaty of peace as necessary.[686]

One reason for possible treaty supremacy in this context, unlike other contexts, is the functionalist argument from necessity. On this account, a treaty of peace, in order to be effective—literally stop the bloodshed on the

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be subject to the Revision and Controul of the Congress."); THE FEDERALIST NO. 32, *supra* note 4, at 200–01 (Alexander Hamilton) (discussing "concurrent jurisdiction" of the states and the federal government).

[681] *See* U.S. CONST. art. VI, cl. 2.

[682] Professor Yoo proposes to eliminate the possibility of clash between the lawmaking and treaty-making powers by restricting the scope of the self-executing treaty-making power to matters not touching the lawmaking power. *See supra* notes 136–40, 167–68 and accompanying text. This is more work than the supremacy principle, as a structural consideration, can perform alone. This involves the historical question of the scope of the self-executing treaty-making power. Once we accept that self-executing treaties may be made on matters touching Congress's legislative powers, the supremacy principle suggests that statutes and treaties are not of equal legal priority.

[683] The thoughts sketched herein are based on considerations of constitutional structure. This issue deserves further attention as a matter of constitutional history.

[684] *See* 3 E. DE VATTEL, THE LAW OF NATIONS, bk. 4, ch. 2, § 9, at 346 (James Brown Scott ed., 1916) (1758) ("When two powers which were at war have agreed to lay down their arms, the agreement or compact in which they settle the terms of peace and regulate the manner in which it is to be restored and maintained is called the *treaty of peace*."); *id.* § 19, at 350 ("The effect of the treaty of peace is to put an end to the war and to abolish the subject of it."). I take no position as to whether a treaty to avoid a certain war that has not yet been declared (i.e., a treaty to preserve the peace) is equivalent to a treaty of peace for constitutional purposes.

[685] *See id.* § 11, at 347 (discussing "alienation of a part of the State . . . in cases of urgent necessity, such as those brought about by an unfortunate war"). For extensive discussion, see LAWSON & SEIDMAN, *supra* note 250, at 65–68. Whether a treaty of peace alienating state or national territory would require the consent of Congress is beyond concern here.

[686] Yet, the special place of a treaty of peace in the constitutional structure and a congressional presumption to preserve peace suggest that there is an ultra-strong clear statement rule if a later-enacted statute is to trump a prior treaty of peace in case of conflict.

battlefield, and ensure the nation's survival—would need to annul the nation's statutes incident to the state of war[687] and perhaps other statutes too.[688] The argument from necessity draws support from several clauses in the original Constitution recognizing circumstances that cannot afford delay.[689] Of course, the statutes relating to the war being settled, including at a minimum, the declaration of war, might be properly read to sunset upon the ratification of a treaty of peace, in which case the treaty of peace would not repeal them.[690] However, not all statutes might be read to sunset in this way, in which case the treaty of peace would need to repeal them in order to be effective.[691] Alternatively, if a treaty of peace did not of itself effect the repeal of existing statutes, it might nevertheless place a constitutional duty on Congress to do so.[692] The countervailing consideration is that Congress should have a say in determining the terms of the peace.

Another reason for possible treaty supremacy in this context, unlike other contexts, relates to the separation of powers involving war and peace. On this account, the Constitution carefully separates these powers along three tracks: the power to declare (and possibly make) war is vested in Congress; the power to conduct (and possibly make) war is vested in the President; and the power to make peace is vested in the President and Senate.[693]

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[687] *See, e.g.*, Letter I of Helvidius, *reprinted in* LETTERS OF PACIFICUS AND HELVIDIUS, *supra* note 154, at 58 ("[A] conclusion of peace *annuls* all the *laws* peculiar to a state of war, and *revives* the general *laws* incident to a state of peace.").

[688] Arguments from necessity do not mean that a treaty of peace may do what the Constitution prohibits. All treaties are subject to the Constitution at all times. Whether the Constitution itself recognizes its preservation as a meta-principle of constitutional construction or whether some actions in the name of necessity really are unconstitutional is a separate question. For an enlivening debate, compare Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004) with Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004).

[689] *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); *see also* THE FEDERALIST NO. 74, *supra* note 4, at 449 (Alexander Hamilton) (stating that the "principal argument" for vesting the power of pardoning in the President is that "in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall").

[690] *See* AMAR, *supra* note 20, at 304.

[691] Professor Amar suggests otherwise, but does not focus on these possibilities. *See id*.

[692] Of course, a treaty of peace, even in cases of urgent necessity, may require congressional action for reasons unrelated to the amendment or repeal of existing statutes. For example, a treaty of peace may often require appropriations, in which case the President would need to convene the House of Representatives on this extraordinary occasion. *See* U.S. CONST. art. II, § 3.

[693] *See* 2 FARRAND, *supra* note 127, at 318–19 (rejection of motion at the Philadelphia Convention to add "and peace" to the Declare War Clause, U.S. CONST. art. I, § 8, cl. 11).

If the peace power is meaningfully independent of the war power, it would seem to follow that a treaty of peace made by the President and Senate would not require the further consent of Congress in the event of statute-treaty conflict. This conclusion draws support from the constitutional principle that it should be easier to declare or make peace than to declare or make war.[694] It would not be easier to determine peace if the terms of the peace remain subject to congressional veto. The countervailing consideration is that the power to make peace by treaty is not unlimited, but is subject to constitutional limitations, one of which may relate to the necessity of congressional consent in the event of statute-treaty conflict.

Of course, when peace is not at stake, the foregoing considerations do not apply. In such cases, there are no constitutionally sufficient reasons for the supremacy of later-enacted treaties to prior statutes.[695]

V. SOME MODERNIST REFLECTIONS

How do we square an eighteenth-century foreign affairs Constitution with twenty-first century reality? For some, originalism as a methodology of constitutional interpretation may be less persuasive in thinking about foreign affairs because the Founding generation's world order has changed in the most profound ways.[696] America is no longer an isolated hinterland

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[694] *See id.* at 319 (remarks of Oliver Ellsworth and George Mason at the Philadelphia Convention expressing desire that making peace should be easier than declaring and making war); *id.* at 548 (discussing power to make peace by treaty).

