

GLOBALISM AND THE CONSTITUTION: TREATIES, NON-SELF-EXECUTION, AND THE ORIGINAL UNDERSTANDING

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As the globalization of society and the economy accelerates, treaties will come to assume a significant role in the regulation of domestic affairs. This Article considers whether the Constitution, as originally understood, permits treaties to directly regulate the conduct of private parties without legislative implementation. It examines the relationship between the treaty power and the legislative power during the colonial, revolutionary, Framing, and early national periods to reconstruct the Framers' understandings. It concludes that the Framers believed that treaties could not exercise domestic legislative power without the consent of Congress, because of the Constitution's creation of a national legislature that could independently execute treaty obligations. The Framers also anticipated that Congress's control over treaty implementation through legislation would constitute an important check on the executive branch's power in foreign affairs.

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INTRODUCTION

We live in a world of treaties. Today, treaties regulate aspects of politics, economics, and law that affect the everyday lives of many Americans. The United Nations treaty governs matters such as war and peace and establishes a mechanism for cooperation in maintaining international security.¹ Other agreements oblige the United States to send its men and women into battle to protect our allies.² The General Agreement on Tariffs and Trade,³ as recently strengthened by the World Trade Organiza-

1. See U.N. Charter art. 1, para. 1.

2. See, e.g., North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

3. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

tion Agreement,⁴ sets the rules of international trade, which now comprises approximately one-third of the nation's economic activity.⁵ The North American Free Trade Agreement creates a free market among the United States, Canada, and Mexico that subjects American businesses and jobs to tougher competition and opens new opportunities for economic growth.⁶ Various conventions establish the minimum level of individual rights that the United States owes its citizens.⁷ Other agreements regulate the environment and conserve wildlife,⁸ while contemplated treaties would require the United States to protect biodiversity and to limit its energy use and industrial pollution.⁹

As the breadth of our treaty obligations has broadened, their depth has increased as well. Recent treaties have sought to establish universal norms of public and private conduct that require multilateral agreement to ensure worldwide compliance. International agreements aim to prevent private conduct that harms the environment, human rights conventions seek to control the manner in which a state treats its citizens, and agreements such as the WTO attempt to regulate international economic activity. Some agreements even have created elaborate institutional

4. See *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.

5. See *Economic Report of the President*, February 1998, H.R. Doc. No. 105-176, at 216 (2d Sess. 1998).

6. See *North American Free Trade Agreement*, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289.

7. See, e.g., *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 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 a Human Rights Committee); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1960, 993 U.N.T.S. 3 (providing for rights to self determination and nondiscrimination, and to economic rights including economic assistance).

8. See, e.g., *Protocol on Substances that Deplete the Ozone Layer*, S. Treaty Doc. No. 100-10, at 1541 (1987) (establishing specific obligations to reduce use of chloroflourocarbons and other chemicals that deplete the ozone layer); *Vienna Convention for the Protection of the Ozone Layer*, S. Treaty Doc. No. 99-9, at 1516 (1985) (providing cooperation and research on preventing depletion of stratospheric ozone); *Convention on Long-Range Transboundary Air Pollution*, Nov. 13, 1979, 34 U.S.T. 3043, 18 I.L.M. 1442 (agreeing on protocols for controlling emissions of sulfur, nitrogen oxides, heavy metals and organic pollutants); *Agreement on the Conservation of Polar Bears*, Nov. 15, 1973, 27 U.S.T. 3918 (regulating sustainable use of polar bears for hunting, and providing for habitat protection); *Convention for the Conservation of Antarctic Seals*, June 1, 1972, 29 U.S.T. 441 (enumerating species of seals that will not be killed or captured in the agreed Antarctic areas); *International Convention for the Regulation of Whaling*, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (establishing an International Whaling Commission to regulate whaling and to research whales).

9. See, e.g., *Rio Declaration on Environment and Development*, June 14, 1992, 31 I.L.M. 874 (agreeing on principles of participation and cooperation in environmental management); *Framework Convention on Climate Change*, May 9, 1992, 31 I.L.M. 849; *Convention on Biological Diversity*, June 5, 1992, 31 I.L.M. 818 (creating general obligations to develop plans to monitor biodiversity, conserve ecosystems, and encourage diversity within species).

mechanisms and verification organizations to monitor adherence with treaty norms. As Abram and Antonia Chayes have observed, while "[s]uch treaties are formally among states, and the obligations are cast as state obligations . . . [t]he real object of the treaty . . . is not to affect state behavior but to regulate the activities of individuals and private entities."¹⁰ International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action.

Globalization is occurring at a time when our understanding of the primary constitutional mechanism for making such agreements,¹¹ the treaty power, remains confused and contradictory. Although, like statutes and the Constitution, treaties are supreme over inconsistent state law,¹² the process and objectives of treaty-making are quite different from other forms of public lawmaking. This leads to ambiguity and contradictions in the status of treaties in the American legal system. At times treaties are thought to take direct effect in American domestic law, even though they are made by the President and two-thirds of the Senate, without the participation of the House.¹³ At other times, however, courts consider treaties to be obligations between nations under international law, and refuse to give them effect in suits brought by individuals.¹⁴ First established in Supreme Court case law by Chief Justice John Marshall, the

10. Abram Chayes & Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 14 (1995).

11. This Article does not discuss the constitutionality of the congressional-executive agreement, which has been used in many situations in which a treaty might have been thought necessary. There is an ongoing dispute concerning whether such agreements are constitutional. Compare Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1250, 1277-78 (1995) (contending that the congressional-executive agreement cannot be used as an alternative to the treaty method in every instance), with Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 873-75 (1995) (arguing that such agreements appropriately modernize the treaty-making system, given the constitutional transformation at the end of World War II).

12. See U.S. Const. art. VI, cl. 2.

13. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 706 (1995) [hereinafter Vázquez, *Four Doctrines*].

14. See, e.g., *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 969 (4th Cir. 1992) (holding that the Hague Convention does not create a private right of action for its violation); *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466, 471 (5th Cir. 1992) (holding that a treaty between the U.S. and the Philippines did not create a private right of action to enforce its terms); *Frolova v. U.S.S.R.*, 761 F.2d 370, 374 (7th Cir. 1985) (holding that the human rights provisions of the U.N. Charter do not create a private right of action in U.S. courts); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (holding that the Treaty of Commerce and Navigation did not waive sovereign immunity so as to allow tort suit against the U.S. for treaty violations); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1299 (3d Cir. 1979) (holding that neither the Paris Convention nor the Pan American Convention creates a private right of action); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979) (holding that the Convention on the High Seas is not self-executing).

doctrine of "non-self-execution" counsels courts to refuse to enforce treaty provisions, in certain circumstances, unless Congress has passed implementing legislation.¹⁵ The political branches at times also pursue a course of non-self-execution. In ratifying a treaty, the President and Senate often attach reservations, understandings, or declarations that preclude courts from enforcing treaty provisions that might intrude on congressional prerogatives or the reserved powers of the states, unless Congress has passed the necessary statute.¹⁶

Despite this practice by the political branches and the courts, a developing academic consensus has emerged that sharply criticizes non-self-execution.¹⁷ These scholars argue that the Supremacy Clause requires courts to automatically enforce treaties, just as with constitutional and statutory provisions.¹⁸ Any exception for non-self-executing treaties is a narrow one, if it exists at all. Professor Carlos Vázquez, the most thorough critic of non-self-executing treaties, argues that the Supremacy Clause makes treaties law, on a par with the Constitution and federal statutes, that must be enforced by courts in properly brought suits by individuals.¹⁹ Professor Louis Henkin has gone so far as to declare that a "tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of . . . the Constitution."²⁰ These critics accuse treaty-makers who attach non-self-executing reservations to treaties, and judges who respect such provisions, of negating the supremacy of treaty law. According to Henkin, "that recent practice, accepted without significant discussion, is 'anti-Constitutional' in spirit and highly problematic as

15. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

16. See, e.g., Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, in *Parliamentary Participation in the Making and Operation of Treaties* 261, 261 (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994) (criticizing Senate reservations rendering treaties non-self-executing); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, in *Parliamentary Participation in the Making and Operation of Treaties*, supra, at 205, 207 (describing the usage of non-self-executing declarations in recent U.S. practice).

17. See, e.g., Louis Henkin, *Foreign Affairs and the United States Constitution* 201 (2d ed. 1996) [hereinafter Henkin, *Foreign Affairs*] (arguing that non-self-execution "runs counter to the language, and spirit, and history" of the Constitution); Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 760 (1988) (arguing that non-self-execution is a judicial invention at odds with the Constitution and the views of the Framers); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1087 (1992) [hereinafter Vázquez, *Treaty-Based Rights*] (arguing that text and history of the Constitution demonstrate that courts may directly enforce treaty provisions in properly brought suits by individuals).

18. The Supremacy Clause, U.S. Const. art. VI, cl. 2, states that "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"

19. See Vázquez, *Treaty-Based Rights*, supra note 17, at 1084-85.

20. Henkin, *Foreign Affairs*, supra note 17, at 201.

a matter of law.”²¹ I refer to these scholars as “internationalists” because their approach to treaties results in the tight integration of international and domestic law, and frees international agreements from many of the constitutional restraints that apply in the ordinary public lawmaking process.²²

Because current practice has rejected a blanket rule of self-execution, internationalists rest their arguments on history. These critics, who count among their number every legal scholar to write on the question, declare that the Supremacy Clause itself reflects the Framers’ intent that treaties be directly incorporated into American law.²³ According to Professor Vázquez, for example, “by declaring treaties to be laws, the Framers meant to make treaties enforceable by individuals in our courts.”²⁴ Professor Henkin reads much into the early years of the Republic, and even interprets Chief Justice Marshall’s creation of a doctrine of non-self-execution as a clear affirmation of the general self-execution of treaties.²⁵ Like the debate over war powers,²⁶ this divergence of academic theory and political practice has led to an unusual arrangement of ideology and constitutional interpretation. Those who support a broader role for international law in domestic political and legal decisionmaking find themselves arguing for a Constitution whose meaning is relatively fixed by the intention of its Framers. An argument in favor of non-self-execution takes a more functional approach, based in the text and structure of the Constitution, in judicial doctrine, and in the practice of the political branches and the need for governmental efficiency. Defenders of the new academic consensus of self-execution usually respond to such pragmatic arguments, made by courts and the political branches, by citing the Framers’ intent, rather than by addressing these claims on their merits.

This Article seeks to resolve the debate concerning the self-executing nature of treaties by providing a more complete account of the original understanding of the place of treaties within the American legal system. It agrees with the methodology employed by critics of non-self-execution. To understand the interaction of the Treaty Clause, the Supremacy Clause, and Article I, Section 8, one must first look at the Framing of the

21. *Id.* at 202 (footnote and endnote omitted).

22. Cf. Curtis A. Bradley, *Breard*, Our Dualist Constitution, and the Internationalist Conception, 51 *Stan. L. Rev.* 529, 539–56 (1999) (describing the internationalist conception of the relationship between international and domestic law).

23. See, e.g., Henkin, *Foreign Affairs*, *supra* note 17, at 198–201 (arguing that treaties should be considered the law of the land just like statutes and the Constitution); Paust, *supra* note 17 (same); Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1104 (same). This Article is the first recent scholarly work to provide a defense of the doctrine of non-self-executing treaties.

24. Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1084.

25. See Henkin, *Foreign Affairs*, *supra* note 17, at 199–202.

26. For my discussion of this debate, see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Cal. L. Rev.* 167, 189–92 (1996) [hereinafter Yoo, *War Powers*] (tracing arguments that presidential initiation of war powers without a congressional declaration of war or approval is unconstitutional).

Constitution. The results of such an inquiry, however, provide a different, more nuanced story than the standard internationalist account. Upon closer examination, the original understanding does not *compel* a reading of the Supremacy Clause that immediately makes treaties law within the United States, but instead allows the branches of government to delay execution of a treaty until Congress as a whole can determine how treaty obligations are to be implemented. Non-self-execution maintains a clear separation between the power to make treaties and the power to make domestic law, and it gives Congress the means to limit the potentially unbounded Treaty Clause. This Article will present a complex theory of the concept of federal supremacy, one that shows that non-self-execution is not at odds with the Supremacy Clause. It will also demonstrate that non-self-execution is consistent with the Framers' notions of democratic self-government and popular sovereignty.

Reconstructing the understanding of treaty-making during the Framing Period requires us to adopt a comprehensive approach to historical sources and their use. Internationalists have neglected both to review the Framing-era sources carefully enough and to utilize a systematic methodology. These writers do not focus on the records from the critical state conventions, such as Pennsylvania and especially Virginia, in which the treaty power and federal supremacy were extensively discussed. They also appear to have missed important documents in the modern collections.²⁷ This Article will fill this gap by focusing on important factors that have been virtually ignored by most scholars, such as the British approach to treaties and the Pennsylvania, Virginia, and New York ratifying conventions. It will use sources that have not been systematically examined by internationalist writers, such as the great mass of Federalist and Anti-Federalist writing and the records of the ratifying conventions. It will attempt to address the treaty question within the larger intellectual and constitutional world of the Framers. As this Article will show, the conclusion of the ratification process yielded an understanding of the treaty power that kept well within the traditional Anglo-American distinction between the power to make treaties and the power to legislate.

This examination of the original understanding undermines the internationalist argument that non-self-execution is unconstitutional. In addition, these scholars misunderstand the proper functions of the non-self-executing treaty doctrine: to respect the division of powers established by Articles I and II and to protect Congress's plenary powers over domestic legislation. The Framers were concerned that the treaty power, when combined with the Supremacy Clause, threatened to break down

27. In particular, these works do not discuss James Madison's statements at the Virginia Convention, nor do they examine the important memo from Madison to George Nicholas, which outlined the Federalists' major arguments on the Treaty and Supremacy Clause issues. See *infra* text accompanying notes 518–534. Even historians of the Treaty power have not examined in any detail the Madison-Nicholas correspondence, probably because the documents were published after their articles had appeared.

the traditional separation between the power to make treaties and the power to legislate. The Treaty Clause had created a democracy gap, as it were, because vesting the power partially in the Senate and excluding the House threatened to remove the people's most direct representatives from an important lawmaking function. Including the President in the treaty-making process and allowing treaties to be rendered non-self-executing—and, hence, in need of implementing legislation—ensured that the treaty power would retain majoritarian roots. Furthermore, the political branches, rather than the courts, would maintain the discretion to decide how the nation should meet its international obligations.

This Article will proceed in three parts. Part I will discuss the Constitution's textual allocation of treaty-making authority, the recent practice of the three branches, and the response of the dominant school of thought within the academic community. The balance of the Article will demonstrate that support for non-self-execution can be found in the original understanding of the Constitution. Part II will re-create the constitutional, legal, and political background against which the Framers acted, while Part III will review the question of non-self-execution within the Framers' discussion of the treaty power and the powers of the federal government. This Article concludes that although the Framers were concerned about many of the structural and normative problems with the treaty power, they believed that these problems could be alleviated if treaties were to take effect as internal U.S. law upon implementation by Congress. While the original understanding does not definitively show that all treaties must be non-self-executing, neither does it require the opposite conclusion. This allows the treaty-makers and the judiciary to protect the constitutional prerogatives of the lawmakers by requiring legislation before treaties may take effect as law.

I. TREATIES, NON-SELF-EXECUTION, AND THE INTERNATIONALIST VIEW

This Part will provide the necessary context for a discussion of the Treaty Clause. Section A reviews the constitutional allocation of authority over the treaty process. Section B briefly examines the practice of the federal courts and of the political branches regarding the execution of treaties. Section C describes and critiques the prevailing academic response to this practice.

A. *The Constitutional Text*

As with all constitutional questions, an analysis of the treaty power should begin with the constitutional text, which allocates authority over international agreements between the executive and legislative branches. Article II, Section 2 declares that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur"²⁸ The President's role in

28. U.S. Const. art. II, § 2, cl. 2.

the system is not buttressed by many other textual grants of power, aside from the rights to "receive Ambassadors and other public Ministers"²⁹ and to appoint Ambassadors, although the latter authority requires senatorial consent to be perfected.³⁰ The President exercises a broad foreign affairs power that derives from these provisions, from Article II's vesting of the executive Power, and from his position as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"³¹ The President's power, however, is not exclusive. The Senate's coordinate power of "advice and consent" potentially allows the upper house to play a broad role concerning treaty policymaking, either by participating in negotiations, by providing advice on foreign policy, or by using its veto power to force the President to accept senatorial policy.³²

Although the Senate is the sole legislative participant in the treaty power, Congress as a whole enjoys plenary power over several areas that involve international relations. These include authority to impose "Duties, Imposts and Excises,"³³ "To regulate Commerce with foreign Nations,"³⁴ "To establish an uniform Rule of Naturalization,"³⁵ "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"³⁶ and "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."³⁷ In addition to these specific powers, Congress enjoys general control over the appropriation of funds, and it has the authority to "make all Laws which shall be necessary and proper for carrying into Execution the [powers in Article I, Section 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."³⁸ These last two provisions have played significant roles in the debates over treaty power questions, as they have in other constitutional issues.

While the division of the treaty power between the President and Senate—and its implications for the making, interpretation, and termination of international agreements—has received the most sustained scholarly attention,³⁹ the provision's true innovations rest in the area of feder-

29. *Id.* § 3.

30. See *id.* § 2, cl. 2.

31. *Id.* cl. 1.

32. See, e.g., Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 *Wash. L. Rev.* 1, 117–20 (1979) (arguing that the Senate's advice and consent power was intended to give it an active role in setting foreign policy).

33. U.S. Const. art. I, § 8, cl. 1.

34. *Id.* cl. 3.

35. *Id.* cl. 4.

36. *Id.* cl. 10.

37. *Id.* cl. 11.

38. *Id.* cl. 18.

39. See, e.g., Michael J. Glennon, *Constitutional Diplomacy* 123–63 (1990) (exploring the tensions between the legislative and executive roles in treaty processes); Harold

alism. To cure the defects of the Articles of Confederation, the Constitution places treaties on par with other constitutional provisions and federal law in their supremacy over state law. Article VI requires state judges to execute these species of federal law over inconsistent state law:

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.⁴⁰

To complete the centralization of competence over international agreements in the national government, the Constitution divests the states of any power in the field. Article I, Section 10 contains two separate prohibitions on the involvement of the states in treaty-making. Clause 1 declares that "[n]o State shall enter into any Treaty, Alliance, or Confederation." The third clause dictates that "[n]o state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."⁴¹ Until the turn of the century,

Hongju Koh, *The National Security Constitution* 40–45 (1990) (exploring the issues created when the executive branch attempts to circumvent legislative input in international agreement making); Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 Nw. U. L. Rev. 577, 583 (1980) (arguing that the President cannot terminate treaties unilaterally); Bestor, *supra* note 32 (arguing that the treaty clause was intended to preserve a role for the Senate in defining foreign policy objectives of treaties); Joseph R. Biden, Jr. & John B. Ritch III, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. Pa. L. Rev. 1529, 1545 (1989) (claiming that the President cannot unilaterally and fundamentally change a treaty by reinterpreting it in disregard of executive representations to the Senate); Lawrence J. Block, et al., *The Senate's Pie-In-The-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. Pa. L. Rev. 1481, 1483 (1989) (arguing that the responsibility to interpret treaties is solely vested in the President by the Constitution); Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 Harv. L. Rev. 1956, 1958 (1986) (challenging the President's authority to modify or alter a treaty obligation without the consent of the Senate); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 Harv. L. Rev. 1972, 1985 (1986) (defending the President's authority to interpret the ABM Treaty broadly).

40. U.S. Const. art. VI, cl. 2.

41. In passing, these provisions also suggest that there may be a difference between a "treaty" on the one hand, which states are absolutely prohibited from joining, and an "agreement" or "compact," which states may enter with congressional approval. See, e.g., Tribe, *supra* note 11, at 1265–67 (noting the difference between an "agreement" and a "treaty"); see also Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 1, 54 Yale L.J. 181, 187 (1945) (articulating a framework for understanding and classifying "treaties" and "agreements"). The Constitution does not provide a clue as to the line separating these different types of international agreements. Although the presence of the words "agreement" and "compact" suggests that the Framers acknowledged the existence of other forms of international agreements, the Constitution provides no other explicit process for the national government to enter into arrangements other than treaties. Drawing on the Necessary and Proper Clause, New Deal scholars read this ellipsis to allow the federal government to enter into non-treaty agreements without undergoing the

government leaders, judges, and academics regarded the Treaty Clause as the exclusive mechanism for entering into international agreements.⁴² As legal historian G. Edward White writes about foreign relations law in the 1890s, "treaties, initiated by the Executive and ratified by the Senate, and tariff legislation, initiated by Congress, would compose virtually the entire spectrum of peaceful transactions between the United States and other nations."⁴³

The federal judiciary has no special role in the treaty process, although Article III parallels the Supremacy Clause in its inclusion of treaties in its definition of federal law. Article III, Section 2, extends the judicial power 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."⁴⁴ If Congress chooses to allow state judges to hear cases interpreting treaties, and if it does not create any lower federal courts, then at least the Supreme Court as the federal court of last resort must have jurisdiction over treaty questions. The Constitution also creates federal jurisdiction over other subject matter that might implicate treaties, such as cases involving ambassadors, admiralty and maritime cases, and between a state or its citizens and a foreign state or foreign citizens.⁴⁵

One distinction made clear by the constitutional text is the difference between treaties and other forms of federal lawmaking. Although the Constitution fails to define what a treaty is, the Supremacy Clause distinguishes between "all Treaties made, or which shall be made, under the Authority of the United States," and the "Laws of the United States which shall be made in Pursuance thereof."⁴⁶ In the past, this distinction has suggested to some that the treaty power was not limited by the Constitution but only by the Authority of the United States, which referred to something broader than the Constitution.⁴⁷ The main purpose of this

Article II treaty process. See *id.* at 205. Constitutional silence, however, could just as easily mean that the Framers understood the Treaty Clause to be the exclusive method for the United States to reach agreements with other nations.

42. See, e.g., *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890) (holding that treaty with France overrode state common law); 29 *Annals of Congress* 531 (Joseph Gales ed., 1816) (speech by Senator John C. Calhoun concerning scope of treaty power); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 *Va. L. Rev.* 1, 9–21 (1999) (explaining the historical development of treaty power jurisprudence).

43. White, *supra* note 42, at 12.

44. U.S. Const. art. III, § 2, cl. 1.

45. See *id.*

46. U.S. Const. art. VI, cl. 2.

47. See, e.g., Pitman B. Potter, *Inhibitions upon the Treaty-Making Power of the United States*, 28 *Am. J. Int'l L.* 456, 466–73 (1934) (discussing explicit or implied Constitutional limitations on the treaty-making power, and the extent of their validity); Arthur E. Sutherland, Jr., *Restricting the Treaty Power*, 65 *Harv. L. Rev.* 1305, 1318–20 (1952) (noting that there is no "express exception" leaving the Constitution supreme over treaties). This thought was also suggested by Justice Holmes in his opinion for the Court in *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("It is open to question whether the

language, however, was to give supremacy effect to treaties made under the Articles of Confederation, such as the 1783 peace treaty with Great Britain.⁴⁸ It was not until 1957, though, that the Supreme Court put to rest the idea that the treaty power was not limited by the Constitution, at least with regard to individual rights,⁴⁹ if not the separation of powers and federalism.⁵⁰

Another significant textual difference between a treaty and a law is found in the treaty power's placement in Article II, which vests the executive power in the President, rather than in Article I, which vests all "legislative Powers herein granted" to the Congress. The Treaty Clause's location suggests that treaties are executive, rather than legislative, in nature. 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. Instead, the Constitution appears to include the Senate both to dilute the unitariness of executive action in the area of treaties, and perhaps to impart more continuity and wisdom to the conduct of foreign affairs. With their six-year terms (two years longer than the President's), Senators would provide "a sense of national character" and stability, much like that supplied by the privy council in England and the governors' councils in the states, and would restrain abuses of power by the executive.⁵¹

These differences in textual treatment leave unanswered several questions regarding the place of treaties in the American public lawmak-

authority of the United States means more than the formal acts prescribed to make the convention.").

48. See Edward S. Corwin, *The President: Office and Powers 1787-1957*, at 421 n.17 (1957). But see Charles A. Lofgren, "Government From Reflection and Choice": Constitutional Essays on War, Foreign Relations, and Federalism 192 n.137 (1986).

49. See *Reid v. Covert*, 354 U.S. 1, 15-17 (1957). This conclusion might have been reached earlier by looking to Article III, which extends the judicial power to cases arising under the Constitution, the Laws of the United States, and "Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. In this provision, the Constitution contemplates that treaties are subject to the Constitution, and to federal statutes as well, rather than vice versa.

50. See generally John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 *Const. Commentary* 87, 111-16 (1998) (arguing that treaties also should be subject to the Constitution's structural provisions) [hereinafter Yoo, *New Sovereignty*].

51. *The Federalist* No. 63 (James Madison), reprinted in 16 *The Documentary History of the Ratification of the Constitution* 292 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter *Documentary History*] (originally printed in N.Y. *Indep. J.*, Mar. 1, 1788). Madison, for example, justified the Senate's role in foreign affairs on the ground that,

[w]ithout a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy . . . but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.

Id.

ing system. First, the text does not make clear how the treaty power is affected by the Tenth Amendment and the general reservation of powers to the states. Despite recent Supreme Court cases denying the federal government such authority under the Commerce Clause,⁵² a treaty conceivably might permit the federal government to force state legislators or executive officers to implement an international agreement. Second, the Constitution does not answer whether a treaty obligation is subject to the separation of powers. In other words, a treaty might allow the executive branch to perform a function that would normally be fulfilled by the legislature or the judiciary, or a treaty might delegate authority from the executive branch to international organizations.⁵³ Third, the Constitution does not describe the limits on the scope of the treaty power. In the absence of such limits, it is possible that the President and Senate could enter into a treaty on any matter, even if that issue rests within the plenary powers of Congress.⁵⁴ Fourth, the Constitution does not directly address the implementation of treaties. As international affairs come to exert more impact on domestic matters, efforts to enter broader, more intrusive treaties may place considerable stress on the public lawmaking system. The next Section will examine the increasing globalization of affairs, its effects on the public lawmaking system, and the academic consensus in response.

B. Globalization and the Political Branches: Non-Self-Execution

The Constitution's provisions for handling international matters—the treaty power and Supremacy Clause, Congress's foreign commerce and spending powers, and federal court jurisdiction—arose in the very different world of the late eighteenth century. At that time, international law involved relations among nation-states. International affairs and domestic affairs occupied fairly separate spheres, and international agreements rarely regulated private activity, which was the preserve of domestic lawmaking.⁵⁵ Matters today are quite different. Relationships and problems that were once domestic, such as economics and the environment, have become international in scope. Events abroad, as most notably seen in the Asian financial crisis, affect domestic markets and institutions in a more profound manner than in the past. Efforts to regulate domestic problems need to address international affairs in order to be comprehensive and effective. Correspondingly, policy solutions have

52. See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992).

53. See Yoo, *New Sovereignty*, *supra* note 50, at 116–29.

54. For an effort to limit the treaty power by reference to federalism, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 416–17 (1998) (arguing that the Framers assumed subject matter limits on treaty powers).

55. See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1672 (1997); see generally Arthur Nussbaum, *A Concise History of the Law of Nations* 126–33 (1947) (reviewing the nature of agreements between nation-states during the eighteenth century).

come to rely upon new types of international agreements that include multiple parties, that create independent international organizations, and that pierce the veil of the nation-state and seek to regulate individual private conduct. While perhaps necessary to meet international goals, these novel arrangements and institutions create difficulties because they intrude into what was once controlled by the domestic political and legal system. Examples include arms control, in which a recent treaty called for on-site inspections of chemical manufacturing facilities by international inspectors;⁵⁶ international economics, in which the WTO and NAFTA agreements establish standards of conduct for domestic manufacturers and create new dispute resolution mechanisms;⁵⁷ environmental law, in which international agreements increasingly set substantive norms once created by domestic legislation;⁵⁸ and human rights treaties, which

56. See generally Yoo, *New Sovereignty*, *supra* note 50, at 90–96 (criticizing the on-site inspection regime of the Chemical Weapons Convention).

57. Some have criticized the GATT and WTO decisions invalidating American environmental legislation in favor of free trade rules. For discussion of the controversy, see, e.g., Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 Wash. & Lee L. Rev. 1279, 1289–90 (1992) (reviewing nature of agreements between nation-states during eighteenth century); Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 Am. J. Int'l L. 700, 726 (1992) (concluding that "the GATT and environmental protection are largely compatible"); Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 Colnm. J. Envtl. L. 385, 413–17 (1993) (discussing reactions to the concerns raised by the intersection of free trade and environmental protection); David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 Iowa L. Rev. 769, 786–91 (1994) (discussing opportunities for the public to be involved in international tribunals adjudicating environmental issues under GATT). Others have criticized the WTO for allowing non-Article III tribunals to adjudicate claims arising under federal law. See Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1455 (1992); Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1299 (1992). But see Harold H. Bruff, *Can Buckley Clear Customs?*, 49 Wash. & Lee L. Rev. 1309, 1312–13 (1992) (defending the constitutionality of international dispute settlement); William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 Wash. & Lee L. Rev. 1315, 1315–22 (1992) (same).

58. See, e.g., *Montreal Protocol on Substances That Deplete the Ozone Layer*, (1987), S. Treaty Doc. No. 100-10, 26 I.L.M. 1541 (establishing a schedule for the retirement of substances that deplete the ozone layer); *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Mar. 3, 1973, art. 2, 27 U.S.T. 1087, 993 U.N.T.S. 243, 245–46 (entered into force July 1, 1975) (banning trade for commercial purposes in species threatened with extinction); *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, Feb. 2, 1971, preamble, T.I.A.S. 11,084, at 5, 996 U.N.T.S. 245, 246 (entered into force Dec. 21, 1975) (protecting wetlands); Patricia W. Birnie & Alan E. Boyle, *International Law and the Environment* 213–14 (1992); Chayes & Chayes, *supra* note 10, at 184–89.

surpass domestic legislation and constitutions in regulating the duties that a state owes its citizens.⁵⁹

Globalization raises difficult problems concerning the nature of the treaty power and its relationship with the normal processes of public lawmaking. Once upon a time, the more pressing issue was whether treaties could extend beyond the limits of Article I, Section 8 and the general ambit of federal powers.⁶⁰ With the vast expansion of federal power permitted by the Supreme Court's broad reading of the Commerce Clause, however, it is more likely that today's multilateral treaties will not extend beyond federal powers, but will adopt regulatory standards usually set by statutes or regulations pursuant to Congress's domestic legislative powers. Globalization, therefore, and the concomitant expansion in the scope and depth of treaties, raises important questions of whether the treaty power can supplant the domestic lawmaking process, whether courts are to give effect to treaties that intrude on areas within Congress's Article I, Section 8 powers, and whether the treatymakers can render such treaties non-self-executing in order to preserve congressional prerogatives.

Both the judiciary and the political branches have responded to these problems by seeking to render treaties non-self-executing. The first Supreme Court decision directing courts to refuse to enforce some treaties without implementing legislation came in the 1829 case of *Foster v. Neilson*.⁶¹ Written by Chief Justice John Marshall, *Foster* declared that federal courts could enforce certain treaty provisions, particularly those that created individual rights, but not others, such as those that promised future action by the government. This Article will examine the precise circumstances of *Foster* in Part III. It is important now to recognize only that, as early as 1829, the Marshall Court had rejected the idea that all treaties should be self-executing.

In the late nineteenth century, the Court expanded upon *Foster* by grounding non-self-execution in the nature of international politics and the separation of powers. In cases such as the *Head Money Cases*⁶² and *Whitney v. Robertson*,⁶³ the Court allowed statutes passed by both Houses

59. See, e.g., International Covenant on Civil and Political Rights, S. Exec. Doc. No. 95-2, arts. 6-27 (1978) (defining political rights); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, S. Exec. Doc. No. D. 95-2 art. 3 (1978), 993 U.N.T.S. 3 (guaranteeing rights of equal treatment in economic and social spheres); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 4, S. Exec. Doc. C, 95-2 (1978), at 1, 3-4, 660 U.N.T.S. 195, 218-220 (entered into force Jan. 4, 1969) (prohibiting hate speech); Restatement (Third) of the Foreign Relations Law of the United States, Introductory Note to Part VII, at 144 (1987) (declaring that "how a state treats individual human beings, including its own citizens, in respect of their human rights, is not the state's own business alone").

60. See, e.g., Bradley, *supra* note 54, at 409-22 (reviewing eighteenth- and nineteenth-century understanding of the treaty power).

61. 27 U.S. (2 Pet.) 253 (1829).

62. 112 U.S. 580 (1884).

63. 124 U.S. 190 (1888).

to overrule earlier treaties. In so doing, the Justices commented that treaties were generally not self-executing because international law recognized states as the primary actors in international relations and that politics, not courts and law, were the means for remedying treaty violations. As the Court declared in the *Head Money Cases*:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.⁶⁴

Disputes involving foreign relations are considered to be within the domain of the political branches, which are textually vested with the constitutional authority to negotiate and ratify international agreements. Such disputes do not lend themselves to judicial competence.⁶⁵ Shortly after the *Head Money Cases* were decided, the Court relied on this line of reasoning in defending the last-in-time rule in *Whitney v. Robertson*.⁶⁶ Observing that the political branches address international disputes, the Court said, "If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests."⁶⁷ Because of the political nature of treaty violations and foreign relations, the courts generally are to restrain themselves from entering the area. As the *Whitney* Court further explained, "The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our

64. *Head Money Cases*, 112 U.S. at 598.

65. Central to the Court's reasoning were concerns that bear a strong resemblance to those that today animate the application of the political question doctrine to foreign affairs. As the modern Court observed in *Baker v. Carr*, foreign affairs can raise justiciability problems because "[n]ot only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." 369 U.S. 186, 211 (1962). Application of the political question doctrine to foreign affairs, most famously in the area of war powers, has received widespread academic criticism. See, e.g., John Hart Ely, *War and Responsibility* (1993) (arguing that Congress is constitutionally required to express formal approval of wars, and thus the political question doctrine should not preclude challenges to unauthorized wars); Thomas M. Franck, *Political Questions/Judicial Answers* 158 (1992) (reasons for judicial deference are "simply . . . wrong"); Koh, *supra* note 39, at 181-84 (listing a number of reforms that would reinvolve the courts); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976) (arguing that the political question doctrine is merely an exercise of respect for the political branches). For a defense of the political question doctrine's application to the war powers context, see Yoo, *War Powers*, *supra* note 26, at 287-90.

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

67. *Id.* at 194.

country was justified in its legislation, are not matters for judicial cognizance."⁶⁸

Federal courts, in response to such concerns, have presumed treaties to be non-self-executing. Vested by the Constitution with control over foreign relations, the political branches are to enforce treaties, break treaties, or seek remedies for their violation in the arena of international politics. As the Court said in *Whitney*, "the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws."⁶⁹ Non-self-execution gives the political branches the discretion they need to successfully pursue American foreign policy goals, and it restrains the courts from entering a field in which they have neither competence nor power to enforce their will. At the same time, however, the courts were unwilling to adopt a blanket rule of non-self-execution for all treaties. Expanding on a theme developed in *Foster v. Neilson*, the Justices linked self-execution to the specific creation of individual rights by treaty. In the *Head Money Cases*, for example, the Court declared that

a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.⁷⁰

The turn-of-the-century Court evidently believed, as Chief Justice Marshall did in *Foster*, that the abilities of the judiciary limited its function "to decide upon individual rights, according to those principles which the political departments of the nation have established."⁷¹ If the political branches wished to render a treaty self-executing they would have to make that clear in its text.

Since these turn-of-the-century cases, the line between non-self-executing and self-executing treaties has become, if anything, even more obscured. In the post-World War II era, for example, prominent commentators and several courts have introduced a subjective element into their examination of self-executing treaties. The majority view maintains that the central factor in determining whether a treaty is self-executing is the intent of the treaty makers. For instance, the *Restatement (Third) of the Foreign Relations Law of the United States* instructs that treaties are not self-executing "if the agreement manifests an intention that it shall not be

68. *Id.*

69. *Id.* at 195.

70. *Head Money Cases*, 112 U.S. 580, 598 (1884). As illustrations of self-executing provisions, Justice Miller mentioned treaties that specifically "regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens." *Id.*

71. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829).

come effective as domestic law without the enactment of implementing legislation."⁷² Since it is up to the United States to decide how to carry out its international obligations, the *Restatement* observes, "the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action."⁷³ When the intent of the United States is not clear from the treaty itself, the *Restatement* approves of the use of presidential statements in concluding the treaty and of legislative materials that document the Senate approval process.⁷⁴

Although the *Restatement* is not law, in this case it reflects the practice of some courts. Lower courts have sought to determine intent by examining not just the text of the treaty, but also its negotiating history, pre-ratification statements by the Executive and the Senate, and any acts creating an enforceable cause of action in the courts.⁷⁵ Courts have resorted to legislative history in the interpretation of treaties just as they have in reading statutes. Such efforts seem to indicate that courts are attempting to incorporate treaties into their conceptual frameworks for deciding constitutional and statutory questions. This is nowhere more clear than in the current refinement of the intent-based approach into a private cause-of-action analysis. When determining whether a treaty is self-executing, the Supreme Court and the lower courts today ask whether its provisions create a private right of action. For example, in *Argentine Republic v. Amerada Hess Shipping Corp.*, the Court was confronted with a

72. *Restatement (Third) of the Foreign Relations Law of the United States* § 111(4)(a) & cmt. h (1987).

73. *Id.* § 111 cmt. h.

74. *See id.*

75. *See, e.g., Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (*per curiam*); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). Those familiar with the debates concerning the use of legislative history in the interpretation of statutes will recognize the many problems that arise from this intent-based approach. Compare Antonin Scalia, *A Matter of Interpretation* (1997) (arguing against the use of legislative history), and John F. Manning, *Textualism as a Non-delegation Doctrine*, 97 *Colum. L. Rev.* 673 (1997) (same), with William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 *Mich. L. Rev.* 1509 (1998) (book review critiquing the "new textualism"). Whose intent is important—the state parties', the Senate's, or the President's? Should courts look for evidence of intent outside the text of the treaty—in, for instance, the negotiating history, the speeches and declarations of the President, the representations made by the executive branch to the Senate, or the Senate committee reports and floor debates? What is the presumption that treaties are operating under? In other words, is silence to be construed as intending self-execution or non-self-execution? Not surprisingly, courts have used different approaches and have relied on different materials in the course of passing on the question of a treaty's self-executing nature. *See, e.g., Goldstar*, 967 F.2d at 968 (relying on internal evidence from treaty document as a whole); *Frolova*, 761 F.2d at 376 (relying on presidential statement); *Postal*, 589 F.2d at 881–83 (looking to Senate hearings and opinions of the State Department). When reviewing the cases, it is evident that courts do not employ a common methodology to determine whether a treaty is self-executing or not; the divisions that have beset the field of statutory interpretation have similarly fallen upon treaties.

claim by two Liberian companies against Argentina for alleged damage caused to their ships by the defendant's military during the Falklands War.⁷⁶ Plaintiffs argued that the Alien Tort Statute, by allowing jurisdiction over suits brought by aliens for torts committed "in violation of the law of nations,"⁷⁷ and in violation of treaties signed by the United States,⁷⁸ could override Argentina's sovereign immunity as guaranteed by the Foreign Sovereign Immunities Act of 1976.⁷⁹ In rejecting the treaty claims, the Court responded, "[t]hese conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts."⁸⁰ In the course of its discussion, the Court tellingly cited to the passages in *Foster v. Neilson* and the *Head Money Cases* discussed above.⁸¹ In this regard, the Court was following the example set by earlier lower court decisions that also had gleaned from *Foster* and its progeny the rule that treaties were not self-executing unless they created a private right of action.⁸²

Recent developments in the treatment of treaties by the political branches mirror the judiciary's adoption, in some cases, of non-self-execution. Either at the behest of the Senate or on his own initiative, the President has declared recent human rights treaties to be non-self-executing.⁸³ In other cases, the Senate has qualified its consent to a treaty with the condition that its provisions not take effect in internal United States

76. 488 U.S. 428 (1989).

77. 28 U.S.C. § 1350 (1994).

78. Respondents relied upon the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, and the Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, 2 Bevans 721.

79. 28 U.S.C. § 1330(a)-(c) (1994).

80. *Amerada Hess*, 488 U.S. at 442.

81. *Id.* at 442-43.

82. See the differing approaches of *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (4th Cir. 1992); *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-76 (7th Cir. 1985) (per curiam); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283-84 (9th Cir. 1985); *Tel-Oren*, 726 F.2d at 808-10; *United States v. Postal*, 589 F.2d 862, 875-88 (5th Cir. 1979); *Edwards v. Carter*, 580 F.2d 1055, 1056-59 (D.C. Cir. 1978); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); *People of Saipan v. United States Dep't. of Interior*, 502 F.2d 90, 100-03 (9th Cir. 1974) (Trask, J., concurring). See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298-99 (3d Cir. 1979). Although they look to a number of factors, lower courts generally still ground their analysis in the question of whether the treatymakers have intended to create a private right of action. These cases are ably critiqued in Vázquez, *Four Doctrines*, *supra* note 13, at 719-22.

83. For a review of historical examples of this practice, see Natalie H. Kaufman, *Human Rights Treaties and the Senate* 177, 185-86, 192-93 (1990). For criticism of this practice, see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 346-48 (1995); Riesenfeld & Abbott, *supra* note 16, at 900-04.

law.⁸⁴ At other times, the President or Senate or both have declared that a treaty commitment requires no change in American law, thereby indicating to American courts that the treaty's provisions have no substantive legal effect independent of existing constitutional and statutory law. In considering the Torture Convention,⁸⁵ for example, the Bush Administration submitted to the Senate, along with the treaty, a set of reservations, understandings, and declarations (RUDs) that had the effect of declaring the Convention to be non-self-executing within the United States. In the process of approving the International Covenant on Civil and Political Rights, President Bush requested and the Senate adopted a declaration in its resolution of advice and consent that the agreement would be non-self-executing. Similarly, during the approval of the Genocide Convention in 1985, the Senate Foreign Relations Committee issued a committee report that indicated the treaty would be non-self-executing.⁸⁶

When outright declarations of non-self-execution are not used, the President and Senate often resort to what, in Professor Damrosch's words, are their "functional equivalent."⁸⁷ For example, in the case of international human rights treaties, the President and Senate have included "federalism" understandings that promised implementation of a treaty only to the extent that the federal government "exercises jurisdiction" over matters covered by the treaty. Compounding the impact of these federalism provisions, the President and Senate also regularly include a reservation that, for lack of a better term, might be labeled a status quo ante clause. This reservation declares that the United States understands that compliance with the treaty requires no changes to existing American law.⁸⁸

The practice of including RUDs indicates that the political branches are concerned about the possible effects of treaty self-execution. RUDs appear designed to reserve treaty implementation to those elements of

84. Congress as a whole even has declared that the terms of congressional-executive agreements provide no cause of action in American courts. For example, in passing the legislation approving American entry into the World Trade Organization, Congress included a provision holding the congressional-executive agreement non-self-executing. See 19 U.S.C. § 3512(a)(1) (1994).

85. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988).

86. See S. Exec. Rep. No. 99-2, at 26 (1985), reprinted in Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 Am. J. Int'l L. 612, 621 (1986).

87. Damrosch, *supra* note 16, at 210.

88. For example, one of the reservations to the Torture Convention limited the meaning of the treaty's prohibition of "cruel, inhuman or degrading treatment or punishment" to that conduct already prohibited by the Due Process Clause and the Eighth Amendment. This was specifically included, in part, to exclude the death penalty from the scope of the Convention. A final proviso to the Convention's instrument of ratification also noted that the Senate understood generally that the treaty did not require any changes in American law inconsistent with the Constitution. See 136 Cong. Rec. S17,492 (1990).

the American government that would have power over those subjects in the absence of a treaty. RUDs that refuse to allow courts to enforce a treaty's terms maintain the status quo ante, which preserves Congress's authority to implement international agreements. Thus, the President and Senate did not make torture a crime by ratifying the Torture Convention, but instead rendered the treaty non-self-executing, which allowed Congress to decide whether to enact a federal crime of torture. In the absence of a treaty, there is no doubt that only Congress could make torture, or any other activity, a federal crime, and so the RUD protects the legislature's plenary power over a particular subject matter. Similarly, in regard to multilateral human rights treaties, RUDs maintain Congress's power to decide whether to expand the political, civil, and economic rights of American citizens beyond those guaranteed by the Constitution. RUDs also defend the reserved powers of the states and of the people. In the case of human rights treaties, especially those that go beyond even the rights that the federal government as a whole can protect,⁸⁹ non-self-execution provisions reserve to the states the choice whether to grant new forms of rights, or they leave to the people the decision whether to add to the Bill of Rights and the Reconstruction Amendments.

Understood in this light, the practices of the political branches stand in harmony with the judicial doctrine of non-self-execution. We can see at least three purposes motivating the federal courts. First, the resort to the private right of action analysis clearly evidences a desire to incorporate treaties into the common approach employed in enforcing constitutional and statutory provisions. In its recent private-cause-of-action cases, the Supreme Court has found that a statutory provision will be self-executing only if Congress intended to establish a cause of action. Congressional intent is determined through a four-part test.⁹⁰ In the absence of a

89. The International Covenant on Civil and Political Rights, for example, prohibits the imposition of the death penalty upon individuals younger than eighteen. See International Covenant on Civil and Political Rights, Dec. 19, 1966, U.N.T.S. 171, 175. It is doubtful that the Supreme Court today would hold that Congress had the authority to impose such a minimum on the states, and indeed the Court has refused to block the execution of individuals younger than eighteen. The text of the same Covenant also could be read to allow the United States to enact a statute along the lines of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (1994), which the Supreme Court invalidated as outside the powers of the federal government in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). See Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Commentary 33, 34 (1997) (raising possibility that treaty power could support reenactment of religious freedom statute). Newer treaties, as yet unratified by the United States, would interfere even more deeply with matters that have been the preserve of the states. For example, the Convention on the Rights of the Child, adopted Nov. 20, 1989, 28 I.L.M. 1448, and the Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 13, 1981, 1249 U.N.T.S. 13, would impose standards of conduct that have been the subject of state family law or education. See also Bradley, *supra* note 54, at 402–03.

90. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 n.9 (1979).

clear provision in the text, this test will yield few implicit causes of action; a similar result will most likely follow in the treaty context. Second, relying upon a private-right-of-action analysis provides the political branches with the discretion to decide how to enforce the nation's treaty obligations. If individuals cannot bring suit in federal court to enforce every treaty obligation, then the political branches need not worry that the litigation decisions of private persons or judicial decisions will interfere with foreign policy. Third, a private-right-of-action analysis imposes self-restraint upon the judiciary, a duty that arises out of Article III concerns about the constitutional powers of the federal courts. By requiring that the text of the treaty or the treaty-makers unambiguously state their intention to give individuals a cause of action enforceable in court, the judiciary limits itself to the types of cases that it can best address.⁹¹ By refusing to enter into the highly political arena of foreign affairs, where the judiciary's competence and authority are questionable, the courts can conserve their resources for the defense of individual rights at home.

RUDs and judicial non-self-execution demonstrate agreement among the branches to reserve questions of treaty enforcement for the political branches and to keep them out of the federal courts. This practice also suggests that the political branches and the judiciary share a reluctance to collapse the distinctions between international lawmaking by treaty and domestic lawmaking by statute. Like the non-self-execution doctrine, the practice of the President and the Senate indicates their belief that in many cases full legislative action is required before a treaty's provision is to be considered the internal law of the United States. RUDs guarantee that decisions that usually rest in the hands of the democratically elected branches remain there, even in the presence of a treaty on the subject, or, if the function is outside the powers of the national government as a whole, that the ordinary processes of American public lawmaking apply.

C. *Self-Execution: The Internationalist View*

An emerging academic consensus, highly critical of these practices by the three branches of government, answers that international agreements and law ought to be directly merged into the domestic legal system. What might be described as the internationalist approach seeks to make international law a seamless part of domestic law by freeing international agreements from the normal public lawmaking process. Advanced most forcefully by Professor Henkin, the internationalist model argues that international agreements and international law should take effect directly as domestic law without any intervening legislative action. In the

91. As Chief Justice Marshall declared in *Foster v. Nielson*, "The judiciary is not that department of the government, to which the assertion of [the nation's] interests against foreign powers is confided." 27 U.S. (2 Pet.) 253, 307 (1829). Instead, the duty of the judiciary is "to decide upon individual rights, according to those principles which the political departments of the nation have established." *Id.*

treaty context, for example, Professor Henkin and others argue that once a treaty is made, it is automatically enforceable in the United States in federal and state courts without legislative implementation. Describing a different default rule, Professor Henkin writes that “[i]n some constitutional systems, treaties are only international obligations, without effect as domestic law; it is for the parliament to translate them into law, and to enact any domestic legislation necessary to carry out their obligations.”⁹² That, Professor Henkin argues, is not the law in the United States because the Supremacy Clause makes treaties “the supreme Law of the Land” on par with the Constitution and federal statutes. According to Professor Henkin, “[t]hat clause, designed principally to assure the supremacy of treaties to state law, was interpreted early to mean also that treaties are law of the land of their own accord and do not require an act of Congress to translate them into law.”⁹³ Professor Henkin would admit only a narrow exception for cases in which a treaty makes only a promise of future action that must be undertaken by the legislature, such as enacting a criminal law or appropriating money. In other words, most treaties would become, upon their approval by the Senate and ratification by the President, “self-executing” in American law, with only the small exception of future promises becoming “non-self-executing” and requiring further legislative action.⁹⁴

Advocacy of self-execution bears important implications in terms of federalism and the separation of powers. Self-execution obliges all branches of the government, federal and state, to carry out a treaty’s provisions, because the Supremacy Clause makes them binding both as international agreements and as domestic law. Furthermore, because they have already undergone a valid constitutional process, and because they are not governed by the limitations on Congress’s Article I powers due to the Treaty Clause’s placement in Article II, treaties are not subject to the Constitution’s normal structural limitations that apply to statutes. On the question of treaties and federalism, for example, internationalists maintain that treaties are not restricted by the Tenth Amendment or by any reserved state powers.⁹⁵ Similarly, internationalists believe that the separation of powers should pose no obstacle to the implementation of a treaty.⁹⁶ Under this philosophy, except for the powers of appropriations and declaring war, the treaty makers can exercise all other legislative powers. Nor are subject matter exclusions from the treaty power to be inferred from Article I.⁹⁷ Finally, internationalists insist that treaties take

92. Henkin, *Foreign Affairs*, *supra* note 17, at 198.

93. *Id.* at 199.

94. See *id.* at 199–200.

95. See, e.g., *id.* at 191 (“Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material.”).

96. See *id.* at 196.

97. See *id.* at 194–95.

direct effect upon their ratification, and that no congressional implementation is needed. To require otherwise is "anti-constitutional."⁹⁸ In part, internationalists have been able to justify these efforts to extend the reach of the treaty power by relying upon the growing internationalization of domestic affairs. As foreign affairs has expanded to touch on many different aspects of domestic life, academics have argued that the treaty power must expand accordingly.⁹⁹

Internationalists base their claim that all treaties generally must be self-executing on two chief grounds. First, they argue that the plain text of the Supremacy Clause equates treaties with constitutional and statutory provisions. Because they are the "Law of the Land," constitutional and statutory provisions are enforceable in federal and state courts and preempt inconsistent state law. Therefore, treaty provisions must be judicially enforceable law as well. "The distinction found in certain cases between 'self-executing' and 'non-self-executing' treaties," Professor Jordan Paust declares, "is a judicially invented notion that is patently inconsistent with" the Supremacy Clause.¹⁰⁰ In fact, Professor Paust continues, "such a distinction may involve the most glaring of attempts to deviate from the specific text of the Constitution."¹⁰¹ The Supremacy Clause, Professor Carlos Vázquez argues, demonstrates the intent to "adopt[] the very same mechanism for enforcing treaties, federal statutes, and the Constitution itself."¹⁰² Under the Constitution, therefore, judges are to be "the primary enforcers of all three categories of law" listed in the Supremacy Clause through the adjudication of cases brought by individuals directly in federal court.¹⁰³ Courts that refuse to immediately enforce treaties, internationalists conclude, violate the Supremacy Clause.¹⁰⁴

To reach this conclusion, internationalists too hastily equate "Law of the Land" with judicial enforceability. Both the text of the Supremacy Clause and its history indicate that its primary purpose was to guarantee the primacy of federal law over state law. Article VI requires that state judges give federal law supremacy and that any state constitutional or stat-

98. *Id.* at 202.

99. See, e.g., Neuman, *supra* note 89, at 46 (arguing that human rights "is no longer a matter of exclusive domestic concern, but rather as a subject of international cooperation and oversight).

100. Paust, *supra* note 17, at 760.

101. *Id.*

102. Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1108.

103. *Id.*

104. For proponents of this view, see Henkin, *Foreign Affairs*, *supra* note 17, at 201; Paust, *supra* note 17, at 764; Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 *Am. J. Int'l L.* 892, 896-901 (1980); Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1097-1104; see also Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 *Va. J. Int'l L.* 627, 638 (1986) (asserting that the U.S. automatically incorporates treaties into domestic law); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *Am. J. Int'l L.* 310, 320 (1992) (stating that U.S. courts treat some treaties as self-executing).

utory laws to the contrary are preempted.¹⁰⁵ The Clause's purpose as a central component of Our Federalism could not be clearer. Nothing in the clause, however, indicates that supremacy was to be achieved automatically through the direct enforceability of treaties in federal and state courts.¹⁰⁶ Reading Article VI as requiring direct enforceability of treaties in courts unnecessarily transforms a federalism provision into a separation of powers provision. Treaties can still receive supremacy by means of a process that requires congressional legislation to implement treaty provisions. Interpreting Article VI in this manner makes even more sense in the foreign affairs context, because it provides the political branches with the discretion to decide how the nation's international obligations will be enforced. Relying as it does on automatic judicial enforcement, the internationalist approach robs the President and Congress of the flexibility they might need in conducting the nation's foreign affairs.

Contrary to the arguments of some internationalists, a reading of Article VI that does not require self-execution of treaties *is* consistent with the Supremacy Clause. Including treaties in Article VI serves the purpose of making clear that treaties are entitled to the same supremacy as constitutional and statutory provisions, when they are enforced by the national government in conflict with state laws. In other words, the first element of the Supremacy Clause gives the federal government the authority to pass legislation to enforce treaties, much in the way that the Necessary and Proper Clause provides the authority to pass enabling legislation for other constitutional grants of power. Article VI leaves to the political branches of the national government discretion regarding enforcement. This purpose would correct a significant defect of the Articles of Confederation, which lacked a provision declaring that treaties, when enforced by the national government, superseded state laws.¹⁰⁷ The Supremacy

105. See U.S. Const. art. VI, cl. 2 ("and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

106. Professor Henkin, in a footnote, admits this possibility. See Henkin, *Foreign Affairs*, supra note 17, at 199 n.* ("As an original matter, one might have asked whether the purpose of achieving the supremacy of federal treaties required that they become law automatically, and whether indeed that was the purpose and purport of the Supremacy Clause."). Henkin argues that an early Marshall Court opinion, *Foster v. Neilson*, has established the rule otherwise. As I discuss *infra*, this badly overreads *Foster*. See *infra* text accompanying notes 646–654.

107. In fact, the Articles of Confederation only specifically prohibited the states from laying "any imposts or duties which may interfere with any stipulations in treaties" between the United States and other nations. Articles of Confederation art. VI. When read in light of the Articles' general reservation of powers to the states, see *id.* art. II ("Each State retains its sovereignty, freedom, and independence, and every Power, jurisdiction and right" which are not "expressly delegated" to the United States), this provision seems to suggest that states could pass statutes that conflicted with treaties, so long as they did not involve imposts or duties. Cf. John C. Yoo, *Our Declaratory Ninth Amendment*, 42 *Emory L.J.* 967, 980 (1993) (discussing the Articles' reservation of powers clause). The Articles of Confederation period is discussed in more detail *infra* text accompanying notes 251–268.

Clause's second element, which requires state judges to give federal laws primacy over state laws, buttresses this federalist interpretation of the clause. The provision requiring state judges to enforce federal law creates a default rule that would be triggered only if the political branches chose to enforce a treaty judicially, but had failed to establish any lower federal courts.

Second, not content to rely solely on the Supremacy Clause's text, internationalists turn to the Constitution's original understanding for support. Non-self-executing treaties, Professor Henkin concludes, are "not what the Constitution provides or what the Framers intended."¹⁰⁸ Internationalists argue that one of the Framers' primary concerns focused on the national government's inability to enforce state compliance with treaties and to make federal law operative on individuals.¹⁰⁹ The reasoning of the internationalist case is fairly straightforward. Under the Articles of Confederation, the national government suffered because of its inability to secure state compliance with treaties. States refused to obey provisions of the Treaty of Paris of 1783, which had ended the Revolutionary War and allowed British creditors to seek pre-war debts from American debtors.¹¹⁰ Failure to enforce the treaty threatened the security and future prosperity of the new nation. This problem arose primarily because the general government lacked the power to enact legislation that operated directly on individuals; instead, Congress had to make recommendations and requests upon the states which clearly were not laws because they lacked a legal sanction. To remedy this situation, the delegates to the Constitutional Convention included the Supremacy Clause, which made federal law directly applicable upon individuals and allowed the national government to free itself from its dependence on the states for treaty enforcement. "The Convention and ratification debates, and contemporaneous statements, show clearly that the Framers were concerned about treaty violations," argues Professor Vázquez.¹¹¹ "To prevent or remedy treaty violations before they produced these consequences, they declared treaties to be the 'supreme Law of the Land.' By so doing," he concludes, "the Framers intended to make treaties operative on individuals and enforceable in the courts in cases between individuals."¹¹²

Without the Supremacy Clause, treaties would have been merely morally, rather than legally, binding. In order to make treaties a species of meaningful federal law, internationalists claim, individuals must have the right to enforce treaties in court. Internationalists seek their primary historical support in several additional pieces of evidence. First, they quote *Federalist No. 22*, in which Alexander Hamilton mentions that "[t]he treaties of the United States, to have any force at all, must be con-

108. Henkin, *supra* note 17, at 202 n.**.

109. See Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1104.

110. See *infra* text accompanying notes 274-328.

111. Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1110.

112. *Id.*

sidered 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."¹¹³ Second, they often refer to William Davie's statement, in the North Carolina ratifying convention, 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."¹¹⁴ Third, more sophisticated internationalists argue that the Constitutional Convention adopted the Supremacy Clause to allow direct enforcement of treaties precisely so as to avoid more aggressive mechanisms, such as Madison's proposal for a federal veto on state laws.¹¹⁵ Finally, internationalists rely upon an early Supreme Court case, *Ware v. Hylton*,¹¹⁶ which enforced the terms of the 1783 Treaty of Paris against an inconsistent Virginia law. According to internationalists, the *Ware* Court's enforcement of the treaty in a private suit demonstrates that the Framers understood that treaties were to be self-executing in court.¹¹⁷

This Article will address the materials from the Framing and ratification of the Constitution in detail in following sections, but suffice it to say that many of the materials relied upon by internationalists are too general to support their broad theory. Like the quotes from *The Federalist No. 22* and William Davie above, their sources discuss the binding nature of treaties upon the United States, but they rarely address the narrower question of how these international obligations are to be enforced. Certainly treaties can be made "binding upon us" through the actions of the political branches, without judicial intervention. Internationalists' evidence also might refer to the judicial determination of the scope of individual rights under a treaty, as with Alexander Hamilton's brief aside in *The Federalist No. 22*, but they do not address whether individuals may bring actions immediately upon the entry into force of a treaty or whether an implementing statute is required first. *Ware*, decided shortly after the ratification, is perhaps the internationalists' best piece of historical evidence. While this Article will discuss *Ware* in a later section on events during the Washington and Adams administrations, it is worth noting at this point that the case is part of a more complex story than is commonly thought, one that includes support for both self-execution and non-self-execution positions.¹¹⁸

113. *The Federalist No. 22* (Alexander Hamilton), reprinted in 14 *Documentary History*, supra note 51, at 442; see Paust, supra note 17, at 762; Vázquez, *Treaty-Based Rights*, supra note 17, at 1109.

114. 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 158 (Jonathan Elliott ed., 2d ed. 1881).

115. See Vázquez, *Treaty-Based Rights*, supra note 17, at 1104–07.

116. 3 U.S. (3 Dall.) 199 (1796).

117. See Vázquez, *Treaty-Based Rights*, supra note 17, at 1113; Paust, supra note 17, at 764–66.

118. *Ware* is discussed in further detail in Part III. See infra text accompanying notes 558–591.

These examples point to a more systematic problem with the internationalist reading of history. In discussions of the nature of the treaty power, internationalists commonly mix modern concepts about international and constitutional law with speeches from the Philadelphia Convention, *The Federalist Papers*, the state ratification debates, and the comments and cases after ratification, producing one confused jumble.¹¹⁹ This "law office" approach to history fails to capture the legal, constitutional, and historical context within which the ratification took place, the evolution of the Framers' thinking about the treaty power from the beginning of the Philadelphia debates through the significant state ratifying conventions, and the arguments that occurred between Federalists and Anti-Federalists in the press—all of which shaped the original understanding of the Constitution. Internationalists attempt to use the Framers' every mention of the word "treaty" to glean some clear message about the applicability of treaties as domestic law, while ignoring the deeper structural imperatives, arising from federalism and the separation of powers, that the Constitution imposes upon treaties. Parts II and III will discuss the more complex story of the evolution of the treaty power during the Framing and ratification of the Constitution within its proper historical context.

II. THE FRAMING AND THE TREATY POWER

This Part locates the Constitution's textual allocation of the treaty power within the legal and political context of Anglo-American government in the eighteenth century. Section A sets the stage for our discussion by examining the treatment of the treaty power in eighteenth-century political thought and in Anglo-American political practice. Section B continues to address the pre-constitutional context by examining the relationship between treaties and legislation during the revolutionary and early national periods.

History is important to our analysis for several reasons. First, the Supreme Court's renewed interest in the structural elements of the Constitution has relied in part upon the original understanding. Recent separation of powers cases, for example, have turned to the Framers' intentions to illuminate the inherent powers of the branches.¹²⁰ Similarly,

119. I have criticized this faulty historical methodology on the part of foreign affairs scholars in more detail elsewhere. See John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 *Colo. L. Rev.* 1169 (1999).

120. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (describing the original intent of the Presentment Clause); *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218–24 (1995) (describing the Framers' intention that the judicial and legislative powers be strictly separated); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (describing Madison's pragmatic view of the separation of powers); *Morrison v. Olson*, 487 U.S. 654, 674–75 (1988) (discussing the Framers' views on appointments); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (describing the Framers' concern about maintaining separation of powers); *INS v. Chadha*, 462 U.S. 919, 946 (1983) (discussing the Framers' views of the Presentment Clause).

recent cases examining the balance of authority between the national government and the states have sought to understand the original thinking of those who drafted and ratified the Constitution.¹²¹ While obviously there is some dispute about how dispositive Framing history ought to be, both sets of decisions have made urgent appeals to *The Federalist Papers*, to the discussions of the Philadelphia Convention, and to the state ratifying debates for authority. If the Supreme Court is to address the effect of globalization upon treaties and the lawmaking process, it likely will consult the original understanding for guidance.

Second, writers on foreign affairs, especially those in favor of the doctrine of self-executing treaties, anchor their arguments upon the original understanding. As noted before, Professor Henkin flatly asserts that judicial and legislative willingness to find treaties non-self-executing clearly contradicts the Constitution's history.¹²² Other writers have repeated the claim that the Framers specifically intended that treaties be immediately implemented by courts.¹²³ Professor Vázquez concludes that "the Framers intended to make treaties operative on individuals and enforceable in the courts in cases between individuals" and that federal courts were to be the primary implementers and enforcers of treaties.¹²⁴ Earlier writers on treaties, who argued for a broad reading of the power and upon whom modern scholars often rely, also claimed that the original understanding of the Framers indicated that treaties were to have direct effect in American law.¹²⁵

A more systematic examination of the sources, however, will show that these claims cannot find firm support in the original understanding. In making his blanket assertions that the history of the Constitution does not justify non-self-execution, Professor Henkin provides no citations to any primary historical documents.¹²⁶ Instead, Henkin relies on *Foster v. Neilson*¹²⁷ to support the argument that the original understanding favors self-execution. This is odd not only because the Court decided *Foster* in

121. See, e.g., *Printz v. United States*, 521 U.S. 898, 910 (1997) (reviewing the *Federalist Papers* and other contemporary commentary); *Seminole Tribe v. Florida*, 517 U.S. 44, 71 (1996) (discussing areas of sovereignty that the Framers reserved to the states); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (same); *New York v. United States*, 505 U.S. 144, 155 (1992) (same); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (same). On this score, see John C. Yoo, *Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1357–58 (1997) [hereinafter Yoo, *Judicial Safeguards*].

122. See Henkin, *Foreign Affairs*, supra note 17, at 201.

123. See, e.g., Paust, supra note 17, at 761–62 (citing Framing era quotes as "further evidence that there was to be one type of treaty law, that which is immediately operative as supreme federal law when approved by the Senate and ratified by the President," and stating that "this expectation predominated among the Framers").

124. Vázquez, *Treaty-Based Rights*, supra note 17, at 1110.

125. See, e.g., 1 Charles Butler, *The Treaty-Making Power of the United States* 340–392 (1902); Samuel B. Crandall, *Treaties: Their Making and Enforcement* 19–63 (1916).

126. See Henkin, *Foreign Affairs*, supra note 17, at 201, 476–77.

127. 27 U.S. (2 Pet.) 253 (1829).

1829, 40 years after the ratification, but also because *Foster* introduced non-self-execution into American law.¹²⁸ Professor Paust, another supporter of self-executing treaties, provides historical evidence, but he mixes sources from before, during, and after the ratification, without noting their historical relevance,¹²⁹ without using the proper reference sources,¹³⁰ and without providing a sense of the general historical and political context within which the Framers acted. While more sensitive to context and the sources, Professor Vázquez's work also fails to provide a complete historical picture. For example, Professor Vázquez, like Professor Paust, focuses almost all of his attention on the Constitutional Convention, and to the extent he looks to the ratification process, he quotes only a few of the Federalist and Anti-Federalist papers and the debates of the North Carolina ratifying convention.¹³¹

128. See *infra* text accompanying notes 628–657.

129. For example, Professor Paust places great store in comments made during the North Carolina state ratifying convention, which actually rejected the Constitution, and the South Carolina ratifying convention, which was not considered politically important. See Paust, *supra* note 17, at 762–63. South Carolina did not become a battleground for ratification, as Federalists outnumbered Anti-Federalists by about two to one, and Anti-Federalists chose to fight in states where the Constitution was contested and the parties more evenly balanced. See Jack N. Rakove, *Original Meanings* 116 (1996). He fails to discuss substantial evidence in other state ratifying conventions that cuts against self-execution. Paust discusses John Jay's report of 1786 on treaties when he discusses the Constitutional Convention, as if both had the same importance and revealed the same intention with regard to treaties, which they did not. See *id.* at 760–61. He suggests that post-ratification practice uniformly affirmed that treaties should be self-executing, when in fact, as demonstrated by the debates surrounding the Jay Treaty, there was anything but consensus. See *id.* at 763–64.

130. For example, Professor Paust relies upon, for documents, Charles Butler's 1902 study of the treatymaking power, which is not a reference work on the Framing Period and itself made poor use of historical materials. See Paust, *supra* note 17, at 760–61 nn.3–9. While he does use Farrand's records of the Philadelphia Convention, he relies upon Elliot's outdated book for the few selective quotations that he provides. See *id.* at 762–63 nn.15–26. He fails to cite the Documentary History of the Ratification of the Constitution, which is the standard reference work for the state conventions and for the Federalist and Anti-Federalist writings on the Constitution. This use of sources fails to meet the standards set out for historical work by other scholars who study the Framing Period. See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523, 552–55 (1995) (outlining "basic" historical standards, including taking account of a larger historical context, consideration of both primary and secondary sources, and some deference to settled historical scholarship).

131. See Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1101–10. Reliance upon the North Carolina convention, however, demonstrates the faults of selectively using history—the North Carolina convention came *after* the necessary nine states had already ratified the Constitution, and, in fact, the first North Carolina convention withheld its consent. If anything, the North Carolina Convention stands as evidence that the Framers, at least in that state, did not believe in self-execution. Not only did the Convention reject the Constitution by a vote of 184 to 84, see 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 250–51 (Jonathan Elliot ed., 1881), but it also proposed an amendment to the Constitution that read, "[t]hat 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

A context-less treatment of the treaty power is symptomatic of a deeper problem with the internationalists' use of history. In focusing on a few statements here and there, or in swiftly drawing contemporary lessons from phrases such as "law" or "supremacy," they fail to sufficiently understand the political, legal, and constitutional world of the late eighteenth-century American. While this may be a difficult task, it is not impossible.¹³² Whether one wants to develop rules for originalists,¹³³ or measure the use of historical sources by the basic standards of the historical profession,¹³⁴ at the very least scholars who use an originalist approach must be sensitive to the broader intellectual picture of the Founding generation and the secondary works that attempt to re-create it. When this more comprehensive approach toward history is undertaken, the internationalist theory of automatic self-execution is found lacking.

This Section will attempt to provide an examination of the original understanding that meets these standards. It will focus on important factors that have been virtually ignored by most scholars, such as the British approach to treaties and the Pennsylvania and Virginia ratifying conventions. It will use sources that have not been systematically examined by these writers, such as the great mass of Federalist and Anti-Federalist writing, and it will attempt to show how the treaty question fit into the larger intellectual and constitutional world of the Framers. This analysis finds

treaty be valid which is contradictory to the Constitution of the United States." Id. at 246. James Madison, for one, later would argue that this amendment was an effort to "ascertain, rather than to alter the meaning of the constitution." James Madison, *Jay's Treaty* (Apr. 6, 1796), reprinted in 16 *Papers of James Madison* 290, 298 (J.C.A. Stagg et. al. eds. 1989).

132. If anything, we enjoy today an outpouring of excellent primary and secondary sources on the American Revolution and founding periods that make such historical reconstruction possible and worthy of effort. The *Documentary History of the Ratification of the Constitution*, supra note 51, collects, and continues to collect, into one place almost all of the extant speeches, debates, and pamphlets of the Ratification Period. We have the excellent works of historians to guide us. See Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967) [hereinafter *Bailyn, Ideological Origins*]; Bernard Bailyn, *The Origins of American Politics* (1968); Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790* (1965); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985); Forrest McDonald, *We the People: The Economic Origins of the Constitution* (1958) [hereinafter *McDonald, We the People*]; J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979) [hereinafter *Rakove, Beginnings*]; Rakove, supra note 129; Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969) [hereinafter *Wood, Creation*]; Gordon S. Wood, *The Radicalism of the American Revolution* (1992). One might also refer to works by John Philip Reid, Jack Greene, Edmund S. Morgan, Richard B. Morris, Lance Banning, and Joyce Appleby. An outstanding journal, the *William and Mary Quarterly*, provides a forum for the historical discussion of the Colonial, Revolutionary, and Framing Periods. At a minimum, works that take history seriously ought to take these original and secondary works into account in providing the necessary context for their inquiries.

133. See H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 659, 662-95 (1987) (setting out fourteen "rules" for the use of history by originalists).

134. See Flaherty, supra note 130, at 549-56.

that the Framers were part of a political world that viewed the power to legislate as a critical check on executive powers in foreign affairs, one that had been won after decades of struggle, first between the King and Parliament, and then between Parliament and the colonial assemblies. When the continuing separation of the treaty and legislative powers created severe problems for the new republic, the Framers developed *two* different responses for constitutional reform. While leaders such as Alexander Hamilton and John Jay wanted state courts to enforce treaties, James Madison and others devised a solution that relied upon a truly national representative legislature to carry treaties into effect. Both themes would run into the ratification fight itself and provide meaning to Article I and the Treaty Clause.

A. *Eighteenth-Century Political Thought and the Practice of British Foreign Policy*

To begin, we need to examine the legal, constitutional, and political background of the Anglo-American world of the eighteenth century. The Framers were former citizens of the British empire; the constitutional and political history of Great Britain had been, until 1776, their shared history. How legal authorities, therefore, thought about the relationship between treaties and laws, and the history of constitutional and political struggle between Crown and Parliament over the power to make treaties, formed the context within which the Framers would have understood the new Constitution. Events during the Revolution and the Critical Period also shaped the views of the Framing generation on treaties, especially as several prominent controversies during this period involved the treaty power. This part of the analysis will show that the Anglo-American legal, constitutional, and political world recognized a sharp distinction between the power to make treaties and the power to legislate, with the former seen as an executive power and the latter vested solely in the hands of the people's most direct representatives. Treaties dealt with matters involving foreign affairs, while the regulation of domestic conduct remained the province of domestic legislation.

Our effort to determine the original understanding of the treaty power starts with the British constitution. In the area of foreign affairs, the Framers borrowed from English legal concepts such as "declare War," "Commander in Chief," and "Letters of Marque and Reprisal."¹³⁵ Understanding what those terms meant in the British context, and how they worked in practice, will indicate what the Framers believed they had established when they wrote the Treaty Clause. Further, as former members of the British Empire, those who wrote and ratified the Constitution would have understood the new frame of government by comparing it to

135. See Yoo, *War Powers*, *supra* note 26, at 198.

their experience under the British system.¹³⁶ The eighteenth-century British constitution was composed of a series of unwritten principles, expressed in practice, statutes, and understandings that had developed over the course of centuries. These principles, which defined the relationship between the government and its people, and between the Crown and Parliament, had undergone significant change during the seventeenth and eighteenth centuries. The meaning and significance of these English constitutional developments would have been familiar to the ratifiers of the American Constitution, and the arrangement of British institutions and their control of the treaty power would have provided the context necessary to understand the Constitution. Also of intellectual importance was the political philosophy of the period, which often served as legal and constitutional authority in the British world. To reconstruct the mindset of the Framers, then, we will examine the thinking of seventeenth- and eighteenth-century political theorists on foreign affairs, law, and treaties, and then turn to the political and constitutional struggle between Crown and Parliament and its impact on the treaty power.

1. *Eighteenth-Century Political and Legal Theory.* — On questions concerning international law, the Framers first would have turned to the well-known publicists Hugo Grotius and Emmerich Vattel. Their treatises were a regular resource both for the Framers and for English legal authorities, such as William Blackstone, to whom the revolutionary generation looked for guidance.¹³⁷ Of course, these writers could not anticipate the growth in the breadth and depth of treaty-made international law that is now taking place at the end of the millennium. Indeed, they were at work laying the barest of foundations for the structure of modern international law, which at this time remained the preserve of relations between nation-states concerning basic issues of war, peace, and security.¹³⁸ However, their discussions of international law questions can shed some light upon today's growing merger of international and domestic affairs, and the corresponding growth of the scope of treaties. Well-known to the Framers, Grotius's *De Jure Belli ac Pacis* classified international agreements into treaties, sponsions, and other agreements.¹³⁹ Although he did not draw precise lines, he generally discussed treaties as encompassing three classes of subjects: treaties that enforce the law of nature, peace treaties,

136. As historian Forrest McDonald has observed, preparing for the bar in early America required lawyers to learn the history of the British constitution and of the powers of the monarchy and Parliament; nearly two-thirds of the Philadelphia Convention delegates had received this education. See Forrest McDonald, *The American Presidency* 12–13 (1994).

137. See Yoo, *War Powers*, supra note 26, at 204–06.

138. See Nussbaum, supra note 55, at 126–33.

139. See 2 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* 391 (James B. Scott & Francis W. Kelsey trans., Bobbs-Merrill 1925) (1646).

and treaties of alliance.¹⁴⁰ In the first class, Grotius placed agreements that provided rights, such as hospitality, between nations that had no relationship with each other. In the second group, Grotius placed agreements that ended hostilities by settling the issues that had led to war. According to Grotius, the final class included treaties of commerce, such as those setting import duties, and agreements to go to war in aid of another.¹⁴¹

As treaties were used generally to end wars, Grotius linked the power to enter into treaties with the authority to make war. "Those who have the right of initiative in conducting a war have the right to enter into treaties for the purpose of ending it."¹⁴² Distilling Roman practice, Grotius believed that treaties were made by the "highest authority" in a nation, meaning the domestic power that exercised sovereign authority.¹⁴³ In democracies, the treaty power would be lodged with the people; in aristocracies, it would rest with the state council. In a section discussing the subject matter of treaties, however, Grotius argued that the symmetry between the warmaking and the treatymaking powers sometimes ought to be broken. In the case of treaties that called for the transfer of sovereignty, such as ceding territory, population, or possessions, the approval of more than just a nation's representative in foreign affairs was required. Due to the transfer of territory or citizens, Grotius considered such agreements to be an alienation of sovereignty that required the approval of the people of a nation through its legislature.¹⁴⁴ "In order, therefore, that the undivided sovereignty may be transferred in a valid manner, the consent of the whole people is necessary."¹⁴⁵ This "may be effected," Grotius observed, "by the representatives of the parts which are called the estates," or, in modern terms, the legislature.¹⁴⁶ Even if the nation were a monarchy, it still must seek the approval of the people for changes in sovereignty, because the Crown held its power "as if in usufruct."¹⁴⁷

Vattel's *The Law of Nations or the Principles of Natural Law* followed Grotius's lead on the alienation of sovereignty.¹⁴⁸ Although both thinkers had sought to derive rules of international law and politics from natu-

140. See Michael D. Ramsey, Executive Agreements and the (Non)Treaty Power, 77 N.C. L. Rev. 133, 167 (1998) (discussing Grotius's classification of international agreements); see also Grotius, *supra* note 139, at II, xv, 393-96.

141. See Ramsey, *supra* note 140, at 167; Grotius, *supra* note 139, at II, xv, 393-96.

142. 3 Grotius, *supra* note 139, at 804.

143. Thus, "in a war which is public on both sides the right to end it belongs to those who have the right to exercise supreme power."

144. See *id.* at 805.

145. *Id.* at 806.

146. *Id.*

147. *Id.*

148. Vattel was well received in England and the American states soon after his 1758 and 1777 publications in English. See 2 Albert de Lapradelle, Introduction to Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* xxvi-xxx (Charles G. Fenwick trans., James Brown Scott ed., Carnegie Institution 1916) (1758).

ral law, Vattel pursued a more extreme position on sovereignty. Grotius, for example, believed that sovereignty sometimes could be vested in a king by its people, just as an individual could sell himself into slavery.¹⁴⁹ Vattel, however, argued for a background principle that “true sovereignty is essentially inalienable.”¹⁵⁰ According to Vattel, this rule was necessary because of the nature of civil society—people form into a society in order to live according to their own laws; a public authority is formed solely to administer those laws; government power cannot be transferred to another entity without the approval of the people who created the society.¹⁵¹ Therefore, even if a nation authorizes its leader to represent it abroad, it still cannot delegate to him the authority to transfer sovereignty unless they have given their express approval.¹⁵² In the absence of an express delegation or a history of executive practice, “the concurrence of the Nation or of its representatives” is necessary in order to transfer sovereign powers.¹⁵³

Vattel’s and Grotius’s early discussions of delegated powers in the context of treaties provide an analogy for our discussion. Their conceptualization of an “alienation” of sovereignty is roughly similar to the loss of lawmaking authority that arises in today’s regulatory treaties. While modern agreements do not require the alienation of land or people to another government, they do call for something similar—a sovereign nation’s transfer of control over a certain type of conduct occurring within its territory. To the extent that the works of Vattel and Grotius bear on questions of non-self-execution, they suggest that international agreements that transfer sovereignty cannot be made by the unilateral actions of the executive; international agreements require the consent of the legislative power, which represents the people. As Grotius described it, “[i]n order to validly alienate any part of the sovereignty there is need of a twofold consent, that of the whole body, and in particular the consent of that part of which the sovereignty is at stake”¹⁵⁴ Approval by the people of such a treaty is necessary, he believed, “since without its consent [sovereignty] cannot be separated from the body to which it has belonged.”¹⁵⁵ Transplanting these writers to the current discussion, if all of the nation’s people are ceding, in common, part of their sovereign pow-

149. See 1 Grotius, *supra* note 139, at 119–20.

150. Vattel, *supra* note 148, at 33.

151. See *id.*

152. Only if the leader has been given “full and absolute sovereignty,” and has been exercising such power without dissent for some time, Vattel thought, could he then unilaterally alienate sovereign power to another nation. *Id.* at 101 (proclaiming that “[I]f the fundamental law forbids any such dismemberment by the sovereign he has no power without the concurrence of the Nation or of its representatives,” before elaborating that “if the law is silent on that point, and if the Prince has been given full and absolute sovereignty, he is then the depositary of the rights of the Nation and the organ of its will.”).

153. *Id.*; see *id.* at 347.

154. 3 Grotius, *supra* note 139, at 806.

155. *Id.*

ers over a certain subject matter, then popular sovereignty, as articulated by Grotius and Vattel, would seem to require a majoritarian process to approve the treaty.

In addition to these authorities on international law, the Framers would have consulted theorists on domestic constitutional structure. As treaty-making, like war-making, is a fusion of international and domestic law, the Framers' thinking would have been shaped by authorities on both subjects. On this point, the writings of Locke, Montesquieu, and Blackstone profoundly impacted the thinking of the Founding generation.¹⁵⁶ As historians Bernard Bailyn and Gordon Wood have shown, the ideas of these thinkers, combined with radical eighteenth-century English opposition ideology, provided the intellectual foundations for the American Revolution.¹⁵⁷ Together, these works describe the abstract forms of government that the Framers sought to emulate in part, and to reject in part. They also recover conceptions of the separation of powers against which we can measure current arrangements and arguments about the treaty power.

Examination of these sources indicates that eighteenth-century Anglo-American constitutional thought distinguished between the foreign affairs power on the one hand, and domestic legislation on the other, and that this distinction was part of the development of the separation of powers. As others have observed, the birth of the modern concept of the separation of powers occurred in England during the time of the Civil War and the Protectorate.¹⁵⁸ Attempting to justify the constitutional change rendered by the execution of Charles I and the dissolution of the House of Lords, English political thinking began to move away from the model of mixed government—the ancient idea that government should be composed of representatives of the different classes of society (monarch, nobility, and the people) who could check and balance one another.¹⁵⁹ In its place, English writers articulated a rudimentary constitutional theory that sought to divide government by function, rather than by class. In his *Second Treatise of Government*, John Locke distinguished between the legislative power and the executive power, and then differentiated the functions of the executive power itself. Both powers derived, according to Locke, from man's abilities in the state of nature. The legislative power traced its roots to the individual's power to do as he pleased.

156. The writers of *The Federalist Papers*, for example, sometimes quoted long passages from Montesquieu's *Spirit of the Laws*. See, e.g., *The Federalist* No. 9 (Alexander Hamilton), reprinted in 14 *Documentary History*, supra note 51, at 160–62. Blackstone's *Commentaries* had great appeal for the Founding generation as the authoritative treatise on many different areas of law. See Wood, *Creation*, supra note 132, at 10.

157. See, e.g., Wood, *Creation*, supra note 132, at 10–18; Bailyn, *Ideological Origins*, supra note 132, at 31.

158. See W.B. Gwyn, *The Meaning of the Separation of Powers* 37–70 (Tulane Studies in Political Science Vol. IX, 1965); M.J.C. Vile, *Constitutionalism and the Separation of Powers* 23–57 (2d ed. 1998).

159. See Vile, supra note 158, at 23–57.

The executive power found its origins in the individual's right to punish crimes against natural law. In a modern commonwealth, the legislative power included the authority to establish rules of conduct, while the executive power, a "power always in being," bore responsibility to "see to the execution of the laws that are made and remain in force."¹⁶⁰

On the subject of foreign affairs, Locke identified within the executive authority yet another power, the "federative" power. Although individuals, when they form a society, are governed by its laws, they are still "in the state of nature with the rest of mankind."¹⁶¹ Thus, a federative power was necessary to govern "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."¹⁶² While the federative and executive powers were usually vested together, Locke observed that they were "really distinct in themselves."¹⁶³ The executive power was concerned with "the execution of the municipal laws of the society within itself upon all that are parts of it," while the federative power was focused on "the management of the security and interest of the public without, with all those that it may receive benefit or damage from."¹⁶⁴ Locke's reason for differentiating the federative from the executive power, where no one had before, is important. Locke envisioned the executive power as providing an agency of government that, since it was always in being, could execute the laws that an intermittently sitting legislature would enact. Executives would be subject to the laws passed by the Parliament, which should establish rules to anticipate most domestic contingencies. Foreign affairs, by contrast, "are much less capable to be directed by antecedent, standing, positive laws" because "what is to be done in reference to foreigners," since it was dependent on their actions, "must be left in great part to the prudence of those who have this power committed to them."¹⁶⁵ Because foreign affairs are not easily controlled by prior legislation, when the executive acts abroad it is not actually executing the law. Instead, the executive is leading a united society in its relations with other societies, governed only by the law of nature.¹⁶⁶ In this respect, the executive's performance of the federative function is similar to its use of the prerogative, which allows it to act in its discretion to protect the society in cases in which the law did not provide, or in which strict application of the law would harm the community.¹⁶⁷

Modern treaties raise difficulties for this vision of government because, while they involve foreign affairs, their actual intent and effect is to

160. John Locke, *The Second Treatise of Government* § 143–44 (Regnery ed., 1955) (1690).

161. *Id.* § 145.