[695] The possible supremacy of a last-in-time treaty of peace over prior statutes may serve to explain *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), an early case in the Supreme Court involving the "Quasi-War" with France. The undeclared Quasi-War began on July 7, 1798, when Congress by statute terminated the nation's treaties with France, and ended with a "Convention" between the two nations signed on September 30, 1800 and ratified on July 31, 1801. *See* Prakash & Ramsey, *Executive Power over Foreign Affairs*, *supra* note 154, at 326 n.409 (2002). In *Schooner Peggy*, the Supreme Court decided that the capture of the Schooner Peggy, a French ship, as prize pursuant to a federal statute of July 9, 1798, was no longer lawful given the last-in-time "peace" treaty. *See* 5 U.S. at 109–10. The Court observed that the treaty "positively changes the rule which governs." *Id.* at 110.

There are only two interpretive possibilities: (1) the 1800 treaty was in conflict with the 1798 statute, and the Court resolved the conflict by applying the last-in-time rule; or (2) the 1800 treaty was not in conflict with the 1798 statute because the Court interpreted the 1798 statute (which was passed in the immediate wake of the July 7, 1798 statute all but declaring war on France) as properly "sunsetting" upon the ratification of the treaty, *see supra* note 690 and accompanying text. At the very minimum, *Schooner Peggy* involves special circumstances of (undeclared) war and peace, which limits the application of any last-in-time rule to be derived from the case. Of course, nearly three decades later, Chief Justice Marshall would observe, in dicta, that a later-enacted treaty trumps existing statutes in case of conflict. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829); *see also supra* text accompanying note 656 (discussing this point in *Foster*). Thanks to Professor Sloss for bringing *Schooner Peggy* to my attention.

[696] On the importance of originalism in the constitutional law of foreign affairs, see, for example, John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1221–22 (1999); Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2218 n.2.

across the pond,[697] but is the world's economic and military superpower. Contrary to the Founding generation's expectations, treaties are no longer rare or infrequent.[698] Treaties are increasingly coming to resemble statutes in regulating private conduct.[699]

These "changed circumstances" may bear on the scope of the treaty-making power, consisting of the vertical structural relationship known as federalism and the horizontal structural relationship between the treaty-making power and the lawmaking power.[700] But it is difficult to see how they bear on the lexical priority of statutes and treaties. It is hard to imagine that this fundamental structural relationship has been altered by the changes since the Founding any more than the requirements for bicameral approval and presentment in lawmaking have.[701] Rules are rules. Just the same, it is worth considering the modern foreign affairs Constitution in practice, beyond the interpretive lens of the Founding, to see what clues emerge with respect to the structural relationship between statutes and treaties and the doctrine of non-self-execution.

Importantly, modern practice soundly resonates with the three tiers of federal law thesis and the partial non-self-execution thesis, two sides of the same coin. This Part begins by briefly considering two changed circumstances of treaty-making and questions the relevance of the Founders' design. The Part then considers doctrinal arguments and the coherence of the partial non-self-execution thesis with the judicial doctrine. The Part then addresses three modern phenomena supporting the three tiers of federal law thesis: (i) the displacement of the treaty by the congressional-executive agreement as the dominant form of international agreement-making; (ii) an increasing judicial presumption toward non-self-executing treaties; and (iii) a growing practice among treaty-makers to attach "non-self-execution" reservations, understandings, and declarations (RUDs) to treaties. Finally, this Part offers some thoughts on codifying the three tiers of federal law thesis. The three tiers of federal law thesis best coheres with both the Constitution's original meaning as well as our constitutional experience.

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[697] *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 179, at 212 (remarks of James Madison, Virginia ratifying convention) ("Have we any danger to fear from the European countries? . . . Our situation is relatively the same to all foreign powers. View the distance between us and them: the wide Atlantic—an ocean three thousand miles across—lies between us. If there be any danger to these states to be apprehended from any of those countries, it must be Great Britain and Spain, whose colonies are contiguous to our country.").

[698] *See infra* Part V.A.1.

[699] For examples, see Yoo, *Globalism and the Constitution*, *supra* note 33, at 1956–57 (surveying treaties regulating international security, international trade, individual rights, and the environment).

[700] On taking historical change into account when interpreting the Constitution, see JOHN HART ELY, DEMOCRACY AND DISTRUST 63–69 (1980); BOBBITT, *supra* note 661, at 92–93; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

[701] *See* U.S. CONST. art. I, § 7, cl. 2.

A. The Changed Circumstances of Treaty-Making

Two of the Founders' assumptions concerning treaty-making are in especially sharp tension with modern realities. First, the Founders believed that treaties would be infrequent, and thus systematically underestimated the possibility of statute-treaty conflict. Second, the Founders excluded the House of Representatives from treaty-making because they thought the House would be unfit to participate. These changed circumstances and their implications for the modern constitutional law of foreign affairs are discussed below.

1. The Frequency of Treaties.—The Founding generation believed that treaties would be infrequent and would therefore not interfere much with federal laws.[702] America was an isolated hinterland across the pond—and the Founders were content for the young nation to be removed from the sphere of foreign affairs after the Revolutionary War. At the Philadelphia Convention, Elbridge Gerry, discussing the power of the Senate, commented that "few" ambassadors and ministers were "necessary," and that "[i]t is the great opinion of many that they ought to be discontinued, on our part; that none may be sent among us, & that source of influence be shut up."[703] Gouverneur Morris likewise observed that "[i]n general he was not solicitous to multiply & facilitate Treaties. . . . The more difficulty in making treaties, the more value will be set on them."[704]

The Founding generation's assumptions about the frequency of treaty-making came into sharp relief during discussions regarding whether the Senate, feared by Anti-Federalists, would be constantly sitting. The Senate's responsibilities, apart from lawmaking, include impeachments, treaties, and appointments.[705] These responsibilities would not take much time. As James Wilson observed at the Pennsylvania ratifying convention:

> With regard to their power in making treaties, it is of importance that it should be very seldom exercised. We are happily removed from the vortex of European politics, and the fewer and the more simple our negotiations with European powers, the better they will be. If such be the case, it will be but once in

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[702] Some thought that federal lawmaking would be infrequent too. *See id.* art. I, § 4, cl. 2 ("The Congress shall assemble *at least once* in every Year . . . ." (emphasis added)); 2 FARRAND, *supra* note 127, at 198 (remarks of Gouverneur Morris) (stating that "[i]t was improper to tie down the Legislature to a particular time, or even to require a meeting every year" because "[t]he public business might not require it"); THE FEDERALIST NO. 53, *supra* note 4, at 334 (James Madison) ("The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code. Improvements on the first draught will every year become both easier and fewer."); A Citizen of New Haven: Observations on the New Federal Constitution (Jan. 7, 1788) [hereinafter A Citizen of New Haven], *reprinted in* 15 DHRC, *supra* note 4, at 281 ("It is not probable that Congress will have occasion to sit longer than two or three months in a year, after the first session which may perhaps be something longer.").