162. *Id.* § 146.

163. *Id.* § 147.

164. *Id.*

165. *Id.*

166. See Vile, *supra* note 158, at 66–67.

167. See Locke, *supra* note 160, § 160.

regulate the domestic conduct of private parties. Unlike the exigencies of war and peace, which were the concern of the federative power, today's treaties do not involve matters that are incapable of control by "antecedent, standing, positive laws."¹⁶⁸ In fact, today's international regulatory agreements exist to do exactly that, to establish positive rules of conduct that will govern the activities of individuals. Locke's vision of the separation of powers suggests that the legislative power—not the executive's federative power—would govern matters that could be governed by antecedent rules and that were not subject to the sudden flux of international relations. This conclusion is consistent with Locke's broader goal of subjecting the executive to the rule of law, and of restricting the ability of the government to act in a manner "absolutely arbitrary over the lives and fortunes of the people."¹⁶⁹ By establishing a separation of powers, Locke sought to subject the power to regulate individual conduct to rules that would ensure accountability and fair process. Hence, legislative action could not be exercised by "extemporary arbitrary decrees," but only by general, "promulgated" laws.¹⁷⁰ Nor could the legislative power be exercised by anyone other than the people's representatives. "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others."¹⁷¹ Locke's non-delegation principle ensured that the legislature could not avoid the checks on its power by delegating it to another body, such as the monarch. Locke's principals of legislation would find the new species of treaties similarly troubling, due to their transfer of lawmaking authority to international institutions. In a sense, the use of the federative power to enact domestic regulations would have raised in Locke's mind the fear of uniting the executive and legislative powers.

Locke was not the only English political writer who influenced the thinking of the Framers. As intellectual historians such as Bailyn, Wood, and J.G.A. Pocock¹⁷² have shown, the Revolutionary generation was steeped in the opposition "Country" mentality that challenged the "Court" policies of the Walpole administration.¹⁷³ Not quite the result of partisan conflict, this difference of ideology arose among the landed gentry in reaction to the establishment of a permanent executive ministry, under the Hanoverian kings, that oversaw a new financial and administrative system that funded Britain's expensive wars and managed the na-

168. *Id.* § 147.

169. *Id.* § 135.

170. *Id.* § 136.

171. *Id.* § 141. According to Locke, the other two checks on legislative power are that it cannot exercise an arbitrary power that goes beyond what an individual possesses in the state of nature, and that it cannot take property without the owner's consent. See *id.* §§ 135, 138.

172. See *infra* text accompanying note 132.

173. See, e.g., Bailyn, *Ideological Origins*, *supra* note 132, at 47–48; John Trenchard & Thomas Gordon, *Cato's Letters* (6th ed., Liberty Classics 1995) (1755).

tional debt.¹⁷⁴ Polemicists such as John Trenchard and Thomas Gordon, the authors of the popular *Cato's Letters*, interpreted these developments as an effort by the Crown and its ministers to corrupt the mixed constitution, which had maintained the liberties of the people by balancing power against power.¹⁷⁵ A power-grabbing ministry used bribery, the sale of offices, costly wars, a standing army, and heavier taxes and public debts, to sap the independence of Parliament, oppress the people, and enrich the upper classes. Such methods allowed the Crown to engage in an end-run around the checks and balances of the ancient constitution, and gave it the power to erode Parliament's ability to defend the rights of the people. In response, Country writers urged a return to simpler government, with less bureaucracy and war, in which Parliament recaptured its independence and control over funding and legislation.

Locke and English opposition thought reached the Framers both directly and through the writings of Charles Louis de Secondat, Baron Montesquieu.¹⁷⁶ In the field of foreign affairs, Montesquieu closely followed Locke's example in maintaining a line between war and peace, on the one hand, and domestic legislation on the other. His famous discussion of the English constitution in *Spirit of the Laws* begins with the declaration that "[i]n every government there are three sorts of powers: the legislative; the executive in respect to things dependant on the law of nations, and the executive in regard to matters that depend on the civil law."¹⁷⁷ Montesquieu adopted Locke's understanding of the executive power as composed of a foreign affairs power (Locke's federative power) and a domestic authority to execute the law. Under the foreign affairs power, Montesquieu observed, the executive "makes peace or war, sends or receives embassies, establishes the public security, and provides against

174. See, e.g., John Brewer, *The Sinews of Power: War, Money and the English State, 1688-1783* (1989).

175. See generally Trenchard & Gordon, *supra* note 173.

176. Montesquieu had a profound influence upon the Framing generation, and references to his *Spirit of the Laws* are sprinkled liberally throughout the Philadelphia Convention, *The Federalist Papers*, and the state ratification debates. Montesquieu, for example, was the most cited secular thinker by both Federalists and Anti-Federalists during the 1780s. See Donald S. Lutz, *The Origins of American Constitutionalism* 145 (1988) (table showing that Montesquieu's writings composed 29% of the cites by Federalists and 24% of the cites by Anti-Federalists). Putting to one side the debate over whether it faithfully described reality, Montesquieu's chapter on the English constitution, and his discussion of the manner in which it enhanced liberty by separating power, served as a model for the Framing generation. Montesquieu was perhaps the first major political thinker to accord the judiciary an equal status as a third branch of government, and he leavened Locke's stricter separation of powers theory with some of the balanced government arguments of English oppositionist thought. See Gwyn, *supra* note 158, at 109-13; Vile, *supra* note 158, at 83-106. His account of governmental power blended an emphasis on a functional allocation of authority with a measure of checks and balances to produce a system similar to the one adopted in Philadelphia in 1787.

177. Charles Louis de Secondat, Baron Montesquieu, *Spirit of the Laws*, bk. 11, ch. 6 (Thomas Nugent trans., 1949) (1748).

invasions.”¹⁷⁸ Legislative power, in contrast, encompasses the authority to declare the “voice of the nation” and the rules of conduct that citizens owe one another.¹⁷⁹ Apart from establishing the domestic regulations that bound society, the legislature also maintained a check on the executive through its funding power, particularly in the area of foreign affairs.¹⁸⁰ While Montesquieu’s major innovation in separation of powers thought was his argument in favor of an independent judiciary, which apparently was to have no role in foreign affairs, he wrote little that altered Locke’s basic vision of a federative power—a power distinct from the legislature’s regulation of domestic conduct.

As Locke had acknowledged, however, the federative power was fused often—if not always—with the executive power because both functions required quick, decisive action. In his *Commentaries on the Laws of England*, William Blackstone took Locke one step farther: He declared that foreign affairs was a pure executive power. In fact, it was the quintessential executive function.¹⁸¹ Initially, Blackstone had followed Locke’s emphasis on the functional superiority of the executive as the reason for vesting the treaty power in the Crown. Because “[i]t is impossible that the individuals of state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves,” Blackstone observed, “[w]ith regard to foreign concerns, the sovereign is the delegate or representative of his people.”¹⁸² Hence, the people vested their foreign affairs power in the King because “[u]nanimity must be wanting to their measures, and strength to the execution of their counsels.”¹⁸³ Blackstone employed similar functional reasoning in explaining the Crown’s sole control over the military, declaring war, and negotiating with foreign nations.¹⁸⁴

But Blackstone then went even further by shifting the justification—from function to sovereignty—for locating the treaty power in the King. Quoting Puffendorf, he argued that treaties must be made “by the sover-

178. *Id.* Montesquieu almost fully equates the domestic side of executive power with an independent judiciary. He initially conceives of executive power as only encompassing foreign affairs, but later in his work he identifies a domestic executive power of enforcing the law that is distinct from the power to judge cases.

179. *Id.*

180. *See id.*

If the legislative power was to settle the subsidies, not from year to year, but forever, it would run the risk of losing its liberty, because the executive power would be no longer dependent; and when once it was possessed of such a perpetual right, it would be a matter of indifference whether it held it of itself or of another. The same may be said if it should come to a resolution of intrusting, not an annual, but a perpetual command of the fleets and armies to the executive power.

Id.

181. 1 William Blackstone, *Commentaries* *252–*253.

182. *Id.* at *252.

183. *Id.*

184. *See, e.g.,* Yoo, War Powers, *supra* note 26, at 202–04.

eign power" so that they would be "binding upon the whole community."¹⁸⁵ In the case of treaties, "in England the sovereign power, *quoad hoc*, is vested in the King."¹⁸⁶ Because the Crown served as the representative of all the people in the area of treaty-making, Blackstone argued, "no other power in the kingdom can legally delay, resist, or annul" the King's treaties, which he referred to as "contracts."¹⁸⁷ "What is done by the royal authority, with regard to foreign powers, is the act of the whole nation," Blackstone concluded.¹⁸⁸ His treatment of the treaty power in this respect was consistent with his overall approach to the executive, in which he collapsed the distinctions that Locke had drawn in describing the power of the Crown. Thus, Blackstone described the treaty-making and warmaking powers as the "principal prerogatives of the sovereign,"¹⁸⁹ and subjected them to the control of the law, whereas Locke thought of the prerogative as an extra-constitutional authority.

Again unlike Locke, Blackstone did not undertake a detailed consideration of the nature of legislative power. He nonetheless recognized that Parliament played the dominant role in the regulation of domestic affairs. Parliament, Blackstone said, was "the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms."¹⁹⁰ Parliament enjoys the "sovereign and uncontrollable authority" in all forms of legislation concerning matters "of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal."¹⁹¹ Parliamentary authority, Blackstone noted, had regulated the succession to the Crown, changed the national religion, and even altered the constitution. "[T]hat what the parliament does no authority upon earth can undo," Blackstone wrote.¹⁹² While the Crown could issue proclamations interpreting and enforcing parliamentary laws, it could not "contradict the old laws or tend to establish new ones," because "the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power."¹⁹³ Blackstone, however, does not seem to have considered the interaction between the Crown's monopoly over the treaty power and Parliament's supremacy over the regulation of domestic affairs. For example, Blackstone does not discuss what would happen if a treaty required domestic legislation for its implementation due to, for example, the need to vote funds or to change statutory or common law. Yet, Blackstone's declaration of parliamentary supremacy over taxation and domestic legislation would suggest that only the legislature could implement treaties that required such action.

185. Blackstone, *supra* note 181, at *257.

186. *Id.*

187. *Id.*

188. *Id.* at *252.

189. *Id.* at *261.

190. *Id.* at *160.

191. *Id.*

192. *Id.* at *161.

193. *Id.* at *270.

Blackstone's categorization of the treaty-making power as part of the royal prerogative suggests that he too thought of treaties as separate from domestic lawmaking. Modifying Locke, he conceived of the prerogative as acting in those situations in which the positive laws are silent, rather than as a power to act in the public interest even against the standing laws. Impeachment was the only remedy for misuse of the prerogative,¹⁹⁴ because the prerogative was instant action, rather than ongoing regulation; repealing legislation would be of little use in reversing the prerogative, because its exercise would cease once the royal action had ended. In this respect, the treaty-making power resembled the other significant royal prerogative in foreign affairs, the power to declare war. Blackstone envisioned impeachment as one of the chief parliamentary checks on the Crown's exclusive authority to make war, and as treaties usually accompanied the outbreak of war and the agreement for peace, it seems unsurprising that the constitution treated the two powers in the same manner.¹⁹⁵

194. It seems that Blackstone at least would have allowed Parliament the power to limit the domestic effect of treaties, because he recognized that even the Crown's discretion in treaty-making abroad was not absolute. Although the King held a monopoly over foreign affairs under the constitution, Parliament could nullify Crown policy by impeaching the King's ministers who had advised him to enter into an unfortunate treaty. "[L]est this plenitude of [royal] authority should be abused to the detriment of the public," Blackstone wrote, "the constitution . . . has here interposed a check, by the means of parliamentary impeachment . . ." *Id.* at *257. Impeachment would be used as a "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." *Id.* In a different discussion of the treaty power, Blackstone indicated that the ministers need not have acted out of criminal motives to warrant impeachment; any treaty that detracted from the public good would do. Including the treaty-making power in the royal prerogative, Blackstone defined the prerogative as "the discretionary power of acting for the public good, where the positive laws are silent." *Id.* at *252. If, however, "that discretionary power be abused to the public detriment," then "such prerogative is exerted in an unconstitutional manner." *Id.* Blackstone believed that impeachment was the remedy for such unconstitutional exercises of the prerogative. "Thus the sovereign may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded." *Id.*

195. Some believe that impeachment today can still serve an effective role in controlling executive misdeeds in foreign policy. See Lori F. Damrosch, *Impeachment as a Technique of Parliamentary Control over Foreign Affairs: A Presidential System?*, 70 U. Colo. L. Rev. 1525, 1551 (1999) ("egregious subversion of constitutionally mandated congressional prerogatives concerning major foreign policy decisions" can constitute an impeachable offense).

The similar checks and balances upon the treaty and war powers suggest a deeper affinity between these two dimensions of the royal prerogative. Both powers involved the nation's state of relations with other countries under international law, rather than the regulation of domestic conduct and events. When the Crown decided to wage war, the declaration served to notify both the British people and other nations that Great Britain considered itself to be in a state of war under international law. See Yoo, *War Powers*, *supra* note 26, at 204-08. So too, the King's prerogative over treaty-making was concerned with defining rights and obligations that Great Britain held toward other nations under

Although Blackstone was not as clear in his thinking as perhaps Locke or Montesquieu, he implicitly shared their distinction between treaty-making and lawmaking. This difference in approach, but similarity in outcome, may have resulted from Blackstone's thinking on the separation of powers. Locke and Montesquieu pursued a pure separation of powers scheme, in which each governmental function was classified as either legislative, executive, or judicial, and then allocated to that branch. Blackstone, on the other hand, adapted the separation of powers to a more traditional balanced government framework, in which different functions were distributed so that each organ of government could check the other.¹⁹⁶ In the former scheme, maintaining a line between treaty-making and lawmaking fits the distinction between executive power in foreign affairs and legislative control over domestic regulation. Limiting the treaty power to matters of international affairs, however, and requiring parliamentary participation for any treaty undertakings of a domestic nature also provided Parliament with a check on the royal prerogative over international agreements. As we will see presently, these theoretical discussions of the treaty power drew upon the actual workings of British politics in the seventeenth and eighteenth centuries.

2. *The Making of British Foreign Policy at the Time of the Framing.* — In considering the treaty power, the Framers would have looked as much to recent British political history as to the intellectual thinking concerning the separation of powers. 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.¹⁹⁷ British political history was the Framers' shared history, at least until 1776, and in many ways the revolutionaries believed that they were defending the ancient constitution against the political corruption that appeared to take

international law, such as strategic alliances and neutrality pacts. As such, both 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.

196. See Vile, *supra* note 158, at 111–15.

197. One can see this, for example, in the Framers' discussion of war powers. See, e.g., Cato, Essay IV, N.Y.J. (1787–1788), reprinted in 2 *The Complete Anti-Federalist* 113, 115 (Herbert J. Storing ed., 1981) (comparing President's war powers to British King's prerogative); *The Federalist* No. 69 (Alexander Hamilton), reprinted in 16 *Documentary History*, *supra* note 51, at 390–92 (arguing that President's war powers were weaker in operation than those enjoyed by British monarch); 2 *The Records of the Federal Convention of 1787*, at 541 (Max Farrand ed., 1911) [hereinafter Farrand] (Pierce Butler comparing President's war powers to Duke of Marlborough's prolonged command of British army).

hold of the British government after the Seven Years War.¹⁹⁸ Furthermore, while Locke, Montesquieu, and Blackstone certainly informed the Framers' thinking on the formal aspects of the British constitution, that constitution itself was not a fixed document. It was instead a series of unwritten principles that changed in response to significant political events and practices. To understand the British constitution, and the background principles it embodied for the Framers, we will retrace British political history of the seventeenth and eighteenth centuries as it related to treatymaking and lawmaking.

Struggle over the powers of war and peace would have rested in the center of the Framers' memories of recent British political history. The contest between Crown and Parliament for primacy in foreign affairs was a critical element of the Civil War, the Interregnum, the Restoration, and the years of settlement. While the Crown entered the seventeenth century with absolute authority over treatymaking, this monopoly came under attack by Parliament, which primarily used its control over finances to win significant influence over the course of foreign policy. During the Interregnum, Parliament went farther and claimed ultimate control over issues of war and peace, but formal authority over treaties was returned to the monarchy during the Restoration. Nonetheless, the political settlement of the eighteenth century provided Parliament with significant checks on the treaty power through its monopoly over domestic lawmaking. 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. Such a result would have subverted both the separation of powers principles and the checks and balances that two centuries of political struggle had wrought.

While by the end of the Elizabethan Period the Crown had retained its monopoly over foreign affairs, under the Stuarts foreign affairs became the source of one of the central conflicts between the monarchy and Parliament.¹⁹⁹ Initially, James I had attempted to rule England without calling Parliament into session—primarily by relying on revenues from Crown properties—because Parliament had provided a forum for the criticism of Stuart policies. But the beginning of the Thirty Years War in 1618 led James I to undertake several military and diplomatic initiatives requiring the financial support of Parliament, which had the sole

198. See, e.g., Bailyn, *Ideological Origins*, *supra* note 132, at 66–77, 94–117; 3 John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Legislation* 68–74, 79–86, 126–41 (1991).

199. See David Lindsay Keir, *The Constitutional History of Modern Britain, 1485–1951*, at 180–91 (5th ed. 1953); Frederick W. Maitland, *The Constitutional History of England* 306–11 (1961); J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603–1689*, at 46–50 (1952); Thomas Pitt Taswell-Langnead, *English Constitutional History from the Teutonic Conquest to the Present Time* 481–90 (A.L. Poole ed., 9th ed. 1929).

constitutional power to raise taxes and vote supplies.²⁰⁰ Parliament, however, distrusted James's motives and his foreign policy goals, which included the establishment of an alliance with Spain and France.²⁰¹ Though it had no formal role in the treatymaking process, Parliament used its powers over supply to force James to alter his diplomatic strategy to one of hostility toward the Catholic powers. In 1621, Parliament petitioned James, in return for a small subsidy, to terminate his alliance with Spain and attack her in order to slow down the pace of Catholic victories in Germany.²⁰² In response, the King rejected these efforts to alter his foreign policy, warned the Commons that "none therein shall presume henceforth to meddle with anything concerning our Government or deep matters of State,"²⁰³ and claimed that Parliament's powers derived only from the monarchy's "grace and permission."²⁰⁴

Yet the Crown soon realized that without adequate funds its ability to conduct a meaningful foreign policy was impossible. By 1624 James gave in, called another Parliament, and even publicly sought its advice on foreign affairs.²⁰⁵ Acceding to legislative demands, he terminated his treaties with Spain and engaged in war against his former allies in Germany, in exchange for new grants of funding that were contingent on an anti-Catholic policy.²⁰⁶ Charles I's ascension to the throne in the following year led Parliament to push its powers even farther. In exchange for larger subsidies to pursue the new foreign policy, Parliament demanded that the Crown terminate its alliance with France and explain the conduct of military operations on the Continent.²⁰⁷ Resisting what he saw as further encroachment on the prerogative, Charles ruled without Parliament for eleven years, during which time the Crown raised funds through forced loans, a tax on maritime communities to support the navy, and the sale of royal property.²⁰⁸ By 1640, internal rebellion in Scotland forced Charles to turn to Parliament again for supply, which set in motion another struggle over the prerogative and funding that eventually led to

200. See Keir, *supra* note 199, at 185.

201. See *id.* at 186.

202. See Commons Petition (Dec. 3, 1621), reprinted in *The Stuart Constitution 1603-1688: Documents and Selected Commentary* 43-47 (J.P. Kenyon ed., 1st ed. 1966).

203. King's Message to Commons (Dec. 3, 1621), reprinted in Tanner, *supra* note 199, at 48.

204. *Id.* at 49. Protesting James's theory of parliamentary authority, the Commons argued that it had the right to debate, and counsel the monarch on, any and all matters of state, including foreign policy and national defense, in addition to the power to make laws. See *The Commons, Protestation* (Dec. 18, 1621), reprinted in *Stuart Constitution*, *supra* note 202, at 47-48. James became so enraged at this claim that he dissolved Parliament and even personally ripped the Commons' message out of the parliamentary journal. See Keir, *supra* note 199, at 187-88; Tanner, *supra* note 199, at 49.

205. King's Speech at the Opening of Parliament (Feb. 19, 1624), reprinted in *Stuart Constitution*, *supra* note 202, at 48-50.

206. See Subsidy Act of 1624, reprinted in *id.* at 76-80.

207. See Tanner, *supra* note 199, at 54-59; Keir, *supra* note 199, at 188-89.

208. See Tanner, *supra* note 199, at 59-82; Keir, *supra* note 199, at 190-212.

Cromwell, Charles's execution, and the Interregnum.²⁰⁹ Even during this final struggle, Parliament recognized that the King retained the power to make treaties, although it sought to force the King to use that power to enter into alliances with other Protestant nations as one of the conditions for parliamentary cooperation.²¹⁰ In his final answer as King, Charles admitted that the Commons exercised a check on his foreign affairs powers by its control over lawmaking, funding—which he called “the sinews as well of peace as of war”—and impeachment.²¹¹ Until his execution, Charles consistently refused to accept any proposals for further parliamentary controls over war and peace.²¹²

Governing without a king produced several experiments concerning the allocation of the treaty power, all of which maintained its distinction from the authority to legislate. Some early proposals for a new constitution placed the conduct of foreign policy in the hands of a king with a Council of State, but with control over war and peace ultimately in the hands of Parliament, while others centralized all powers in the Parliament.²¹³ Throughout these experiments, the victors continued to distinguish between “the enacting, altering and repealing of laws” that governed domestic conduct on the one hand, and “the making war and peace” and the “treating with foreign states” on the other, even when both powers were given to the same body.²¹⁴ In all of these proposals, the power to legislate remained in the hands of Parliament, which was seen as the representative of the people, while the treaty power was vested either in Parliament as a whole or in an executive with the participation of the Parliament or its representatives.²¹⁵ Cromwell's efforts to legitimate his military government through written constitutions continued to recognize this distinction. In *The Instrument of Government*, which he issued in 1653 to a hand-picked Parliament, all the “supreme legislative

209. See *Stuart Constitution*, *supra* note 202, at 189–97.

210. See *The Nineteen Propositions* (June 1, 1642), reprinted in *Stuart Constitution*, *supra* note 202, at 244–47.

211. *King's Answer to the Nineteen Propositions* (June 18, 1642), reprinted in *Stuart Constitution*, *supra* note 202 at 21–23.

212. See *Stuart Constitution*, *supra* note 202, at 294–95.

213. See *The Heads of the Proposals* (Aug. 1, 1647), reprinted in *Stuart Constitution*, *supra* note 202, at 302–08.

214. *The First Agreement of the People* (Oct. 28, 1647), reprinted in *Stuart Constitution*, *supra* note 202, at 308, 309.

215. See *Fron a Remonstrance of Fairfax and the Council of Officers* (Nov. 16, 1648), reprinted in *Puritanism and Liberty, Being the Army Debates (1647–49)*, at 456, 457 (A.S.P. Woodhouse ed., 1938) (distinguishing between “the power of making laws, constitutions, and offices, for the preservation and government of the whole, and of altering or repealing and abolishing the same” and “the power of final judgment concerning war or peace”). Interestingly, several proposals discussed the idea of ending the war with the King by making a peace “treaty” with him, but then distinguished between such a treaty and the domestic scheme of government, which was addressed by legislation. See, e.g., *The Humble Petition* (Sept. 11, 1648), reprinted in *Stuart Constitution*, *supra* note 202, at 319–24.

authority” of the English Commonwealth was vested in the “Lord Protector” and the Parliament by the people.²¹⁶ The Instrument did not view the treaty power as part of this authority. Instead it separately vested the powers to conduct foreign affairs and to make war and peace upon the Lord Protector and his council of advisers. In contrast, the Instrument declared that “the laws shall not be altered, suspended, abrogated, or repealed, nor any new law made, nor any tax, charge or imposition laid upon the people” without the consent of Parliament.²¹⁷ Four years later, the instability of the political system gave rise to yet another constitution, *The Humble Petition and Advice*, which came even closer to reproducing the old constitution’s division of powers by allocating treaty-making to the executive and reserving domestic lawmaking to Parliament.²¹⁸

Restoration of the monarchy soon renewed tension with Parliament over funding and legislation in support of foreign affairs. From 1660 to the end of the Seven Years War in 1763, Great Britain engaged in at least seven major conflicts, the initiation or settlement of which involved treaties that often called upon Parliament either to provide money or to enact commercial legislation.²¹⁹ These continued conflicts forced the Crown to involve Parliament in the setting of foreign policy. Even though Charles II’s return brought a restoration of the monarchy’s ancient powers over war and peace,²²⁰ Parliament had firmly established its own formal control over legislation and taxation.²²¹ Making treaties or pursuing a successful foreign policy would thenceforth require the cooperation of

216. *The Instrument of Government* (Dec. 16, 1653), reprinted in *Stuart Constitution*, supra note 202, at 342, 342.

217. *Id.* at 343.

218. *The Humble Petition and Advice* (May 25, 1657), reprinted in *Stuart Constitution*, supra note 202, at 350.

219. Recent works on British diplomatic history reflect a new interest in the relationship between foreign policy and domestic politics. The monographs of Jeremy Black, in particular, have been at the forefront of this movement, which has provided much of the research for this Section of the Article. See Jeremy Black, *British Foreign Policy in an Age of Revolutions, 1783–1793*, at 472–518 (1994) [hereinafter *Black, Age of Revolutions*]; Jeremy Black, *British Foreign Policy in the Age of Walpole 75–89* (1985) [hereinafter *Black, Age of Walpole*]; Jeremy Black, *Natural and Necessary Enemies: Anglo-French Relations in the Eighteenth Century 93–133* (1986); Jeremy Black, *A System of Ambition?: British Foreign Policy 1660–1793*, at 12–58 (1991) [hereinafter *Black, A System of Ambition*]. Black’s work emphasizes the manner in which Parliament’s constitutional powers in foreign affairs, particularly in the treaty process, provided it with an important voice in the setting of foreign policy. Even the other significant line of work on British foreign relations during this period, which emphasizes the decisions and personalities of individual ministers and diplomats, acknowledges that Parliament and its constitutional powers were an important factor in the making of foreign policy. See, e.g., H.M. Scott, *British Foreign Policy in the Age of the American Revolution 19–22* (1990).

220. See *An Act Declaring the Sole Right of the Militia to be in the King* (1661), reprinted in *Stuart Constitution*, supra note 202, at 374; Keir, supra note 199, at 236.

221. See Keir, supra note 199, at 232–33.

Parliament.²²² In addition to funding the wars against the Dutch in 1665 and 1672, Parliament was also called upon to enact a series of Navigation Acts in order to wage economic warfare upon the United Provinces.²²³ Although the Crown retained the initiative in foreign affairs throughout this period, Parliament at times sought to use its powers to persuade Charles II to adopt a more vigorous stance against France. In 1677 and 1678, for example, the Commons voted funding for the military contingent on the formation of an alliance against Louis XIV, and in so doing declared that it would refuse to "grant supplies for maintenance of wars and alliances before they are signified in Parliament."²²⁴ Although Charles protested this invasion of his prerogative over treaty-making,²²⁵ he eventually entered into an alliance with the Dutch against France, as Parliament desired.²²⁶ Charles ended his reign by governing without Parliament, and funding his administration by subsidies from Louis XIV, which only demonstrated further that the Crown could not conduct a meaningful foreign policy and enter into treaties without parliamentary support.

While the 1688 Glorious Revolution produced no formal rearrangement of this constitutional balance between Crown and Parliament, the years of settlement witnessed the rise of Parliament, through the use of its constitutional powers, as a political counterweight in the field of international affairs.²²⁷ At the turn of the century, Parliament began to use its authority in the areas of legislation and funding to repudiate treaties with more regularity. In 1698 and 1700, for example, parliamentary opposi-

222. Parliament also began exercising its appropriations power during this period more effectively, as it began voting exact funds for specific budgetary items—line-iteming, in modern legislative parlance. In 1677, for example, Parliament voted exactly 584,978 pounds, 2 shillings, and 2 pence for the construction of 30 warships, and in the next two years effectively ordered the demobilization of specific military units by cutting off funds unit by unit. See *Stuart Constitution*, *supra* note 202, at 363.

223. See Black, *A System of Ambition*, *supra* note 219, at 122.

224. Commons Address (May 25, 1677), reprinted in *Stuart Constitution*, *supra* note 202, at 399; see Yoo, *War Powers*, *supra* note 26, at 212.

225. See *The King's Reply*, (May 28, 1677), reprinted in *Stuart Constitution*, *supra* note 20, *supra* note 202, at 400–01.

226. See *Stuart Constitution*, *supra* note 202, at 397–98.

227. See Keir, *supra* note 199, at 268–72. The constitutional settlement reached by the Glorious Revolution was expressed in three documents, the Bill of Rights of 1689, the Triennial Act of 1694, and the Act of Settlement of 1701. Of these and other acts, the only significant change to the distribution of foreign affairs power was the prohibition on the Crown's prerogative to raise and keep a standing army in peacetime without the consent of Parliament. See *The Bill of Rights* (1689), reprinted in *The Eighteenth Century Constitution 1688–1815*, at 28 (E. Neville Williams ed., 1960). The Act of Settlement also barred the Crown from engaging in "any war for the defence of any dominions or territories which do not belong to the crown of England, without the consent of parliament." *Act of Settlement* (1701), reprinted in *Eighteenth Century Constitution*, *supra*, at 59. These limitations on the Crown's military authority certainly forced greater cooperation with Parliament, but they did not reallocate the power of making treaties or foreign policy.

tion effectively prevented William III from living up to what were known as the Partition treaties,²²⁸ while in 1713 Parliament rejected outright an Anglo-French commercial treaty that was seen as crucial to the government's efforts to repair relations with France.²²⁹ Parliament's funding powers gave it a formal veto over any treaties that required military expenditure, financial subsidies to other powers, or favorable commercial treatment. Yet, just as parliamentary resistance could render treaties still-born and frustrate Crown policies, parliamentary support had the opposite effect. Parliament's financial and, perhaps more important, its political support allowed the Crown to act with a stronger hand abroad by signaling domestic stability and access to resources to carry out threats and promises.²³⁰ "As Parliament was the public forum in which the ministry formally presented and defended its policy and was criticised in a fashion that obliged it to reply," a British diplomatic historian of the period has observed, "it was Parliament where the public debate over foreign policy can be seen as most intense and effective."²³¹ Even if the funding check should fail, Parliament ultimately could use the power of impeachment to remove ministers for pursuing treaties with which it disagreed.²³² Parliament's constitutional role gave it the leverage to become a forum for the determination of foreign policy and the national interest.²³³

228. See Black, *System of Ambition*, *supra* note 219, at 46–48.

229. See *id.* at 49.

230. See Black, *The Age of Walpole*, *supra* note 219, at 77–79.

231. Black, *Age of Revolutions*, *supra* note 219, at 491.

232. See, e.g., Blackstone, *supra* note 181, at *250:

It is also the prerogative of the Crown to make treaties, leagues, and alliances with foreign states and princes. . . . And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution . . . 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.

233. Political changes in the structure of the Crown also bolstered Parliament's influence. In the seventeenth century, monarchs had administered the affairs of state through a Privy Council, which was usually composed of hand-picked advisers and confidants of the King. After the Glorious Revolution, executive government evolved into a nascent cabinet system. See Keir, *supra* note 199, at 316–20; see also Geoffrey Holmes & Daniel Szechi, *The Age of Oligarchy: Pre-industrial Britain, 1722–1783* (1993); J.H. Plumb, *The Growth of Political Stability in England, 1675–1725* (1967). While the monarch still had the authority to select his ministers, he no longer freely chose his friends and political allies. The system, however, had not yet evolved into Bagehot's nineteenth-century ideal, in which the cabinet was composed of the leaders of the majority party in Parliament. See Walter Bagehot, *The English Constitution* 11–13 (2d ed. 1872). During the eighteenth century, a transitional, perhaps unstable arrangement emerged in which ministers were selected for their ability to convince Parliament to follow Crown policies. Because cabinet members were not necessarily political leaders in the legislature, they did not automatically enjoy the benefits of party discipline, and thus they often had to rely on patronage to manage the House of Commons. In the mid-eighteenth century, it appears that one-third of the members of the House of Commons held offices appointed by the Crown, and another five percent held government contracts with the Crown. The Crown

By the time of the framing, then, the British constitutional system had reached an accommodation concerning the royal prerogative over treaties that provided the legislature with a significant role in their making. While the Crown formally enjoyed an absolute monopoly over treaty-making, Parliament retained the authority to make any changes in the domestic law or to raise the revenue needed to comply with the agreement.²³⁴ As one British diplomatic historian has acknowledged, Parliament's authority over implementing legislation and financial support allowed it to "exert[] a more direct influence over foreign policy" than the formal allocation of constitutional powers would suggest.²³⁵ Britain's rule was not some peculiar practice that developed more through happenstance than thought. Rather, the distinction between the power to legislate and the power to make treaties was a core element of the separation of powers and the rise of parliamentary government. It provided Parliament with an important means to check the Crown's power in foreign affairs, one that it gradually used to seize an influential role in the setting of national policy. Not only did this shared history inform the Framers as they ratified the Constitution, it also suggests that any effort to reverse the British rule would have prompted significant protest and opposition, as it would have removed one of the legislature's crucial checks on the executive.

B. Treaty-making and the Power to Legislate in Colonial and Revolutionary America

Although the treaty power may not have been as central to the Revolution as the issue of taxation, the relationship between the legislative power and foreign affairs was bound up in the crucial revolutionary dispute over the nature of sovereignty. We can understand the constitutional arguments of the revolutionaries as a defense of the rights of popularly elected assemblies to enact internal legislation, free from the dictates of a foreign affairs power exercised by a central government. As the colonies became independent states, bound to each other through the

also appointed allies and friends of Commons members to thousands of other Crown-appointed positions. This practice gave rise to claims by the Country opposition in England that the ancient constitution, particularly the separation of the executive and legislative branches, had been "corrupted" by the Crown. American colonists took this interpretation of eighteenth-century English politics to heart in forming the political ideology that would lead to revolution. See Bailyn, *Ideological Origins*, *supra* note 132, at 34–54. Such patronage would be unnecessary were Parliament not a significant political as well as constitutional force in affairs of state.

234. See G.C. Gibbs, *Laying Treaties Before Parliament in the Eighteenth Century*, in *Studies in Diplomatic History* 116–37 (Ragnhild Hatton & M.S. Anderson eds., 1970).

235. Scott, *supra* note 219, at 20. Even as a formal matter, as the English legal historian Sir William Holdsworth observed, the Crown's prerogative over treaties itself was no longer absolute by the eighteenth century. See 10 William Holdsworth, *A History of English Law* 374 (1938). By this time, 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. See *id.* at 401.

Articles of Confederation, they maintained the distinction between treaties and legislation, with the former vested in the central government and the latter in the hands of the state legislatures. This continuing separation of powers, divided between two levels of government rather than two branches of government, caused enormous foreign policy difficulties for the new nation. State refusal to implement and observe treaty obligations not only provoked Great Britain into maintaining a military presence within American borders, it also undermined American diplomatic efforts to reach vital trade agreements with the European great powers. In short, the nature of treaties and their place in the American legal system developed into one of the critical questions for American foreign policy and the future of the Union. We cannot analyze the decisions made during the ratification without understanding the foreign policy and political context of the Revolution and of the Articles of Confederation.

Efforts to address what was a federalism question—how to ensure compliance with national treaty obligations—soon became a separation-of-powers question—what process, at the national political level, ought to govern the making of treaties and their domestic enforcement. The challenges of the Critical Period (as the period between the Peace with Great Britain and the ratification of the Constitution is known)²³⁶ produced different proposals for reform from three of the future leaders of the ratification effort: Alexander Hamilton, John Jay, and James Madison. Hamilton and Jay believed that the treaty power ought to subsume within it the power of internal legislation, and that state judges ought to directly enforce treaty terms. Madison, however, sought to reconcile the treaty power with proposals for a truly national government that would emerge at the Constitutional Convention. In his vision, the treaty power had to rely upon the national organs of government for enforcement, which included the federal legislature as well as the federal courts. Legislative powers, Madison believed, still should remain distinct from the treaty power. The thinking of these future collaborators would set the stage for the debate over the treaty power, and over larger questions of national sovereignty, that would arise during the Constitutional Convention and the ratification debates.

This Section will discuss these elements of the story in three sections. Section 1 will review the understanding of the power of legislation during the Revolutionary period. Section 2 will discuss the allocation of the treaty power under the Articles of Confederation. Section 3 will examine the disputes that arose under the Articles of Confederation concerning the relationship between the treaty power and the power of legislation.

1. *Revolutionary Ideology and the Power to Legislate.* — A ratifier studying the proposed Constitution's treatment of the treaty power would have drawn upon not only British constitutional history, but also the revolu-

236. See John Fiske, *The Critical Period of American History, 1783–1789* (1888) for the creation of the phrase.

tionary experience. Questions regarding treaties, their implementation, and the role of the three branches of government would have raised analogies to the constitutional issues at stake in the break with Great Britain. As several historians of the Revolutionary Period have shown, the Americans of 1776 believed that they were defending their customary constitutional rights from tyranny and corruption on the part of the King and Parliament.²³⁷ Colonists argued that the Crown and Parliament had overstepped their constitutional boundaries by forcing them to pay for the costs of the Seven Years War and the continuing expenses of Britain's colonial military presence. While Americans agreed that the treaty power and other foreign affairs powers were the province of the central government in London, they argued that these authorities remained distinct from powers over internal matters, such as taxation and supply, that rested within the province of the colonial assemblies. This barrier between foreign affairs and domestic law would continue throughout the early years of independence, creating difficulties that would lead to the Constitutional Convention in 1787.

While the constitutional relationship between the American colonies and Great Britain at the end of the Seven Years War was uncertain, we can identify some broad outlines. Power was not centralized in London; rather, it was diversified at different levels on different issues. Until the early 1760s, the King and Parliament had almost entirely avoided any interference in internal colonial matters, while the colonies acknowledged the Crown's primacy over foreign policy, particularly in war and treaty-making.²³⁸ Like their counterpart in the mother country, the colonial assemblies exercised full legislative powers within their jurisdictions, and in fact they were even able to enjoy substantial influence upon the governor's control over foreign affairs through their control over the purse.²³⁹ As Professor Bailyn has observed, King and Parliament "touched only the outer fringes of colonial life; they dealt with matters obviously beyond the competence of any lesser authority All other powers were enjoyed, in fact if not in constitutional theory, by local, colonial organs of government."²⁴⁰ A series of political precedents and constitutional custom had established the assemblies as the political representatives of the colonists on internal matters. "[T]he colonial assemblies by the middle of the eighteenth century," Professor Greene writes,

237. See Bailyn, *Ideological Origins*, *supra* note 132, at 217-29; Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788*, at 19-43 (1986); Reid, *supra* note 198, at 126-41.

238. See Greene, *supra* note 237, at 55-78.

239. See, e.g., Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689-1776*, at 297-306 (1963) (showing how the lower houses influenced foreign affairs through sharing the exercise of military powers, enabled by the power of the purse); see also Yoo, *War Powers*, *supra* note 26, at 219-21.

240. Bailyn, *Ideological Origins*, *supra* note 132, at 203.

managed through precedent and custom to establish their authority and status as local parliaments, as the most important institutions in the colonial constitutions and the primary guardians of the colonists' inherited rights as Englishmen, including especially the right not to be subjected to any taxes or laws relating to their internal affairs without the consent of their representatives in assembly.²⁴¹

Beginning with the imposition of the Stamp Act in 1764, Parliament's efforts to change this arrangement helped precipitate the American Revolution. In order to pay for the costs of the Seven Years War, and for the continuing military protection of British North America, Parliament sought to impose taxes and internal regulations upon the colonies. It based its actions upon an evolving theory of parliamentary supremacy both in Britain and in America.²⁴² London's actions sparked such resistance because parliamentary supremacy entrenched on at least three firmly held beliefs held by colonial Americans, beliefs that would have looked with suspicion on efforts to eliminate the distinction between foreign affairs and domestic legislation. First, from an ideological perspective, the Crown's efforts to extend its monopoly from foreign affairs to internal legislation amounted to a plan to overturn the balanced constitution in favor of a centralized absolutist state centered around government bureaucracy, standing armies, and the new financial classes. Predictions of the eighteenth-century Country, or oppositionist writers in Britain, whose works helped shape the Framers' world-view, seemed to be coming true. More than a rationalization for revolution, this mindset gave meaning to the new taxes, the new declarations of supremacy, the quartering of soldiers, and the closing of ports. The Founding generation interpreted these events as a deliberate conspiracy by the Crown and its ministers, in an effort to establish a military-financial state, to corrupt Parliament and to use its legislative authority to steal individual liberty.

Second, as John Philip Reid has argued, the events leading to revolution took place in a rapidly evolving constitutional context in which colonists and those in the mother country were coming to have different views. British defenders of the Stamp Act and the Declaratory Act located in the King-in-Parliament all sovereignty in the empire; its legislation had to be supreme, therefore Parliament was supreme.²⁴³ Under this theory, Parliament was supreme over the Crown, and as the final sovereign voice in the British government, Parliament was supreme over the colonies. Parliamentary sovereignty and supremacy could admit no place for the claims of colonial assemblies to a constitutionally guaranteed power over taxes and internal regulation. American revolutionaries responded by

241. Jack P. Greene, *The Colonial Origins of American Constitutionalism*, in *Negotiated Authorities: Essays in Colonial Political and Constitutional History* 25, 35 (1994).