[703] 2 FARRAND, *supra* note 127, at 285.

[704] *Id.* at 393.

[705] *See* U.S. CONST. art. I, § 3, cl. 6; *id.* art. II, § 2, cl. 2.

> a number of years that a single treaty will come before the Senate. I think, therefore, that on this account it will be unnecessary [for the Senate] to sit constantly.[706]

The Founders were never quite correct. Treaties were not so infrequent at the Founding.[707] During the first fifty "isolationist" years of the Republic, the nation entered into 60 treaties and 27 non-treaty international agreements.[708] During fifty recent "internationalist" years, from 1939 to 1989, the nation entered into 702 treaties and 11,698 non-treaty agreements.[709] As of this writing, there are over two thousand treaties in force today, along with scores of non-treaty agreements.[710]

The Founders' systematic underestimation of the possibility of statute-treaty conflict is no reason not to think carefully about it now. The question is whether the last-in-time rule makes sense given modern realities in an age of globalization.

2. The Role of the House of Representatives.—The Framers' rejection of the House of Representatives from the treaty-making process is a classic example of changed circumstances in the constitutional law of foreign affairs. The Framers rejected the House because of the need for secrecy and dispatch, which they believed would be compromised in a large body.[711] They did so because of their belief that the President and Senators

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[706] 2 ELLIOT'S DEBATES, *supra* note 179, at 513 (remarks of James Wilson, Pennsylvania ratifying convention); *see also* 3 *id.* at 410 (remarks of James Madison, Virginia ratifying convention) ("With respect to treaties, the occasions of forming them will not be many, and will make but a small proportion of the time of session."); 4 *id.* at 135 (remarks of Archibald Maclaine, North Carolina ratifying convention) ("Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary."); A Citizen of New Haven, *supra* note 702, at 281 ("Nor will it be necessary for the senate, to sit longer than the other branch, the appointment of officers may be made during the session of Congress, and trials on impeachment and making treaties will not often occur and will require but little time of the senate to attend to them."); Letter XI of Federal Farmer, *supra* note 328, at 309 ("It is probable the United States will not make more than one treaty, on an average, in two or three years.").

[707] *See, e.g.*, THE FEDERALIST NO. 3, *supra* note 4, at 42–43 (John Jay) ("America has already formed treaties with no less than six foreign nations, and all of them, except Prussia, are maritime, and therefore able to annoy and injure us. She has also extensive commerce with Portugal, Spain, and Britain, and with respect to the two latter, has, in addition, the circumstance of neighborhood to attend to.").

[708] *See* John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 766 (2001) (citation omitted).

[709] *Id.* (citation omitted).

[710] U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2004 (2004).

[711] *See, e.g.*, 2 FARRAND, *supra* note 127, at 538 (remarks of James Wilson, Philadelphia Convention) (stating that "[t]he circumstance of secrecy in the business of treaties formed the only objection" to legislative ratification of treaties); *id.* (remarks of Roger Sherman, Philadelphia Convention) (stating that "the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature"); THE FEDERALIST NO. 75, *supra* note 4, at 452 (Alexander Hamilton) (stating that "*secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous."); 3 ELLIOT'S DEBATES, *supra* note 179, at 509 (remarks of Federalist Francis Corbin, Virginia ratifying convention) (stating that "large

would have an experience and expertise advantage in foreign affairs due to their longer office-holding terms.[712] They did so because of their belief that the President and Senators would spend significant time at the seat of government,[713] where they would be in close proximity to foreign ambassadors,[714] in contrast to Representatives who would quickly return home after relatively short sessions of Congress.[715]

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popular assemblies are very improper to transact such business, from the impossibility of their acting with sufficient secrecy, despatch, and decision, which can only be found in small bodies" and that "such numerous bodies are ever subject to factions and party animosities"); 4 *id.* at 119 (remarks of Federalist William Davie, North Carolina ratifying convention) (noting the "necessity and reason arising from that degree of secrecy, design, and despatch, which is always necessary in negotiations between nations"); Letter of Civis (Feb. 4, 1788), *reprinted in* 16 DHRC, *supra* note 4, at 24 ("Can the Continental House of Representatives [keep a secret in making treaties]?"); Letter I of Marcus (Feb. 20, 1788), *reprinted in* 16 DHRC, *supra* note 4, at 168 ("From the nature of the thing, [the treaty-making power] could not be vested in the popular Representative.").

[712] *See, e.g.*, 1 FARRAND, *supra* note 127, at 426 (remarks of James Wilson) (stating that "Senate will probably be the depositary of the powers concerning" relations "to foreign nations" because of the longer terms of Senators); *see also* THE FEDERALIST NO. 64, *supra* note 4, at 392 (John Jay); 3 STORY'S COMMENTARIES, *supra* note 5, § 1511, at 363–64.

[713] *See, e.g.*, 2 FARRAND, *supra* note 127, at 274 (remarks of George Mason, Philadelphia Convention) (observing that Senators "will probably settle themselves at the Seat of Govt." unlike Representatives "chosen frequently and obliged to return frequently among the people"); *id.* at 523 (remarks of James Wilson, Philadelphia Convention) ("The Senate, will moreover in all probability be in constant Session."); *id.* at 537 (remarks of George Mason, Philadelphia Convention) (supporting President's privy council because it would "prevent the constant sitting of the Senate which he thought dangerous"); *id.* at 639 (remarks of George Mason, Philadelphia Convention) (referring to "long continued sessions of the Senate"); Mason's Objections, *supra* note 307, at 349 (referring to Senate as "a constant existing Body almost continually sitting"); Letter XVI of Brutus, *supra* note 319, at 67 (stating that Senators "will for the most part of the time be absent from the state they represent" and will be inhabitants of the "federal city"); 2 ELLIOT'S DEBATES, *supra* note 179, at 287–88 (remarks of Robert Livingston, New York ratifying convention) ("Their attention to their various business will probably require their constant attendance.").

[714] *See, e.g.*, U.S. CONST. art. II, § 3 ("[The President] shall receive Ambassadors and other public Ministers"); *id.* art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction."); Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469–78 (1989).

[715] *See, e.g.*, Barnes v. Kline, 759 F.2d 21, 38–39 (D.C. Cir. 1985) (stating that "the Framers envisioned that Congress would convene its annual session, complete its business within several months, and adjourn for the remaining three-fourths of the year"), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). On the significance of short legislative sessions for the House's role in treaty-making, see THE FEDERALIST NO. 75, *supra* note 4, at 452–53 (Alexander Hamilton) ("The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened to obtain their sanction in the progressive stages of a treaty would be a source of so great inconvenience and expense as alone ought to condemn the project."); 2 ELLIOT'S DEBATES, *supra* note 179, at 506 (remarks of James Wilson, Pennsylvania ratifying convention) (stating that "[a] long series of negotiation will frequently precede [treaties]; and can it be the opinion of these gentlemen that the legislature should be in session during this whole time?").

To be sure, none of these justifications are terribly compelling in our modern constitutional order.[716] The Senate today is more than three times the size of the original Senate, not to mention more than one and one half times the size of the original House. Most treaties do not demand secrecy or dispatch, particularly given that the Senate's role has been largely limited to consent.[717] Representatives are no longer farmer-legislators, but professionals with significant knowledge of foreign affairs,[718] who spend just as much time in Washington, D.C., as Senators. Given their high incumbency rates,[719] the House today has more continuity than the Founding generation ever expected.[720]

The original(-ist) justifications for excluding the House from the treaty-making process are weak. Indeed, there are reasons to suppose that the Founders would not have excluded the House if exposed to modern realities. The Founders recognized that legislative participation in treaty-making was desirable and sometimes indispensable, particularly given assumptions of self-execution, but were forced to justify the exclusion of the People's branch by repairing to arguments of secrecy, dispatch, etc. The question is whether it still makes sense to cut the House out of the loop in the treaty-making process, especially when the repeal of statutes is at stake. A practice of non-self-execution by the President and Senate infuses the treaty-making process with democratic elements by giving Congress the opportunity to implement treaties as a matter of domestic law.[721]

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[716] For an excellent discussion on which this section builds, see Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2241 & n.85; Yoo, *supra* note 708, at 845–46.

[717] *See* RESTATEMENT (THIRD), *supra* note 5, § 303, reporters' n. 3; STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 55–58 (1993); 3 STORY'S COMMENTARIES, *supra* note 5, § 1517, at 370–72. When President Washington appeared in the Senate to discuss a treaty, the noise and confusion led to the postponement of the matter to be discussed, and according to one story, he declared that "he would be damned if he ever went there again." ELKINS & MCKITRICK, *supra*, at 55.

[718] *See* Yoo, *supra* note 708, at 845 ("[T]he House today can play an equal role to the Senate in foreign policy, with committees on international relations, national security, and intelligence that routinely handle sensitive information.").

[719] *See id.* at 845 n.366 (citing NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS, 1997–1998, at 47–49, 64–65 (1998)).

[720] *Cf.* THE FEDERALIST NO. 64, *supra* note 4, at 392 (John Jay) (praising involvement of Senate in treaty-making) ("Nor has the convention discovered less prudence in providing for the frequent elections of senators in such a way as to obviate the inconvenience of periodically transferring those great affairs entirely to new men; for by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved.").

[721] For additional discussion, see *infra* Part V.D.1 (advocating practice of non-self-execution by treaty-makers).

B. Doctrinal Considerations

A constitutional theory's fit with doctrine is important to most and essential to some.[722] In general, a theory has the most appeal when claims based on text, history, structure, and doctrine cohere.[723] In practice, doctrine tends to be judicial doctrine, though the interpretations of other constitutional actors such as Congress and the President are also relevant. A detailed review of the judicial doctrine of non-self-execution is beyond the scope of this Article, but a few short observations are in order.

The accepted judicial doctrine (and conventional wisdom) is the total self-execution thesis: treaties, if they purport to be self-executing, are self-executing as a matter of domestic law, even when they touch subjects within Congress's legislative powers, with exceptions for certain powers thought to be within Congress's exclusive province.[724] According to Professor Vázquez, there are "many, many cases" supporting this thesis in the Supreme Court and lower federal courts.[725] This thesis implicitly denies the superiority of statutes to treaties: Under the last-in-time rule, the President and Senate may make a self-executing treaty, even though that treaty conflicts with existing statutes made by Congress and the President. To date, the only cases where treaties have been found to be non-self-executing are those cases where the treaty, by its terms, purports to be non-self-executing.[726]

Importantly, the partial non-self-execution thesis lays claim to a nearly perfect fit with the accepted judicial doctrine. Although the last-in-time rule between statutes and treaties is both well-established and long-established,[727] it has been squarely applied in the "reverse" direction of later-enacted treaties and prior statutes in only one case in the Supreme Court[728] and a small handful of cases in the lower federal courts.[729] As a

[722] *See* BOBBITT, *supra* note 661, at 39–58 (discussing doctrinal argument); *see also* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–28 (2000) (discussing "documentarians" and "doctrinalists").

[723] For a thoughtful discussion, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

[724] *See supra* notes 126–30 and accompanying text.

[725] Vázquez, *Laughing at Treaties*, *supra* note 27, at 2189; *see id.* at 2191 n.147 (citing cases). Several of these cases relate to the Warsaw Convention, which limits plaintiffs' damages under state tort law for airplane accidents. Professor Yoo characterizes the Warsaw Convention as arguably not touching upon Congress's legislative powers. *See* Yoo, *Treaties and the Lawmaking*, *supra* note 31, at 2255. Professor Vázquez criticizes this characterization with respect to modern Foreign Commerce Clause doctrine—and rightly so. *See* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2214.

[726] These cases are numerous and relate to statutory (treaty) interpretation, not explicit constitutional considerations. *See, e.g.*, Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2255 n.139 (listing cases).

[727] *See supra* Part I.B.

[728] *See* Cook v. United States, 288 U.S. 102 (1933); *see also supra* Part I.B.4 (discussing *Cook*). For one possible exception involving special circumstances of war and peace, see United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), discussed at *supra* note 695.

doctrinal matter, the partial non-self-execution thesis only requires the overruling of one Supreme Court case on one point, thereby restricting the last-in-time rule to the "forward" direction of later-enacted statutes and prior treaties. Moreover, the considerations of stare decisis are at their weakest when it comes to overruling the last-in-time rule.[730] To accept the last-in-time rule simply because it is entrenched is to put doctrine—and utterly unreasoned doctrine—before constitutional argument; the strength of doctrine should depend on the quality of its reasoning.[731] Thus, even for the strongest doctrinalists, the partial non-self-execution thesis should have significant appeal given its coherence with all but the smallest (and unreasoned) portion of the accepted judicial doctrine.[732]

C. Modern Phenomena

Three modern phenomena support the principles underlying the three tiers of federal law thesis and the superiority of statutes to treaties irrespective of time. These three phenomena are discussed below.