242. See Reid, *supra* note 198, at 63–86 (discussing theory and limits of parliamentary supremacy in context of the Declaratory Act).

243. See *id.* at 65–68.

calling upon an earlier vision of the British constitution, in which the colonists and their assemblies enjoyed a direct relationship with the English King, rather than with Parliament. From the founding of the colonies, these revolutionaries argued, the Crown had granted the colonists the right to regulate themselves on all internal matters, just as Parliament possessed the power to legislate in Great Britain.²⁴⁴ In their minds, there was a clear distinction between the power to legislate—the essence of the Revolution was where this power lay, in the assemblies or the Parliament—and executive power, such as the power over war and treaties, which remained unchallenged in the King. The Revolution came not because of the King's decision to fight the Seven Years War, or the stationing of troops and bureaucracy in British North America. Rather, the fight came when Parliament sought to pass legislation for the colonies without the consent of the assemblies. From the colonial perspective, the Revolution responded to Parliament's effort to seize the power of the colonial assemblies over domestic legislation, which served as a critical counter-balance to the Crown's control over the military and foreign affairs.

Parliament's attempts to bring the colonies under tighter imperial control would have raised alarm bells on yet a third level, that of colonial institutional politics. As Greene has observed, "[t]he rise of the representative assemblies was perhaps the most significant political and constitutional development in the history of Britain's overseas empire before the American Revolution."²⁴⁵ Formal constitutional arrangements vested great power in the royal governors, who possessed the authority externally to wage war, make treaties (which they generally did with Indian tribes), and represent the colony in inter-colony negotiations.²⁴⁶ Internally, governors enjoyed the authority to veto laws, to prorogue the legislature, to appoint officers and to sit as a court of equity.²⁴⁷ Formal authority, however, did not yield actual power. During the period after the Glorious Revolution, the assemblies engaged in a campaign to win the rights to tax, to control funding, and to enact laws.²⁴⁸ Because Parliament did not finance colonial governments, governors were dependent on the assemblies to fund their operations and, eventually, even British

244. See *id.* at 68–74, 113–25.

245. Jack P. Greene, *The Role of the Lower Houses of Assembly in Eighteenth-Century Politics*, in Greene, *Negotiated Authorities*, *supra* note 241, at 163; see also Greene, *supra* note 239.

246. See Evarts B. Greene, *The Provincial Governor in the English Colonies of North America* 107–09 (1898); Yoo, *War Powers*, *supra* note 26, at 219–21.

247. See McDonald, *supra* note 136, at 105–07.

248. See *id.* at 107–22. Works describing the struggles between the colonial governors and the assemblies include John F. Burns, *Controversies Between Royal Governors and their Assemblies in the North American Colonies* (1923); Greene, *supra* note 246; Leonard Labaree, *Royal Government in America 172–217* (1930). Jack P. Greene, however, is the historian who most recently has attempted to synthesize these events into broader themes.

colonial forces. Assemblies came to be identified closely with the individual rights of the colonists themselves, particularly the right to representation and the right to govern their own internal matters.²⁴⁹ After the Seven Years War, the assemblies had pushed their powers even beyond those enjoyed by the House of Commons, and they had taken a strong hand in developing an independent role for themselves in the British constitutional and imperial system.²⁵⁰

From an institutional perspective, measures like the Declaratory Act attempted to impose a centralized imperial government upon a system that had allowed several independent political power centers to develop. Parliament's metropolitan theory of empire threatened the political existence of the assemblies, and it was no mistake that as events moved toward a break with the mother country, Parliament suspended the New York assembly and sought to alter the Massachusetts assembly. The Revolution became a fight not just for individual liberties, but for the rights of the assemblies and of self-government as well.²⁵¹ Fusing control over foreign affairs and internal legislation in the same government, even if it were King-in-Parliament, would have threatened the institutions that had become central to American political identity.

2. *The Articles of Confederation and Treaty-making.* — Upon achieving independence, Americans maintained the separation between war and treaties, on the one hand, and funding and internal legislation on the other. Power over foreign relations formally devolved to the Continental Congress, which replaced the King as the executive branch at the national level. Contrary to the mistaken assertions of some foreign affairs scholars,²⁵² legislative powers—even in the foreign affairs arena—remained with the state assemblies, while under the Articles of Confederation the Continental Congress assumed the functions of the Crown.²⁵³ 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. While these checks were once in the hands of Parliament, after the Revolution they devolved to the assemblies. The Government under the

249. See Greene, *supra* note 241, at 174–77.

250. See *id.* at 178–81.

251. See *id.* at 183.

252. See, e.g., Raoul Berger, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 33 (1972) (explaining the usurpation of legislative power from the states); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 Seton Hall L. Rev. 527, 568 (1974) (arguing that the Articles demonstrate that foreign policy ought “to be arrived at through legislative deliberation—the very antithesis of the idea of vesting the power of war and peace in executive hands”).

253. See Jerrilyn Greene Marston, *King and Congress: The Transfer of Political Legitimacy, 1774–1776*, at 303–04 (1987); Eugene R. Sheridan & John M. Murrin, *Introduction to Congress at Princeton: Being the Letters of Charles Thomson to Hannah Thomson (June–October 1783)*, at xxxiv–xxxviii (Eugene R. Sheridan & John M. Murrin eds., 1985).

Articles had a separation of powers, but one that existed vertically rather than horizontally.

Having created a vacuum in executive authority by breaking with the Crown, the drafters of the Articles transferred all foreign affairs powers to the Continental Congress. Article IX declared that Congress possessed “the sole and exclusive right and power of determining on peace and war.”²⁵⁴ This monopoly extended to “treaties and alliances,” which required the approval of a super-majority of nine states.²⁵⁵ The Articles anticipate the Constitution in preempting virtually all state activity with foreign nations. Article VI prohibited states both from sending or receiving ambassadors or from “enter[ing] into any conference, agreement, alliance or treaty” with any foreign nation or king without the consent of Congress.²⁵⁶ States also could not enter into any “treaty, confederation or alliance” with each other without congressional approval.²⁵⁷ Finally, Article VI prohibited states from imposing any imposts or duties, “which may interfere with any stipulations in treaties,” already made or proposed, at the time of the Articles’ ratification, between the United States and France or Spain.²⁵⁸ Article VI’s explicit bar on this narrow type of implementing legislation implies that states possessed a broader authority over domestic execution of treaty obligations, an implication further reinforced by Article II’s general reservation of each state’s “sovereignty, freedom, and independence, and every power, jurisdiction, and right” not “expressly delegated” to Congress.²⁵⁹

The separation of powers between the Continental Congress and the states paralleled the division of authority between the Crown and Parliament. Just as the Crown required the cooperation of Parliament in implementing and funding treaties, so too did the Continental Congress rely upon the states for supplies and changes in their internal laws to execute the nation’s international obligations. Congress could not pass laws that applied to individuals; it could not impose direct taxes or raise troops; it could not regulate interstate commerce. Congress could only enact requisitions upon the states for supplies and recommend legislation to the assemblies for adoption.²⁶⁰ As historians Eugene Sheridan

254. Articles of Confederation art. IX.

255. *Id.* Interestingly, the drafters barred Congress from entering into commercial treaties that prevented the states from imposing the same duties and imposts on foreigners that applied to their own citizens, or that forbade the states from “prohibiting the exportation or importation of any species of goods or commodities whatsoever.” *Id.* This exception clause not only recognizes what Article IX calls the “legislative power of the respective States” to implement commercial treaties, but it also protects that power by barring the national government from entering into international agreements that might implicate it. *Id.*

256. *Id.* art. VI.

257. *Id.*

258. *Id.*

259. *Id.* art. II.

260. See *id.* arts. VIII, IX.

and John Murrin have observed, "the legislative powers of Parliament tended to devolve upon the states, while the executive powers of the Crown passed to Congress, which we should probably conceptualize as more of a plural executive than a legislature."²⁶¹ The Revolutionary generation had rebelled against Parliament because it had imposed taxes and internal regulations without representation. As only the states (which had one vote each), and not the people, were represented in Congress, it would have made little sense under revolutionary ideology to grant Congress the power to legislate either by treaty or by statute.

Organization of the central government, which forced Congress to rely upon the states for funding and legislation, suffered from two additional defects. First, the Continental Congress, although an executive branch, was plural in nature, and its history is the tale of failed efforts to exercise its powers effectively.²⁶² Second, its representation bore no relationship to population, thereby creating a threat that sectional concerns could override the national interest. One congressional controversy over foreign policy is worth examining in detail because it would become an important touchstone for the ratification debates that would occur the following year on the treaty power. From 1785–86, John Jay, as Secretary for Foreign Affairs, negotiated with Spain concerning various boundary disputes involving the United States and Spain's North American territories.²⁶³ Chief among these issues was the question whether American settlers would have the right to navigate the southern reaches of the Mississippi River, which passed through Spanish territory on its way to the sea. Spain had closed its portion of the Mississippi to American commerce in 1784; Congress specifically instructed Jay that any treaty with Spain had to

261. Sheridan & Murrin, *supra* note 253, at xxxiv.

262. The story is told in McDonald, *supra* note 132, at 133–54; Richard B. Morris, *The Forging of the Union 1781–1789* (1987), at 95–99; Rakove, *Beginnings*, *supra* note 132, at 199–205. See also E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776–1790* (1961). Congress, which initially was dominated by a group of states-rights adherents, attempted to make and implement foreign policy by committee, which ended in dismal failure. By 1781, political leaders with a more nationalist bent decided to create independent executive departments under the control of individual secretaries for war, foreign affairs, finance, and the navy. See Rakove, *Beginnings*, *supra* note 132, at 198–205. Even this more rational, unified control over executive functions did not produce success. Secretaries for foreign affairs failed to win the right to initiate policy, to control the activities of various envoys and commissioners, and to prevent Congress and its members from dealing independently with foreign diplomats. See, e.g., Lawrence S. Kaplan, *Colonies into Nation: American Diplomacy 1763–1801*, at 152 (1972). Because Congress was organized as an assembly, sectional divisions and commercial interests could arise that frustrated any unified action. Aside from the French-American alliance in 1778 and the peace treaty with Great Britain in 1783, Congress's ambassadors failed to conclude any significant commercial or strategic agreements under the Articles framework.

263. See Bestor, *supra* note 32, at 60–68; Rakove, *Beginnings*, *supra* note 132, at 349–50. The standard historical account of American relations with Spain, including the Jay-Gardoqui negotiations, remains Samuel Fagg Bemis, *Pinckney's Treaty: America's Advantage from Europe's Distress, 1783–1800* (1960).

win back that right.²⁶⁴ Spain's ambassador, Don Diego de Gardoqui, refused to accede to this demand out of Spanish fears of America's westward expansion. Instead, de Gardoqui offered to enter into a commercial treaty that would benefit the northeastern port cities of Boston, New York, and Philadelphia, but that would not open the Mississippi to American shipping. With negotiations at an impasse, Jay sent home for guidance.

Faced with this choice, Congress in the summer of 1786 considered whether to modify Jay's instructions and in so doing opened up a sharp sectional divide. Seven northern states from New Hampshire to Pennsylvania stood to gain from a liberal commercial treaty with Spain. For the Southern states, however, closing the Mississippi would cut off their expansion into the West.²⁶⁵ Although two-thirds of the states were required to make a treaty, a simple majority could terminate negotiations altogether.²⁶⁶ This meant that the four Southern states, joined by Maryland, could not terminate the negotiations, but they could successfully block the ratification of any treaty. Nonetheless, the Northern states, by a vote of 8 to 5, defeated Southern attempts to end the Jay-Gardoqui discussions, and by a simple majority allowed Jay to dispense with the Mississippi River demand.²⁶⁷ But since five states had declared their opposition to such a provision, any treaty without free navigation of the Mississippi would fail to receive the necessary two-thirds vote.²⁶⁸

Nonetheless, controversy over the Jay-Gardoqui negotiations threatened the dissolution of the Union. It forced the states into two hardened camps defined by economic and sectional self-interest. As an economic and foreign policy dispute that mutated into a constitutional one, it revealed structural shortcomings in the way that the Articles of Confederation distributed the treatymaking power. To southerners, even the two-thirds requirement failed to protect the national interest, especially in regard to treaties that raised sectional divisions. The Jay-Gardoqui controversy suggested that less than two-thirds of the states could pursue agreements that were not in the best interests of the majority of the people. Southern delegates emerged from this controversy questioning whether a two-thirds requirement for treaties, with each state possessing one vote, provided adequate protection for their economic and territorial interests. It would prompt Southern leaders in the next two years to search for a better approach to treatymaking that would include a more

264. See 29 Journals of the Continental Congress 1774-1789, at 658 (1933) [hereinafter JCC] (instruction of August 25, 1785).

265. See Bestor, *supra* note 32, at 64.

266. See *id.* at 65.

267. See 31 JCC, *supra* note 264, at 595-96.

268. These divisions prevented the United States from reaching an agreement with Spain until 1795, at which time, with American power dramatically increased, free navigation of the river was obtained. With the Louisiana Purchase in 1803, the United States would come into possession of the river itself and the port of New Orleans. See Bemis, *supra* note 263, at 281-82, 310-14.

democratic voice to represent the people. It also demonstrated to some, such as James Madison, that treaty disputes could threaten the dissolution of the Union unless contained by a broader, republican national government.²⁶⁹

3. *Enforcing Treaties During the Critical Period.* — Foreign policy failures were central to the primary defect in the Articles' treaty-making structure: the freedom of the states to ignore or frustrate treaties. During the Critical Period, enforcement of treaties became one of the key problems that led to the movement for a new constitution. Because the Articles of Confederation gave Congress no textual authority to compel states to enforce treaties or to obey national legislation, Congress could only request that states pass laws to implement the treaty rights of foreign subjects.²⁷⁰ When it came to the peace with Great Britain, many states vigorously resisted congressional requests for implementation, leading to foreign policy setbacks and calls for constitutional reform. This Section will describe the problems raised by the Treaty of Paris of 1783, and the manner in which the controversies became a central focus in the minds of three of the leaders of the ratification effort, Alexander Hamilton, John Jay, and James Madison. Not only would their concerns about treaties become well-known, but their thinking would be representative of the pro-Constitution cause, which they would make public as co-authors of the Federalist Papers.²⁷¹ Examining their views will show not only that the Framers were not of one mind concerning the treaty power and federal supremacy, but also that there were two distinct themes running through the Founding period: one that turned to judicial enforcement of treaties, and another that looked to a national legislature capable of implementing treaties directly.

Inability to command compliance with its foreign policy virtually ensured Congress's failure during the Critical Period. Congress could not raise revenue, bargain effectively, enforce a common commercial policy, or even promise that the states would observe its agreements. Foreign nations, notably Britain and Spain, refused to agree to lower trade barriers because they knew that Congress could not prevent the states from

269. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 66–71 (1995).

270. To enforce Article XI of the alliance with France, for example, Congress had to ask the states on January 14, 1780, to enact laws guaranteeing French subjects treaty-based privileges. See 2 *Secret Journals of Congress* 568–70 (1820) (recommending that state legislators “make provision, where not already made, for conferring like privileges and immunities on the subjects of his most Christian majesty”); Crandall, *supra* note 125, at 34–36 (collecting citations to state laws).

271. This Article does not intend to undertake a review of the general failures and successes of the Articles of Confederation. While the Continental Congress certainly met with setbacks in the areas of treaty enforcement and foreign policy, it encountered some domestic successes, such as resolving territorial and jurisdictional controversies between the states. See, e.g., Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787*, at 3–20 (1983) (discussing the role played by the early Congress in resolving jurisdictional struggles within and among the states).

closing off or taxing trade. States would not cooperate to win trade concessions from foreign nations, Congress could not guarantee that states would change their laws to comply with trade treaties, and neither the states nor Congress could impose meaningful sanctions.²⁷² As Lord Sheffield, an advocate for a tough policy toward the former colonists, said, "America cannot retaliate. It will not be an easy matter to bring the American States to act as a nation. They are not to be feared as such by us."²⁷³ During the Critical Period, American diplomats managed to negotiate only two treaties, a "meaningless" agreement with Prussia, and a treaty of "amity and commerce" with the Dutch, at a time when the new nation badly needed political and commercial alliances.²⁷⁴

The Treaty of Paris highlighted the weakness in America's governmental structure. Overall, the newly independent states received highly favorable terms: Britain recognized American independence, acknowledged America's borders to reach as far west as the Mississippi River and as far north as the Great Lakes, evacuated its forces from New York City and the South, and promised to turn over a series of strategic forts in the Great Lakes area.²⁷⁵ London received three concessions in return. Article IV declared that "creditors on either side shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts heretofore contracted."²⁷⁶ In other words, British financiers would be able to recover on pre-war debts. Article V stated that "Congress shall earnestly recommend . . . to the legislatures of the respective states" that they compensate Loyalists whose property had been confiscated during the war.²⁷⁷ Article VI prohibited any further confiscation, prosecution,

272. See generally Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 52–95 (1973) (highlighting Congress's difficulty in eliminating foreign trade barriers due to state sovereignty and its effect on the ability to enter into commercial treaties).

273. 1 Bradford Perkins, *The Cambridge History of American Foreign Relations: The Creation of a Republican Empire, 1776–1865*, at 57 (Warren I. Cohen ed., 1993).

274. See McDonald, *supra* note 136, at 145.

275. See Perkins, *supra* note 273, at 42–44 (deeming the treaty "generous" to the United States). For discussions and evaluations of the Treaty of Paris, see Samuel F. Bemis, *The Diplomacy of the American Revolution* 243–56 (1957); Jonathan R. Dull, *A Diplomatic History of the American Revolution* 144–63 (1985); Richard B. Morris, *The Peacemakers: The Great Powers and American Independence* 173–90 (1965); *Peace and the Peacemakers: The Treaty of 1783* (Ronald Hoffman & Peter J. Albert eds., 1986).

276. *Definitive Treaty of Peace Between Great Britain and the United States*, Sept. 3, 1783, U.S.-Gr. Brit., art. IV, 48 Consol. T.S. 487, 493 [hereinafter *Definitive Treaty of Peace*].

277. The treaty assumed that the provision allowing for recovery of prewar debts required state implementing legislation, a point we will return to later.

It is agreed, that the Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties, which have been confiscated belonging to real British subjects: and also of the estates, rights, and properties, of persons resident in districts in the possession of his Majesty's arms, and who have not borne arms against the said United States. . . .

or civil action against individuals based on their roles in the war.²⁷⁸ British negotiators did not even consider these articles to be much of a victory; in the words of one historian, they were “trifling concessions and empty formulas.”²⁷⁹

Nonetheless, the treaty’s compensation and debt provisions proved to be the source of constitutional breakdown in the United States and of corresponding setbacks for American foreign policy. Massachusetts, New York, Pennsylvania, and all of the southern states either passed laws that confiscated debts owed to British citizens, or prevented the collection of such debts after Congress’s ratification of the treaty.²⁸⁰ British diplomats claimed that state courts were refusing to suspend the operation of these laws, even in light of the nation’s obligations under Article IV of the Treaty.²⁸¹ As one historian of the period has observed, “[t]here was no question that the United States had violated the peace treaty.”²⁸² In response, the British refused to evacuate the northern frontier forts, which controlled access to the Great Lakes and nearby rivers.²⁸³ British refusal to relinquish the forts was not just a blow to American pride, but a significant military and economic setback. These forts served as centers of commerce and as support areas to protect against hostile Indian tribes and loyalists threatening the new nation.²⁸⁴ Leading American politicians throughout the states concluded that the national government needed the power to force the states to obey treaty obligations in order to solve the crisis, which they feared would soon not be unique to affairs with Britain.²⁸⁵

Id. at 493. Legal scholars sometimes mistake the Treaty of Paris as an American commitment to actually provide for compensation; rather, the treaty itself recognized the limitations of Congress’s power by only undertaking to recommend such measures to the states. Charles Butler’s treatise on treaty-making, for example, argued that the states understood that Congress’s treaty-making authority allowed it to regulate the internal affairs of the states, and that, therefore, both Article IV and Article V of the Treaty of Paris were well within national powers. See 1 Butler, *supra* note 125, at 275–78. The history of events outlined here, as well as the historians cited, show Butler to be wrong on this point.

278. See *Definitive Treaty of Peace*, *supra* note 276, art. VI at 493–94 (decreeing that “there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage either in his person, liberty or property. . . .”)

279. Perkins, *supra* note 273, at 42 (quoting James H. Hutson, John Adams and the Diplomacy of the American Revolution 128 (1980)).

280. See Crandall, *supra* note 125, at 36–37; Marks, *supra* note 272, at 6, 11.

281. See Message from Mr. Hammond, Minister Plenipotentiary of Great Britain, to Mr. Jefferson, Secretary of State (Mar. 5, 1792), 1 American State Papers 226 (British report to the Continental Congress detailing the legislation and policies of each state that defied the recovery provision of the Treaty of Paris).

282. See Marks, *supra* note 272, at 11.

283. See *id.* at 5–11.

284. See *id.*

285. See *id.* at 11–15.

One of the first to reach this conclusion was Alexander Hamilton, who encountered the issue in the 1784 case of *Rutgers v. Waddington*.²⁸⁶ As feelings against Loyalists and the British ran high in New York state, much of which had been occupied at some point during the war, the state assembly passed a series of harsh measures against Loyalists.²⁸⁷ In addition to a wartime confiscation act of Loyalist property, the legislature enacted the 1782 Citation Act, which stayed the execution of debts owed to Loyalists, and the 1783 Trespass Act, which allowed Americans who had fled New York City to recover damages from those who had occupied their property during the war.²⁸⁸ Not only did these statutes conflict with the international laws of war, which allowed a defense for civilians acting under the orders of an occupying army, but they violated Article VI of the Treaty of Paris, which prohibited further actions against Loyalists for their wartime actions. Hamilton decided to challenge the Trespass Act by representing an English businessman who had operated a brewery within occupied New York City during the war.²⁸⁹ He made three arguments before the state court—first, that the Act violated the laws of war;²⁹⁰ second, that the Act violated the Treaty of Paris, which had legislative effect as part of Congress's treaty power; and third, that the court had the authority to invalidate the Act as contrary to the Treaty, which had been ratified by Congress and was now part of the New York Constitution. Plaintiffs forcefully responded that state courts, as creatures of the legislature, had no authority to invalidate the statute. In an ambiguous decision, the court avoided the question of the supremacy of the peace treaty by reading the Act narrowly, as Hamilton had urged in a secondary argument.²⁹¹

286. See 1 Julius Goebel Jr., *The Law Practice of Alexander Hamilton: Documents and Commentary* 289 (1964).

287. See Forrest McDonald, *Alexander Hamilton: A Biography* 64 (1979).

288. See Trespass Act, March 17, 1783, *Laws of New York*, Sixth Session, ch. 31.

289. Plaintiff's lawyers located a classic sympathetic party to bring a test case under the Act. Mrs. Elizabeth Rutgers, a widow in her seventies, owned a brewery and alehouse that had been seized during the occupation and operated by Benjamin Waddington and Evelyn Pierrepont, who had been ordered by the British commander-in-chief to use the property, which they had done for an enormous profit. See Goebel, *supra* note 286, at 297. Having previously protested the treatment of Loyalists in New York, Hamilton agreed to represent Waddington, who had fled to England with the profits after the brewery had mysteriously burned down at the end of the war. See *A Letter from Phocion to the Considerate Citizens of New York* (Jan. 1–27, 1784), reprinted in 3 *Papers of Alexander Hamilton* 483 n.1 (Harold C. Syrett ed., 1962) [hereinafter *Papers of Hamilton*]. The Waddington of the case was formally Joshua Waddington, who served as agent for his uncle, Benjamin Waddington. See 1 Goebel, *supra* note 286, at 291–93.

290. Hamilton argued that the laws of war were enforceable in New York because they were part of the common law, which had been incorporated into state law by the New York Constitution. See 1 Goebel, *supra* note 286, at 346–52.

291. Hamilton claimed that the court ought to construe the statute to avoid conflict with the law of nations and the Treaty; to do otherwise would be to attribute irrationality to the legislature and lead to absurd results. Since the Act did not explicitly apply to British citizens, Hamilton urged, the court could uphold the validity of the Act, not pass on the

To the extent that it is still remembered, *Rutgers v. Waddington* usually appears in discussions of the early foundations for judicial review.²⁹² It also stands, however, as one of the earliest—if not the first—American judicial encounters with arguments for treaty self-execution. Hamilton's arguments were more than the product of his representation of a paying client. Around the same time that he was filing briefs in *Rutgers*, Hamilton wrote two pamphlets under the pseudonym "Phocion" that provided a fuller exposition of his arguments against anti-loyalist legislation.²⁹³ Hamilton argued that the Treaty of Paris constituted higher law because it emanated from the Continental Congress, the repository of national sovereignty. "Does not the act of confederation place the exclusive right of war and peace in the United States in Congress?" Hamilton asked rhetorically.²⁹⁴ "Are not these among the first rights of sovereignty, and does not the delegation of them to the general confederacy, so far abridge the

question of its own powers, and still find for Waddington. See *id.* at 357–60. In its decision, the court adopted elements of Hamilton's statutory interpretation argument but not his claims about the supremacy of federal treaties over state legislation. See *id.* at 414–19. The decision in *Rutgers* can be seen as one of the earliest American cases based on the principle that statutes should not be construed so as to conflict with international law, known today as the *Charming Betsy* canon. For a discussion of the canon, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *Geo. L.J.* 479 (1998).

The court awarded Mrs. Rutgers only 800 pounds of the 8,000 pounds that she had sought in damages. That she received any damages at all was due to the difference in military authorization provided to Waddington. From 1778 to 1780, Waddington and Pierrepont had received permission to use the premises, rent-free, from the commissary general. From 1780 to 1783, they received permission to occupy the facilities from the British commander-in-chief, upon payment of 150 pounds in rent a year to the Vestry for the Poor. The court concluded that the law of nations and the Treaty did not apply to the first period, because the permission had come from a subordinate military official, but that it did apply to the second period. See 1 Goebel, *supra* note 286, at 289–90, 338–89.

292. See, e.g., Robert L. Clinton, *Marbury v. Madison and Judicial Review* 49–51 (1989) (describing use of *Rutgers* in 20th Century debates over original understanding of judicial review); Julius Goebel, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 132–37 (1971) (noting *Rutgers* was "the earliest reported case where the restraints upon a state legislature implicit in the national constitution, such as it then was, were brought to issue"); Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 19–20 (1990) (discussing the case as an early exercise of judicial review). In this regard, *Rutgers* does not appear to stand as a precedent for what we think of today as modern judicial review, as much as it illustrates an earlier conception of judicial power more in line with Blackstone than with Chief Justice Marshall. See Christopher Wolfe, *The Rise of Modern Judicial Review* 3–17 (1986) (defining modern judicial review); see also Clinton, *supra*, at 49–51 (describing *Rutgers* as "an early, and possibly the first, example of an application of Blackstone's Tenth Rule").

293. See Letter from Phocion to the Considerate Citizens of New York (Jan. 1–27 1784), reprinted in 3 *Papers of Hamilton*, *supra* note 289, at 483; Second Letter from Phocion (April 1784), reprinted in *id.* at 530. Phocion was an Athenian general who was well-known in ancient history for his mercy toward the defeated enemy and his protection of prisoners of war. See Douglass Adair, *A Note on Certain of Hamilton's Pseudonyms*, in *Fame and the Founding Fathers* 272, 274–75 (Trevor Colbourn ed., 1974).

294. *Papers of Hamilton*, *supra* note 289, at 489.

sovereignty of each particular state?"²⁹⁵ Allowing states to pass laws in conflict with a treaty would "involve the contradiction of *imperium in imperio*," wrote Hamilton.²⁹⁶ Hamilton was unwilling to place any bounds on the extent of the treaty power, so long as it was used to advance the national interest. "It follows that Congress and their Ministers acted wisely in making the treaty which has been made; and it follows from this, that these states are bound by it, and ought religiously to observe it."²⁹⁷ Prohibiting treaties from affecting "the internal police" of a state, the rule favored by the legislation's supporters, Hamilton responded, would make "a mere nullity" of Congress's power to make treaties.²⁹⁸ "In short," Hamilton concluded, "if nothing was to be done by Congress that would affect our internal police, . . . would not all the powers of the confederation be annihilated and the union dissolved?"²⁹⁹ Realizing, however, that his arguments about national sovereignty were not widely shared, Hamilton devoted the large majority of his "Phocion" papers to the economic and political benefits that would accrue to New York should it observe the 1783 Treaty. Nonetheless, it seems clear that Hamilton believed that, even under the Articles of Confederation, treaties of their own force already preempted inconsistent state law.

John Jay shared Hamilton's views. As Secretary for Foreign Affairs, Jay had concluded that refusal to observe the 1783 Treaty was impeding efforts to reach commercial agreements with Britain, France, and Spain. On October 13, 1786, he presented a report to Congress responding to the British complaints of treaty violations.³⁰⁰ Jay declared that he "considers the thirteen independent sovereign States as having, by express delegation of power, formed and vested in Congress a perfect though limited sovereignty for the general and national purposes specified in the Confederation," particularly the war and treaty powers.³⁰¹ "When therefore a treaty is made," Jay continued, "it immediately becomes binding on the whole nation and superadded to the laws of the land, without the intervention, consent, or fiat of State legislatures."³⁰² Since the parties to a treaty are the two national sovereigns, observed Jay, "states have no right to accept some Articles and reject others" or to "subject [treaties] to such alterations as this or that State Legislature may think expedient to make."³⁰³

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 490–91.

299. *Id.* at 491.

300. See 31 JCC, *supra* note 264, at 847.

301. *Id.*

302. *Id.*

303. *Id.* Only the two sovereign parties to a treaty, acting together, could interpret, suspend, or alter treaty provisions. "Were the legislature to possess and to exercise such power," Jay warned, "we should soon be involved as a Nation in Anarchy and confusion at

Jay urged Congress to recommend to the states three measures based on these principles. The first declared that the state legislatures could not pass any act “interpreting, explaining, or construing a National treaty” or “restraining, limiting or in any manner impeding, retarding or counteracting the operation or execution of the same.”³⁰⁴ Acknowledging the existence of state laws that violated the Treaty of Paris, the second resolution demanded that they “be forthwith repealed.”³⁰⁵ As a further safeguard, the third recommended that the states repeal any laws that might come into conflict with the Treaty in the future, and it recommended that the states grant their courts the power to adjudicate treaty questions, “any thing in the said Acts or parts of Acts to the contrary thereof in any wise notwithstanding.”³⁰⁶ In his proposals, Jay sketched the three elements of one approach to treaty supremacy: (1) National sovereignty was vested in Congress, not the states; (2) state laws inconsistent with national treaties were invalid; (3) state courts were to arrest the operation of state laws that were in conflict with treaties. Following Jay’s advice, Congress on April 13, 1787 issued his report in its own name to the states and adopted the three resolutions.³⁰⁷

Tellingly, the very form of the resolutions proved Jay (and Hamilton) wrong about the status of treaties under the Articles of Confederation. If the Continental Congress had already enjoyed a legislative power in treaty-making that preempted conflicting state law, then Congress should not have needed to ask the states to repeal their inconsistent laws. Rather than declaring congressional supremacy, as set out in Jay’s report, the resolutions demonstrated that the state assemblies still possessed the power to legislate, and that Congress still relied upon their goodwill to carry out its policies. Further, if there were general agreement on Jay’s interpretation of the treaty power under the Articles, one might have expected the states to have complied quickly with Congress’s demands. Seven states did pass such laws, all but one of them from the North, which had the most to gain from a more centralized treaty power.³⁰⁸ All but one of the Southern states that had opposed the change in Jay’s negotiating instructions refused. Congress’s weakness can be most clearly seen in

home, and in disputes which would probably terminate in hostilities and War with Nations with whom we may have formed treaties.” *Id.*

304. *Id.* at 869–70.

305. *Id.* at 870.

306. *Id.*

307. See *id.* at 177–84. Congress adopted the three resolutions on March 21, 1787, but did not issue them to the states with an explanation until April 13. See *id.* at 124–25.

308. The states voting to comply were New Hampshire, Massachusetts, Rhode Island, Connecticut, Delaware, Maryland, and North Carolina. See Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* 27–28 n.5 (1913). That state self-interest lay behind the impetus to pass these laws can be seen, for example, in the efforts of Alexander Hamilton on behalf of New York’s legislation. See New York Assembly, *Remarks on an Act Repealing Laws Inconsistent with the Treaty of Peace* (Apr. 17, 1787), reprinted in 4 *Papers of Hamilton*, *supra* note 289, at 150–52.

Virginia's response, which passed the requested act but made its operation contingent upon a finding by the governor that Great Britain had surrendered the western posts.³⁰⁹ Even at the high tide for the treaty supremacy effort during the Critical Period, the power to legislate still rested firmly in the hands of the state legislatures.³¹⁰

During this same period, Jay's and Hamilton's future collaborator, James Madison, was engaged in his own examination of the relationship between the treaty power and the power of legislation. By 1786, according to Madison scholars, he had become disillusioned with the state legislatures, which he believed were subject to demagoguery and were engag-

309. See Corwin, *supra* note 308, at 27–28 n.5.

310. Arguing that national sovereignty already existed in the Continental Congress, Edward Corwin believed that the request for repeal of the state statutes was necessary because judicial review was not yet commonly accepted. See *id.* at 28. Some treaty scholars of more recent vintage have taken Corwin's point farther and have interpreted Jay's report as demonstrating that the Continental Congress already had the constitutional authority, under the Articles of Confederation, to directly enforce treaties against inconsistent state law:

By unanimously adopting Jay's historic report, Congress affirmed this early expectation that all treaties would be self-executing and superadded immediately to the laws of the land.

Jay's report also reflected the expectation that treaties would be national acts creating a supreme law of the land "independent of the will and power of" state legislatures and that they were to be applied in all courts hearing causes or questions arising from or touching on such law.

Paust, *supra* note 17, at 760–61 (citations omitted). Professors Corwin's and Paust's analyses seem historically and constitutionally inaccurate. As this Section demonstrates, there was no widespread agreement that treaties were to have this effect; if anything, historical events and the Founders' reaction to them indicate a broader understanding that treaties did not have direct effect as law but instead required voluntary state compliance. Indeed, if their account were correct, there would have been little need for the Jay report in the first place, nor for the concern of the Framers such as Hamilton, Jay, and Madison about treaty enforcement. Professor Paust's reliance upon outdated works, such as Charles Butler's *The Treaty-Making Power of the United States*, written in 1902, for much of his historical support, has probably led him astray. See, e.g., Paust, *supra* note 17, at 760–61 nn.3–9 (relying heavily on Butler to discuss John Jay's report to the Constitutional Convention). Subsequent historians have concluded that few Americans prior to the late 1780s would have accepted this notion of national sovereignty. See, e.g., Charles A. Lofgren, "Government from Reflection and Choice": Constitutional Essays on War, Foreign Relations, and Federalism 185–86 (1986) ("Prior to the late 1780's few Americans accepted the popular sovereignty position . . ."); McDonald, *supra* note 132, at 1900–91 (showing the divisions on the issue of the location of sovereignty). Such a theory would have run counter to the reservation in the Articles of Confederation to the states of every "sovereignty, freedom, and independence, and every power, jurisdiction, and right" not "expressly delegated" to Congress, in Article II of the Articles of Confederation, and instead must have relied on the extra-constitutional theory of foreign relations power most forcefully expressed by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). This theory has been heavily criticized for its poor reliance upon history. See Lofgren, *supra*, at 167–205; David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L.J. 467 (1946).

ing in unjust economic legislation.³¹¹ Madison also had become concerned about the divisions in the Continental Congress that arose in response to the Jay-Gardoqui controversy.³¹² Supporting the opening of the Mississippi as a matter of policy, he feared that the North's use of its majority power would undermine the cause of strengthening Congress's powers. After the failure of the Annapolis Convention to expand Congress's commercial powers, Madison and others turned their attention to broader constitutional overhaul. Madison's singular innovation, which would set him apart from Hamilton and Jay, was to seek treaty enforcement not in the states or their judiciaries, but in a representative national Congress that truly exercised the power to legislate.

Preparing for the Philadelphia Convention in the spring of 1787, Madison drafted a memo, "Vices of the Political System of the United States," that laid out much of his thinking.³¹³ States had obstructed the success of the Confederation by encroaching on congressional powers, violating treaty obligations, and refusing to cooperate on matters of national interest. As examples of the first, Madison cited wars and treaties between the states and the Indians and unapproved interstate compacts.³¹⁴ As examples of the second, Madison recited the violations of the Treaty of Paris, which he traced to the parochial outlook of state legislators. "From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on," he observed, "irregularities of this kind must frequently happen."³¹⁵ Of the third class of problems, Madison pointed to interstate commerce, which witnessed state discrimination against imports and failure to present a common national front on trade. These were not unusual criticisms of the Articles of Confederation system. What made Madison's thinking original, however, was that it traced these problems to the unrestrained nature of popular government in the states.³¹⁶

311. See Rakove, *supra* note 129, at 39–41; see also Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *Wm. & Mary Q.* 215, 223–25 (1979) (discussing Madison's disillusionment with "turbulent majorities who ruled the state legislatures"). In examining Madison's thought during the Framing Period, I also have relied upon Banning, *supra* note 269; Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (1989); and William Lee Miller, *The Business of May Next: James Madison and the Founding* (1992).

312. See Rakove, *supra* note 129, at 43.

313. See *Vices of the Political System of the United States* (Apr. 1787), in 9 *Papers of Madison* 345 (Robert A. Rutland & William M.E. Rachal eds., 1975).

314. See *id.* at 348–49.

315. *Id.* at 349.

316. If the multiplicity and mutability of [state] laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in

While Madison's *Vices* are read today mostly as an early version of *Federalist No. 10*, for its proposal of an expanded republic in order to cure the threat of majoritarian tyranny, it less famously traced the problems of the confederation to the state legislatures. Why had the Confederation failed? "[F]rom a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies," Madison wrote, "would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals"³¹⁷ Since the people had never ratified the articles, it was no more than "a treaty of amity of commerce and of alliance, between so many independent and Sovereign States," rather than part of every state constitution. Therefore, Congress could not enforce its directives upon the states or individuals, nor could it be confident that state courts would enforce its commands over state laws. "Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail," Madison observed. "[A]nd as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State."³¹⁸

Madison remained unconvinced that a more perfect union ought to rely upon state judges and legislatures. "It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government, ought not be calculated on," he wrote in his *Vices* memo.³¹⁹ Rather, he believed that the federal government needed the power to "operate without the intervention of the States" directly upon individuals. "A sanction is essential to the idea of law, as coercion is to that of Government," Madison wrote. "The federal system being destitute of both, wants the great vital principles of a Political Cons[ti]tution."³²⁰ Once the national government was to promulgate, execute, and adjudicate laws directly upon individuals, it had to be fundamentally reorganized to give it three branches of government—legislative, executive, judicial—to exercise these new powers.³²¹ In addition to a federal power that acted directly on individuals, Madison proposed a

such Governments, are the safest Guardians both of public Good and of private rights.

Id. at 354. See also Rakove, *supra* note 129, at 49–50 (discussing Madison's "disillusion with the failings of state legislators and citizens alike").

317. *Vices of the Political System of the United States*, *supra* note 313, at 351, reprinted in 9 Papers of Madison, *supra* note 313, at 345.

318. Id. at 352.

319. Id. at 351.

320. Id.

321. Madison summarized the thoughts expressed in his *Vices* memo in letters to Washington, Randolph, and Jefferson. See To Edmund Randolph (Apr. 8, 1787), reprinted in 9 Papers of Madison, *supra* note 313, at 368; To George Washington, (Apr. 16, 1787), reprinted in id. at 383–84; To Thomas Jefferson (Mar. 19, 1787), reprinted in id. at 317–22.

radical solution: a federal negative on all state legislation.³²² Drawing upon the Crown's prerogative to review colonial legislation, Madison essentially proposed to make the federal government part of every state legislature; "[w]ithout this defensive power," he believed, "every positive power that can be given on paper will be evaded & defeated."³²³ While scholars have focused on the negative as an effort to control majority oppression of minorities within the states, it also represented a powerful effort to control state encroachment on federal law by means of institutional and political design, rather than through reliance on state judiciaries.³²⁴

Madison reconciled the nature of treaties, the power to legislate, and the democratic nature of a new federal government in a way that Hamilton and Jay had not. Hamilton and Jay sought to clothe in supremacy the decisions of an institution that was more of a treaty organization than a representative government. They chose to rely upon state courts to enforce the law of a different sovereign—one that did not even function along democratic lines. Most important, their approach to treaty making and enforcement failed to account for the creation of a representative national government, created by a popularly ratified document, that possessed its own executive, legislative, and judicial branches. They did not ask whether the establishment of a popular, national government would obviate the need for the intervention of the states to enforce treaty obligations. Further, they did not consider whether the treaty implementation would require the participation of the popular branch of government, which would regularly enact domestic legislation.

Madison, however, had thought through these questions. The first steps in his reform of the national government placed it on the firmer footing of popular ratification, based representation on population, and vested it with necessary national powers, especially over interstate and foreign commerce. Second, and equally important, the government was to be given the authority to enact and enforce law upon individuals through its own independent institutions. Once the national government was reconstituted in this manner, it would no longer need to rely upon the states and their judiciaries for implementation of federal law. Such important matters, Madison predicted, could not be entrusted to the states. "If the judges in the last resort depend on the States & are bound by their oaths to them and not to the Union," Madison worried, "the intention of

322. The negative is proposed in the same three letters. See also Hobson, *supra* note 311, at 219 (citing the same letters in which the negative is proposed); Rakove, *supra* note 129, at 51–55 (same).