1. The Displacement of the Treaty.—As an empirical matter, the treaty—and specifically the self-executing treaty—is somewhat of an endangered species. Since World War II, the treaty has been largely displaced

[729] *See* cases cited *supra* note 89.

[730] We may see this point in a few ways. As a general matter, stare decisis is a rule of policy, not a rule of law. As the Supreme Court has reminded us, the policy of stare decisis "is not an inexorable command" and "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *See* Agostini v. Felton, 521 U.S. 203, 235 (1997) (O'Connor, J.). More importantly, one of the most important policy interests of stare decisis is the protection of the "reliance interests" of individuals, which has no applicability in the context of the last-in-time rule which involves the structural issues of constitutional law, namely the separation of powers between the treaty-makers and the lawmakers. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."). Finally, an overruling of the last-in-time rule would hardly cause a jolt to the legal system, even less so given that the rule is infrequently applied. For an excellent discussion of the specific policy factors of stare decisis (workability, reliance, "remnant of abandoned doctrine," changed facts, and judicial integrity), see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1551–67 (2000).

[731] *See, e.g.*, *Payne*, 501 U.S. at 827 ("[W]hen governing decisions are . . . badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

[732] For this very reason, Professor Yoo's total non-self-execution thesis, which is in tension with a large portion of the judicial doctrine, lacks appeal among doctrinalists or those who place significant value on a theory's fit with actual judicial doctrine (in contrast to documentarians who place significant value on the actual meaning of the document, even if at variance with the doctrine). *Cf.* Flaherty, *History Right?*, *supra* note 48, at 2098 (criticizing Yoo's originalist methodology in light of the "modern doctrinal position" and "constitutional practice"). For his part, Yoo concedes, parsimoniously, that his theory "cannot claim to fully fit current practice." *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2254.

by the "congressional-executive agreement."[733] As its name suggests, the congressional-executive agreement is an international agreement made by the President and approved by a simple majority of each House of Congress.[734] It has the status of a treaty as a matter of international law,[735] and the status of a statute as a matter of domestic law. Some of the most important international agreements of the past century have taken the statutory form, including the Bretton Woods Agreement,[736] SALT I,[737] NAFTA,[738] and the Uruguay Round establishing the World Trade Organization.[739] A recent study found that between 1946 and 1972, almost 90% of all international agreements took the form of statutory agreements.[740] The question is why.

The rise of the congressional-executive agreement reflects the democratization of the treaty-making process.[741] To be sure, there may be other factors at work, such as the desire to circumvent the notoriously difficult two-thirds supermajority consent requirement in the Senate.[742] Interestingly, the congressional-executive agreement has taken firm hold in areas involving international trade, where Congress has power and where the propensity for statute-treaty conflict is particularly high.[743] Because the congressional-executive agreement has the status of a statute, the last-in-time rule applies to resolve conflicts between laws of the same tier. Although congressional-executive agreements may not be perfectly interchangeable with treaties because they involve powers of different scope,[744]

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[733] For a good discussion, see Yoo, *supra* note 708, at 765–68.

[734] In addition, a number of international agreements have been made by the President alone in what is commonly known as a "sole executive" agreement. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998).

[735] International law defines an international agreement as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law," RESTATEMENT (THIRD), *supra* note 5, § 301(1), a definition sufficiently broad to include both congressional-executive agreements and treaties as valid international obligations of the United States, not to mention sole executive agreements. *See also id.* § 111.

[736] Bretton Woods Agreement Act, Pub. L. No. 79-171, 59 Stat. 512 (1945).

[737] Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3462.

[738] North American Free Trade Agreement, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289.

[739] Multilateral Trade Negotiations: Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 108 Stat. 4809, 33 I.L.M. 1125.

[740] *See* Yoo, *supra* note 708, at 766 (citation omitted).

[741] *See* Henkin, *Treaties in a Constitutional Democracy*, *supra* note 14, at 422–23 (commending democratic character of congressional-executive agreements).

[742] For a good discussion of the rationale and consequences of this supermajority rule, see also McGinnis & Rappaport, *supra* note 671, at 760–69.

[743] *See* Yoo, *supra* note 708, at 811.

[744] *See id.* at 821–52 (arguing that the scope of congressional-executive agreements is limited to Congress's legislative powers). For the conventional wisdom of complete interchangeability, see RESTATEMENT (THIRD), *supra* note 5, § 303 cmt. e ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."); HENKIN,

the modern preference for congressional-executive agreements in lieu of treaties powerfully supports the principles of the three tiers of federal law thesis by affirming the superiority of statutes to treaties as a form of law-making.

2. *The Judicial Presumption of Non-Self-Execution.*—In recent years, courts have increasingly attached a presumption that treaties are non-self-executing as a matter of domestic law.[745] This judicial presumption has been most disturbing to internationalists who condemn non-self-execution as clashing with the Supremacy Clause's command that "all Treaties made, or which shall be made, . . . shall be the supreme Law of the Land."[746] But these internationalists miss the point entirely: the presumption is simply a matter of what the treaty purports to do, not what the Constitution requires.[747] The presumption has a decidedly dualist character because it presumes that treaty-makers wish to make binding international commitments, but not automatically incorporate those commitments into the domestic law. Again, the question is why.

There are several reasons why courts have adopted a presumption of non-self-execution. In general, Professor Bradley suggests that "[i]n explaining this presumption, courts have noted that treaties are often less precise than federal statutes, their interaction with existing domestic law tends to be less certain, and their enforcement is more likely to raise foreign relations difficulties."[748] There may be other specific factors at work, including the desire to avoid (i) difficult questions concerning the scope of the treaty-making power,[749] (ii) political questions,[750] (iii) implying a private right of action which may cause a burst of litigation,[751] and (iv) preemption of state

supra note 6, at 217 ("[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty . . . ." (citations omitted)).

[745] *See, e.g.*, Bradley, *Dualist Constitution*, *supra* note 14, at 541 & n.62 (discussing presumption and citing cases); BRADLEY & GOLDSMITH, *supra* note 644, at 346–49.

[746] *See supra* note 124; *see also* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2173–75 (grappling with the "tension" between treaties purporting to be non-self-executing and the Supremacy Clause).

[747] Moreover, it is not a prohibition against self-execution; it is a simply a presumption or clear statement rule that shifts the burden of self-execution to the treaty-makers. The presumption may be overcome by affirmative evidence to the contrary, whether that evidence is text of the treaty, the intent of the parties, or the intent of the United States treaty-makers. *See* RESTATEMENT (THIRD), *supra* note 5, § 111 & cmt. h.

[748] Bradley, *Dualist Constitution*, *supra* note 14, at 541.

[749] *Cf.* Ashwander v. TVA, 297 U.S. 288, 341–56 (1936) (Brandeis, J.) (discussing statutory interpretation and avoidance of constitutional questions).

[750] On the linkage between non-self-execution and justiciability doctrine, see Vázquez, *Laughing at Treaties*, *supra* note 27, at 2178–80.

[751] *Cf.* Cort v. Ash, 422 U.S. 66 (1975) (setting forth factors with respect to implied private right of action).

law.[752] Most importantly for present purposes, the presumption may also reflect a desire to avoid the implied repeal of prior statutes by later-enacted treaties.[753] Or, it may also reflect a desire to allow Congress to participate in the creation of federal law.[754] These latter two reasons resonate with the three tiers of federal law thesis and the superiority of statutes to treaties as a form of lawmaking. As the quantity of statutes and treaties multiplies along with the probability of statute-treaty conflict, these aspects of the presumption of non-self-execution are likely to become more prominent in judicial decisions.

3. *Non-Self-Execution and Conditional Consent.*—The modern practice of treaty-makers lends support to the three tiers of federal law thesis and the superiority of statutes to treaties as a form of lawmaking. In recent years, treaty-makers have increasingly expressed their intent that treaties are non-self-executing. Sometimes the treaty itself specifies that it is non-self-executing.[755] In other cases, the President or the Senate, or both, may specify "non-self-execution" conditions to treaty ratification through reservations, understandings, and declarations (RUDs) in a practice known as "conditional consent."[756] Since they were first proposed by President Carter in 1979, "non-self-execution" RUDs have been attached by the United

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[752] *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (establishing clear statement rule for federal statutes with respect to preemption of state law in quintessential areas of state sovereignty). Strictly, this is a question of preemption, not non-self-execution, because a non-self-executing treaty may nevertheless preempt state law. *See supra* note 142. The issues are commonly linked because a self-executing treaty, by definition, would preempt state law (unless it provided otherwise).

[753] *Cf.* Johnson v. Browne, 205 U.S. 309, 321 (1907) ("Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty.").

[754] Professor Yoo embraces the presumption of non-self-execution on this ground. *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 31, at 2220 (advancing a "soft" rule that courts require treaty-makers "to issue a clear statement if they want a treaty to be self-executing").

[755] Or a treaty may provide that it is not a binding international commitment until it is implemented as a matter of domestic law in the respective jurisdictions. For nineteenth- and early-twentieth-century examples, see BRADLEY & GOLDSMITH, *supra* note 644, at 396.

[756] *See id.* at 385–99. Each has a different relationship to the treaty itself. In brief, reservations are "specific qualifications or stipulations that modify U.S. obligations without necessarily changing treaty language." CRS STUDY, *supra* note 126, at 125. Understandings are "interpretive statements that clarify or elaborate, rather than change, the provisions of an agreement and that are deemed to be consistent with the obligations imposed by the agreement." *Id.* Declarations are "statements of purpose, policy, or position related to matters raised by the treaty in question but not altering or limiting any of its provisions." *Id.* at 126. Although the constitutionality of reservations and understandings is largely settled, that of declarations is not. *See* BRADLEY & GOLDSMITH, *supra* note 644, at 396–98. Professor Henkin has characterized the Senate's practice of attaching non-self-execution declarations as "'anti-Constitutional' in spirit and highly problematic as a matter of law." HENKIN, *supra* note 6, at 201. For academic commentary on the constitutionality of non-self-execution declarations, see Bradley & Goldsmith, *supra* note 34, at 446–51; Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002).

States treaty-makers to all of the nation's major human rights treaties that have been ratified.[757] Once again, the question is why.

The reasons for non-self-execution RUDs are similar to the apparent reasons for the judicial presumption of non-self-execution discussed above. According to one State Department official, "The decision to make the treaty 'non-self-executing' reflects a strong preference, both within the Administration and in the Senate, not to use the unicameral treaty power of the U.S. Constitution to effect direct changes in the domestic law of the United States."[758] Importantly, because Congress is not commonly thought to have the power to enact human rights treaties by statute, the reasons for non-self-execution RUDs probably do not relate to the desire to avoid creating federal law in a sphere where Congress could also act. The reasons for these RUDs probably relate to the desire to avoid difficult constitutional questions concerning the scope of the treaty-making power and to avoid the repeal of existing state and federal statutory law without the involvement of Congress (and potentially the state legislatures). The latter point is especially important because human rights treaties would likely sweep aside scores of state and federal statutes in their path.[759] Thus, the use of non-self-execution RUDs by treaty-makers affirms the principles of the three tiers of federal law thesis.

D. Codifying the Three Tiers of Federal Law Thesis

In making statutes and treaties, Congress and the treaty-makers have an important role to play in codifying the three tiers of federal law thesis and promoting the harmony between statutes and treaties. If statutes are superior to treaties, as this Article maintains, Congress and the treaty-makers may act to lessen the probability of statute-treaty conflict. And if the last-in-time rule is constitutionally required, Congress and the treaty-makers may nevertheless promote the superiority of statutes to treaties and lessen the probability of statute-treaty conflict.

1. The Role of the Treaty-Makers.—In making treaties, the treaty-makers may promote the three tiers of federal law thesis in various ways. They may exercise their *power* to make treaties that are non-self-executing

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[757] *See, e.g.*, U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992), *reprinted in* BRADLEY & GOLDSMITH, *supra* note 644, at 388–89; *id.* at 394.

[758] BRADLEY & GOLDSMITH, *supra* note 644, at 396 (quoting Statement of Conrad K. Harper, USUN Press Release #49-(95), at 3 (Mar. 29, 1995)).

[759] This exact point was immediately apparent in the late 1970s when the first human rights treaties were introduced. *See* Charles H. Dearborn, III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 235 (1979); *see also* BRADLEY & GOLDSMITH, *supra* note 644, at 394 (stating that President Carter's non-self-execution RUDs countered opposition that "the vaguely worded terms in the treaties, would, if self-executing, sow confusion in the law by superseding inconsistent state law and prior inconsistent federal legislation").

without congressional implementation. This practice solves the problem of statute-treaty conflict because the implementing statute, as the statute carrying the non-self-executing treaty into execution, is last-in-time and supersedes prior statutes. There may be constitutional limits to Congress's power to implement non-self-executing treaties, which are discussed below.