323. To George Washington, *supra* note 321.

324. In his letter to Washington, for example, Madison's arguments in favor of the negative claim that without it, "[t]he States will continue to invade the national jurisdiction, to violate treaties and the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of interest." *Id.* at 384. The ability of the negative to place a "controul on the internal vicissitudes of State policy" comes second, as yet another "happy effect" of this new federal prerogative. *Id.*

the law and the interests of the nation may be defeated by the obsequiousness of the Tribunals to the policy or prejudices of the States.”³²⁵ Instead of the Articles system, it was far better to create a national legislature and judiciary that would bypass the states entirely.³²⁶ Madison’s approach to treaties and lawmaking can be seen as a part of his broader remedy for the weaknesses of the Confederation—a sweeping reconstitution of the national government into a democratic republic.³²⁷

These differing approaches to treaty implementation framed the debate that would occur during the ratification of the Constitution and the new government’s early years. Under the Articles of Confederation, the Continental Congress held the traditionally executive power to make treaties, but lacked the legislative authority to implement them. One response, embodied by the legal and political efforts of Hamilton and Jay, was to argue that national sovereignty resided in the Congress, which could make treaties that had direct legislative effect upon individuals. Nonetheless, their view still relied upon the machinery of state government to make treaties supreme. Leading up to the Constitutional Convention, Madison developed an alternate vision, one that sought to unify the executive treaty power and the legislative power in a different manner. Rather than give treaties a domestic lawmaking power, Madison believed that a sweeping new constitution ought to vest the national government with the true power to legislate. With the force of popular sovereignty behind it, Congress would pass its own laws, implement its own treaties, and rely upon its own independent organs of government. Both approaches to treaties and lawmaking were debated at the Constitutional Convention, which, while appearing to adopt the Hamilton-Jay system, would provide the grounds for the Madisonian structure that prevailed during ratification.

III. THE CONSTITUTIONAL CONVENTION AND THE RATIFICATION

In reconstructing the original understanding of the treaty power, two themes emerge. First, the Framers maintained the distinction between treaty-making and legislation that characterized British practice and their own thinking during the Revolution and the Critical Period. The Constitution reflects this understanding by maintaining the allocation of treaty-making to the executive branch and lawmaking to Congress. This division of powers did not just empower the Senate by giving it a joint role in treaties, but also protected the lawmaking process by limiting trea-

325. To Edmund Randolph, *supra* note 321, at 370.

326. To Thomas Jefferson, *supra* note 321, at 319–20. It seems significant that at the time he was describing these thoughts to other important Virginians, such as George Washington, Thomas Jefferson, and Edmund Randolph, Madison was in Congress both attempting to defuse the ongoing Jay-Gardoqui controversy and examining the Jay report on the treaty power. Madison was clearly confronted with the alternative to treaty obligations presented by Jay, but decided to pursue his majoritarian course instead.

327. See Banning, *supra* note 269, at 5–6.

ties to an executive function. Second, concern about the anti-democratic nature of the treaty process led at least some of the leading Framers to accept a role for the popularly elected House. In response to criticism that an unlimited treaty power could override individual rights or bargain away important national objectives, Federalists responded that treaties could not accomplish anything so drastic without the participation of the House in implementing legislation. Their position undermines internationalist arguments that the Constitution's original understanding compels the automatic execution of all treaties, and instead indicates that the House was to play an important role in integrating treaties into the domestic lawmaking system.

This understanding of the relationship between treaties and legislation extended from the revolutionary period into the Constitutional Convention and the ratification period. Initially, important Framers such as Madison and James Wilson sought to include a formal role for Congress in treatymaking, but the desire for secrecy and dispatch in foreign affairs led the Convention to exclude the House. Instead, they were able to vest the President with a significant role, which was thought to enhance the participation of the people in foreign affairs. During ratification, however, Anti-Federalists waged a powerful attack upon the treaty power for its lack of a formal House role. Because the treaty power enjoyed federal supremacy and appeared open-ended, Anti-Federalists argued that basic constitutional principles demanded the participation of the legislature, rather than solely the President and the Senate. Some Federalists, such as Jay, responded by saying that House participation was impracticable because of its large size and the need for secrecy. When this explanation did not prove convincing, it fell to others, such as Wilson in the Pennsylvania ratifying convention and Madison in the Virginia ratifying convention, to return to the traditional separation of treatymaking and lawmaking between the executive and legislative branches. The arguments made by Virginia Federalists to meet a powerful Anti-Federalist attack, the culmination of almost a year of debate on the Constitution throughout the states, are an important indication of the generally received meaning of the Constitution's treaty system. As we will see, the conclusion of the ratification process yielded an understanding of the treaty power that kept well within the traditional Anglo-American distinction between treatymaking and lawmaking.³²⁸

328. In approaching these sources, it is important to distinguish between the Philadelphia Convention and the ratification process, a point that internationalist scholars have neglected. See, e.g., Paust, *supra* note 17, at 760–64 (quoting Jay report, ratification pamphlets, and Philadelphia votes); Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1097–1110 (intermixing statements from Philadelphia Convention, *The Federalist*, and ratifying conventions). In unearthing the original understanding of the Constitution, the records of the Philadelphia Convention may not bear the interpretive significance enjoyed by the debates during the ratification itself. As even Federalists themselves argued, the drafters of the Convention exercised no power other than that of making

This Part will explore the framing of the treaty power in three parts. Section A will discuss the drafting of the Treaty and Supremacy Clauses, with particular attention paid to the development of these provisions in relation to the broader structural themes and tensions that arose during the Constitutional Convention. Section B will examine the understanding of the Treaty Clause as it developed during the ratification debates in the different states. It will focus on the Federalist–Anti-Federalist debates in the press and in the conventions in three critical states: Pennsylvania, New York, and Virginia. Section C will review selected post-ratification evidence, namely the continuing revolutionary debt problem, the Jay Treaty, and *Foster v. Neilson*, for the light they shed on the structural decisions made during the ratification.

A. Drafting the Treaty Clause

Most writing about the original understanding of the Treaty Clause has focused on the Constitutional Convention to determine the meaning of the Senate's advice and consent role in treatymaking.³²⁹ Few, however, have examined the Philadelphia debates in detail concerning treaties and their interaction with the legislative power. Discussion of this question during the Philadelphia Convention occurred in three distinct stages. The first was during the month of June 1787, when the delegates worked on a proposed form of government that would be organized along the principles of popular sovereignty, in which all branches of the govern-

recommendations; it was the ratifiers of the document who gave it political legitimacy. As James Wilson declared before the Pennsylvania ratifying convention:

I think the late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen.

The Pennsylvania Convention (Dec. 4, 1787), 2 Documentary History, *supra* note 51, at 483. James Madison, writing as Publius, similarly remarked:

[t]he powers [of the Convention] were merely advisory and recommendatory; that they were so meant by the States, and so understood by the Convention; and that the latter have accordingly planned and proposed a Constitution, which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.

The Federalist No. 40, 1788, reprinted in 15 Documentary History, *supra* note 51, at 407. As a result, the original understanding of the Constitution held by its ratifiers should bear greater weight than the intentions of the drafters in Philadelphia. Further, indiscriminately lumping all of the framing materials together misses the constitutional and political developments that occurred within the Framing Period itself. Important differences in meaning about the constitutional text emerged between the Philadelphia Convention and the ratifying debates. Anti-Federalists and Federalists engaged in a nationwide debate on the Constitution and the treaty power, but like most debates, it changed over time, with some arguments quickly discarded, others winning concessions, and some shared understanding emerging.

329. See, e.g., Bestor, *supra* note 32, at 91–117; Jack N. Rakove, Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study, 1 Perspectives in American History, New Series 233, 236–247 (1984).

ment would be selected by a popularly elected legislature. It was at this point that the Madisonian plan of a national legislature was at its high point. The second stage occurred during July, when the smaller states succeeded in winning equal representation in the Senate. At this point, the Hamilton-Jay approach, relying as it did on state institutions for treaty enforcement, supplanted Madison's vision. The third stage occurred in late August and early September, when the Philadelphia delegates turned to the exact wording of the Treaty Clause. Here, the forces of popular sovereignty attempted a comeback by granting a role to the President in the treaty-making process, by seeking to include the House, and by attempting to reduce the super-majoritarian requirement for the approval of treaties. Although the latter two efforts failed, their backers left the Convention with the idea that even though the House did not have a formal say in approving treaties, it would continue to enjoy an indispensable role in treaty-making because of its authority over domestic legislation.

1. *Stage One: The Virginia Plan and the Negative on State Laws.* — As one of the obvious national difficulties suffered under the Articles of Confederation, treaty enforcement became one of the first issues that the Framers planned to address. In the first major speech of the Convention, on May 29, 1787, Edmund Randolph of Virginia (who had been in correspondence with Madison concerning the Articles' defects)³³⁰ identified the chief problem with the Articles as their inability "to prevent a war nor to support it by th[eir] own authority."³³¹ Randolph cited examples that showed "that [the United States] could not cause infractions of treaties or of the law of nations, to be punished."³³² This was particularly dangerous to the Union, he said, because "particular states might by their conduct provoke war without controul," a war that the Continental Congress did not have the resources at its command to fight and win.³³³ To address these and other challenges, Randolph proposed a constitution that established a re-constituted national government with new powers, known as the Virginia Plan.

The Virginia Plan addressed the problem of treaties under the Articles of Confederation in two ways. First, it proposed a new national government with a bicameral legislature that would exercise all legislative power and would operate on the basis of popular representation.³³⁴ A national executive, chosen by the legislature, would enjoy the executive powers of government.³³⁵ A national judiciary would adjudicate controversies under federal law, but the job of reviewing the constitutionality of proposed legislation would fall to a council of revision.³³⁶ This new na-

330. See *supra* notes 321–326.

331. 1 Farrand, *supra* note 197, at 19.

332. *Id.*

333. *Id.*

334. See *id.* at 20.

335. See *id.* at 21.

336. See *id.*

tional government would exercise powers over foreign affairs, interstate commerce, areas in which the states were incompetent, and taxation. Randolph's proposal created a government that could act directly upon individuals, freeing it from dependence upon the states for the execution of national laws and treaties. It did not enumerate the national government's limited powers, but instead resorted to broad grants of authority.

The Virginia Plan's reform of treaty implementation gave the federal government the means to suppress state laws that were inconsistent with federal treaties. Randolph was obviously influenced by Madison, who had authored the scheme for a negative over state laws. Modifying Madison's original design, the Virginia Plan proposed that the negative extend only to state laws that violated, "in the opinion of the National Legislature the articles of Union," rather than in all cases whatsoever.³³⁷ By a unanimous vote, the Convention subsequently approved a motion, without discussion, by Benjamin Franklin to add "or any treaties subsisting under the authority of the Union," to make clear that the negative would protect both the Constitution and treaties.³³⁸ Madison's efforts, however, to expand the negative to "improper" state acts—in other words, giving the federal government the power of review over all state laws, whether unconstitutional or not—failed in June. But the Committee of the Whole adopted the limited form of the negative, along with other elements of the Virginia Plan, soon thereafter.³³⁹

Confusion resulted, however, concerning the division of national powers among the branches, as no firm consensus could be reached on whether the foreign affairs powers should be vested solely in the President or in the Senate. Drawing on their British experience, almost all of the delegates who spoke on this question agreed that the powers of war and peace were executive in nature. Yet, mindful of the Crown's efforts to use its foreign affairs powers to encroach on the legislative, the delegates were unsure whether transferring the Continental Congress's executive authorities in this area to the President would be wise. Charles Pickney's comments were typical—he "was for a vigorous Executive but was afraid the Executive powers of [the existing] Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one."³⁴⁰ Some, most prominently Wilson, argued in favor of making the foreign affairs power completely legislative in nature by vesting it solely in Congress.³⁴¹ Arguing that the model of the English constitution was ill-suited to America, Madison and Wilson succeeded early in June in limiting the President to executing the laws,

337. *Id.*

338. 1 Farrand, *supra* note 197, at 54.

339. *See id.*

340. 1 Farrand, *supra* note 197, at 64–65; *see also id.* at 65 (comments of John Rutledge); *id.* at 65–66 (comments of James Wilson).

341. *See id.* at 65–66.

appointing officers, and exercising powers delegated to him by Congress.³⁴²

2. *The New Jersey Plan and the Triumph of State Sovereignty.* — While the Virginia Plan, supported by the delegates of the large states, met with early success, its approach toward treaties began to unravel when William Paterson introduced his New Jersey Plan on June 15.³⁴³ Supported by the small states, the Plan sought to retain the existing structure of the Articles of Confederation, while only expanding its scope to include the regulation of interstate and international commerce and the right to impose import duties.³⁴⁴ Congress would still represent the states alone, it would still lack the power to act on individuals, and it would still be dependent, for the most part, on the states for supply and for execution of its laws. A national executive and judiciary would be established, but of limited powers.³⁴⁵ Proposing an alternative to Madison's negative on state laws, Paterson's scheme included the progenitor of the Supremacy Clause:

[A]ll Acts of the U. States in Cong[ress] made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent ye carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederate States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.³⁴⁶

Paterson's proposals closely tracked the arguments made by Hamilton in *Rutgers* and Jay in his report to Congress: Treaties are the supreme law of the land, part of the higher law of each state, and must be enforced by state judges.

While the New Jersey Plan needed a supremacy clause, the Virginia Plan did not. Madison's and Randolph's proposal had created a new, popularly elected legislature that could override state laws both through the negative and through its own powers, or that could avoid state law entirely by acting on individuals directly. It solved the problem of treaty enforcement by raising the power of implementation to the national level. Under the New Jersey Plan, Congress had no such new powers, and as a result it was still dependent on the state governments to give effect to its treaty commitments. If state enforcement failed, the New Jersey Plan

342. See *id.* at 67 (motion of James Madison, seconded by James Wilson).

343. See 1 Farrand, *supra* note 197, at 242.

344. See *id.* at 243.

345. See *id.* at 244.

346. *Id.* at 245.

could resort only to physical coercion. As Randolph argued in evaluating the New Jersey Plan on June 16, "[t]here are but two modes, by which the end of a Gen[era]l Gov[ernmen]t can be attained: the 1st is by coercion as proposed by Mr. P[aterson]'s plan. 2. [B]y real legislation as prop[ose]d by the other plan."³⁴⁷ Calling physical coercion of other states "impracticable, expensive, cruel to individuals," Randolph urged that "[w]e must resort therefore to a national Legislation over individuals, for which [the present] Cong[ress]s are unfit." Both the Virginia and New Jersey plans essentially amended the separation of powers in each state: Virginia's added Congress as an effective upper house to each state legislature; New Jersey's expanded the powers of each state judiciary to include judicial review of state laws.

For Madison, the New Jersey Plan's reliance upon state judicial review would provide few guarantees for federal supremacy. In a lengthy critique on June 19, Madison argued that one of the chief defects of Paterson's proposal was its failure to "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars."³⁴⁸ As Madison observed, "[t]he tendency of the States to these violations has been manifested in sundry instances. The files of Cong[ress]s contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us."³⁴⁹ Ominously, Madison predicted that "[t]his cannot be the permanent disposition of foreign nations."³⁵⁰ The New Jersey plan would do nothing to remedy this state of affairs. "The existing confederacy does not sufficiently provide against this evil. The proposed [Paterson] amendment to it does not supply the omission. It leaves the will of the States as uncontrouled as ever."³⁵¹ State judicial review would not solve this problem, Madison argued, because under the New Jersey Plan Congress continued to represent only the states, not the people. "It could not therefore," Madison reasoned, "render the acts of Cong[ress]s in pursuance of their powers even legally paramount to the Acts of the States."³⁵² State judges would have no choice but to follow state law, and state legislatures and executives easily could override federal acts.³⁵³ Relying upon the negative and the federal power to legislate, believed representatives of the larger states, would be far preferable to the smaller states' alternative of coercion and state judicial enforcement.³⁵⁴

While the small states put up resistance, initial drafts of the Constitution continued to hew closely to the Virginia Plan. Representation con-

347. *Id.* at 256.

348. *Id.* at 316.

349. *Id.*

350. *Id.* Repeating his "Vices" memo, Madison asserted that states had entered into treaties with each other and with the Indians without the approval of Congress. See *id.*

351. *Id.*

352. *Id.* at 317.

353. See *id.*

354. See Rakove, *supra* note 129, at 173.

tinued to be based on population, but because of concerns about the President's powers, the Committee on Detail vested the Senate with the sole power over war and peace, treaty-making, and the appointment of ambassadors.³⁵⁵ Under the Virginia Plan, the Senate served as a council of state, which many state constitutions had established to share executive power with the governor. It was to be elected by the members of the House, rather than appointed by the state legislatures. Original proposals vested foreign affairs power in the Senate because, it was believed, the Senate would have the continuity and wisdom to handle the difficulties of foreign affairs. With smaller numbers and six-year terms, Senators could handle sensitive diplomatic relations and could pursue policies that advanced the long-term national interest.³⁵⁶ At the same time, the majoritarian impulses of Madison and other large state delegates were satisfied by the Senate's mode of election by the popularly elected House.

The Great Compromise changed this sanguine view of the Senate. On July 16, the delegates resolved their impasse over representation by agreeing to a bicameral legislature composed of a popularly elected House of Representatives and a Senate in which each state legislature would select two Senators.³⁵⁷ Equal state representation ruined the attempt of Madison and Wilson to organize the new government along the principles of national popular sovereignty.³⁵⁸ Such a Senate would be large, and therefore it would lack the ability to act with the wisdom, stability, and calculation necessary for executive functions. A Senate representing states in their corporate capacity would be unlikely to exercise the negative on state laws as freely as it should, and it would not hold the devotion to the national interest that justified vesting it with the foreign affairs powers. One day after the Great Compromise, the Convention eliminated Madison's negative by a vote of seven to three. Some delegates criticized the negative as unnecessary, because "sufficient Legislative authority should be given to the Genl. Government" to override inconsistent state laws,³⁵⁹ others argued that state courts would invalidate any state laws contrary to federal law,³⁶⁰ while yet others claimed that the negative would prove a logistical nightmare.³⁶¹ Defending his proposal, Madison again expressed doubts about the ability of state courts to correct violations of federal law: "Confidence can[not] be put in the State Tribunals as guardians of the National authority and interests. In all the

355. See 2 Farrand, *Records*, *supra* note 197, at 183; see also Yoo, *Judicial Safeguards*, *supra* note 121, at 1366–74 (discussing dual role of the Senate).

356. As James Wilson declared on June 26, the "Senate will probably be the depository of the powers concerning" relations "to foreign nations" because of Senators' longer terms in office. 1 Farrand, *Records*, *supra* note 197, at 426.

357. See 2 Farrand, *Records*, *supra* note 197, at 15–16. The politics of the Grand Compromise are retold in Rakove, *supra* note 129, at 65–70.

358. See Rakove, *supra* note 129, at 62–63.

359. See 2 Farrand, *Records*, *supra* note 197, at 27 (comment of Gouverneur Morris).

360. See *id.* (comment of Roger Sherman).

361. See *id.* (comment of Luther Martin).

States these are more or less depend[en]t on the Legislatures.”³⁶² Madison’s arguments, however, proved unsuccessful, and the Convention instead adopted unanimously a motion by Luther Martin to adopt the New Jersey Plan’s supremacy clause instead.³⁶³ Once plans for a legislature with broad powers, elected on the basis of population, had been dispensed with, it seems that the momentum for other nationalistic mechanisms, such as the negative, no longer had political support. Yet, whether the judicial process was to be the only method for treaty enforcement remained unclear. Some, like Madison, remained dubious about the effectiveness of judicial review, and others, like Gouverneur Morris, thought that treaties ought to be enforced by national laws.

3. *The Resurrection of Majoritarianism.* — Transformation of the Senate from a popularly elected body to a representative of state interests profoundly affected the delegates’ conception of the Senate’s role in foreign affairs. What the proponents of popular sovereignty, such as Madison and Wilson, had lost in the debates over federalism, they would seek to win with the separation of powers.³⁶⁴ By pressing for a legislative role in the making of treaties, they could avoid state governments and rely instead upon national legislation for implementing federal treaties. When the provision concerning the Treaty Clause came before the Convention on August 23, supporters of majority rule sought to leaven the Senate’s sole authority. James Madison began the discussion by observing that “the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.”³⁶⁵ Professor Rakove’s work already has laid out a strong case suggesting that one of these “other obvious reasons” was a concern about the Senate’s unrepresentative nature and the President’s democratic accountability.³⁶⁶ Once the President’s election by the people is taken into

362. *Id.* at 27–28.

363. The clause declared,

that the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. 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—& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.

Id. at 28–29. One significant change would be made after this vote—the delegates later added state constitutions to the list of laws that could be superseded by federal law.

364. That the negative and the House’s role in treaty-making were intertwined seems clear from the lineups in favor of both proposals, and by the strategic efforts of the Madison-Wilson camp to bring up the issues at the same times. On August 23, Madison and Wilson had lost yet another effort to restore the negative, by only one vote. See 2 Farrand, *Records*, *supra* note 197, at 390–92. In the course of making his case, Wilson again criticized reliance upon the judiciary as not sufficiently firm to protect the federal government. See *id.* at 391. On the same day, directly after this last vote on the negative, Madison raised the question of the Senate’s sole role in treaty-making. See *id.* at 392.

365. *Id.*

366. See Rakove, *Treatymaking*, *supra* note 329, at 244–46.

account, Madison's comment gains significance, because it demonstrates that he sought to counter-balance the influence of the states in the treaty process by including the republican, representative President.

The Senate's alteration into a representative of the states troubled other delegates, who supported an effort to expand the treaty process to include the House. Speaking directly after Madison, Gouverneur Morris declared that he was uncertain whether "to refer the making of Treaties to the Senate at all."³⁶⁷ Instead, Morris proposed an amendment that "no Treaty shall be binding on the U.S. which is not ratified by a law."³⁶⁸ Nathaniel Gorham criticized Morris, because he believed the proposal would place the power to appoint ambassadors and the power to ratify treaties in different hands.³⁶⁹ Wilson, however, argued in favor of Morris's amendment because it did nothing more than recognize the power that the legislature would have in regard to treaties. Analogizing to the British constitution, Wilson observed that Parliament had a voice "[i]n the most important Treaties," despite the royal prerogative, because "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"—in other words, the Parliament had to approve implementing legislation for a treaty to take effect in domestic British law.³⁷⁰ Pursuing Gorham's point, William Johnson responded that "[t]he Example of the King of G. B. was not parallel. Full & compleat power was vested in him."³⁷¹ Legislative participation was not needed to ratify the treaty (and thus "make" the agreement), but only to fulfill its obligations. "If the Parliament should fail to provide the necessary means of execution," Johnson said, "the Treaty would be violated."³⁷² Both Wilson and Johnson agreed that the British Parliament had the authority to block a treaty, they just disagreed whether parliamentary action resulted in no agreement being made, or in an agreement being made and then broken. Wilson thought that the legislature's implicit role showed that different bodies could negotiate and ratify; Johnson believed that the legislature's role showed the exact opposite because the legislature's role was not formal. At the very least, both Wilson's and Johnson's comments suggest that they thought that Congress's legislative powers gave it sole control over a treaty's domestic implementation.

Although some of the most influential delegates had arrived in Philadelphia with the mission of diminishing the power of the states, more than just hostility drove this late effort to modify the Treaty Clause. First, there was concern that state interests might not correspond to the best interests of the nation, and that instead states might use their power

367. 2 Farrand, Records, *supra* note 197, at 392.

368. *Id.*

369. *See id.*

370. *Id.* at 393.

371. *Id.*

372. *Id.*

under the Treaty Clause to capture benefits at the expense of the people or of a minority of states. Wilson, for example, warned that "[u]nder the clause, without the [Morris] amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port."³⁷³ In an earlier debate on August 15 concerning the House's sole authority to originate money bills, George Mason of Virginia had foreshadowed Wilson's argument when he exclaimed that he "was extremely earnest to take this power from the Senate, who . . . could already sell the whole Country by means of Treaties."³⁷⁴ These statements expressed a fear that treaties might be used by the states to enact protectionist or favorable economic legislation that could not survive a normal legislative process. As the Jay-Gardoqui controversy had shown, this was not just an idle fear.

Second, there was a desire behind the Morris amendment to make it more difficult for the nation to enter into treaties. Although one would not think this to be the natural result of a change from senatorial to congressional approval of international agreements, House participation would place another check on the Senate, and on treaties in general. In response to Gorham's and Jolinson's arguments, for example, Morris admitted that problems might exist when different bodies negotiate and ratify a treaty. American ambassadors would be unsure of their instructions, with the result that foreign ambassadors would most likely have to come to the United States to negotiate important treaties.³⁷⁵ Nonetheless, he characterized a difficult ratification process as a virtue. Morris "was not solicitous to multiply and facilitate Treaties."³⁷⁶ Rather, the "more difficulty in making treaties, the more value will be set on them."³⁷⁷ Morris's comments expressed American ambivalence toward international entanglements, which also characterized the Federalist Papers, George Washington's farewell address, and early American policy toward the European wars between Great Britain and France.

Morris's proposal was defeated by a vote of eight states to one, leaving the treaty power solely in the hands of the state-dominated Senate.³⁷⁸ The forces of majority rule were not so easily defeated, however, as they succeeded in postponing final consideration of the Treaty Clause. As they adjourned for the day, Madison "hinted for consideration," as he put it in his notes, whether the President and Senate ought to share power over peace and alliance treaties, and whether to require a majority vote of the whole legislature for other treaties.³⁷⁹ From there the Treaty Clause

373. *Id.*

374. Madison In Convention (Aug. 15, 1787), reprinted in 2 *id.* at 297.

375. See Madison In Convention (Aug. 23, 1787), reprinted in 2 *id.* at 392-93.

376. *Id.* at 393.

377. *Id.*

378. See *id.* at 393-94. A prior motion to postpone consideration of Morris's amendment failed by an evenly divided Convention. See *id.*

379. *Id.* at 394.

was sent to the Committee on Postponed Parts, which was formed to resolve questions upon which substantial disagreement had emerged. The Committee reported the version that forms the basis for today's clause: The President was given power to make treaties with the advice and consent of two-thirds of the Senate.³⁸⁰

While the Committee left no record of its deliberations, two members of the South Carolina delegation later discussed the crafting of the clause during their state's ratification process. Pierce Butler, a Committee member, stated that the Committee believed that none of the branches—Senate, President, and the House—alone could be trusted to exercise the power properly. The Senate's sole control "was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve."³⁸¹ Although some wanted to vest the power in the President, others opposed this motion on the ground that it would allow him to involve the country in war too easily. The participation of the House was suggested, but the idea was doomed by "an insurmountable objection," in Butler's words, "that negotiations always required the greatest secrecy, which could not be expected in a large body."³⁸² Confirming Butler's account, a second delegate, General Charles Cotesworth Pickney, observed that agreement existed that the House should not have a role in making treaties because of "the secrecy and dispatch which are so frequently necessary in negotiations."³⁸³ Pickney then explained why the Committee had included the President in the treaty-making provision. Some had emphasized the representative feature of the Presidency that Madison had raised on August 23: The President "was to be responsible for his conduct, and therefore would not dare to make a treaty repugnant to the interest of his country; and from his situation he was more interested in making a good treaty than any other man in the United States."³⁸⁴ Others, however, expressed concern that a President might be bribed by a foreign power or swayed by sectional interests. Therefore, Pickney concluded, the Committee had vested the power in the President and Senate both.³⁸⁵

As Professor Rakove has observed, these two speeches "fill a major gap in the records of the proceedings at Philadelphia."³⁸⁶ They indicate that the Committee altered the Treaty Clause specifically so as to implement two of the themes raised by the earlier debates in the Convention. First, the President was inserted into the process not only to check the Senate, but also to represent the nation as a whole. The President's republican nature contrasted sharply with that of the Senate, which repre-

380. See Madison In Convention (Sept. 3, 1787), reprinted in 2 *id.* at 498–99.

381. Elliott, *supra* note 114, at 263.

382. *Id.*

383. *Id.* at 264.

384. *Id.*

385. See *id.* at 265.

386. Rakove, Treaty-making, *supra* note 329, at 243.

sented state and sectional interests. Second, the Committee, like the majority of the Convention, remained hostile to participation by the House in the making of international agreements because they believed it structurally unsuited to the delicacies of international negotiation. The elevation of the President as the representative of the people in foreign affairs also may have led critics to focus on the House's functional inadequacies, rather than on its democratic nature.

When the Convention took up the modified Treaty Clause on September 7, 1787, the supporters of majority rule made one more attempt to reduce the power of the states. Wilson immediately moved that the Constitution require that treaties receive the approval of both House and Senate, in order to render the procedures for statutes and treaties congruent. "As treaties . . . are to have the operation of laws," Wilson argued, "they ought to have the sanction of laws also."³⁸⁷ In other words, if treaties were to enjoy the effect of laws within the United States, they ought to undergo the same lawmaking process. Roger Sherman argued that "the necessity of secrecy" precluded allocation of the power to the whole legislature. Wilson's amendment lost ten to one, and the Convention approved the President and the Senate's shared control over treaty-making.³⁸⁸ The delegates, however, did not consider whether Wilson's original point was correct—that treaties were to have the force of legislation—and instead focused solely on the House's functional ability to play a role in diplomacy. One might see the vote simply as a decision that the House was not to be involved in treaty-making because of its structural inadequacies, rather than as a resolution of whether those treaties could supplant domestic lawmaking, in which the House was to play the dominant role.

With participation by the House decisively rejected, an illuminating debate occurred on the two-thirds vote requirement. Wilson attacked the supermajority provision because it "puts it in the power of a minority to controul the will of a majority."³⁸⁹ Rufus King emphasized that the two-thirds requirement was unnecessary because "the Executive was here joined in the business," which constituted a "check which did not exist in [the Continental] Congress."³⁹⁰ The Convention then unanimously adopted a Madison amendment to exclude peace treaties from the two-thirds requirement, "allowing these to be made with less difficulty than other treaties."³⁹¹ Madison further sought to alter the Constitution's treatment of peace treaties by allowing them to be made by two-thirds of the Senate without presidential involvement. "The President," Madison worried, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of

387. 2 Farrand, *Records*, *supra* note 197, at 538.

388. See *id.*

389. *Id.* at 540.

390. *Id.*

391. *Id.*

peace.”³⁹² His motion was seconded by Pierce Butler, who thought the amendment a “necessary security against ambitious & corrupt Presidents.”³⁹³ During a debate that extended over the course of September 7 and 8, the Convention rejected Madison’s modifications to the Treaty Clause. On September 7, the delegates defeated by a vote of eight to three Madison’s amendment removing the President from the process for peace treaties. The next day, the Convention reversed Madison’s first motion on peace treaties, which had been accepted unanimously, and decided to subject such agreements to the same two-thirds vote requirement that governed all treaties. Again the vote was eight to three. Throughout the deliberations, the delegates brushed aside the repeated efforts by James Wilson to include the House in the treaty process.³⁹⁴

Madison’s efforts to alter the procedures for peace treaties were ultimately frustrated because of the concerns expressed in late August. Gouverneur Morris opposed the exclusion of the executive because of its position as the representative of the people. “[N]o peace ought to be made without the concurrence of the President, who was the general Guardian of the National interests,” said Morris.³⁹⁵ Others worried that sectional interests in the Senate would swamp the national interest if voting procedures were eased. “In Treaties of peace the dearest interests will be at stake, as the fisheries, territory &c,” Elbridge Gerry claimed.³⁹⁶ Gerry believed that a simple majority requirement would allow a group of smaller states to pursue their sectional interests against the wishes of a majority of the people. As he said on September 8, he was concerned about “the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people.”³⁹⁷ Hugh Williamson also argued that the two-thirds requirement would safeguard small states as well as large states, because the small states could still prevent a treaty inimical to their interests.

4. *Conclusions.* — Internationalists place great store in the events of the Constitutional Convention. They argue that the elimination of the Virginia Plan’s veto over state laws, and the adoption of the New Jersey Plan’s Supremacy Clause, represent a clear decision to make treaties self-executing in American courts and to exclude Congress from treaty-making.

392. *Id.* For the significance of this discussion for the ongoing debate on the constitutional allocation of war powers, see Yoo, *War Powers*, *supra* note 26, at 265–69.

393. 2 Farrand, *Records*, *supra* note 197, at 541.

394. See, e.g., *id.* at 547–48 (Wilson moving to remove two-thirds requirement because “[i]f the majority cannot be trusted, it was a proof . . . that we were not fit for one Society.”); *id.* at 548 (Wilson declaring that “[i]f two thirds are necessary to make peace, the minority may perpetuate war, against the sense of the majority.”); *id.* at 549 (Wilson losing vote to strike out two-thirds clause nine to one).

395. *Id.* at 541.

396. *Id.*

397. *Id.* at 548.

ing.³⁹⁸ “The rejection of the Virginia plan,” Professor Vázquez argues, “thus reflects a decision not to make the legislature the primary interpreter and enforcer of treaties against the states, and the adoption of the Supremacy Clause represents a decision to vest this power and duty in the courts.”³⁹⁹ Internationalists, however, focus their gaze too narrowly upon the choice of the Supremacy Clause, without reviewing subsequent events during the Constitutional Convention. To be sure, the Convention did select the Supremacy Clause approach over Madison’s more aggressive effort to place the federal government in the position of a state legislature of last resort. Nonetheless, this Article’s more complete examination of the Constitution’s drafting suggests that the actions of the Constitutional Convention did not represent a repudiation of Madison’s vision for treaty enforcement, nor did it amount to an outright dismissal of any role for the House. Evidence from the Constitutional Convention supports more complicated conclusions that undermine the internationalists’ picture of the convention as a binary choice between congressional or judicial enforcement of treaties.

First, the history reviewed here indicates that the Convention did not reject a treaty-making role for the House because it sought to choose the courts over Congress as the preferred treaty enforcer. Certainly, the delegates agreed to prevent the House from participating formally in the making of international agreements. They rejected Madison’s and Wilson’s motions to include the House, however, not because they believed that it could not perform the job of treaty enforcement, but because they concluded that it was structurally unsuited for the task of conducting diplomacy. Members of the Convention did not explain their adoption of the Supremacy Clause as a choice in favor of courts over Congress in the enforcement of treaties. In fact, several delegates, including several of the Convention’s leading members, believed that to have direct effect in domestic law, treaties should be approved by Congress. Events after the adoption of the Supremacy Clause seem to show that the Convention was not of a single mind as to whether the British rule—executive treaty-making followed by legislative implementation—would continue to prevail under the new Constitution.

Second, delegates to the Constitutional Convention continued to express concerns about the undemocratic nature of the treaty power. The Great Compromise’s transformation of the Senate into a representative of the states ran counter to the original design of the body as a national council. Once the Convention had altered the Senate’s method of selection, delegates sought repeatedly to inject more democratic elements into the treaty-making process. Several Framers held concerns that a simple majority of the states might seek to oppress a minority of states for sectional or economic advantage. Without a two-thirds requirement, a

398. See Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1106–08; Paust, *supra* note 17, at 761–62.

399. Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1106.

majority of states could impose treaty provisions against the wishes of a popular majority. Later in the Convention, the delegates vested the President with the dominant role in treatymaking, again, to provide majoritarian safeguards on the treaty power. Efforts to include the House would have furthered this goal, but such efforts were derailed by the widespread belief that the House could not participate effectively in diplomatic relations. A House role in the implementation of treaties, but not in their formal negotiation, would have satisfied both structural concerns among the delegates.

Third, and most important, internationalists err in viewing the adoption of the Supremacy Clause as a defeat for the Madisonian vision of the relationship between treaties and domestic lawmaking. To be sure, the Convention decisively rejected the negative over state laws, perhaps an inevitable result once the small states had won equal representation in the Senate. The delegates, however, adopted the other major elements of Madison's plan, including a popularly elected branch of the national legislature, which had the power to pass laws that applied directly to individuals, and whose laws could be enforced by independent organs of the national government. Further, the proposed Constitution vested Congress with powers, such as those over interstate and international commerce, that would require its cooperation for future treaties. The Convention had not chosen between the two possible methods, identified by Hamilton and Jay, on the one hand, and Madison, on the other, for enforcing treaties. While the Convention had adopted the Supremacy Clause, it also had created the national mechanisms for enforcement envisioned by Madison. It had not, however, fully confronted the tension between treaties, the Supremacy Clause, and the power to legislate.

It was not until the ratification process that state leaders grappled with the problems posed by treaties that infringed upon Congress's powers. This points out the deepest problem with the internationalist use of history. Internationalists place such reliance upon the choice of the Supremacy Clause over the veto of the negative on state laws that they overlook the importance of the ratification process. In the standard internationalist accounts, the ratification is discussed in a secondary manner so as only to buttress conclusions drawn from examination of the Constitutional Convention.⁴⁰⁰ The Constitutional Convention, however, had no official authority to make the decisions that gave the Constitution its political legitimacy. Rather, the state ratification conventions made the crucial decisions whether to adopt the Constitution. While originalists should not, by any means, ignore the Constitutional Convention, they should give primary weight to the ratification and secondary attention to Philadelphia. The understandings of the state ratifiers, not those of the

400. See, e.g., *id.* at 1097–1110 (devoting most of discussion of framing to the Constitutional Convention).

Philadelphia drafters, should receive the greatest attention. It is to those understandings that this Article now turns.

B. The Ratification Debates and the Rise of Non-Self-Execution

Curiously, the two leading histories of the Treaty Clause do not examine the state ratification debates in any detail. Professor Bestor virtually ignores the ratification debates, while Professor Rakove focuses on *The Federalist Papers* and a few statements to investigate the question of the scope of the Senate's advice and consent power. Perhaps this is understandable; the Constitutional Convention constituted a single assembly at a single point in time, in which we can discern the relationships between different discussions and important votes. The ratification process was far more unruly. After the Constitutional Convention, there was no physically unified place for debate to occur; events moved to the thirteen ratifying conventions, which were separated by both geography and time. Lacking the almost instantaneous modes of communication that we enjoy today, the founding generation relied upon open-air and closed-door meetings, and letters and newspapers carried by horse and sea, for political discussion and exchange of information.

The ratification debates contain revealing evidence—evidence perhaps more relevant and yet unnoticed—concerning the role of the House in the process of making international agreements. Critics of the Constitution complained that the Treaty Clause improperly vested power in the Senate, rather than the House, arguing that such a scheme allowed the President and Senate to conspire against the people's wishes. When initial responses that the House was ill-suited for diplomacy did not seem to gain traction, leading Federalists fell back upon Madison's vision, which included an important role for the House in controlling treaties. In maintaining the Anglo-American tradition of separating the power to make treaties from the power to legislate, they placed in the hands of the political branches the authority to determine treaty implementation. In defending the Constitution, these Federalists downplayed the Supremacy Clause and relied upon a national government that would enforce its own treaties through legislation. They would leave open for future Presidents and Congresses the decision between these two approaches to treaty enforcement.

This Section will address the ratification process in four parts: Subsection 1 discusses Anti-Federalist criticisms of the treaty power; Subsection 2 examines the Pennsylvania ratifying convention and Federalist reliance upon the legislative power to check the treaty power; Subsection 3 turns to the debates in the New York press, which witnessed a detailed debate over the relationship between treaties and legislation; and Subsection 4 reviews the debates at the crucial Virginia convention, where Madison and other Federalists defended the treaty power on the ground that treaties which regulated areas within Congress's enumerated powers would require implementing legislation.

1. *Anti-Federalist Criticisms of the Treaty Power.* — Possibly unlimited in scope and creating powers shared by the President and Senate, the Treaty Clause generated significant controversy during the ratification process. Anti-Federalists cited the clause as proof that the Constitution violated the separation of powers and threatened individual liberties. They raised three main challenges to the treaty power. First, the treaty power fueled attacks upon the Senate as an aristocratic body, vested with sweeping powers, that would corrupt the government. Anti-Federalists argued that the Senate, in collusion with the President, would use the Treaty Clause to serve its own ends at the expense of the public good. As George Mason's widely published *Objections to the Constitution* argued:

[T]heir other great Powers (vizt. their Power in the Appointment of Ambassadors & all public Officers, in making Treaties, & in trying all Impeachments) their Influence upon & Connection with the supreme Executive from these Causes, their Duration of Office, and their being a constant existing Body almost continually sitting, join'd with their being one compleat Branch of the Legislature, will destroy any Balance in the Government, and enable them to accomplish what Usurpations they please upon the Rights & Libertys of the People.⁴⁰¹

At the root of this fear was the concern that the Constitution vested the Senate with legislative, executive, and judicial authorities. The Senate exercised legislative powers as part of Congress, executive powers when making treaties and appointments, and judicial powers that relate to the impeachment process.⁴⁰² To any student of Montesquieu, this combination of authority in the same body was a clear violation of the separation of powers. Montesquieu had warned that any such combination of legislative and executive power would lead to tyranny.

In regard to treaties specifically, Anti-Federalists argued that the treaty power was either wholly executive or wholly legislative, and that, consequently, the joint allocation of the power to both the President and Senate violated the separation of powers. The most well-regarded Anti-

401. George Mason, *Objections to the Constitution* (Oct. 7, 1787), reprinted in 13 *Documentary History*, supra note 51, at 349. Mason's objections were known to have been published in at least 27 newspapers from Maine to South Carolina and served as a sounding board for numerous Federalist and Anti-Federalist essays. See *id.* at 348.

402. As the influential Anti-Federalist "Federal Farmer" complained before the start of the Pennsylvania ratifying convention, "in this senate are lodged legislative, executive and judicial powers . . ." Letter III from the Federal Farmer (Oct. 10, 1787), reprinted in 14 *Documentary History*, supra note 51, at 32. The Letters from the Federal Farmer were published as 40-page pamphlets for sale, rather than as articles in newspapers. Apparently thousands of copies were sold throughout the states, and they appeared in Pennsylvania, New York, and Massachusetts before their ratifying conventions concluded. See John P. Kaminski & Gaspare J. Saladino, Editors' Note to *id.* at 14–18. They are considered to be "one of the most significant publications of the ratification debate." *Id.* at 14. The "Federal Farmer" was once thought to be Richard Henry Lee, but recent scholarship has cast doubts upon the identity of the author. See, e.g., Gordon S. Wood, *The Authorship of the Letters from the Federal Farmer*, 31 *Wm. & Mary Q.* 299 (1974).

Federalists argued that the treaty power, because of the Supremacy Clause, had become tantamount to the power to legislate, and therefore should not be vested concurrently in the Senate and President. Again, Mason's *Objections* was illustrative: "By declaring all Treaties supreme Laws of the Land, the Executive & the Senate have, in many Cases, an exclusive Power of Legislation"⁴⁰³ Not only had Montesquieu warned against the dangers of combining the executive and legislative powers, but the Framers also believed that the British Parliament had won the right to defend the liberties of the British people by keeping the power to legislate distinct from the Crown's power to enter into treaties.⁴⁰⁴ An effort to subsume the legislative power into the treaty power would have recalled, particularly in Anti-Federalist minds, the corruption of Parliament by the Crown.

Anti-Federalists complemented this criticism with a second attack on the treaty power for its open-ended nature. Foreshadowing a debate of the limits on the treaty power that continues to this day,⁴⁰⁵ some Anti-Federalists charged that the legislative aspect of the treaty power was potentially unbounded, because it was not subject to the limits of Article I. The influential Federal Farmer wrote on October 12, 1787:

By the [Supremacy Clause], treaties also made under the authority of the United States, shall be the supreme law: It is not said that these treaties shall be made in pursuance of the constitution—nor are there any constitutional bounds set to those who shall make them: 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, whether it be practicable to set any bounds to those who make treaties, I am not able to say: If not, it proves that this power ought to be more safely lodged.⁴⁰⁶

By giving treaties supremacy effect, the Anti-Federalists argued, the Constitution had vested in only the President and the Senate the power to enact laws. Because the Senate was an aristocratic body, it could corrupt the President—already a monarchical figure—and enlist his cooperation in the oppression of the people. As one of the most thoughtful Anti-Federalist writers, Brutus, observed:

403. Mason, *supra* note 402, at 350.

404. See, e.g., An Old Whig III (Phila. Indep. Gazetteer, Oct. 20, 1787), in 13 Documental History, *supra* note 402, at 426.

405. See, e.g., Bradley, *supra* note 54, at 450–57 (arguing that federalism limits should apply to the treaty power).

406. Letter IV from the Federal Farmer (Oct. 12, 1787), reprinted in 14 Documental History, *supra* note 112, at 43–44.

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. Ought not a government, vested with such extensive and indefinite authority, to have been restricted by a declaration of rights? It certainly ought.⁴⁰⁷

Without a Bill of Rights, open-ended power grants like the Treaty Clause would allow the new national government to violate individual freedoms.

The third element of the Anti-Federalist attack was the Constitution's failure to take the necessary corrective measures to contain the treaty power. In addition to a Bill of Rights, Anti-Federalists wanted to maintain the Anglo-American distinction between the power to make treaties and the power to legislate, so that at least the popularly elected House could block any tyrannical uses of the treaty power. The Constitution's unfortunate treatment of the treaty power, Mason observed, "might have been avoided, by proper Distinctions with Respect to Treaties, and requiring the Assent of the House of Representatives, where it [could] be done with Safety."⁴⁰⁸ Significantly, Mason asserted that the Constitution is remarkable, and therefore dangerous, precisely because it departs from the usual separation between the power to legislate and the power to make treaties. He responded by invoking the traditional approach to treaty-making: Treaties were to be kept distinct from laws, and any treaties that had domestic effect required implementation by the popularly elected legislature. Without such checks, Anti-Federalists feared, the President and Senate could use the treaty power to threaten individual liberties, which were not explicitly enumerated (and therefore not protected) by the Constitution. Widely circulated by October and November of 1787, both Mason's *Objections* and the *Letters from the Federal Farmer* reflected the views of other leading Anti-Federalists on the treaty question.⁴⁰⁹ Indeed, Mason's attack on the treaty power seems to have been repeated in each of the major states for which we have records, primarily in the press but also in the ratifying conventions themselves.

2. *Pennsylvania and the Rise of the Legislative Power.* — These Anti-Federalist arguments made an important appearance in the first major battleground of the ratification struggle, Pennsylvania. There are several reasons to pay close attention to the Pennsylvania ratifying convention. Due to strong Anti-Federalist opposition, Pennsylvania was "the first state in

407. Brutus II (N.Y. J., Nov. 1, 1787), reprinted in 13 *Documentary History*, supra note 402, at 529.

408. Mason, supra note 402, at 350.

409. See John P. Kaminski & Gaspare J. Saladino, Editor's Note to Mason, in 13 *Documentary History*, supra note 51, at 346–48 (describing circulation of Mason's objections in October, 1787); 14 *id.* at 14–18 (describing distribution of Federal Farmer in October and November, 1787).

which the Constitution was seriously debated."⁴¹⁰ Unlike Delaware, it was the first large and strategically important state to ratify, which it did on December 12, 1787 by a vote of 46 to 23.⁴¹¹ Pennsylvania was not just the "keystone state" in terms of its population, central location, and economic clout; it was also one of the symbolic centers of American politics.⁴¹² Philadelphia had been home to the Continental Congress, it was the scene of the signing of the Declaration of Independence, and it was host to the Constitutional Convention. As a result, both Federalists and Anti-Federalists realized that their actions took on significance not just within the state, but nationally as well. As one historian has written, "the Pennsylvania debates took on a special significance, delineating, as it were, the terms of discourse, the grammar, syntax, and vocabulary of ratification."⁴¹³

In Pennsylvania, Anti-Federalists linked the unbounded nature of the Treaty Clause to their broader criticism of the Constitution for its lack of a Bill of Rights. They argued that if there were no Bill of Rights, and if the Constitution were to contain potentially unlimited legislative powers—as was evidenced by the Treaty Clause—then the federal government would oppress individual liberties. In the first public defense of the Constitution by one of the Philadelphia Convention's delegates, James Wilson gave a speech in the Pennsylvania State House Yard on October 6, 1787, that sought to quell these concerns. Wilson's main point was that the Constitution did not need a Bill of Rights because the powers of the federal government were limited and enumerated; a Bill of Rights would imply that the federal government had general powers to affect individual rights.⁴¹⁴ Wilson sought to show that the structure of the government made a Bill of Rights unnecessary. At first, he acknowledged that the Senate had violated Montesquieu's famous dictate that executive and legislative powers must be distinct and must be exercised by different governmental organs. "This body branches into two characters, the one legislative, and the other executive," Wilson admitted.⁴¹⁵ Yet this did not mean that the Senate exercised unlimited authority: "In its legislative

410. George J. Graham, Jr., *Pennsylvania: Representation and the Meaning of Republicanism*, in *Ratifying the Constitution* 52, 52 (Michael A. Gillespie & Michael Lienesch eds., 1989).

411. See *Convention Proceeding* (Dec. 12, 1787), reprinted in 2 *Documentary History*, supra note 51, at 590–91. Delaware was the first state to ratify, on December 7, 1787, by a unanimous vote. See *The Delaware Convention* (Dec. 3–7, 1787), reprinted in 3 *id.* at 110.

412. Graham, supra note 410, at 57–58.

413. *Id.* at 53.

414. On this point, see, e.g., Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 *Colum. L. Rev.* 1215, 1249–77 (1990) (discussing Federalist position on Bill of Rights); Yoo, *Ninth Amendment*, supra note 107, at 995–96 (same).

415. James Wilson, *Speech at Public meeting in Philadelphia* (Oct. 6, 1787), reprinted in 13 *Documentary History*, supra note 402, at 341. For the influence of Wilson's speech, which was widely published and referred to throughout the ratification, see John P. Kaminiski & Gaspare J. Saladino, *Editors' Note* to *id.* at 337–39.

character it can effect no purpose, without the co-operation of the house of representatives, and in its executive character, it can accomplish no object, without the concurrence of the president."⁴¹⁶ Thus, Wilson suggested that the treaty-making power was purely an executive function, one that it shared with the President. Any legislative power that could affect individual liberties would have to be shared with the House.

Pennsylvania Anti-Federalists remained unconvinced by Wilson's vague allusions to the balanced nature of the legislative and executive powers. Responding directly to Wilson, "An Old Whig" argued that "the president and two thirds of the senate have power to make laws in the form of treaties, independent of the legislature itself."⁴¹⁷ For example, the President and Senate could enter into a treaty "upon terms which would be inconsistent with the liberties of the people and destructive of the very being of a Republic," yet the treaty and supremacy clauses "will give such a treaty the validity of a law."⁴¹⁸ In tyrannies, "[w]here all power legislative and executive is vested in one man or one body of men," Old Whig commented, "treaties are made by the same authority which makes the laws . . ."⁴¹⁹ A Republic, however, is "where the legislature is [distinct] from the executive, [and] the approbation of the legislature ought to be had, before a treaty should have the force of a law . . ."⁴²⁰ According to Old Whig, things were not this bad even in Great Britain:

[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, 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.⁴²¹

In attacking the Treaty and Supremacy Clauses, the Pennsylvania Anti-Federalists resorted to the claim that the new Constitution was not enough like the British constitution.

Once the Pennsylvania ratifying convention itself began in late November, Anti-Federalists reiterated these objections to the Treaty Clause. On December 3, for example, Anti-Federalist leader William Findley argued that "[n]otwithstanding the legislative power in Article I, section 1, the power of treaties is given to the President and Senate. This is [a] branch of [the] legislative power."⁴²² In England, by contrast, the King

416. *Id.* at 341.

417. *An Old Whig III*, *supra* note 405, at 426.

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. *Convention Debates* (Dec. 3, 1787), reprinted in 2 *Documentary History*, *supra* note 51, at 459 (statement of William Findley). Notes from the Pennsylvania ratifying convention are sometimes difficult to decipher. Much of the day to day discussions were recorded by James Wilson, who took the notes in order to keep track of the objections to the Constitution. Aside from his own lengthy speeches, Wilson did not attempt to record

"makes [treaties] ministerially, and the legislature confirms them."⁴²³ Federalist Timothy Pickering defended the Constitution by arguing that treaties, under the Constitution, did not have the force of law. "According to common acceptance of words, treaties are not part of the legislative power," Pickering responded, citing the powers of the British King.⁴²⁴ Picking up on Findley's distinction between ministerial and legislative actions, James Wilson argued that "[t]he President and [Senate] in this Constitution make[] the treaty ministerially."⁴²⁵ Anti-Federalists seemed to agree. John Smilie said, "[s]upreme laws cannot be made ministerially, but legislatively In Great Britain, a law is frequently necessary for the execution of a treaty."⁴²⁶ Observed 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."⁴²⁷ Both Anti-Federalists and Federalists agreed that under the previous system of government, the power to make treaties and the power to legislate were kept distinct, and that treaties could have no domestic effect without confirming legislation. Where they disagreed was whether the Constitution incorporated this principle. Fearful of unlimited federal powers, Anti-Federalists argued that the Constitution did not. Searching for a democratic check on the treaty power, Federalists argued that it did.

From the sketchy records that we have, it appears that the Anti-Federalists remained unconvinced. On December 7, Anti-Federalists again attacked the combined effect of the Treaty and Supremacy Clauses. "A treaty is not constitutionally guarded," Findley complained.⁴²⁸ "It may be superior to the legislature itself. The House of Representatives have nothing to do with treaties."⁴²⁹ On December 11, Wilson began an elaborate defense of the treaty power. First, Wilson argued that the President would serve as a popular check on treaty-making: "[H]ere [the Senators] are also under a check, by a constituent part of the government, and nearly the immediate representative of the people," Wilson said. "I mean the President of the United States. They can make no treaty without his concurrence."⁴³⁰ Wilson's arguments did not seem to convince Anti-Federalists, who believed that the Senate and President would collude to use their treaty power to override individual liberty. Wilson's second argu-

speeches verbatim, but only to capture the main thought of the speaker. See Merrill Jensen, Note on Sources, 2 Documentary History, *supra* note 51, at 36, 40-43.

423. Convention Debates (Dec. 3, 1787), reprinted in 2 Documentary History, *supra* note 51, at 459-60 (statement of William Findley). The shorthand record of the Pennsylvania debates did not record the fuller arguments that Findley probably made along the lines of those by Old Whig, Mason, and the Federal Farmer.

424. *Id.* at 459 (statement of Timothy Pickering).

425. *Id.* at 459 (statement of James Wilson).

426. *Id.* at 460 (statement of John Smilie).

427. *Id.* (statement of Robert Whitehill).

428. *Id.* at 522 (statement of William Findley).

429. *Id.*; see also *id.* at 523.

430. *Id.* at 561-62 (statement of James Wilson).

ment suggested that treaties were not really laws at all because of their status as international agreements. "But though treaties are to have the force of laws," Wilson at first suggested, "they are in some important respects very different from other acts of legislation. In making laws, our own consent alone is necessary. In forming treaties, the concurrence of another power becomes necessary" ⁴³¹ Treaties, therefore, were not really laws on their own; instead, they "are truly contracts, or compacts, between the different states, nations, or princes, who find it convenient or necessary to enter into them." ⁴³² Although Anti-Federalists wanted the House of Representatives to have a formal role in treaty-making as in law-making, Wilson responded that the large size of the House made a direct, formal role impracticable. "[S]ometimes secrecy may be necessary, and therefore it becomes an argument against committing the knowledge of these transactions to too many persons." ⁴³³

Wilson's third, and most directly responsive argument, was that even without a formal role the House would still enjoy the same power over treaties as that of Parliament. Even though the British Constitution had recognized that all formal power over treaty-making belonged to the Crown, constitutional custom and political reality had given the Commons the final say over treaties in their domestic effects. "[T]hough the House of Representatives possess no active part in making treaties," Wilson remarked, "yet their legislative authority will be found to have strong restraining influence upon both President and Senate." ⁴³⁴ Analogizing to the British system, Wilson admitted that no treaty could have direct legislative effect without the participation of Congress. "In England," Wilson continued,

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 that 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?* ⁴³⁵

American practice would mirror British practice, Wilson predicted. ⁴³⁶ Safety from tyranny was not to be found in giving the House a formal role in treaties, but in understanding that Congress's control over legislation and the purse would give it a working check on the exercise of the treaty power. Despite the Supremacy Clause, Wilson suggested that

⁴³¹ Id. at 562.

⁴³² Id. "[I]n their nature," Wilson concluded, "treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make" Id.

⁴³³ Id.

⁴³⁴ Id.

⁴³⁵ Id. at 562–63 (emphasis added).

⁴³⁶ "Shall less prudence, less caution, less moderation take place among those who negotiate treaties for the United States . . . ?" Wilson asked. Id. at 563.

treaties would need implementing legislation, just as they did in Great Britain, before they could take direct effect at home.

What is important for interpretive purposes is what Wilson left unsaid. Wilson did not respond by admitting that the Supremacy Clause had the effect that Anti-Federalists claimed, but that it was necessary to control state encroachments on federal treaties. Wilson even could have defended the Supremacy Clause as a compromise in favor of states' rights. Instead, Wilson responded by emphasizing that the treaty power was subject to strong controls by the popularly elected branches of the government. To deflect Anti-Federalist criticisms of the effect of the Treaty Clause and the Supremacy Clause, Wilson offered a narrow reading of the Supremacy Clause that did nothing to change the customary separation-of-powers principles that governed treaties. While treaty obligations might operate like laws, they would not be entitled to be treated like laws until they had received legislative confirmation at the national level. Wilson's speech should receive significant interpretive weight, because it came after long, careful discussions of the treaty power, in a setting of great political and symbolic importance. It offered a prediction of the manner in which the treaty power, the power to legislate, and federal supremacy would interact that was built upon a common understanding shared by Federalists and Anti-Federalists alike. It was the public explanation of the Constitution's meaning, before the first critical state ratification convention, that "sold" the Constitution to its ratifiers.

3. *New York, The Federalist, and the Role of Congress in the Treaty Power.* — After Pennsylvania had ratified, the next two significant "vetogates" for the Constitution to overcome were New York and Virginia. New York witnessed more vigorous debate in the press, while Virginia was the state in which the Anti-Federalists made their strongest political effort to forestall ratification. Ratification in New York was virtually assured once word had arrived that Virginia had approved the Constitution on June 25, 1788, and thus New York's convention lacked the sharpness of argument and discussion that characterized the Pennsylvania and Virginia conventions.⁴³⁷ It is worthwhile, however, to examine the debates in New York that occurred in the press, as they too reflect the understandings and arguments of the Anti-Federalists and Federalists concerning the treaty power.

Anti-Federalist criticisms of the Treaty and Supremacy Clauses received a full airing in the New York newspapers. Soon after Pennsylvania's ratification, for example, that state's defeated Anti-Federalist

437. It is also the case that at this point in time, our records of the Pennsylvania and Virginia conventions are superior to that of New York's. The *Documentary History of the Ratification of the Constitution* provides complete documentation for Pennsylvania and Virginia, but it has yet to include New York, for which we must continue to rely upon Jonathan Elliott's *Debates*, which are poorly edited and incomplete.

minority published a dissent that circulated widely in New York.⁴³⁸ The dissenters repeated their criticisms that the Senate's participation in treaties violated the separation of powers, that the open-ended nature of the treaty power threatened individual liberties, and that Congress ought to enjoy Parliament's right to confirm treaties through legislation. "It is the unvaried usage of all free states," the dissenters declared, referring specifically to Parliament's implementation of a recent commercial treaty with France, "whenever treaties interfere with the positive laws of the land, to make the intervention of the legislature necessary to give them operation."⁴³⁹ In effect, the minority argued that the Constitution ought to declare formally what Wilson promised would occur informally. George Mason's *Objections to the Constitutions* and the Federal Farmer's *Letters* made similar arguments in the New York press in October and November 1787. Prominent New York Anti-Federalist writers also took up the charge. "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 . . .," wrote "Cato" in December 1787.⁴⁴⁰ "[B]ut 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."⁴⁴¹ The able Anti-Federalist writer Brutus also criticized the treaty power as unlimited and unrestrained by the legislature.⁴⁴²

Responses to these arguments came primarily through *The Federalist*. The first paper devoted to the treaty power, *Federalist No. 64*, appeared on March 5, 1788.⁴⁴³ One of the few papers written by John Jay, it contained a very different understanding of the treaty power than Wilson offered in Pennsylvania or that Madison would layout in Virginia. Jay began by

438. See The Dissent of the Minority of the Pennsylvania Convention (Pa. Packet, Dec. 18, 1787), reprinted in 15 Documentary History, *supra* note 47, at 7, 13–34. On the Dissent's wide distribution in New York, see John P. Kaminski & Gaspare J. Saladino, Editor's Note, 15 *id.* at 10.

439. *Id.* at 29.

440. Cato VI (N.Y.J., Dec. 13, 1787), reprinted in 14 Documentary History, *supra* note 112, at 431. Cato, whom historian Paul Leicester Ford believed to be New York governor George Clinton, was published and widely discussed in New York, but not outside the state. See John P. Kaminski & Gaspare J. Saladino, Editors' Note to Cato I (N.Y. J., Sept. 27, 1787), reprinted in 13 Documentary History, *supra* note 51, at 255.

441. Cato VI, *supra* note 439, at 431–32. Cato warned that treaties could give away territory, send troops to Europe, pay out money, and "a thousand other obligations" without legislative participation. *Id.* at 432.

442. See *supra* text accompanying note 407. In a separate paper, Brutus also suggested that the unbounded nature of the treaty power would allow plaintiffs to enter federal court to seek equity relief under treaties. See Brutus XIII (N.Y.J., Feb. 21, 1788), reprinted in 16 Documentary History, *supra* note 51, at 172, 172–73. Brutus was likely playing on fears that a new Constitution might make it easier for British creditors to recover pre-Revolutionary War debts, as provided for by the Treaty of Paris. See *supra* text accompanying note 109.

443. See *The Federalist No. 64* (John Jay), reprinted in 16 Documentary History, *supra* note 51, at 309.

praising the Constitution for vesting the treaty power in the President and Senate, which he believed would be composed of men of the highest character.⁴⁴⁴ While the President could manage foreign negotiations with "perfect secrecy and immediate dispatch,"⁴⁴⁵ the Senate would bring "talents, information, integrity, and deliberate investigation[] . . ."⁴⁴⁶ A large body like the House of Representatives, Jay argued, was incapable of participating in diplomacy.⁴⁴⁷ There was no reason why the treaty power had to be vested in the same body that made laws. "All constitutional acts of power," Jay responded, "whether in the executive or in the judicial departments, have as much legal validity and obligation as if they proceeded from the legislature . . ."⁴⁴⁸ It is up to the people, Jay reasoned, to decide where to vest the different functions of government. "It surely does not follow that because they have given the power of making laws to the legislature," Jay wrote, "that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected."⁴⁴⁹ Because the Constitution represented the people's choices concerning the structure of their government, they could allocate lawmaking authority as they chose.

In Jay's mind, the Constitution's grant of federal supremacy to treaties represented no innovation at all. According to Jay, this had already been the law of the land under the Articles of Confederation. Treaties were binding on the nation, state laws to the contrary notwithstanding, and the only power that could override treaties lay with the nations themselves. "[T]reaties are made not by only one of the contracting parties but by both," Jay maintained.⁴⁵⁰ "[C]onsequently that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them."⁴⁵¹ Under both the Constitution and the Articles of Confederation, neither state laws, nor even unilateral action by other branches of government, could modify or break a treaty obligation. "The proposed constitution therefore has not in the least extended the obligation of treaties," Jay concluded.⁴⁵² "They are just as binding, and just as

444. *Id.* at 310.

445. *Id.* at 311.

446. *Id.* at 312.

447. Wrote Jay:

They who wish to commit the [treaty power] to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and [achieved] by measures, which not only talents, but also exact information and often much time are necessary to concert and to execute.

Id. at 311.

448. *Id.* at 312.

449. *Id.*

450. *Id.* at 313.

451. *Id.*

452. *Id.*

far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government."⁴⁵³ Jay had lost no opportunity to press the expansive treaty theories that he had proposed to the Continental Congress in 1786.⁴⁵⁴ Although consistent with his views as the Continental Congress's Secretary for Foreign Affairs, Jay's arguments on this score contradicted political reality and the views of most other Federalists. For example, although Wilson had maintained that the size of the House prevented it from making treaties, he also had acknowledged that the House would retain the power to legislate, which would control the domestic implementation of treaties. Jay's views, and certainly his aristocratic tone, seem out of place with the more republican notes sounded by the Federalist papers of Madison and Hamilton.

Perhaps sensing that Jay's extreme views had gone too far, the co-authors of *The Federalist Papers* subsequently offered a more nuanced approach to treaties. Writing about a week later, Hamilton in *The Federalist No. 69* sought to demonstrate that comparisons between the British King and the American President were unfounded.⁴⁵⁵ In contrast to the President's joint role with the Senate in making treaties, Hamilton argued, the "King of Great-Britain is the sole and absolute representative of the nation in all foreign transactions."⁴⁵⁶ Hamilton acknowledged the Anti-Federalist argument that Parliament played a significant role in implementing treaties, but he emphasized the informal nature of Parliament's participation. "It has been insinuated," Hamilton observed, "that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to revision, and stand in need of the ratification of Parliament."⁴⁵⁷ Citing Blackstone, Hamilton concluded that Parliament simply did not participate in making treaties. Nonetheless, Hamilton admitted that Parliament did control domestic implementation. "The Parliament, it is true," Hamilton wrote, "is sometimes seen employing itself in altering the existing laws to conform them to the speculations in a new treaty" ⁴⁵⁸ On this point, however, Hamilton did not press home Wilson's argument that the legislature's role would constitute yet another check on the treaty power, but instead suggested that Parliament's role was simply in seeing treaty obligations through. Parliament's role here, Hamilton argued, arose not from any role in foreign policy, but "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" ⁴⁵⁹ A treaty creates a "new state of things,"

453. Id.

454. See *supra* text accompanying notes 300–307.

455. See *The Federalist No. 69* (Alexander Hamilton), reprinted in 16 *Documentary History*, *supra* note 51, at 387.

456. Id. at 390.

457. Id.

458. Id.

459. Id.

according to Hamilton, to which Parliament must adapt "new provisions and precautions" in order to "keep the machine from running into disorder."⁴⁶⁰

Hamilton's *Federalist No. 69* is subject to two different interpretations. First, we might read Hamilton as echoing, however faintly, Jay's position, which he had shared in *Rutgers v. Waddington*.⁴⁶¹ If Hamilton was suggesting that the legislature has a duty to implement treaties, the treaty power has a direct legislative effect that may be superior even to statutes. Yet, Hamilton never claimed in *The Federalist No. 69* that the treaty power, shared by President and Senate, was in any way superior to that of the British King—such a claim would have undermined his broader strategy of showing that the President's powers were in fact much weaker. Hamilton's primary goal was to understate the powers of the President and inflate those of the British Crown, so as to deflect Anti-Federalist arguments that the Presidency possessed monarchical attributes.⁴⁶² Minimizing Parliament's formal role in treaty-making achieved this goal. Accepting Anti-Federalist arguments that the Constitution's Treaty Clause had a greater sweep than the British would have had the opposite effect.

Alternatively, we can read Hamilton as consistent with Wilson and others who emphasized the legislative checks on treaties. Hamilton did not deny that Parliament's control through the legislative power allowed it to implement treaties, nor did he argue that in the United States a different relationship would take hold. A month earlier, Madison had suggested in *Federalist No. 53* that the House would enjoy this right.⁴⁶³ In defending the two-year term for members of the House, Madison had argued that such terms were necessary so that members could become knowledgeable about foreign affairs. "[A] federal representative," Madison maintained, needed to understand American treaties and foreign nations' commercial policies in order to regulate "our own commerce."⁴⁶⁴ He ought "not be altogether ignorant of the law of nations," because that too might be "a proper object of municipal legislation."⁴⁶⁵ When it came to treaties, Madison observed that:

[A]lthough 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 atten-

460. *Id.*

461. See *supra* text accompanying notes 286–291.

462. On war powers, for example, Hamilton in *The Federalist No. 69* clearly misrepresents the British system by claiming that the King had the sole power to raise and regulate the military. See *The Federalist No. 69*, *supra* note 452 at 392. By the middle of the eighteenth century, the Crown had ceded that power to Parliament. See Yoo, War Powers, *supra* note 26, at 278.

463. See *The Federalist No. 53* (James Madison), reprinted in 16 *Documentary History*, *supra* note 51, at 97, 100.

464. *Id.*

465. *Id.*

tion in the ordinary course of legislation, and will sometimes demand particular legislative sanction and co-operation.⁴⁶⁶

Hamilton's comments certainly do not contradict Madison's on this score, and indeed they might even be harmonious. Perhaps Hamilton consciously avoided contradicting either Jay or Madison, or the themes they had expressed, which may have produced the tensions in his own contributions to *The Federalist*. Or Hamilton, having begun with Jay's views, may have gradually developed a more republican vision similar to Madison's.⁴⁶⁷

Hamilton continued his ambiguity in his next paper on the treaty power, *Federalist No. 75*.⁴⁶⁸ Again, Hamilton seemed to be cleaning up after Jay's excessive arguments in *Federalist No. 64*. Instead of praising the aristocratic nature of the Senate, Hamilton suggested that the Constitution's allocation of the treaty power made sense because "[t]he power in question seems . . . to form a distinct department, and to belong properly neither to the legislative nor to the executive."⁴⁶⁹ Hamilton explained:

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 defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment 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 participa-

466. *Id.*

467. In a different *Federalist*, Madison acknowledged that treaties might have the force of law. In responding to Anti-Federalist critics of the Constitution's failure to obey the separation of powers, Madison wrote that the British constitution did not embody a strict separation. For example, Madison argued, "[t]he executive magistrate forms an integral 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." *The Federalist No. 47*, (James Madison), reprinted in *id.* at 500. The crucial phrase, however, is "under certain limitations," and as we have seen from our review of British constitutional history, that limitation was the passage of implementing legislation by Parliament. See *supra* text accompanying notes 194–233.

468. See *The Federalist No. 75*, (Alexander Hamilton), reprinted in 16 *Documentary History*, *supra* note 51, at 481.

469. *Id.* at 482.

tion of the whole or a part of the legislative body in the effect of making them.⁴⁷⁰

Hamilton suggests that treaties may be given "the operation of laws," without having the effect of laws. In his mind, treaties were but "contracts" between sovereigns, rather than rules given by the sovereign to the subject. They would "have the force of law" between sovereign nations under international law. Employing similar language in the Pennsylvania convention, Wilson had declared that treaties would have the "operation of laws," but that Congress's co-operation would be necessary to achieve domestic effect. In some respects, Hamilton's argument parallels Wilson's in assuming that the treaty power would be dependent on subsequent action by the branches—whether the executive in the "exertion of the common strength" or the legislative in prescribing rules for the citizen—to be made meaningful. Hamilton seems to have joined Wilson in melding the argument that treaties constituted binding obligations with the traditional principle that the power to make treaties and the power to legislate occupied different spheres.⁴⁷¹

Anti-Federalist reaction to these arguments were mixed. Some still pressed to give the House a formal role in the ratification of treaties. Anti-Federalists in the Maryland Convention criticized the expansive nature of the treaty power, which they feared would "control the national legislature, if not supersede the Constitution of the United States itself."⁴⁷² Others came away from the discussions of the treaty power with an understanding, seemingly shared by Federalist writers, that Congress's legislative powers would be required to implement treaty obligations. Most notably, the Federal Farmer, who had attacked the Treaty Clause in October, accepted the argument that Congress's plenary power in other areas, especially commerce, would require its cooperation with interna-

470. *Id.*

471. Hamilton's contributions to *The Federalist Papers* on the treaty power are noteworthy on two other points. First, he emphasized, as Jay had not, the argument made in the Constitutional Convention that the presence of the President was necessary to provide a voice for the representative of the people. "To have entrusted the power of making treaties to the senate alone would have been to relinquish the benefits of the constitutional agency of the president," who, in the words of Hamilton, is "the constitutional representative of the nation." *Id.* at 483. The mixture of powers was seen as a benefit, because it allowed the plebiscitary President to safeguard the interests of the people in making treaties with the Senate, the representatives of the states. In the formal distribution of the treaty-making power, Hamilton also continued Jay's criticism of the structural defects of the House in the field of foreign relations. Wrote Hamilton: "the fluctuating, and taking its future increase into the account, the multitudinous composition of [the House], forbid us to expect in it those qualities which are essential to the proper execution of such a trust." *Id.* This argument was made by other Federalist writers in other states. See, e.g., Marcus III, Norfolk and Portsmouth J., Mar. 5, 1788, reprinted in *id.*, *supra* note 51, at 325.

472. Address to the Members of the New York and Virginia Conventions, Apr. 30, 1788, reprinted in *id.* at 259.

tional agreements.⁴⁷³ In a second series of letters, published in May,⁴⁷⁴ the Federal Farmer declared that “[o]n a fair construction of the constitution, I think the legislature has a proper controul over the president and senate in settling commercial treaties.”⁴⁷⁵ Because of Article I, Section 8’s Commerce Clause, he reasoned, Congress had a monopoly on the authority to regulate trade and commerce with foreign nations. On the other hand, Article II, Section 2 gave the President the authority to make treaties, of which the Federal Farmer believed there were three kinds: treaties of commerce, treaties of peace, and treaties of alliance. In order to ensure that the Constitution is “consistently construed,” he concluded, “it shall be left to the legislature to confirm commercial treaties.”⁴⁷⁶

Recognizing Congress’s authority over commerce maintained the traditional separation between the power to legislate and the power to make treaties. Such agreements “are in their nature and operation very distinct from treaties of peace and alliance,” the Federal Farmer observed.⁴⁷⁷ Although treaties of peace and alliance may require secrecy, and so may justify the exclusion of the House, “very seldom” do “they interfere with the laws and internal police of the country.”⁴⁷⁸ “[T]o make them,” the Federal Farmer argued, “is properly the exercise of executive powers,” and therefore the Constitution did not grant the legislature any authority to interfere with them.⁴⁷⁹ But commercial treaties were an entirely different matter:

As to treaties of commerce, they do not generally require secrecy, they almost always involve in them legislative powers, interfere with the laws and internal police of the country, and operate immediately on persons and property, especially in the commercial towns: (they have in Great-Britain usually been confirmed by Parliament;) they consist of rules and regulations respecting commerce; and to regulate commerce, or to make regulations respecting commerce, the federal legislature, by the constitution, has the power. I do not see that any commercial regulations can be made in treaties, that will not infringe upon this power in the legislature; therefore, I infer, that the true construction is, that the president and senate shall make treaties; but all commercial treaties shall be subject to be confirmed by the legislature. This construction will render the clauses consis-

473. Letter from the Federal Farmer XI, May 2, 1788, reprinted in 17 *id.* at 309. Although the date on Letter XI is January 10, 1788, it was not actually offered for sale until May 2. See *id.* at 265 (describing publication and distribution of additional letters).

474. See *id.* at 265–67 (describing publication and distribution of additional letters).

475. *Id.* at 309.

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.*

tent, and make the powers of the president and senate, respecting treaties, much less exceptionable.⁴⁸⁰

In accepting their arguments, the Federal Farmer had made the Federalists' case as clear as could be. Treaties of peace and alliance, generally executive in nature, did not require legislative participation because they did not affect the conduct of domestic parties. Treaties of commerce, however, did require congressional participation, because they "interfere with the laws and internal police of the country" and "operate immediately on persons and property."⁴⁸¹ Unlike treaties of peace and alliance, concerns about secrecy did not require the exclusion of the House from participation in commercial agreements. The Constitution's grant of commerce power in Article I would ensure that Congress could police this distinction between legislation and treaties.

By overlooking the political dynamic at work during the debates in the press, internationalist scholars have failed to appreciate the give-and-take, and eventual resolution, that occurred over the question of treaty enforcement during the ratification. Although they place great reliance upon such ratification debates, internationalist scholars make the mistake of looking to only a few selected sources from the period. Professor Vázquez, for example, says, "[t]hat the Constitution made treaties operative on individuals and enforceable in the courts is shown further by the Framers' statements during the ratification debates."⁴⁸² Professor Paust declares further: "That this expectation predominated among the Framers can be seen as well in the *Federalist* papers."⁴⁸³ The only *Federalist Paper* that both Vázquez and Paust discuss, however, is No. 22, in which Hamilton mentions 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."⁴⁸⁴ They both take No. 22 as the Federalists' leading explanation for the self-executing nature of treaties.

Hamilton's comment in No. 22 was not about whether treaties can take direct effect in American law at all. Indeed, at this point in the debate, Hamilton intended only to point out the problems of the Articles of Confederation system, not to defend the specific provisions of the new Constitution.⁴⁸⁵ In *The Federalist* No. 22, Hamilton does not mention the

480. Id. at 309–10.

481. Id.

482. Vázquez, *Treaty-Based Rights*, supra note 17, at 1109.

483. Paust, supra note 17, at 762.

484. *The Federalist* No. 22 (Alexander Hamilton), reprinted in 14 *Documentary History*, supra note 51, at 442. See Vázquez, *Treaty-Based Rights*, supra note 17, at 1109; Paust, supra note 17, at 762. In a footnote, Professor Paust does quote from *The Federalist* Nos. 64 and 80, without explaining their significance. See Paust, supra note 17, at 762 n.13.

485. Thus, following *The Federalist* No. 21 (also written by Hamilton), which had reviewed the primary defects of the Articles, *The Federalist* No. 22 begins: "In addition to the defects already enumerated in the existing Federal system, there are others of not less

treaty power, the Supremacy Clause, or the judiciary's powers under Article III. Rather, Hamilton merely was criticizing the Articles of Confederation for its "want of a judiciary power."⁴⁸⁶ Hamilton was attempting to show only that an effective national government needed a judiciary to ensure a uniform interpretation of federal law. A system in which treaties did not assume immediate enforceability in domestic law is not truly relevant to Hamilton's argument, because if a treaty were non-self-executing, it would pose no threat to the uniform interpretation of federal law. A treaty could not be subject to different readings and applications in different courts because it could not arise in any court until Congress had passed implementing legislation. Hamilton was not even discussing the Supreme Court or the Supremacy Clause, not to mention Congress's Article I powers.

While internationalist scholars look to a few other sources, they miss the course of the Federalist/Anti-Federalist debates and fail to focus on the most historically significant writers. Professor Vázquez, for example, quotes extensively from a Federalist, "Anti-Cincinnatus," who argued that 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.⁴⁸⁷

There is no indication, however, that Anti-Cincinnatus's writings received much, if any, attention in the ratification debate, or that his arguments were taken up by others, in contrast to *The Federalist Papers* and the Letters from the Federal Farmer. It does not appear that Anti-Cincinnatus was addressing the relationship of the treaty power and the legislative power, for he appears to argue that treaties, even in the absence of a Supremacy Clause, have a binding effect on the nation. He also fails to discuss how they are to be made binding in domestic law. Professor Paust provides a few more quotes from *The Federalist Papers*, particularly from Hamilton's *The Federalist No. 23* and Jay's *The Federalist No. 64*. The former, like the preceding *No. 22*, does not discuss the Constitution but instead the desirability of a stronger national government, while the latter was more the anomaly than the exemplar of the Federalist position in the press debates.⁴⁸⁸ Neither Vázquez nor Paust examines the most significant discussion of the treaty power and its relationship to the separation of powers in *The Federalist No. 69* and *75*, nor do they discuss the most significant Anti-Federalist writing on treaties and non-self-execution by

importance, which concur in rendering it unfit for the administration of the affairs of the Union." *The Federalist No. 22* (Alexander Hamilton), reprinted in 14 *Documentary History*, supra note 51, at 436-37.

486. *Id.* at 442.

487. Vázquez, *Treaty-Based Rights*, supra note 17, at 1109 (quoting Anti-Cincinnatus, *Northampton Hampshire Gazette*, Dec. 19, 1787, reprinted in 14 *Documentary History*, supra note 51, at 38).

488. See Paust, supra note 17, at 762 & nn.13-14.

George Mason, the Pennsylvania ratifying convention's dissenters, and the Federal Farmer, all of which are more on point concerning treaties and the question of non-self-execution.⁴⁸⁹ Without undertaking a broader survey and analysis of the ratification debates in the press, internationalist scholars fail to fully understand the arguments of both sides in the ratification struggle, their thoughts on the treaty power and the legislative power, and the common understandings that they reached.

Our review of the Federalist and Anti-Federalist discussion in the press shows that a much more complex debate occurred concerning the relationship between treaties and the legislative power. Anti-Federalists made the Treaty Clause part of their general criticism of the Constitution, claiming it violated the separation of powers and contained open-ended power grants that threatened individual liberties. From Jay's haughty praise of the vesting of foreign affairs powers in the best and brightest, Federalist responses evolved into Hamilton's, and then Madison's, defense of the treaty power as not invading the legislative power, except in those areas, such as commerce, where Congress would have a checking role in implementation. Published near the end of the ratification battle in the press, the Letters of the Federal Farmer show that some of the leading Framers—both Federalist and Anti-Federalist—had reached a shared understanding that treaties would not have direct effect in areas within Congress's Article I powers, although they still disagreed, perhaps, on whether this arrangement would provide a sufficient check on the powers of the national government.⁴⁹⁰ Only after re-tracing

489. Professor Vázquez does mention one Anti-Federalist writer, Brutus, who, in criticizing the scope of the Supreme Court's Article III jurisdiction, mentions as an aside that he could "readily comprehend what is meant by deciding a case under a treaty. For as treaties will be the law of the land, every person who has rights or privileges secured by treaty, will have aid of the courts of law, in recovering them." Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1109 (quoting Brutus XIII, N.Y. J., Feb. 21, 1788, reprinted in 16 *Documentary History*, *supra* note 51, at 172). Brutus's comment, however, did not address whether treaties could have this effect even without statutory implementing authority, or whether treaties could regulate areas that rest within Congress's Article I powers. In fact, Brutus's arguments were focused primarily on the judicial power, and not the extent of the treaty power or its structural relationship to the legislative power.

490. Placing such importance upon the Federal Farmer does not seem unjustified. The Letters from the Federal Farmer were not just the idle scribbles of one of the many opponents to the Constitution. They were considered at the time, and even now, to be one of the best, if not the best, writings by Anti-Federalists on the Constitution. See, e.g., 2 Herbert J. Storing, *The Complete Anti-Federalist* 214–17 (1981); Editor's Note, 17 *Documentary History*, *supra* note 51, at 265–68. They were published as separate pamphlets and purchased by the thousands throughout the states. See *id.* They became the central theoretical work behind the efforts of Anti-Federalists to coordinate their political opposition to the Constitution. For example, the head of the New York Federal Republican Committee, which was the seat of Anti-Federalist opposition in that state, included the Letters from the Federal Farmer in messages to Anti-Federalist leaders in New Hampshire, New York, Pennsylvania, Maryland, Virginia, North and South Carolina, and perhaps Rhode Island, seeking cooperation in demanding amendments to the Constitution as the price of ratification. See *id.* at 267. Federalist writers admitted both

the lengthy, sophisticated, and detailed debate that spanned several months can we reconstruct this common understanding and its significance.

4. *Virginia and the Triumph of the Power to Legislate.* — Events in Virginia put this understanding to the test. During the crucible of ratification in that critical state, it appears that Federalists and some Anti-Federalists agreed that the treaty power would not supplant Congress's power to legislate. There are several reasons to pay close attention to the Virginia Convention. Those who study the legislative process, for example, place great interpretive weight on congressional committees and their reports, because they serve as "veto-gates" in which the committee and its members can sink a bill or significantly modify its provisions before it can progress to the floor for a vote.⁴⁹¹ Institutionalists also look to the actions of certain leaders on different issues in an effort to identify the preferences of the median legislator who supports a bill.⁴⁹² Taking these considerations into account, Virginia was perhaps *the* critical state in the ratification effort. Geographically it linked the South and the North, and its political leadership in the nation was such that even Alexander Hamilton doubted that the Constitution could survive in New York without Virginia's approval.⁴⁹³ It is difficult to imagine the Union succeeding, even if the necessary states had ratified, without the state of Washington, Jefferson, Madison, and John Marshall, among others.⁴⁹⁴

Nor was the Constitution railroaded through Virginia. According to the records that survive, Virginia witnessed the fullest, and most contentious, debate of all of the ratification conventions. Anti-Federalist political leadership was perhaps stronger in Virginia than anywhere else. Initially, the opposition claimed George Mason and Edmund Randolph, both of whom had attended the Constitutional Convention, refused to sign, and explained their reasons in broadly disseminated pamphlets. In addition, their rhetorical leader was the great speaker, Patrick Henry.⁴⁹⁵ Federalists countered by relying upon the reputation of George Washington, the analyses of Madison and Marshall, the prestige of Edmund Pen-

that the Letters "are reputed the best of any thing that has been written in the opposition," and that they held many areas of agreement with the "judicious remarks" of the Federal Farmer. *Id.* at 268.

491. See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 *Geo. L.J.* 705 (1992) (applying positive political theory to statutory interpretation).

492. See *id.*

493. See 2 Bernard Bailyn, *Debate on the Constitution* 1067 (1993).

494. "Virginia's ratification was almost as important to the Federalists as that of the first nine states. Without those nine states the Constitution could not be put into operation. Without Virginia, George Washington, the man whose unrivalled prestige made him the obvious choice for office, could not be elected president." McDonald, *We the People*, *supra* note 132, at 255–56.