In addition, there are a few options with respect to self-executing treaties:

(1) There is no doubt that a treaty, by its terms, may specify that the nation's commitment as a matter of international law is subject to the lack of conflict with federal statutes, whether pre-existing or later-enacted.[760]

(2) There is little doubt that a treaty, by its terms, may provide that it is self-executing as a matter of domestic law only to the extent that it does not conflict with federal statutes, whether pre-existing or later-enacted.

(3) As a general measure to lessen the probability of statute-treaty conflict, the treaty, by its terms, may provide a converse-*Charming Betsy* rule of construction that it should not be construed to be in conflict with federal statutes if any other construction is possible.

These three options depend on another sovereign's agreement with these conditions, which may not be so easy. The big question is whether the latter two options, which solely relate to the domestic law impact of treaties, may be accomplished by the United States treaty-makers alone through RUDs. This is a question of our constitutional law. If non-self-execution RUDs are constitutional, so are partial non-self-execution RUDs.

2. *The Role of the Congress.*—Congress may, by statute, promote the three tiers of federal law thesis and lessen the probability of statute-treaty conflict in various ways:

(1) There is no doubt that a statute, by its terms, may provide that it is inferior to treaties, whether pre-existing or later-enacted, in the event of conflict. In fact, Congress already has chosen to do so in the field of income taxation. Statutes in this area provide that later-enacted treaties may "override" prior statutes in the event of

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[760] In a recent article, Professor Sloss signifies his agreement that "the treaty makers can agree to a treaty provision that incorporates by reference pre-existing statutes as a limitation on the scope of the international obligation, just as Congress can enact a statute that incorporates by reference pre-existing state law as a limitation on the scope of the federal statute." Sloss, *supra* note 756, at 42–43 n.190. But there is no reason why the limitation must only be with respect to "pre-existing" law. It might be unwise for the treaty-makers or Congress to specify that the treaty or statute, respectively, is subject to later-enacted law, but it is undoubtedly within their right to do so—just as it is in their right to provide for the expiration of the treaty or statute upon a sufficient number of the earth's rotations around the sun.

conflict.[761] This principle may be extended to other statutes selectively, especially politically important ones such as the Antiterrorism and Effective Death Penalty Act of 1996.[762] Or, in theory, this principle may be extended to all statutes retrospectively, eliminating the possibility of conflict between the entire United States Code and treaties, whether existing or later-enacted.[763]

(2) To the extent that Congress may provide federal rules of statutory (treaty) interpretation, Congress may codify the converse-*Charming Betsy* canon that a *treaty* should not be construed to be in conflict with a *statute* if any other construction is possible. This would promote the superiority of statutes to treaties as a matter of domestic law.[764]

(3) To the extent that Congress may provide federal rules of statutory (treaty) interpretation, Congress may codify the presumption of non-self-execution, including the adoption of a clear statement rule that a treaty will be presumed to be non-self-executing if it conflicts with federal statutes, whether pre-existing or later-enacted.

(4) Congress may choose to implement non-self-executing treaties by statute. Under the Necessary and Proper Clause, this power is commonly thought to extend beyond the mere incorporation of the treaty into domestic law and to include the power to legislate pursuant to the treaty by specifying the terms thereof.[765] If the scope of the treaty-making power is limited to that of lawmaking power

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[761] *See, e.g.*, I.R.C. § 894(a)(1) (providing that income tax statutes are to be applied "with due regard to any treaty obligation of the United States which applies to such taxpayer"); *id.* § 7852(d) (2001) (providing that "[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law"). For additional discussion, see Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 683–88 (2001) (discussing changing congressional attitude toward status of later-enacted tax treaties vis-à-vis existing income tax statutes). *See also* Richard L. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*, 9 EMORY INT'L L. REV. 71 (1995); David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?*, 47 TAX LAW. 867 (1994).

[762] *Cf.* Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam).

[763] Congress could not extend this principle to statutes prospectively; that is a choice to be made by the Congress enacting the future statute. *Cf.* 1 BLACKSTONE'S COMMENTARIES, *supra* note 57, at *90 ("Acts of Parliament derogatory from the power of subsequent parliaments bind not.").

[764] The converse-*Charming Betsy* canon carries a cost: it risks interpreting a treaty in a way that is different than the interpretation (if any) given to it by others in the international law sphere (e.g., the courts of the sovereign counterparty or international courts). But this is a risk even in the absence of the converse-*Charming Betsy* canon. Our law has never recognized that the interpretation given to a treaty by others controls its interpretation in the United States. In any case, this is a choice for the United States (Congress? courts?) to make.

[765] *See, e.g.*, Missouri v. Holland, 252 U.S. 416 (1920).

> as some have suggested,[766] Congress would have the power to incorporate and to legislate pursuant to any treaty. If the scopes of the treaty-making power and the lawmaking power are not perfectly co-extensive, as is more likely the case,[767] Congress's power to legislate pursuant to the treaty may be limited to what Congress could do in the absence of the treaty.[768] In such a case, Congress may nevertheless retain the power to merely incorporate a fully-specified but otherwise non-self-executing treaty into domestic law.[769] Such an implementing statute may be thought of as a "self-execution declaration" by Congress, allowing Congress to "carry[] into Execution" the treaty-making power.[770] It would take a very simple form: "This treaty [or treaty provision] shall be incorporated into the domestic law of the United States."

In sum, congressional implementation of non-self-executing treaties infuses the treaty-making process with democratic elements by allowing Congress to decide whether a non-self-executing treaty shall be a part of the domestic law, and, in some cases, allowing Congress to legislate pursuant to the treaty. It also solves the problem of statute-treaty conflict because the implementing statute, as the statute carrying the treaty into execution, is last-in-time and supersedes prior inconsistent statutes.

CONCLUSION

The hierarchical relationship between statutes and treaties is a critical question of constitutional law today. Given an ever-growing number of statutes and treaties in an age of globalization, conflicts between statutes and treaties are multiplying. It seems all but certain that the Supreme Court will have occasion to revisit the last-in-time rule in the near future. Instead of mechanically reverting to precedent, the Court might pause to consider whether the last-in-time rule is worthy of the moniker of judicial precedent given that it is not just badly reasoned, but utterly unreasoned.

Sometimes careful analysis of the Constitution's text, history, and structure can remove the barnacles of conventional wisdom that have at-

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[766] *See, e.g.*, Bradley, *The Treaty Power and American Federalism, Part II*, *supra* note 37; Bradley, *The Treaty Power and American Federalism*, *supra* note 37.