495. Henry's oratorical gifts were legendary. See *id.* at 258 ("With his prestige, his inspiring oratory, and his genius for creating and capitalizing on a dramatic moment, Henry was a formidable opponent.").

dleton, and the knowledge of local affairs of George Nicholas. As one historian has observed, "this state convention brought together nearly every public man of major influence in Virginia for a brilliant and dramatic recapitulation of the larger national debate."⁴⁹⁶ In the Virginia Convention we can see the arguments for and against the Constitution, and for and against the Treaty Clause, made clearly and fully by some of the leading Federalists and Anti-Federalists of the day.

The closeness of the political contest in Virginia also gives added significance to the proceedings. Federalists had won only a narrow margin in elections for the state ratifying convention, and Anti-Federalists had made inroads in converting many of them to their cause.⁴⁹⁷ The Anti-Federalists' final motion to send the Constitution back to the states for amendments lost by only 88 to 80.⁴⁹⁸ As a veto-gate, the Virginia convention was probably the toughest obstacle that the Constitution and the Federalists were to face in the drive to ratification. As a result, we should pay particular attention to the arguments and counter-arguments made to secure its passage in Virginia. While neither the Federalist nor the Anti-Federalist vision of the Constitution was more correct or true,⁴⁹⁹ their debates can reveal common areas of agreement, similarities in reasoning, and sometimes a shared understanding of constitutional texts.

As the ratification process moved to Virginia, the initial responses of *The Federalist Papers* to the demand for House participation in the treaty process did not seem to be succeeding. Even before the Convention had begun in earnest, Anti-Federalists in the state had focused on the Treaty Clause. In early 1788, Massachusetts opened up new political possibilities because Federalists there agreed to recommendatory amendments to the Constitution as the price of ratification.⁵⁰⁰ By the beginning of the Virginia convention in June, Anti-Federalists were drafting amendments to the Treaty Clause to make clear Congress's role in implementing treaties. In response to a May 1788 letter from New York Anti-Federalists to promi-

496. Lance Banning, *Virginia: Sectionalism and the General Good*, in Gillespie & Lienesch, *supra* note 410, at 262 [hereinafter Banning, *Virginia*].

497. See McDonald, *We the People*, *supra* note 132, at 259.

498. See 10 *Documentary History*, *supra* note 51, at 1538 (vote of June 25, 1788).

499. See Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 *Wm. & Mary Q.* 628, 632-33 (1987).

500. Initial counts appeared to show that as many as 200 of the 355 delegates to the Massachusetts convention were opposed to ratification. See McDonald, *We the People*, *supra* note 132, at 183. Governor John Hancock, who remained silent for much of the Convention, was the key voice, and he could have thrown the final vote in either direction. See *id.* at 184-85. He apparently joined the Federalist camp after some had promised to support him for President or Vice-President. In announcing that he would support the Constitution, Hancock proposed several amendments, which helped mollify the opposition of some Anti-Federalists, such as Samuel Adams. See Editor's Note, in 16 *Documentary History*, *supra* note 51, at 63. Hancock's speech and his amendments, according to Federalists, turned the majority of the Convention Federalist, and the Convention soon ratified, 187 to 168 on Feb. 6, 1788. See *id.* at 63-64. Massachusetts's amendments can be found at *id.* at 60.

nent Virginia Anti-Federalists seeking cooperation, George Mason proposed a list of amendments.⁵⁰¹ One of the amendments sought to vest the treaty power in the President and an advisory council, rather than the Senate.⁵⁰² Further, Mason recommended, "all Treaties so made or entered into, shall be subject to the Revision of the Senate and House of Representatives for their Ratification."⁵⁰³ In Mason's view, commercial agreements ought to be subject to a two-thirds vote, and treaties disposing of territory, fishing, or navigation claims were to require an even higher, three-fourths vote for approval.⁵⁰⁴ Patrick Henry told New York Anti-Federalists in a separate letter that Mason's amendments would form the core of Anti-Federalist proposals for amendments during the Virginia convention.⁵⁰⁵ Although eight of the necessary nine states had already adopted the Constitution by the time of their convention, Virginia Anti-Federalists sought to stall the Federalist drive by conditioning ratification upon the acceptance of such amendments.

These amendments were not just designed to satisfy Mason's earlier criticisms of the Treaty Clause; they also targeted Anti-Federalist concerns about the Jay-Gardoqui controversy. By the time of the ratification, navigation of the Mississippi had become one of the major issues in Virginia politics.⁵⁰⁶ Virginia's territory included the present-day states of West Virginia and Kentucky, and settlers in these parts of the state were dependent on the Mississippi River to transport their goods at low cost. Failure to gain navigation rights to the Mississippi threatened to close off expansion of the West to Virginia and the other southern states. In 1788, growth in the West was seen as primarily benefiting the South.⁵⁰⁷ As William Grayson, a former president of the Continental Congress and leading Anti-Federalist lawyer, put it: "If the Mississippi was yielded to Spain, the migration to the Western country would be stopped, and the Northern States would, not only retain their inhabitants, but preserve their superiority and influence over that of the Southern."⁵⁰⁸

501. See Letter from George Mason to John Lamb (June 9, 1788), reprinted in *id.* at 40–41; see also Letter from John Lamb to Richard Henry Lee (May 18, 1788), reprinted in *id.* at 36.

502. See *id.* at 44–45.

503. *Id.* at 45. This should come as no surprise in light of Mason's criticism of the treaty power for excluding the House in his *Objections*.

504. See *id.*

505. See Letter from Patrick Henry to John Lamb (June 9, 1788), reprinted in *id.* at 39.

506. See McDonald, *We the People*, *supra* note 132, at 259, 268, 366–67; Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 *Geo. Wash. L. Rev.* 271, 282–85, 296–97 (1934).

507. Many of the settlers were from southern families, southern states hoped to be conduits for western goods, and the admission of the western states might give the South—or at least its agricultural interests—dominance in the federal government. See Banning, *Virginia*, *supra* note 496, at 265.

508. Speech by William Grayson to the Virginia Convention (June 12, 1788), reprinted in 10 *Documentary History*, *supra* note 51, at 1192.

From a political perspective, the Mississippi River question became *the* issue of the Virginia Convention, more so than even slavery, because it symbolized the threats of sectional division.⁵⁰⁹ It contrasted the voting strengths of North and South on a sectional question that might be replicated in the Senate. It brought to the forefront the different economic interests of the North and the South. While the South, and particularly Virginia, viewed Western expansion as critical to its economic growth and important for the continued health of an agriculturally centered economy, the North—at least in Southern eyes—was based far more on trade, manufacturing, and commerce, and so had been all too willing to barter away future growth in the West for a trade agreement with Spain.⁵¹⁰ The Mississippi issue might even have expressed different, perhaps nascent, differences between North and South about broader issues of political economy. Southerners might have believed that expanding to the West, and keeping open routes for the shipping of American raw materials to Europe, would allow America to remain a nation of republican yeoman-farmers.⁵¹¹ Virginians also might have viewed Northern trade policies as efforts to engage in the rapid economic growth and urbanization that had produced political corruption in England. Finally, the Jay-Gardoqui affair demonstrated not only that the North had more votes by state, and that it differed with the South politically and economically, but also that the North, given the opportunity, actually would press its advantage to enter agreements that benefited only its region.

Anti-Federalists charged that a Treaty Clause that failed to provide for House participation would allow such sectionalism to flourish. In particular, they were concerned that the Constitution required that only two-thirds of the Senators present, rather than two-thirds of all Senators, were necessary to consent to a treaty, which effectively weakened the nine-state rule under the Articles. Because of the possibilities created by the lower quorum requirement, Anti-Federalists feared that it would be rather easy for the North to frustrate Southern plans for expansion.⁵¹² Without the involvement of the House in either the treaty process or impeachment, Anti-Federalists charged, there would be no way to prevent self-interested use of the treaty power. “The Senate, by making treaties may destroy your liberty and laws for want of responsibility,” Patrick Henry told the Virginia

509. See the excellent discussion of the politics of the Virginia Convention in Banning, *Virginia*, *supra* note 496, at 261–99.

510. See *supra* text accompanying notes 263–268.

511. Cf. Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* 197 (1980) (explaining the importance of the Mississippi to retaining the republican character of the American West).

512. As Grayson predicted before the Virginia convention, “[b]y this Constitution, the President with two thirds of the members present in the Senate, can make any treaty. 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.” Speech by William Grayson to the Virginia Convention (June 12, 1788), reprinted in 10 *Documentary History*, *supra* note 51, at 1192.

convention on June 5, 1788.⁵¹³ "Two-thirds of those that shall happen to be present, can, with the President make treaties, that shall be the supreme law of the land: They may make the most ruinous treaties; and yet there is no punishment for them."⁵¹⁴ Only the inclusion of the House, in which large states like Virginia would be proportionally represented, could prevent a treaty that would play to sectional interests.⁵¹⁵

Using the threat of a Mississippi closure to good effect, Anti-Federalists early in the convention managed to convert ten of the twelve delegates from the Kentucky region to oppose the Constitution.⁵¹⁶ Repeated Anti-Federalist attacks on the treaty power and the Mississippi question may even have begun to turn the tide against ratification as the convention reached the middle of June.⁵¹⁷ Although Virginia Federalists had anticipated these arguments and prepared for them, their initial arguments had not proven persuasive. This convinced Federalists to emphasize the role of the President and the House in the treaty process. In a revealing letter written on May 17, only two weeks before the beginning of the convention, James Madison laid out the strategy to Federalist ally George Nicholas.⁵¹⁸ Nicholas had received information that the delegates from the Kentucky region were focused wholly upon the question of the Mississippi River,⁵¹⁹ and he became so concerned that he asked Madison for talking points on the issue.⁵²⁰ Initially, Madison recommended that Federalists should stress that a stronger national government both would give the United States the international respect and power to achieve its foreign policy goals, such as opening up navigation of the River, and would protect expanded settlement in the West. He also argued, somewhat unconvincingly, that the lower quorum requirement for ratification would encourage full attendance in the Senate, thereby safeguarding against sectional treaties.⁵²¹ Federalists would make these arguments in early June, but to little effect.

Anti-Federalist demands for House participation in treaties, and for tighter restrictions on the treaty power, seemed to hold more sway among the delegates. Madison had anticipated these arguments too. In his May

513. Speech by Patrick Henry to the Virginia Convention (June 5, 1788), reprinted in 9 *id.* at 965.

514. *Id.*

515. Indeed, Virginia's representatives to the Constitutional Convention had pressed hard for a legislature organized solely along the lines of proportional representation, and two of them, Mason and Randolph, ultimately had refused to sign the Constitution precisely because of the dominance of the Senate and its expression of state sovereignty.

516. See McDonald, *We the People*, *supra* note 132, at 259.

517. See Banning, *Virginia*, *supra* note 496, at 280–81.

518. See Letter from James Madison to George Nicholas (May 17, 1788), reprinted in 9 *Documentary History*, *supra* note 51, at 804.

519. See Letter from George Nicholas to James Madison (April 5, 1788), reprinted in *id.* at 704.

520. See Letter from George Nicholas to James Madison (May 9, 1788), reprinted in *id.* at 793.

521. See Banning, *Virginia*, *supra* note 496, at 280.

memo to Nicholas, Madison decided that Federalists should emphasize the majoritarian aspects of the treaty process. First, Federalists were to focus attention on the republican character of the President. His participation in treaties "is an advantage which may be pronounced conclusive," said Madison, because the President was "elected in a different mode, and under a different influence from that of the Senate."⁵²² The President's accountability to the people would force him to act in the national interest and to oppose the use of the treaty power for sectional purposes. "As a single magistrate too responsible, for the events of his administration, his pride will the more naturally revolt against a measure which might bring on him the reproach not only of partiality, but of a dishonorable surrender of a national right."⁵²³ A President's need to return to the electorate every four years would safeguard the nation's interests, particularly the preservation of the right to navigate the Mississippi. As Madison bluntly concluded, "[h]is duration and re-eligibility are other circumstances which diminish the danger to the Mississippi."⁵²⁴ As the day-to-day manager of the nation's foreign relations, the plebiscitary President could prevent such a treaty from ever reaching a state-dominated Senate.

Even if the President fell victim to corruption or sectional interest, however, the People still had another safeguard—the House of Representatives. "It is true that this branch is not of necessity to be consulted in the forming of Treaties," admitted Madison.⁵²⁵ Nonetheless, Madison argued, the House could use its legislative powers to exercise an almost equal role in treatymaking. First, Madison argued that an implementing statute would be necessary to execute any significant treaty. The House's "approbation and co-operation," Madison maintained, "may often be necessary in carrying treaties into full effect."⁵²⁶ As he had in *Federalist No. 53*, Madison was describing the doctrine of non-self-executing treaties, and pressing the distinction between making a treaty and making the laws necessary to carry it into effect. While unwilling to grant the House a formal role in treatymaking, Madison was suggesting that the House would participate anyway through its legislative powers.

Second, Madison sought refuge in the House's plenary control over appropriations. In other debates, for example, Federalists had argued that Congress's monopoly on finances would allow it to block presidential actions in foreign affairs with which it disagreed.⁵²⁷ Madison made the same claim in regard to the House's ability to influence the treatymaking process. "[A]s the support of the Government and of the plans of the

522. Letter from James Madison to George Nicholas (May 17, 1788), reprinted in 9 Documentary History, *supra* note 51, at 808.

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. See, e.g., Yoo, War Powers, *supra* note 26, at 279–86 (describing Congress's power of the purse to cut off military operations).

President & Senate in general must be drawn from the purse which [the House of Representatives] hold[s],” he explained to Nicholas, “the sentiments of this body cannot fail to have very great weight, even when the body itself may have no constitutional authority.”⁵²⁸ To be sure, the House’s power on this score did not apply uniquely to the treaty context, but instead applied to all of the operations of the government. Nevertheless, it appears that Madison would not have looked askance at efforts to de-fund diplomatic negotiations or to link the funding of government operations to presidential agreement to follow House foreign policies. Certainly Madison would have approved if the House were to refuse to fund the implementation of treaties with which it disagreed.

Once the House’s control over treaty implementation was acknowledged, Madison hoped, the delegates would recognize that the nature of the House and of popular democracy would prevent the new government from negotiating away its rights to the Mississippi. According to Madison, two elements of the House’s structure would safeguard navigation rights to the River. First, members of the House would be more representative of all of a state’s citizens, and would be chosen “more diffusively” from the state’s population.⁵²⁹ In contrast, Senators were chosen by state legislatures, and thus would be “considered as representatives of the States in their political capacities.”⁵³⁰ Further, Madison believed that most Senators would come from “commercial and maritime situations which have generally presented the best choice of characters” for a body like the Senate.⁵³¹ Here, Madison shows that he fully understood that the change in the Senate’s selection process during the Constitutional Convention had altered the dynamic of the Senate from a council of state, which might best pursue the national interest, to a representative of state and sectional interests. Second, according to Madison, the more populous states had a strong interest in the Mississippi, and so their greater representation in the House would give them a greater voice than in the Senate. Members of the House themselves were more likely to be “a large majority of inland & Western members,” than to be seaboard merchants, Madison predicted.⁵³² “[T]he people of America being proportionally represented in [the House],” Madison concluded, “that part of America which is supposed to be most attached to the Mississippi, will have a greater share in the representation than they have in [the Continental] Congress, where the number of states only prevails.”⁵³³ Of course, this reasoning did not apply solely to the Mississippi; it would prevent the nation from entering

528. Letter from James Madison to George Nicholas (May 17, 1788) reprinted in 9 *Documentary History*, supra note 51, at 808.

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.* at 808–09.

into any treaty that did not receive the support of a majority of the people.

Madison sketched out a tripartite treaty system that weighed in favor of majoritarianism, rather than states' rights. Without the approval of the President, the Senate, and the House, no treaty could succeed, and in this system both the President and the House represented the people. As Madison concluded:

[U]nder 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 President 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.⁵³⁴

In fact, this system was not unlike the ordinary process that would govern the passage of domestic statutes. Finally, as Madison was well aware, his arrangement appealed to the distinction between treatymaking and law-making that had governed under the British Constitution and the Articles of Confederation.

Madison's remarkable memorandum, which has gone undiscovered by earlier writers on the treaty power, provides a full description of the arguments and theories that would guide the Federalists during the Virginia Convention. When William Grayson, Patrick Henry, James Monroe, and other Anti-Federalists began their assault on the Treaty Clause, the Virginia Federalists were ready with Madison's defense. After attacking the open-ended possibilities of the treaty power on June 5, Patrick Henry began a long critique of the Constitution that began on June 7 and ran until June 9. As part of his speech, which for all of its fiery rhetoric was rambling and unorganized, Henry focused his general criticisms of the treaty power onto the specific question of the Mississippi. "There is no danger of a dismemberment of our country, unless a Constitution be adopted which will enable the Government to plant enemies on our backs," Henry warned.⁵³⁵ Under the Articles of Confederation, "[n]o treaty can be made without the consent of nine States."⁵³⁶ "While the consent of nine States is necessary to the cession of territory you are safe," Henry claimed, but "if it be put in the power of a less number," as with the Constitution, "you will most infallibly lose the Mississippi."⁵³⁷ Reminding Federalists of the "*Spanish transactions*," Henry predicted that "[t]his new Constitution will involve in its operation the loss of the navigation of that valuable river" because of the lack of controls on the treaty power.⁵³⁸ Going further, Henry later raised the specter that the treaty power, in the hands of corrupt Senators, was so unrestricted that nothing

534. *Id.* at 809.

535. *Id.* at 1039 (statement of Patrick Henry, June 7, 1788).

536. *Id.*

537. *Id.*

538. *Id.* Henry repeated this accusation about the Mississippi two days later. See *id.* at 1051 (statement of Patrick, June 9, 1788).

was safe. "They may advise your President to make a treaty that will not only sacrifice all your commercial interests, but throw prostrate your Bill of Rights," Henry warned.⁵³⁹

Following Madison's memorandum, George Nicholas answered Patrick Henry's criticisms by invoking the President's role in the process and his direct accountability to the people. He continued to predict that if the President were to deviate from his duty to defend the national interest, he "will be degraded, and will bring on his head the accusation of the Representatives of the people—an accusation which has *ever been*, and always *will be*, very formidable."⁵⁴⁰ The House, moreover, would perform a function that went beyond the mere criticism of executive actions. "Although the Representatives have no immediate agency in treaties," Nicholas said, "yet from their influence in the Government, they will direct every thing. They will be a considerable check on the Senate and President."⁵⁴¹

On June 13, Madison defended the Treaty Clause in similar terms. He argued that three bodies—the Senate, the President, and the House—would play a role in international agreements. Besides the Senate, Madison emphasized, "the House of Representatives will have a material influence on the Government, and will be an additional security."⁵⁴² Commercial interests, Madison predicted, "will have little or no influence" in the House, rendering the Mississippi secure.⁵⁴³ Furthermore, the President's responsibility and accountability to the people would prevent any unfavorable treaty, such as one that would cede the Mississippi, from being concluded with another nation. "As the President must be influenced by the sense and interest of his electors, as far as it depends on him (and his agency in making treaties is equal to that of the Senate) he will oppose the cession of that navigation."⁵⁴⁴ And if anyone had missed the point that popular sovereignty in the treaty process would protect the Mississippi, Madison added, "[a]s far as the influence of the Representatives goes, it will also operate in favor of this right."⁵⁴⁵

Patrick Henry remained unmoved. He continued to predict that the President and the Senate would conspire to make treaties that favored sectional interests, and he responded that the House had no formal role in the treaty process.⁵⁴⁶ The Federalist response was important, because it underscored the roles of the President and the House, and their accountability to the people rather than to the States. "Will [the President] not injure himself, if he injures the States, by concurring in an injudi-

539. *Id.* at 1042 (statement of Patrick Henry, June 7, 1788).

540. *Id.* at 1130 (statement of George Nicholas, June 10, 1788).

541. *Id.* at 1131.

542. 10 *id.* at 1241 (statement of James Madison, June 13, 1788).

543. *Id.*

544. *Id.*

545. *Id.*

546. See *id.* at 1246 (statement of George Nicholas, June 13, 1788).

cious treaty?" Nicholas directly asked Henry.⁵⁴⁷ "How is he elected? Where will the majority of the people be?"⁵⁴⁸ Regarding the House, Nicholas observed that Henry had treated the representatives of the people "with great contempt." Nicholas then compared the treaty-making powers of the House of Representatives to those of the English House of Commons. Even though neither body had any formal constitutional role, they had a significant voice in foreign policy.

How is this business done in [Henry's] favorite Government? The King of Great-Britain can make what treaties he pleases. But, Sir, do not the House of Commons influence them? Will he make a treaty manifestly repugnant to their interests?—Will they not tell him, he is mistaken in that respect as in many others?

One does not need to guess what Nicholas's answers to those questions were. "This gives them such influence that [the House] can dictate in what manner [treaties] shall be made."⁵⁴⁹ 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.⁵⁵⁰ Although Henry's arguments had an effect, Madison and Nicholas had managed to stop his political momentum. Some historians even identify these days in June, when the Federalists responded to Henry, Grayson, and Monroe on the treaty question, as the decisive moment that turned the Virginia convention toward ratification.⁵⁵¹ Shortly after these arguments about the Treaty Clause, the convention ratified the Constitution.

These arguments during the Virginia ratifying convention represent the Federalists' best effort to close the democracy gap, as it were, in the treaty-making process. Federalists' reliance on the President's republican character and the House's control over implementing legislation and funding is significant for interpretive purposes, because it came during the most critical stage of the ratification process. Federalist arguments came specifically in response to criticisms of the Treaty Clause raised by Anti-Federalists. Together, Federalists and Anti-Federalists engaged in a reasoned debate, and the understanding that emerged—that the people would have a voice through the President and the informal role of the House—indicates the meaning that Virginians gave to the Constitution's treaty-making system. 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.⁵⁵²

547. *Id.* at 1251.

548. *Id.*

549. *Id.*

550. See, e.g., *id.* at 1256 (statement of Francis Corbin, June 13, 1788).

551. See Banning, *Virginia*, *supra* note 496, at 282.

552. The formal actions of the Virginia Convention imply some agreement among Federalists and Anti-Federalists about the House's role in the treaty process. At the start of the Convention, Mason drafted amendments for the Anti-Federalists that required formal

5. *Conclusions.* — The significance of events in Pennsylvania, New York, and Virginia surrounding the question of non-self-execution becomes clear when comparing the analysis of this Article with the examination of the ratification by internationalist scholars. Internationalists turn to the ratification to verify their reading of the Constitutional Convention, but do not conduct a systematic analysis of the different state conventions or the political dynamic of the ratification process over time. Professor Vázquez, for example, places almost exclusive reliance upon the North Carolina ratifying convention, where William R. Davie declared 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

House participation in the treaty process. See text accompanying notes 495–499. By the end of June, Federalist arguments prevailed (and news arrived that the necessary ninth state, New Hampshire, had ratified), and the Convention rejected, by a vote of 88–80, the Anti-Federalist proposal that Virginia condition its ratification on the acceptance of amendments. To mollify opposition, however, Federalists agreed to ratify the Constitution with recommendatory amendments clearly taken from Mason’s draft. Compare Letter from George Mason to John Lamb (June 9, 1788), reprinted in 18 Documentary History, *supra* note 51, at 41–45; 10 Documentary History, *supra* note 51, at 155–56 (discussing recommendatory amendments adopted by Virginia Convention on June 27, 1788). A draft of the amendments presented to the Convention on June 27, 1788, undated but in Mason’s handwriting, dropped the amendment calling for ratification of treaties by the House. See Draft Structural Amendments to the Constitution, ante-June 27, 1788, reprinted in *id.* at 1547–50. Most of these amendments dealt with individual rights and some structural issues. One provision addressed the treaty power thus:

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.

Id. at 1554. The differences between Mason’s original draft and this amendment are telling. Anti-Federalists dropped their general demand that the House be included in treaties, even those involving commerce. Mason’s June 9 draft also required that all commercial and navigation laws, separate from treaties, receive a two-thirds vote in both houses. See 18 Documentary History, *supra* note 51, at 45. This change indicates some consensus among Anti-Federalists and Federalists, that the House generally would use its legislative power to participate in the treaty process. Federalists publicly conceded as much in the debates. Hence, an amendment creating a formal role for the House was unnecessary. For treaties involving territorial rights, however, even the House’s power, exercised by majority vote, was not enough of a safeguard. On this issue, the Anti-Federalist amendments retained almost the exact language used by Mason’s June 9 draft to require a three-quarters vote for such treaties. As several other sections of Mason’s draft had undergone substantial revision between June 9 and June 27, it is safe to assume that the deletion of the demand that the House ratify all treaties was not stylistic, but was done for a reason. Compare 18 Documentary History, *supra* note 51, at 45 (Mason’s original draft) with 10 Documentary History, *supra* note 51, at 1544 (final draft). Since Federalists had assured Anti-Federalists that the House would play the same role that Parliament did in regard to treaties, Mason’s proposal to formally include the House in the making of all treaties was no longer necessary.

involve in their nature not only our own rights, but those of foreigners."⁵⁵³ In addition to quoting Davie, Professor Paust looks to James Iredell, who argued in North Carolina that "[w]hen treaties are made, they become as valid as legislative acts,"⁵⁵⁴ William Porter, who appears to support Iredell's comments, and William Lenoir, whom Paust claims "affirmed that the treaty power is a 'legislative power given to the President' and Senate, since treaties 'are to be the supreme law of the land.'"⁵⁵⁵ From such evidence, internationalists conclude that "the Framers intended to make treaties operative on individuals and enforceable in the courts in cases between individuals."⁵⁵⁶

These scholars' reliance upon the North Carolina ratifying convention, however, underscores the problems with the internationalists' use of history and their conception of the original understanding. To be sure, selected quotes from the North Carolina proceedings appear to interpret the treaty power as containing an independent authority to legislate. Placed in context, however, the North Carolina debates have limited relevance to a determination of the understanding of the Constitution held by those who gave it political legitimacy. The debates discussed by internationalists took place after the Constitution had received the necessary nine votes it needed to take effect. North Carolina did not actually ratify the Constitution until November 21, 1789—after the election of Washington as President, the passage of legislation establishing the executive departments of government, the submission of the Bill of Rights to the states, and the passage of the Judiciary Act of 1789. To make matters worse, the debates cited by internationalists actually came from the first state ratifying convention in August 1788, where North Carolina rejected the Constitution by a decisive 183–83 vote.⁵⁵⁷ North Carolina's refusal to ratify makes it difficult to treat the explanations of the Constitution offered there as authoritative. Indeed, Federalist arguments in the North Carolina convention may have gone too far in aggressively interpreting federal power generally, and the treaty power specifically, for they sparked resistance, rather than accommodation.

Even if one regarded the debates of a ratifying convention that rejected the Constitution as evidence of the original understanding, the passages relied upon by internationalists lend little support to arguments for the self-execution of treaties. William Lenoir, for example, was not even a Federalist—he was an Anti-Federalist who was seeking to exaggerate the extent of federal powers in order to defeat the Constitution.⁵⁵⁸

553. See Paust, *supra* note 17, at 762 (same); Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1109–10 (quoting 4 Elliot, *supra* note 114, at 158) (italics added by Vázquez).

554. See Paust, *supra* note 17, at 762 (quoting 4 Elliot, *supra* note 114, at 28).

555. *Id.* (quoting 4 Elliot, *supra* note 114, at 27).

556. Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1110.

557. See 4 Elliot, *supra* note 114, at 250–51.

558. See Michael Lienesch, *North Carolina: Preserving Rights*, in *Ratifying the Constitution*, 343, 347–48 (Michael A. Gillespie & Michael Lienesch eds., 1989) (listing Anti-Federalist leaders in North Carolina convention).

And in an unquoted passage directly after Lenoir's remark, a Federalist leader, Richard Spaight,⁵⁵⁹ answered that the treaty power not only was in the hands of the Senate as representative of the states, but also that treaty-making "was not considered as a legislative act at all."⁵⁶⁰ Coming to Spaight's assistance, another Federalist, Archibald Maclaine, then declared "that laws, or legislative acts, operated upon individuals, but that treaties acted upon states," that the Constitution had to include treaties in the Supremacy Clause because otherwise "they could have no validity at all," and that in treaty-making "the President did not act in this case as a legislator, but rather in his executive capacity."⁵⁶¹ It was only at this point that Iredell claimed that treaties are as "valid as legislative acts." Even then, Iredell did not proceed to argue that treaties would receive immediate enforcement by the courts, but only that making treaties the laws of the land makes them "valid" as "acts of the state by the instrumentality of its officers."⁵⁶² While subsequent comments by Iredell, unreported by internationalists, came closer to their position, he still continued to draw a distinction between treaty-making and lawmaking.⁵⁶³

Other comments from the North Carolina convention equally miss the mark. Porter, to be sure, does declare in a later exchange that "the House of Representatives has no power to intermeddle with treaties" and that "the President, in that case, voted rather in a legislative than in an executive capacity," which was "impolitic."⁵⁶⁴ Like Lenoir, however, Porter was an Anti-Federalist who sought to exaggerate federal powers in order to raise concerns with the delegates.⁵⁶⁵ Even Davie's comments are not as telling as they first appear. While Davie argued that treaties should "operate as laws on individuals," he was discussing not the treaty-making power, but the need for a Supreme Court that would maintain the uni-

559. See *id.* at 348 (listing Federalist leaders in North Carolina convention).

560. Elliot, *supra* note 114, at 27.

561. *Id.* at 28.

562. *Id.*

563. In response to an Anti-Federalist's question regarding whether British treaties were submitted to Parliament for approval, Iredell responded that the King had the sole power to make treaties. See *id.* at 125, 128. While Parliament did not have a formal role in the approval of treaties, Iredell observed, its cooperation was necessary when a treaty required domestic implementation.

It is usual to move for an address of approbation; and such has been the complaisance of Parliament for a long time, that this seldom hath been withheld. Sometimes 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 of circumstances requires. The constitutional power of making treaties is vested in the crown; and the power with whom a treaty is made consider 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.

Id., at 128.

564. *Id.* at 115.

565. See *id.* at 118-19.

formity of federal law.⁵⁶⁶ In fact, in an earlier debate on the Treaty Clause itself, Davie had argued that the Constitution did not address treaties any differently than did other countries, which, due to the law of nations, all considered treaties as "the supreme law of the land to their respective citizens or subjects."⁵⁶⁷ As a result, Davie concluded, the "power of making treaties has, in all countries and governments, been placed in the executive departments."⁵⁶⁸ The Senate shares in this executive power, Davie argued, not because treaties have legislative effect, but because of a desire to check the exercise of executive power by the President.⁵⁶⁹ Federalist responses in North Carolina were consistent with the theme from the three significant ratification moments already reviewed: Because treaty-making is executive in nature, it cannot regulate matters that rest within the legislative authority, which requires the co-operation of Congress.

Internationalists mistake these remarks from the North Carolina Convention for broad approval of self-execution because they fail to provide a more complete examination of the ratification's process and context. When the ratification is viewed comprehensively, particularly with attention to the three most significant state conventions, the evidence indicates that the Constitution's supporters understood the treaty power to be an executive power that was distinct from, and could not supplant, Congress's power to legislate. Anti-Federalists, not Federalists, argued that the Constitution gave treaties a legislative power. In Pennsylvania, the first of the major states to take up the Constitution, the Federalists, led by Wilson, responded that treaty-making remained an executive function that required the co-operation of the House to have domestic effect. While New York gave rise to different Federalist answers, it seems that even Hamilton had moved toward the Wilson/Madison view of treaties and away from Jay's aggressively nationalistic, sharply dissonant, position. By the time of the Virginia convention, probably the most important of the ratification, Federalists openly argued in response to Anti-Federalist attacks that the House, even though lacking a formal role in treaty-making, would check the treaty power by its authority over legislation.

To be sure, the text of the Constitution can lend itself to an alternate reading, the one favored by John Jay in his quest to make the Continental Congress supreme over the states, the one adopted by Anti-Federalists to scare up opposition to the Constitution, and the one that is favored by almost all academic writers on treaties today. This interpretation of the Treaty Clause and the Supremacy Clause, however, cannot depend for its justification upon the original understanding of the Constitution. The

566. See *id.* at 158 ("If the rights of foreigners were left to be decided ultimately by thirteen distinct judiciaries, there would necessarily be unjust and contradictory decisions.").

567. *Id.* at 119.

568. *Id.*

569. See *id.* at 120.

evidence discussed in this section suggests that an alternate theme ran through the Founding period. It began in Great Britain, where legal thinking and constitutional practice had marked out a clear distinction between treaty-making and lawmaking, and continued through the colonial and critical periods, where sharp disputes first between colonies and Crown and then states and Congress involved the preservation of the power to legislate in the state assemblies. Madison and other Federalists sought to solve the problem of treaty enforcement by creating a national legislature that could implement national obligations on its own, without relying upon the states, and it was eventually Madison who developed the winning answer to Anti-Federalist attacks on the Treaty and Supremacy Clauses. When confronted with their most difficult political battle in the effort to ratify, Federalists relied on the arguments of Wilson and Madison, among others, that treaties would require legislative implementation to take domestic effect. The Constitution would continue to recognize the difference between lawmaking and treaty-making.

In these ratifying convention debates, the Framers answered two of the three anti-democratic problems with the Treaty Clause identified by Anti-Federalists. First, a representative of the majority of the people, the President, plays the paramount role in treaty-making because of his authority to negotiate, and finally to make treaties. An officer of the government who is directly accountable to the people decides whether to initiate the treaty process and whether to complete it. Second, the Federalists maintained that the Constitution grants the representatives of the people the power to stop treaties that may disserve the national interest. Even if the President and the Senate were to collude in making an improper treaty, the House could refuse to pass the legislation necessary to implement the treaty's terms. As the Federalists explained it, the House could even take a more pro-active approach by using its funding and other powers to pressure the Executive and the Senate to follow its positions on foreign relations. Although the House had no formal role in the treaty process, as the Anti-Federalists correctly noted, the people's representatives still could use their legislative powers to prevent the other branches from entering into unwise treaties. This argument maintained the distinction, inherited from Great Britain, between the power to legislate and the power to make treaties.

Federalists, however, failed to address a third democracy deficit in the treaty-making process. A counter-majoritarian result still can occur because the two-thirds requirement allows less than a majority of Senators to block a treaty that is supported by the President and a majority of the House. If anything, however, Anti-Federalists would have imposed an ever higher super-majority requirement on the treaty power. The problem identified by supporters of the congressional-executive agreement, and raised by the example of the United States' failure to enter the League of Nations, was not seen as a constitutional defect in the eighteenth century. Both Federalists and Anti-Federalists shared isolationist

assumptions about the future foreign policy of the United States. Anti-Federalists and many Federalists believed that treaties would not be a necessary component of the young nation's foreign policy, because the United States would seek a "[c]ommercial policy," as George Washington stated in his farewell address, that would "hold an equal and impartial hand: neither seeking nor granting exclusive favours or preferences."⁵⁷⁰ The United States would "steer clear of permanent Alliances, with any portion of the foreign world."⁵⁷¹ James Monroe expressed a similar thought during the Virginia ratifying convention: "Our object is the regulation of commerce and not treaties . . . I apprehend no treaty that could be made, can be of any advantage to us."⁵⁷² Permitting one-third of the Senate plus one to block treaties amounted to a normative decision by the Framers to make it difficult for the nation to enter into international agreements. A popular voice in treatymaking was seen as necessary to prevent treaties, not to form them.

Given the evidence from the ratification, it would be an oversimplification to conclude that the Framers designed the Treaty Clause solely to protect the states, as some have argued, or that they sought to exclude the people from the process of making international agreements. The ratification of the Treaty Clause presents a more subtle, nuanced story. Instead of seeking only to safeguard sectional concerns, the Treaty Clause creates a process that provides the people with several mechanisms to make their wishes known in foreign affairs. The people can initiate the treaty process through their servant, the President, and they can block treaties through their more numerous representatives in the House. To the extent that they allowed barely more than one-third of the Senate to block treaties, this anti-majoritarian element reflected the substantive goal of avoiding international entanglements. While the Supremacy Clause declared the superiority of treaties to state law, the Framers did not understand it to override the separation of powers principle that treaties that sought to have a domestic, legislative effect could not take effect without congressional implementation.

C. *Post-Ratification: Ware v. Hylton, the Jay Treaty, and Foster v. Neilson*

Events during the early years of the Republic provide further information about the relationship between the treaty power and the power of legislation. While not as relevant as the records of the ratification debates—arguments and events after 1788 cannot have influenced the minds of those who adopted the Constitution in 1787—post-ratification evidence can show how the structures created by the Framers worked in practice, and whether the Framers believed the new government was op-

570. George Washington, Farewell Address (Sept. 19, 1796), reprinted in George Washington: A Collection 512, 525 (W.B. Allen ed., 1988).

571. *Id.*

572. 9 Documentary History, *supra* note 51, at 1108.

erating according to their expectations. The pre-Revolutionary War debts continued to raise the issue of treaties and legislation, which was finally resolved only with the ratification of the Jay Treaty between the United States and Great Britain in 1795. Internationalist scholars place great store on the post-ratification treatment of the debt issue, because they read *Ware v. Hylton* as adopting a doctrine of self-execution toward the 1783 treaty. A broader examination of the pre-war debt issue, however, shows that a principle of non-self-execution eventually emerged. Controversy over the Jay Treaty's handling of the war debts, in fact, would lead to the articulation of a rule of non-self-execution by the Jeffersonian Republicans and later by Chief Justice Marshall in *Foster v. Neilson*. This Section will review this post-ratification practice in three Subsections: The first will discuss *Ware v. Hylton* and critique the internationalist interpretation of it; the second will show the understanding of non-self-execution that emerged from the Jay Treaty; and the third will complete the story by reviewing *Foster v. Neilson*'s establishment of a doctrine of non-self-executing treaties.

1. *Ware v. Hylton and the Early Strains of Self-Execution.* — After the Framers had established the basic forms of government, foreign relations became the focus of the nation's affairs and the chief source of political conflict. At issue was the basic policy that the United States should pursue toward Great Britain and revolutionary France, which had become embroiled in a war that would conclude only with the defeat of Napoleon. On one side, reflecting efforts to establish a stable political and economic system, individuals such as Hamilton wanted to restore the favorable trade and commercial ties that had existed with Great Britain before the Revolution.⁵⁷³ On the other side, Jefferson and Madison opposed closer relations both because of sympathy for France, and because they saw the new financial, industrial, and social developments in England as a threat to the yeoman-farmer ideal.⁵⁷⁴ Controversy over these issues of political economy and foreign policy would spur the formation of political parties in the early Republic and lead to sharp differences over the allocation of the constitutional powers of foreign affairs. This political contest soon transformed into a separation of powers struggle when the Federalists retained control over the Presidency and the judiciary, while Jefferson, Madison, and the Republicans gained power in Congress.

573. See Stanley Elkins & Eric McKittrick, *The Age of Federalism* 123–31 (1993). These two authors tie Hamilton's plans for a bank and a system to support manufactures to the need for increasing trade, and hence customs revenue, between the United States and Great Britain.

574. See *id.* at 52–54 (discussing Madison's different views concerning trade with England and France), 209–56 (discussing Jefferson's career as Secretary of state and, *inter alia*, his effort to broaden Franco-American relations). See generally, e.g., McCoy, *Elusive Republic*, *supra* note 511, at 76–104 (discussing a variety of U.S. attitudes to foreign powers and foreign trade at the end of the 18th century).

These developments came to a head during the controversy over the Jay Treaty of 1795.⁵⁷⁵ The Jay Treaty resolved several contentious issues between Great Britain and its former colonies, such as the evacuation of the British from the northwestern forts, British compensation for American merchant ships seized during the war with France, and reduced trade barriers. One of the Jay Treaty's signal accomplishments was the resolution of the issue of the debts owed by American borrowers to British merchants. During the Critical Period most of the states had refused to enforce Article IV of the 1783 Treaty of Paris, which had declared that creditors should meet with "no lawful Impediments" in recovering pre-war debts.⁵⁷⁶ Widespread opposition throughout the states led to defiance of Congress's claims to treaty supremacy. Once the war ended, British merchants found that state legislatures and courts refused to hear their claims, especially in Virginia, whose citizens owed approximately two million of the nation's five million pounds in debts.⁵⁷⁷ Whether the federal courts would enforce Article IV of the 1783 Treaty remained an open question during the early years of the new Republic.⁵⁷⁸

Opposition to collection of the debts led to several efforts to prevent the new federal courts from hearing British claims against American debtors. Seeking to limit judicial involvement in the debt question, Congress placed a \$500 minimum amount in controversy on the jurisdiction of the circuit courts, which had the effect of excluding the majority of debt claims from federal court.⁵⁷⁹ Opposition to debt repayment even contributed to the ratification of the Eleventh Amendment, enacted in reaction to *Chisholm v. Georgia*.⁵⁸⁰ In *Chisholm*, the Supreme Court ignored claims of state sovereign immunity and allowed a citizen of South Carolina to bring an action for damages against the state of Georgia. Although *Chisholm* did not involve the peace treaty, its implications for

575. See Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116, T.S. No. 105 (signed at London, approved by Senate June 24, 1795, ratified by United States, Aug. 14, 1795). The policy and politics of the Jay Treaty are discussed in Samuel F. Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (1962); Jerald A. Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* (1970); and Elkins & McKittrick, *supra* note 573, at 375-449.

576. See text accompanying *supra* notes 270-310.

577. See Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 Wm. & Mary Q. (3d ser.) 511 (1962); Emory G. Evans, *Private Indebtedness and the Revolution in Virginia, 1776 to 1796*, 28 Wm. & Mary Q. (3d ser.) 349, 359-67 (1971) [hereinafter Evans, *Private Indebtedness*]; Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 Va. Mag. Hist. & Biography 176 (1984); Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1430-58.

578. See generally Bemis, *Jay's Treaty*, *supra* note 575, at 356-68 (discussing the acceptance of and resistance to the treaty in domestic courts).

579. See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 98 (1995); Evans, *Private Indebtedness*, *supra* note 577, at 371.

580. 2 U.S. (2 Dall.) 419 (1793).

the debt issue were clear.⁵⁸¹ Without state sovereign immunity, British merchants and property owners could sue states in federal court for confiscation and sequestration of their American property.⁵⁸² Passage of the Eleventh Amendment ensured that British creditors would be unable to bring suit in federal court against the states, some of which had allowed American debtors to pay their debts into the state treasury in exchange for a release from their debt under state law.⁵⁸³

The Eleventh Amendment, however, did not protect the original debtors from suit, and it was this avenue that British creditors pursued in *Ware v. Hylton*.⁵⁸⁴ In 1774, Hylton, a Virginian, had issued a bond to pay 3,000 pounds to William Jones, a British merchant.⁵⁸⁵ Under Virginia's wartime sequestration law, Hylton had paid part of the sum, in depreciated paper dollars, into the state treasury and received a discharge of the debt. Because the Virginia courts had refused to hear British creditor claims, Jones did not file for recovery until a federal trial court became available in 1790.⁵⁸⁶ The case was tried between 1793 and 1794 before a Circuit Court in Richmond composed of Chief Justice Jay, Justice Iredell, and Judge Griffin. John Marshall, then a Federalist lawyer practicing in Richmond, argued on behalf of Hylton that the Virginia sequestration law barred recovery, that the British had been a wartime enemy and could not recover in court, and that the British had violated the peace

581. See, e.g., 1 Charles Warren, *The Supreme Court in United States History* 96–102 (1922); 1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 734–41 (1971).

582. One can reach this conclusion without having to take sides in the long-running debate over whether the Eleventh Amendment only guarantees state sovereign immunity in diversity suits, or also applies in cases arising under federal law. For examples of scholars who adopt the narrower view of the Eleventh Amendment, see, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1466–75 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1057–58 (1983) (same); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1920–26 (1983) (same); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 1–13 (1988) (same). But see William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 Harv. L. Rev. 1372, 1372–83 (1989) (supporting a broader view of the Eleventh Amendment). Since these articles were published, the Supreme Court has made clear that state sovereign immunity goes beyond diversity jurisdiction to include some claims arising under federal law. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Alden v. Maine*, 119 S. Ct. 2240, 2253–54 (1999).

583. Virginia, for example, had enacted a sequestration statute in 1778 that allowed its citizens to pay debts owed to British creditors to the state, which would then issue a certificate of payment that discharged them from further obligation to the creditor. See Evans, *Private Indebtedness*, *supra* note 577, at 352–53.

584. 3 U.S. (3 Dall.) 199 (1796).

585. For useful information concerning the historical background of *Ware* see, e.g., Casto, *supra* note 579, at 98–101; Goebel, *supra* note 581, at 748–56; Warren, *supra* note 581, at 144–46.

586. See Casto, *supra* note 579, at 99.

treaty and so could not benefit from its terms.⁵⁸⁷ The plaintiff replied that Article IV of the 1783 treaty suppressed any state laws that stood in the way of the enforcement of a debt claim.⁵⁸⁸

Justice Iredell, writing for a 2-1 majority, found for the Virginia debtor.⁵⁸⁹ Although he was reversed by the Court on appeal, his views are worth pursuing because they receive substantial attention from internationalist scholars.⁵⁹⁰ First, Iredell concluded that Article IV "could only be effected by the legislative authority," and that whenever "a treaty stipulates for anything of a legislative nature, the manner of giving effect to this stipulation is by that power which possesses the legislative authority."⁵⁹¹ Drawing upon the British example for this point, Iredell extensively discussed an 1786 Anglo-French commercial treaty that had required parliamentary co-operation to give it effect.⁵⁹² Second, Iredell observed that the Supremacy Clause had acted to give treaties more than just moral effect. "Under this constitution," Iredell wrote, "so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigor of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for . . ."⁵⁹³ Each branch of government, Iredell concluded, therefore had an obligation to use its powers to execute treaties. Third, Iredell seemed to suggest that because state law had frustrated the implementation of Article IV, ratification of the Supremacy Clause essentially repealed those laws.⁵⁹⁴ Fourth, however, Iredell found that the treaty did not specifically require the states to repeal any "impediments" to debt recovery, and so the federal courts could not infer that a repeal had occurred.⁵⁹⁵ It is unclear whether Justice Iredell was adopting a presumption that treaties were to be non-self-executing unless they clearly said otherwise, or whether he believed that it was the primary obligation of the states to repeal their impeding laws before federal courts could enforce the treaty. Chief Justice Jay dissented in an unreported opinion that has not survived.⁵⁹⁶

Justice Chase wrote the main opinion for a unanimous Court in reversing Iredell. Like Jay, Chase believed that even before the Constitution, Congress had the authority to adopt a treaty that overrode state laws

587. See Richard B. Morris, John Jay, the Nation, and the Court 87-88 (1967); 1 Goebel, *supra* note 581, at 750.

588. See *id.*

589. Justice Iredell's opinion on circuit is included in the Supreme Court's decision reversing him. As the judge writing below, Iredell could not participate in the case on appeal, but his brethren allowed him to reprint his opinion. See *Ware*, 3 U.S. (3 Dall.) at 256 n.*.

590. See Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1110-13.

591. *Ware*, 3 U.S. (3 Dall.) at 272.

592. See *id.* at 273-76.

593. *Id.* at 277.

594. See *id.* at 277-79.

595. See *id.* at 279-80.

596. See Morris, *supra* note 587, at 88.

regarding the British debts. "It seems to me," Chase wrote, "that treaties made by Congress, according to the Confederation, were superior to the laws of the states; because the Confederation made them obligatory on all the states."⁵⁹⁷ Any doubts on this subject were "entirely removed by" the Supremacy Clause. "It is the declared will of the people of the United States that every treaty made by the authority of the United States, shall be superior to the Constitution and laws of any individual State."⁵⁹⁸ Therefore, Justice Chase concluded, the Supremacy Clause required the Court to suppress the Virginia sequestration statute in favor of Article IV of the peace treaty.⁵⁹⁹ Unlike a "stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual states, to do those acts," Justice Chase interpreted Article IV as "an express agreement, that certain things shall not be permitted [in] the American courts of justice."⁶⁰⁰ Because only a court could hear a creditor's claim for recovery, only the courts could give effect to Article IV.⁶⁰¹

Internationalists place great reliance upon *Ware*, claiming that it is an early declaration of self-execution in American courts.⁶⁰² "*Ware v. Hylton* establishes that, when a treaty creates an obligation of a state vis-à-vis individuals," concludes Professor Vázquez, "individuals may enforce the obligation in court even though the treaty does not, as an international instrument, confer rights directly on individuals of its own force."⁶⁰³ Both Professor Vázquez and Professor Paust even read Justice Iredell, in dissent, as admitting that the Supremacy Clause specifically reversed the British rule that Parliament had to implement treaties that had legislative effect.⁶⁰⁴ Internationalists are correct to place such confidence in *Ware*; it stands as the most authoritative declaration in favor of self-executing treaties from the Framing Period. Nevertheless, *Ware* does not provide the grounds for the broad lessons that internationalists draw from it. First, Justice Iredell's opinion, while mined quite thoroughly by internationalists for support, stood for quite the opposite proposition—that the 1783 treaty was not self-executing. Second, Justice Iredell's opinion ap-

597. *Ware*, 3 U.S. (3 Dall.) at 236. Justice Wilson expressly concurred with this point. See *id.* at 281.

598. *Id.* at 237.

599. See *id.* at 244–45.

600. *Id.* at 244.

601. See *id.*

602. See, e.g., Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1110–13 (explaining Justice Iredell's opinion as the Supreme Court's first major treaty decision); Paust, *supra* note 17, at 765 & n.36 ("[T]reaty law was accepted as operating directly as supreme federal law in the face of inconsistent state law").

603. Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1113; see also Henkin, *Foreign Affairs*, *supra* note 17, at 476 n.95 (citing *Ware* for the proposition that a "self-executing treaty when proclaimed, or a non-self-executing treaty when implemented by Congress, supersedes state law automatically, without awaiting its repeal or other action by the states").

604. See Vázquez, *Treaty-Based Rights*, *supra* note 17, at 1113; Paust, *supra* note 17, at 769–70.

pears unclear on whether the Supremacy Clause actually reversed the British rule on treaties. Justice Iredell seems to believe that treaties that require legislative action must continue to be implemented by the legislature. Third, Justice Chase's opinion also contains language that suggests that treaties calling for legislative action still must be implemented by Congress—hence his discussion that only the courts could give effect to Article IV of the peace treaty.⁶⁰⁵ Fourth, contrary to internationalist claims, Article IV did not actually give British plaintiffs a cause of action to sue in federal court. Rather, the treaty only preempted a defense created by state law; the cause of action itself arose under state common law. Finally, as Justice Iredell suggests, the 1783 treaty may not have required congressional implementation because, unlike treaties that would be made after the ratification, it had been reached under the Articles of Confederation and thus may have been implemented directly by the Supremacy Clause.

At best, then, *Ware* can stand for only a very limited form of self-execution. Justices Iredell and Chase could make their statements about judicial enforcement of Article IV because the peace treaty did not call for action by the national legislature. Indeed, Article IV could not do so because, at the time of the treaty's ratification, Congress did not have the authority under the Articles of Confederation to interfere with state laws concerning contracts. While today such matters might fall within the scope of the Commerce Clause, as interpreted by the Supreme Court, it seems doubtful that in 1796 the Framing generation would have considered private loans to be the subject of congressional power.⁶⁰⁶ *Ware*, therefore, did not involve a conflict between the treaty power and the power to legislate because Congress could not legislate, under Article I as it was understood at that time, in the area regulated by Article IV of the Treaty of Paris. Rather, the peace treaty required action by the states to conform their local laws to its terms, and by the courts, which supplied the only forum for its actual implementation. Indeed, both Justice Iredell's and Justice Chase's opinions made statements that were consistent with the idea that if a treaty fell within the legislative powers enumerated in Article I, it would have to be implemented by Congress.

2. *The Jay Treaty and Non-Self-Execution in Congress.* — A central difficulty with internationalists' reliance upon *Ware v. Hylton*, and the issue of the British debts, is that the story ends too soon. *Ware* came down in the very midst of the contentious debate over the Jay Treaty, and thus very little attention surrounded the decision.⁶⁰⁷ The political system was focused on the controversy over the Jay Treaty, which finally resolved the

605. See *Ware*, 3 U.S. (3 Dall.) at 244.

606. See *United States v. Lopez*, 514 U.S. 549, 585–93 (1995) (Thomas, J., concurring).

607. *Ware* was issued shortly after President Washington had declared the Jay Treaty to be in effect and just before the House entered its fateful debate concerning the treaty's merits. See Goebel, *supra* note 581, at 754.

problem of the pre-war debts by transferring British debt claims to an international commission. Only after a contentious debate in which Congress declared that treaties that conflicted with its power to legislate were non-self-executing was the treaty implemented. Rather than supporting internationalist claims, the war debt story indicates that self-execution produces severe strains on the separation of powers. With the Jay Treaty, the political system relieved that strain by articulating and following a rule of non-self-execution. Examination of the treatment of the pre-war debts by the political branches shows that, contrary to the lessons drawn from *Ware v. Hylton*, many of the Framers continued to understand treaties to have no domestic effect when they sought to regulate matters within Congress's legislative authority.

By 1794, relations with Great Britain had deteriorated to the point where a war scare was brewing in the United States.⁶⁰⁸ In addition to retaining the vital northwestern forts since the end of the Revolution, Britain had continued to pursue commercial policies that discriminated against American shipping and goods. In late 1793, Britain initiated an offensive against the French West Indies, which called for the seizure of neutral ships trading in the area. British ships captured more than 250 American merchant vessels; the cargoes and vessels were condemned as prizes and some of their sailors were impressed into the British navy. President Washington appointed Jay, who was still serving as Chief Justice, as ambassador to seek compensation and to resolve other outstanding issues, such as the pre-war debts and the forts, that threatened to spark war between the two nations. Jay left in the spring of 1794, a year after dissenting in *Ware* in the circuit court, and returned a year later with the new treaty. Only then did Jay resign the Chief Justiceship to assume the governorship of New York.

In seeking to negotiate a new agreement with the British, the Washington administration was not confident enough to count upon the courts to implement the Peace Treaty of 1783. Even Chief Justice Jay, whose Court would rule on the issue in *Ware*, was unwilling to represent to the British that the American court system ought to be relied upon to implement its terms.⁶⁰⁹ Instead, Jay proposed a entirely different mechanism to adjudicate the claims of British creditors, as well as those of injured American shippers. Article VI of the treaty established an arbitral commission, composed of two British and two Americans and a fifth to be chosen, which would adjudicate the claims. British claimants could appeal to the commission from American courts and were not bound by the rules of evidence that obtained there.⁶¹⁰ The United States government

608. The background to the Jay Treaty is described in Bemis, *Jay's Treaty*, supra note 575, at 253-78; Combs, supra note 575, at 116-36; Elkins & McKittrick, supra note 573, at 388-96.

609. See Bemis, *Jay's Treaty*, supra note 575, at 356-57.

610. See Treaty of Amity, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 U.S.T. 379, 382-84.

would assume the debts and pay the claims as determined by the commission.⁶¹¹ Rather than rely upon state and judicial implementation, the Jay Treaty finally resolved the pre-war debt problem by relying upon federal action undertaken by federal institutions. Although *Ware* would decide that the 1783 Treaty was self-executing, the political branches in the Jay Treaty turned to other methods to live up to the nation's obligations.

This was a striking conclusion to the British debt problem, given that it was the institutional head of the federal judiciary himself who was the source of the proposal. It was all the more surprising in light of Chief Justice Jay's own dissent in *Ware* and the positions that he had taken as Secretary for Foreign Affairs in 1787 and as author of *The Federalist No. 64*. Jay's Treaty had rendered *Ware v. Hylton*, as it would be decided by the Supreme Court in 1796, practically irrelevant. Although the Chief Justice personally believed that treaties, as the supreme law of the land, ought to be immediately executed in the courts, he must have concluded that the ongoing constitutional and political controversy concerning the enforcement of Article IV of the Treaty of Paris had demonstrated that self-execution was not in the judiciary's best interests. Concludes historian Richard Morris: "When one reflects on the hostility with which the nation reacted to *Chisolm v. Georgia*, it might well appear that Jay demonstrated prudence and common sense in keeping this emotionally charged political issue from further undermining the authority of the Court."⁶¹² Perhaps Chief Justice Jay had realized that a doctrine of self-execution placed the judiciary at risk because it could bring the courts into conflict with the political branches concerning the conduct of foreign policy.

The story does not end with Chief Justice Jay. Subsequent efforts to implement the treaty provoked a sharp political and constitutional struggle over the treaty-making power and the power to legislate. In the end, the treaty-makers had to include the most democratic body of government into the treaty process in order to make treaties meaningful under domestic law. By promising to assume the debts, and to improve the treatment of British shipping and goods, the Washington administration was forced to turn to the House for the necessary implementing legislation. This sparked one of the great constitutional battles of the early National Period.⁶¹³ Among other things, House Republicans decided to use the opportunity to challenge the treaty's failure to win broader neutrality rights for American ships and sailors.⁶¹⁴ Jeffersonians also sought to

611. See *id.*

612. Morris, *supra* note 587, at 97.

613. See David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 210-17 (1997) (providing description of constitutional debates in Congress over Jay Treaty).

614. Although signed in London on Nov. 19, 1794, the treaty was not submitted to the Senate until June 8, 1795, and was only made public a week *after* it had been approved by the Senate on June 24, 1795 by a vote of 20 to 10. Republican opponents to the treaty had to turn to the House to fight the treaty on its merits. The political battle over the Jay Treaty is described particularly well in Combs, *supra* note 575, at 171-88; Elkins &

block the treaty because they viewed it as bringing the nation unacceptably close to Great Britain at the expense of the French. They began to wage a campaign, at first to convince the Senate not to approve the treaty because it guaranteed British citizens the right to own land, which they argued rested outside federal powers, and because it adopted most favored nation status toward British goods, which they claimed ought to be the subject of congressional legislation.⁶¹⁵ These efforts ultimately proved unsuccessful, as the Senate approved the treaty by a party line 20–10 vote on June 24, 1795.⁶¹⁶ The battle soon moved to the House.

In the press and in Congress, Hamilton and other High Federalists responded to Republican claims of unconstitutionality with a strong argument based on a theory of treaty self-execution. Because the Supremacy Clause made treaties the law of the land, the House had a constitutional obligation to implement the Jay Treaty. It had no right to consider the treaty on the merits, nor could it refuse to pass the necessary implementing legislation. Wrote Hamilton in “the Defence,” published as the House began consideration of the treaty,

[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 [treaty] and to give it effect. If they act otherwise they infringe the constitution; the theory of which knows in such case no discretion on their part.⁶¹⁷

To make treaties dependent on legislative execution, Hamilton argued, would make the treaty power a hollow one.⁶¹⁸ “[T]here is scarcely any species of treaty which would not clash, in some particular, with the principle of those objections” Hamilton argued.⁶¹⁹ “[T]he power to make treaties granted in such comprehensive and indefinite terms and guarded with so much precaution would become essentially nugatory.”⁶²⁰

In responding to these arguments, members of the House made a bold claim—bold because it directly challenged President Washington’s authority—that the Jay Treaty was non-self-executing. Republican lead-

McKittrick, *supra* note 573, at 415–49; Ruth Wedgewood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229, 261–66 (1990). Jack Rakove has an interesting discussion that focuses upon Madison’s role in the debate over the Jay Treaty and his reactions to theories of originalist constitutional interpretation raised therein. See Rakove, *supra* note 129, at 355–65.

615. See 4 *Annals of Congress* 861–62 (1795); Currie, *supra* note 613, at 210.

616. The Federalist-dominated Senate approved the treaty 20–10 on a party line vote. See 4 *Annals of Congress* 863 (1795).

617. *The Defence* No. 36, *N.Y. Herald*, Jan. 2, 1796, reprinted in 20 *Hamilton Papers*, *supra* note 289, at 4. Hamilton argued more fully that a treaty could legislate on any matter within Congress’s Article I, Section 8 power, and that any effort to read the treaty power as limited by congressional authority would make it impossible for the nation to enter into treaties. See also *The Defence* No. 37, *N.Y. Herald*, Jan. 6, 1796, reprinted in *id.* at 16–22.

618. See *id.* at 18–22.

619. *Id.* at 18.

620. *Id.*

ers, such as Madison and Albert Gallatin, argued that no treaty that regulated a subject within Congress's enumerated powers could take effect without legislative authorization.⁶²¹ They based their arguments on the fact that the Constitution vested legislative power in Congress and that Congress exercised the same powers that Parliament did in regard to treaties made by the King.⁶²² After describing Parliament's authority, Gallatin declared that "in the same manner is [the treaty-making power] limited here, not however merely by custom and tradition, but by the words of the Constitution, which gives specifically the Legislative power to Congress."⁶²³ Therefore, the House had the right to diplomatic information about the treaty in order to decide whether to implement it.⁶²⁴ According to Gallatin, the House had "a *right* to ask for the papers . . . because their co-operation and sanction was necessary to carry the Treaty into full effect, to render it a binding instrument, and to make it, properly speaking, a law of the land."⁶²⁵ Directly criticizing Hamilton's position, Madison supported a resolution that the Constitution "left with the President and Senate the power of making Treaties, but required at the same time the Legislative sanction and cooperation, in those cases where the Constitution had given express and specific powers to the Legislature."⁶²⁶ Congress had no duty to implement treaties, according to Madison. "It was to be presumed, that in all such cases the Legislature would exercise its authority with discretion . . . [T]his House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation."⁶²⁷ After several weeks of debate, the House passed the resolution, by 62-37, on March 24, 1796, demanding Jay's negotiating instructions.⁶²⁸

Washington, however, refused to hand over the documents. Following Hamilton's example, President Washington argued that the House had a constitutional obligation to implement the treaty, because it was already the law of the land, and that therefore the House had no discretion to examine the agreement on the merits.⁶²⁹ Washington even specifically cited the Constitutional Convention's rejection of the proposal that all treaties receive congressional ratification.⁶³⁰ In response, the House immediately began deliberations on repudiating the President's claim

621. See, e.g., 5 Annals of Cong. 465-69 (1849).

622. See, e.g., *id.* at 469-71 (Gallatin comparing British practice with the American Constitution).

623. *Id.* at 472.

624. See *id.*

625. *Id.* at 465.

626. *Id.* at 493.

627. *Id.*

628. See *id.* at 759.

629. See George Washington, Message to the House of Representatives, Mar. 30, 1796, reprinted in 35 Writings of George Washington 2, 2-5 (John C. Fitzpatrick ed., 1940).

630. See 5 Annals of Cong. 761 (1849).

about congressional exclusion from treaty implementation. On April 6, a Republican representative introduced a resolution declaring that treaties involving matters within Congress's enumerated powers could not take effect without implementing legislation, and that the House had full discretion to decide whether to pass such laws.⁶³¹ That same day, Madison rose to give a remarkable speech defending Congress's role in implementing treaties, one that specifically drew upon the ratification debates of the Constitution. To be sure, Madison admitted, President Washington was correct that the Constitutional Convention had rejected an amendment to give the House a formal role in treaty-making. That, Madison argued, was not the power claimed by the resolution, which sought control only over the implementation, not the making, of treaties. In any event, Madison maintained, evidence from the Constitutional Convention was not controlling because it was the state ratifying conventions that had "accepted and ratified the Constitution."⁶³² An examination, Madison claimed, of the Pennsylvania, Virginia, and North Carolina ratification debates would show that the Framers believed that treaties could not exercise domestic legislative effects without congressional implementation. Not wishing to recite full passages from these debates, Madison said he:

would only appeal to the Committee [of the Whole] to decide whether it did not appear, from a candid and collected view of the debates in those Conventions, and particularly in that of Virginia, that the Treaty-making power was a limited power; and that the powers in our Constitution, on this subject bore an analogy to the powers on the same subject in the Government of Great Britain. He wished, as little as any member could, to extend the analogies between the two Governments; but it was clear that the constituent parts of two Governments might be perfectly heterogeneous, and yet the powers be similar.⁶³³

Convinced by these arguments, the House adopted the resolution on the very next day by another lopsided vote of 57 to 35.⁶³⁴ Having estab-

631. See *id.* at 771-72.

632. *Id.* at 776. Declared Madison:

But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.

Id.

633. *Id.* at 777.

634. The Resolution declared that

the 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,

lished its constitutional authority in treaty-making, the House then began a lengthy debate on the treaty's merits. Pressure from Jeffersonian supporters in the West, who stood to benefit from American control of the northwestern forts and a subsequent reduction in Indian resistance to expansion into the Northwest territories, convinced House leaders to approve implementing legislation.⁶³⁵ The House approved appropriations by a close vote of 51–48.⁶³⁶

Yet, approval of the treaty's substance did not undermine the House's constitutional position. The House had laid claim to the procedural right to evaluate the treaty because it was non-self-executing in those areas under Congress's authority. The House then approved the treaty because it was, under the circumstances, a good one for the nation.⁶³⁷ What makes the Jay Treaty episode important is not just that the Treaty itself removed the issue of the pre-war debts from the federal courts, but that it made clear the reasons why the Jeffersonians believed that non-self-execution was constitutionally required. As articulated by Madison and Gallatin, Article I vested the legislative power in Congress, while Article II established treaty-making as an executive function. Therefore, any treaty that pledged to undertake an action within Congress's Article I power had to receive legislative implementation. In defending this conclusion, Madison argued not just that the Constitution had incorporated British practice, but that this had been the original understanding of the Framers. On this score, Madison had remained fairly consistent from the writing of his "Vices" memo, through the Constitutional Convention, to the Virginia ratifying convention. His purpose had shifted from creating a truly representative national government to ensuring that the legislature maintained sufficient checks on executive power. 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. If anything, the Jay Treaty confirms the Framers' belief that treaties that regulated areas within Congress's Article I powers required legislative implementation.

3. *Foster v. Neilson and Non-Self-Execution in Practice.* — We can see the internationalist reliance upon *Ware v. Hylton* further undermined by

and to determine and act thereon, as, in their judgment, may be most conducive to the public good.

5 Annals of Cong. 771 (1849).

635. See Elkins & McKittrick, *supra* note 573, at 441–47.

636. See 5 Annals of Cong. 1291 (1849); Act of May 6, 1796, ch. 17, 1 Stat. 459. Initially, Republicans had the votes to defeat the implementation of the treaty, and opposition to the treaty's terms had done much to rally support to the nascent Jeffersonian party. See Combs, *supra* note 575, at 157–72; Elkins & McKittrick, *supra* note 573, at 415, 431. But by the end of April, economic prosperity brought on by an easing of Britain's wartime restrictions on American shipping had turned public sentiment in favor of the treaty. See *id.* at 431–32.

637. See Currie, *supra* note 613, at 215.

Chief Justice Marshall in the 1829 case of *Foster v. Neilson*.⁶³⁸ Writing for the Court, Chief Justice Marshall refused to enforce a land grant claim based upon a treaty in which Spain transferred West Florida to the United States. The Court found that a treaty that “operates of itself, without the aid of any legislative provision,” could be enforced by a court.⁶³⁹ Other treaties, however, that constitute a promise between sovereign nations to undertake future conduct are not to be judicially implemented without further legislation. Analogizing treaties to contracts, Chief Justice Marshall found that with non-self-executing treaties “the legislature must execute the contract before it can become a rule for the court.”⁶⁴⁰

In *Foster*, Marshall acknowledged that the Supremacy Clause suggested that all treaties were to be considered self-executing because it “declares a treaty to be the law of the land.”⁶⁴¹ A treaty’s status as supreme federal law requires that the courts regard the international agreement “as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”⁶⁴² According to Marshall, however “[a] treaty is in its nature a contract between two nations, not a legislative act.”⁶⁴³ As a result, a treaty does not achieve, by its own operation, “the object to be accomplished,” but instead “is carried into execution by the sovereign power of the respective parties to the instrument.”⁶⁴⁴ While reading the Supremacy Clause, therefore, to grant treaties the power to immediately integrate themselves into domestic law, Marshall reasoned that the particular character of a treaty’s provisions would determine whether it would have this effect of self-execution.

We can see this approach at work in *Foster* itself. At issue was a provision of the 1819 treaty that sought to preserve Spanish land grants made before the cessation of West Florida to the United States. Plaintiffs sought to guarantee their Spanish land grant under the treaty’s declaration that such grants “shall be ratified and confirmed to the persons in possession of the lands.”⁶⁴⁵ The Court first asked, however, whether the land in question belonged to Spain at the time of the treaty, or whether it had passed from Spain to France, and from thence to the United States as part of the Louisiana Purchase.⁶⁴⁶ On this point, the Court decided to defer to the interpretation of the treaty by the political branches, which had taken the consistent position that Spain had transferred to France all of the territory later sold to the United States. As Chief Justice Marshall wrote, “[i]n a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to

638. 27 U.S. (2 Pet.) 253, 313–16 (1829).

639. *Id.* at 314.

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.* at 299.

646. *See id.*

abide by the measures adopted by its own government.”⁶⁴⁷ When a dispute exists between nations without a “common tribunal . . . between them,” Chief Justice Marshall reasoned, each nation had to decide its own rights for itself.

In this regard, Marshall concluded, the courts were to defer to the political branches. “The judiciary is not that department of the government, to which the assertion of . . . [the nation’s] interests against foreign powers is confided.”⁶⁴⁸ Instead, the duty of the judiciary is “to decide upon individual rights, according to those principles which the political departments of the nation have established.”⁶⁴⁹ Hence, in *Foster*, the separation of powers required deference to the political branches on treaties due to the judiciary’s incompetence beyond the adjudication of individual rights and the preeminent role of the political branches in foreign affairs. Chief Justice Marshall’s approach to treaty interpretation promotes the operation of democracy in foreign affairs by leaving the setting and implementation of international relations to the political branches.⁶⁵⁰ It also confines the counter-majoritarian judiciary to the protection of individual rights, for which it structurally is better suited.⁶⁵¹

The Court could have concluded its analysis at this point, because a finding that Spain never possessed the land in question removed the basis for the plaintiffs’ claims. In this sense, *Foster*’s further discussion of self-executing treaties constituted only an alternative holding, and was dicta. The conclusion of the Court on this second question, however, was closely related to its reasoning on the first—a significant point that modern commentators have missed. Professor Henkin, for example, does not mention *Foster*’s holding on treaty interpretation at all, while Professor Vázquez relegates the holding to a footnote.⁶⁵² On the self-execution question, the plaintiffs argued that the provision declaring that land grants by Spain “shall be ratified and confirmed to the persons in possession of the lands” should be considered self-executing. In rejecting this argument, the Court found that ratification and confirmation of land grants required further legislative action, which Congress had yet to undertake. The treaty did not “act directly on the grants” but instead merely “pledge[d] the faith of the United States to pass acts which shall ratify and confirm them.”⁶⁵³ Chief Justice Marshall reached this conclusion because the separation of powers allocated to the political branches the choice of implementation policy. Provisions that “import a contract,” in Marshall’s words, because “either of the parties engages to perform a

647. *Id.* at 307.

648. *Id.*

649. *Id.*

650. See Yoo, War Powers, *supra* note 17, at 302–05 (vesting of war power in President enhances popular sovereignty).

651. See Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 67–70 (1980).

652. See Vázquez, Four Doctrines, *supra* note 17, at 702 n.35.

653. *Foster*, 27 U.S. (2 Pet.) at 314.

particular act," will not be considered self-executing.⁶⁵⁴ As with deference in treaty interpretation, this conclusion was compelled by the separation of powers. When the United States promises to engage in certain conduct, "the treaty addresses itself to the political, not the judicial department." Therefore, Marshall concluded, "the legislature must execute the contract, before it can become a rule for the court."⁶⁵⁵

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. Certain types of treaty provisions, in Marshall's view, are specifically directed to the judiciary for enforcement. Other types, which constitute promises of future conduct, are within the province of the executive and legislative branches. For the courts to attempt to enforce these provisions, without implementation by Congress, would represent an encroachment by the judiciary upon the foreign affairs power of the President and Congress, just as would a judicial interpretation of a disputed treaty provision in conflict with the position of the political branches. Non-self-execution ensures that the political branches, which are democratically elected, retain the power to choose how or whether to implement the nation's international obligations. It also keeps the counter-majoritarian judiciary within its proper sphere of deciding on individual rights, not foreign policy.

Internationalists have argued that *Foster* stands for the proposition that all treaties are self-executing, and that Marshall's holding constitutes only an "exception" from this general rule. For example, Professor Henkin concludes that under the Constitution, "as Marshall recognized, treaty undertakings are generally, in principle, self-executing."⁶⁵⁶ Professor Vázquez also reads *Foster* as recognizing "the general rule established by the Supremacy Clause, under which treaties are enforceable in the courts without prior legislative action," and he draws from the case the rule that "[t]reaties do not require legislative implementation in the United States 'by [their] nature.'"⁶⁵⁷ Professor Paust similarly reads *Foster* as representing "a new twist, perhaps . . . but, in context, a minor new twist" from the rule that all treaties are presumptively self-executing.⁶⁵⁸ Non-self-executing treaties, according to this commonly held view, are "highly exceptional,"⁶⁵⁹ and efforts to expand the doctrine of non-self-execution are presumptively unconstitutional. According to Professor Henkin, "[a] tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to

654. *Id.*

655. *Id.*

656. Henkin, *Foreign Affairs*, *supra* note 17, at 200.

657. Vázquez, *Self-Executing Treaties*, *supra* note 17, at 702 (quoting *Foster*, 27 U.S. (2 Pet.) at 314).

658. Paust, *supra* note 17, at 767.

659. Henkin, *Foreign Affairs*, *supra* note 17, at 201.

the language, and spirit, and history of Article VI of the Constitution.”⁶⁶⁰ Most, if not all, prominent commentators on the treaty power appear to share Professor Henkin’s view that *Foster* re-affirms a general rule of treaty self-execution, aside from Marshall’s unfortunate exception.⁶⁶¹

Marshall’s opinion, however, does nothing of the sort. Instead, it simply classifies treaties into two types—self-executing and non-self-executing—without stating that a general background rule existed that treaties are self-executing. In addressing the nature of the 1819 treaty with Spain, for example, *Foster* quotes the provision in question and then simply asks: “Do these words act directly on the grants, so as to give validity to those not otherwise valid? or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?”⁶⁶² Marshall mentions no presumption; the issue of self-execution is presented as a simple either/or question. Four years later, the Court overruled its earlier interpretation of the provision in question, because the Spanish text of the treaty indicated that the treaty itself confirmed and ratified existing land grants.⁶⁶³ Again, the Court did not mention any presumption, nor did it overrule *Foster* because it somehow brought the interpretation of the 1819 Treaty into harmony with the Supremacy Clause. Rather, Marshall, writing again for the Court, asked only whether the treaty, with the evidence of the Spanish text before him, “stipulat[ed] for some future legislative act.”⁶⁶⁴ Convinced four years later by the new translation and, importantly, subsequent congressional actions, that the parties to the treaty intended to ratify and confirm land grants “by force of the instrument itself,” Marshall and the Court found the 1819 Treaty self-executing.⁶⁶⁵

Read in this light, *Foster* does not create a presumption that treaties are self-executing. If treaties generally were self-executing, then the Court would have articulated such a presumption, and then measured whether sufficient evidence existed to overcome the presumption. *Foster* never engages in such a maneuver. Instead, it analyzes the treaty provision with an eye to determining what type of action it calls for. A treaty is non-self-executing if it calls for some future action that must be taken by the political branches. A treaty will be self-executing if it is particularly directed to the judiciary for enforcement. If anything, Marshall’s general rule appears to be that treaties are non-self-executing. Only if the text

660. *Id.*

661. See, e.g., Riesenfeld, *supra* note 104, at 900–02 & nn.46–48.

662. *Foster*, 27 U.S. (2 Pet.) at 314.

663. See *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833). The English text had read: “All the grants of land made before the 24th of January 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession 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.” The Spanish text of the treaty stated that all the grants of land “shall remain ratified and confirmed. . . .” *Id.* at 88.

664. *Id.* at 89.

665. *Id.*

clearly indicates judicial enforcement does the Supremacy Clause render the treaty self-executing.

Marshall's approach codified the rule of non-self-execution that had originated in the Framing debates and had further developed during the fight over the Jay Treaty. These post-ratification events confirm this Article's reading of the Framing and the non-self-executing nature of treaties. Internationalists miss these important elements of the post-ratification story by focusing too narrowly on *Ware v. Hylton*. *Ware* was only one in a series of constitutional developments that attempted to resolve the issue of the pre-revolutionary war debts. While *Ware* did announce a limited form of self-execution, it did so in an area where Congress's legislative powers were not at stake. Examination of the Jay Treaty episode suggests that *Ware*'s rule of self-execution produced severe stress upon the separation of powers, one that threatened to drag the courts into political controversy, and one that brought the executive and Congress into conflict.

The Jay Treaty controversy resolved these problems. On one front, it ended the specter of self-execution by removing the debt cases to an international commission. On the other front, the House, in implementing the treaty, asserted and pursued a constitutional doctrine of treaty non-self-execution. And, as Professor Ruth Wedgwood has suggested, the story of Federalist and Republican struggle over the treaty power eventually contributed to the triumph of the Jeffersonian party.⁶⁶⁶ Opposition to self-execution became an important tenet of Republican constitutional thought.⁶⁶⁷ Continuing Federalist efforts to make treaties self-executing, which came to the fore in the Jonathan Robbins controversy, contributed to the defeat of John Adams and the "Revolution of 1800."⁶⁶⁸ If Thomas Jefferson's election in 1800 can be considered a second constitutional revolution of sorts, one area where it established a constitutional rule was in the doctrine of non-self-executing treaties. Recognizing the doctrine's roots in the separation of powers, *Foster* codified, rather than rejected, the rule. Post-ratification evidence, therefore, further confirms this article's interpretation of the original understanding.

CONCLUSIONS

This article's review of the Framing Period shows that the Framers did not understand the Constitution to compel the self-execution of treaties in American law. Emerging from the political thought and the British constitutional struggles of the seventeenth and eighteenth centuries, non-self-execution embodied a deeper structural principle that separated the executive power, which controlled treatymaking, from the legislative

666. See Wedgwood, *supra* note 614, at 354–68.

667. During the Jay Treaty fight, Thomas Jefferson had urged his followers to adopt the theory of treaty non-self-execution. See Thomas Jefferson to James Monroe (Mar. 21, 1796), reprinted in 8 *The Works of Thomas Jefferson* 229–30 (Paul L. Ford ed., 1904); Thomas Jefferson to James Madison (Mar. 27, 1796), reprinted in 8 *supra* at 230–32.

668. See Wedgwood, *supra* note 614, at 354–68.

power, which regulated domestic conduct. Americans during the Colonial and early National Periods sought to maintain this distinction, which checked the power of the central government and ensured that local representatives promulgated the laws. Dissatisfaction with the inability to enforce treaties, however, contributed to the calling of the Constitutional Convention. While some leaders believed that treaties were supreme law and should be enforced by state judges, others, particularly James Madison, sought to establish a truly representative national government that would make, and enforce, treaties by its own means. Tradition and history established a constitutional rule that treaties were not to take domestic effect without legislative implementation; Madison sought to work within this rule by establishing sufficient legislative power at the national level to enforce treaties directly.

Events during and after the Constitutional Convention further undermine claims that the Framers chose to make all treaties self-executing. While the Convention adopted the Supremacy Clause rather than the negative on state laws, it also put into place the mechanisms of a national government that could act directly on individuals. During the ratification debates, Anti-Federalists charged that the Treaty Clause, combined with the Supremacy Clause, threatened to give the executive branch a legislative power that would soon prove despotic. Federalists responded in the most politically significant states that treaties could not infringe upon areas within Congress's legislative powers; this would place an additional check upon the exercise of the treaty power. In certain states, both Federalists and Anti-Federalists seemed to reach agreement on this point, even as they continued to disagree on whether this would amount to a sufficient check on federal powers. What had begun as an idea to invigorate the national government's powers had transformed, in the heat of the ratification battle, into an important element of the separation of powers in foreign affairs. Events after ratification, culminating in the Jay Treaty and *Foster v. Neilson*, confirmed this understanding of the relationship between the treaty-making power and Congress's power to legislate.

Internationalists, then, cannot find full support in the Framers' Constitution for their efforts to eliminate the line between international agreements and domestic, statutory law. Rather, the original understanding demonstrates that two themes emerged from the Framing; while some (perhaps a minority) believed that the Constitution made treaties immediately part of domestic law, other Federalists publicly argued in the most crucial moments of ratification that the American rule would follow that of the British. Treaties would remain an executive action of the government that would require the passage of implementing legislation by Congress before they could have any domestic effect. A presumption of non-self-execution enforces the distinction between the power to make treaties and the power to legislate, it includes the most democratic branch of government in the establishment of rules that apply to the conduct of private citizens, and it allows the judiciary to defer to the political

branches in the management of American foreign relations. If anything, early constitutional history falls on the side of the arguments in favor of non-self-execution, rather than self-execution.

The presence of both non-self-execution and self-execution themes during the Framing Period suggests the rules that courts and the political branches might apply today. Internationalists would do away with the distinction between international and domestic regulation, but in the process they undermine the difference between domestic lawmaking and treaties. If adopted, this approach would generate severe textual and structural constitutional difficulties, and would fail to account for the practice of the President, Congress, and the courts. At the very least, courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing. This would obviate the potential conflicts between the growing demands of the international system and the expanding scope of treaties by maintaining the House's control over domestic legislation, which the Framers thought so important. Such a presumption also has the additional virtue of leaving foreign affairs in the hands of the political branches, keeping the judiciary out of a policymaking role, and providing the national government with the constitutional flexibility to determine how best to live up to our international obligations. Non-self-execution responds to globalization by enhancing the democratic safeguards on the making of international agreements, an important value as treaties come to mimic and even replace statutes in the regulation of domestic affairs.

Such an approach would consider favorably the recent efforts of the President and Senate to render multilateral treaties non-self-executing by reservation. Much like a judicial presumption in favor of non-self-execution, RUDs preserve the House's control over legislation. The original understanding also supports efforts similar to those that occurred during the Jay Treaty. Rather than imposing a fixed rule of self-execution, the Constitution may allow the House and Senate to use their constitutional and political powers over legislation and funding to prevent direct treaty implementation. Congress may use its powers in specific cases to establish the broad principle that any treaty that infringes upon the scope of the domestic legislative power must be implemented by legislation, or it can use its powers on a case-by-case basis to ensure that it plays a central role in treaty implementation. After this process of cooperation or struggle, the branches may even arrive at a rule of complete non-self-execution, depending on historical and international circumstances, the relative power of the branches, and the people's wishes.

The original understanding also could support a stricter approach toward treaties, one that a presumption in favor of non-self-execution is designed to advance. From the historical evidence examined in this article, it appears that the President and Senate cannot use the Treaty and Supremacy Clauses to exercise powers that ordinarily would fall within the scope of Congress's authority over legislation. The House can give

effect to this original understanding by refusing to fund or support treaties that attempt to exert domestic legislative effects without its approval. The federal courts similarly could refuse to enforce, pursuant to the modern doctrine of non-self-execution, treaties that infringe on Congress's enumerated powers under Article I. As Congress's powers have expanded under the Commerce Clause, this approach would render non-self-executing many of the multilateral regulatory treaties under consideration in areas such as the environment, the economy, or human rights. But it also would have the effect of ensuring that the most democratically elected branch of government would retain its control over the imposition of rules that regulate the conduct of its citizens.

Even if one believes that the evidence presented here from the original understanding does not compel non-self-execution, it still undermines academic arguments in favor of self-execution. In criticizing the practice of the courts and the political branches, internationalist scholars rely to a great degree on the original understanding. Their work, however, has focused too narrowly on a small set of sources and has paid insufficient attention to the course of the Constitution's ratification. A more comprehensive examination of the ratification, in its historical context, demonstrates that the evidence relied upon by internationalists is neither conclusive nor definitive concerning the original understanding of the Framers. At the very least, the reconstruction of the original understanding presented here should shift the debate on treaty execution toward textual, structural, or doctrinal arguments, rather than the Framers' intent.

Non-self-execution is not just a technical question for federal courts or constitutional law. The House's reaction to the Jay Treaty, and the original understanding of the relationship between treaty-making and law-making, has clear import for today's challenge in adapting the American legal system to the globalization of domestic affairs. International events now influence numerous areas of life that were formerly the preserve of domestic regulation, while domestic conduct has produced effects on problems of an international scope. Correspondingly, the scope of international agreements has broadened, which has expanded the potential reach of the treaty power. Meanwhile, nationalization of the American economy and society has produced an expansion in the powers of Congress, particularly through its commerce and spending powers. International efforts to regulate areas such as the environment, arms control, the economy, or human rights, therefore, will come into conflict with Congress's constitutional powers, just as treaties threatened to do—albeit in more limited subject matter areas—during the Framing and early National periods. In short, the globalization of affairs will produce substantial tension with a constitutional system that maintains a strong distinction between the power to make treaties and the power to legislate.