[767] *See generally* Golove, *Treaty-Making and the Nation*, *supra* note 37 (presenting the historical case why the scope of the treaty-making power is not limited by that of the lawmaking power).

[768] For arguments that the Necessary and Proper Clause does not give Congress the power to legislate pursuant to a treaty beyond what Congress could do in the absence of the treaty, see Virginia H. Johnson, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 CARDOZO L. REV. 347 (2001); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

[769] This assumes that the treaty, explicitly or implicitly, allows itself to be incorporated into the domestic law.

[770] U.S. CONST. art. I, § 8, cl. 18.

tached to the Constitution over the centuries and reveal refreshingly clear and satisfying insights about its original meaning.[771] These constitutional arguments constitute vectors of varying length and direction, but which point toward one conclusion: the Supreme Court's last-in-time rule is *unconstitutional*. The Constitution establishes three tiers of federal law. Statutes are superior to treaties, irrespective of time.

The historical argument does the yeoman's work in establishing the superiority of statutes to treaties. As a historical matter, the Founding generation would have been absolutely shocked to learn that the President and Senate, feared to be monarchical and aristocratic, respectively, would, by treaty, have the power to repeal the existing Laws of the United States, which necessarily include the judgments of the People's branch of the legislature, without the consent of Congress. This would be decidedly worse than British practice at the Founding, where Parliament's role clearly included carrying into effect treaties that contravened existing statutes. The Constitution did not depart from this British practice, but adopted it. So said leading Founders who addressed the issue of statute-treaty conflict during the framing and ratification periods. Against this showing, there is scant evidence from the Founding history to support the opposite proposition that later-enacted treaties may repeal prior statutes.

The historical answer is nicely buttressed by considerations of text and structure. The weight of textual and structural argument favors the superiority of statutes to treaties and militates against their equality. Chief Justice Marshall's fundamental insight in *Marbury v. Madison* regarding the implicit hierarchy of the Supremacy Clause is not limited to the superiority of the Constitution to statutes and treaties, but has additional application to the issue at hand. As a matter of constitutional text, the superiority of statutes to treaties is the *better answer* when it comes to choosing among the three logical possibilities of statute superiority, treaty superiority, or statute-treaty equality. As a matter of constitutional structure, in the absence of any other information, statutes should be *presumed* to be superior to treaties for the same reason that the Constitution is superior to both: they are superior representations of the will of the People.

Importantly, our modern constitutional experience adds much force to originalist conclusions. Three modern phenomena—the displacement of the treaty by the congressional-executive agreement, the rising judicial presumption of non-self-execution, and the practice of treaty-makers of attaching non-self-execution reservations, understandings, and declarations

[771] For my all-time favorite example of recovering the Constitution's original meaning, see Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995) (arguing that legislative succession to the Presidency, though adopted by statute in 1792, is unconstitutional). For thoughtful responses, see John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

(RUDs) to treaties—reflect, to varying degrees, the desire for later-enacted treaties not to repeal prior statutes without the consent of Congress.

The significance of the three tiers of federal law thesis extends beyond the necessary correction of the Supreme Court's last-in-time rule. The thesis has important implications for the longstanding non-self-execution debate.

A necessary consequence of the lexical priority of statutes to treaties is that treaties that conflict with existing statutes are non-self-executing. This rule of non-self-execution is the partial non-self-execution thesis. Under this thesis, Congress has the power to amend (or not) existing statutory law so as to remove the statute-treaty conflict and bring the treaty to life as a matter of domestic law. As a historical matter, this thesis is strongly supported by British practice at the Founding and the Founders' statements regarding the applicability of British practice to the Constitution. The partial non-self-execution thesis provides a much needed correction to the conventional wisdom of non-self-execution recently defended by Professors Flaherty and Vázquez by adding the case of statute-treaty conflict to the list of cases where the Constitution is understood to require non-self-execution.

At the same time, the partial non-self-execution thesis affirms traditional views about the scope of the treaty-making power. Careful historical analysis reveals that treaties, when made, may be self-executing even when they touch subjects within Congress's legislative powers, provided that they do not touch certain subjects within Congress's ostensibly exclusive legislative powers (consistent with the conventional wisdom) and provided that they do not conflict with existing statutes (consistent with the partial non-self-execution thesis). In other words, the scope of the *self-executing* treaty-making power is not completely limited by Congress's legislative powers, as Professor Yoo's total non-self-execution thesis would have it. In a world of sweeping congressional powers, Yoo's thesis means that the self-executing treaty-making power is largely a dead letter. As a historical matter, leading Founders did not define the scope of the treaty-making power by reference to Congress's legislative powers, or conversely, define the scope of Congress's power to implement treaties by reference to the same. Yoo's thesis did not gain currency until the Jay Treaty debate of 1795 to 1796, and then only in a House of Representatives whose constitutional powers were at stake in one of the greatest political firestorms of the early Republic.

The three tiers of federal law thesis also has important implications for the scope of the treaty-making power today. Given that there is probably no treaty of any significance that can be made today that does not interfere with some existing federal statute (or even another treaty), the partial non-self-execution thesis and Yoo's total non-self-execution thesis lead, somewhat surprisingly, to the same place: treaties must be non-self-executing, which means that congressional implementation is required before they may have the force of domestic law. But is this really so bad? There is hardly a

compelling reason today for excluding the House of Representatives from the process of treaty-making, especially given that treaties are increasingly regulating domestic conduct. There is, however, one important difference between the partial non-self-execution thesis and Yoo's thesis. The treaty-making power is not forever crippled by the need for congressional implementation: Congress may provide, by statute, that later-enacted treaties override prior statutes, just as Congress has done in the field of income taxation.

There remains the important question as to whether the three tiers of federal law thesis will be embraced by courts and scholars in lieu of the last-in-time rule. Professor Vázquez has written that "[t]o the extent that text, history, and doctrine are inconclusive, it may well be appropriate to defend a constitutional interpretation on the basis of the types of arguments one would make in drafting a constitution from scratch."[772] Although one may well disagree as to whether traditional constitutional interpretation is inconclusive, it is worth considering whether the three tiers of federal law thesis is one that the drafters of a new Constitution would want to adopt. Whether statutes are superior to treaties is then in many ways less important than the basic insight of this Article. At a bare minimum, courts and scholars should agree that statutes and treaties should not fall within the twilight zone of the last-in-time rule in the absence of serious justification as a matter of first principles.

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[772] *See* Vázquez, *Laughing at Treaties*, *supra* note 27, at 2154 n.3.