1999

History Right?: Historical Scholarship, Original Understanding and Treaties as 'Supreme Law of the Land

Martin Flaherty

Fordham University School of Law, mflaherty17@yahoo.com

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship

Part of the [Law Commons](#)

Recommended Citation

Martin Flaherty, *History Right?: Historical Scholarship, Original Understanding and Treaties as 'Supreme Law of the Land*, 99 Colum. L. Rev. 2095 (1999)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/728

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

RESPONSES

HISTORY RIGHT?: HISTORICAL SCHOLARSHIP, ORIGINAL UNDERSTANDING, AND TREATIES AS “SUPREME LAW OF THE LAND”

Martin S. Flaherty*

Historians have long assumed that the Founders intended treaties to be self-executing, having domestic effect without implementing legislation. In this Response to Professor Yoo's challenge to the prevailing view, Professor Flaherty argues that careful examination of the self-execution assumption only confirms it. Relying on both British practice and the Articles of Confederation's failure to ensure swift compliance with treaty obligations, the Framers crafted a Constitution that made treaties self-executing upon ratification. The text of the Supremacy Clause, which makes treaties "the supreme Law of the Land," makes it clear that this was the dominant view, as do the votes and debates at the Constitutional Convention. In the ratification debates, a handful of Anti-Federalists attempted to limit the plain language of the Supremacy Clause. However, the overwhelming ratification evidence confirms the understanding clearly expressed by the Convention. While revisionism at times properly upsets common understandings, sometimes prevailing assumptions deserve to prevail.

INTRODUCTION

No serious historian would dispute the idea that changing law reflects changing times. This truism applies as fully to foreign affairs doctrine as to domestic law, sometimes more so. Recently, Professor G. Edward White made a powerful case that a “complex combination of international events and altered perceptions”¹ drove a “transformation”² of the Supreme Court's foreign affairs jurisprudence that developed even earlier than the domestic “‘revolution’” associated with the New Deal.³ On this account, landmarks such as the emergence of the Soviet Union led to a rejection of formalist nineteenth-century understandings, fostering instead a regime that was executive-centered in terms of separation of

* Professor of Law & Co-Director, Joseph R. Crowley Program in International Human Rights, Fordham Law School. My thanks to John Baker, Lance Banning, Curtis Bradley, Larry Kramer, James Oldham, Liam O'Melinn, Gerald Neuman, Jack Rakove, Paul Schwartz, William Michael Treanor, Carlos Vázquez, and John Yoo for advice, comments, and suggestions. My thanks as well to Ian Goldrich and Tiffany Hughes for invaluable research assistance. Finally, I would like to thank Louis Henkin for suggesting that I undertake this project.

1. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 149 (1999).

2. *Id.* at 148.

3. *Id.* at 147.

powers, nationalist as a matter of federalism, and internationalist in its general orientation. Along similar lines, conventional wisdom has long held that the Cold War sustained and entrenched these aspects of the twentieth-century foreign affairs orthodoxy whose origins White recounts.⁴

The Cold War is over. No sooner did it end, and with it the need for unity against a grave external threat, than parochial doctrines reemerged. Domestically, "states' rights" is no longer a segregationist slogan but once again constitutional doctrine.⁵ Externally, the foreign affairs orthodoxy remains in place,⁶ but lately faces a challenge from various constitutional scholars, at least some of whom are self-consciously engaged in the project of forging "a 'new' American foreign affairs law."⁷ At its best this movement reexamines the textual, structural, and historical premises of mainstream views that have been taken for granted. More often than not, however, the effects of the proposed new foreign affairs law tend toward isolationism in result if not by design.⁸ With "Globalism and the Consti-

4. See Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987) (adopting the twentieth-century orthodox view that customary international law is incorporated as a form of federal law); Louis Henkin, *Foreign Affairs and the U.S. Constitution* 111 (2d ed. 1996).

5. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999) (holding that state "sovereign immunity" precludes suits against states on certain claims of federal rights in state courts); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government cannot "commandeer" state executive officials); *New York v. United States*, 505 U.S. 144 (1992) (holding that the federal government cannot "commandeer" state regulatory process).

6. Professor Vázquez has been prominent among scholars who have defended traditional foreign affairs understandings even while exploring their implications. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l. L. 695 (1995) [hereinafter Vázquez, *Four Doctrines*]; Carlos Manuel Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 Geo. Immigr. L.J. 39 (1993) [hereinafter Vázquez, *Self-Executing Character*]; Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082 (1992) [hereinafter Vázquez, *Treaty-Based Rights*].

7. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. Colo. L. Rev. 1089, 1090 (1999) [hereinafter Bradley, *Foreign Affairs*]. For efforts at both describing and forging the "new foreign affairs law," see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998); Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395 (1999).

Professor White explains this post-Cold War "jurisprudential turning," as he did the transformation of foreign affairs law earlier this century, as happening "not because a particular scholar or court has had a brilliant idea, but because the idea has come to resonate with the intuitive responses of contemporary Americans in their experiences." G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. Colo. L. Rev. 1109, 1124-25 (1999).

8. See Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1841 (1998) (warning against the "balkanization" of foreign policy and international affairs); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371, 384-85 (1997) (suggesting that the proposed new foreign affairs law may appeal to the "segregationist

tution,” Professor John Yoo confirms his place in the revisionist vanguard.⁹

Explaining legal change is one thing; evaluating it is something else. Historians at some point will sort out how and why the current challenge to the foreign affairs orthodoxy sprang from the post-Cold War landscape. But it is judges, lawyers, and engaged citizens who must decide whether the proposed new approach meets the requirements of convincing legal discourse. That means the new model must seek justification through some mix of constitutional text, structure, history, practice, precedent, and political science rather than simply exploiting novel circumstances. Some commentators might argue that these and other rules of legal discourse are largely instrumental, that doctrine shifts to meet changing demands, and that asking whether a given shift is legitimate or not is beside the point. Whoever else may argue these points, the foreign affairs revisionists are not among them.

Professor Yoo’s article provides a superb test case not least because of its doctrinal ambitions and their theoretical justifications. In effect, “Globalism and the Constitution” would overturn a foreign affairs law tenet that is not only central to the twentieth-century orthodoxy, but arguably predates it. Where the modern position holds “the Supremacy Clause requires courts to automatically enforce treaties” subject to narrow exceptions,¹⁰ Yoo advocates a system in which the so-called “political branches, rather than the courts, would retain the discretion to decide how the nation [is] to meet its international obligations.”¹¹ Moreover, he justifies this result based upon one of constitutional law’s most jurisprudentially conservative techniques: original understanding. No crit he, Yoo defends his position by arguing that a doctrine of “non-self-execution is not at odds with the Supremacy Clause,” but is instead more “consistent

strand” of the American foreign policy tradition). Professor Bradley responds that moving back to a more state-centered foreign affairs law in particular may not mean a lessening of U.S. activism in causes such as human rights. See Bradley, *Foreign Affairs*, *supra* note 7, at 1106.

A number of scholars who have reexamined the twentieth-century orthodoxy have concluded that it is defensible. See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. Rev. 1791 (1998).

9. See John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 Colo. L. Rev. 1169 (1999) [hereinafter Yoo, *Clio at War*]; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996) [hereinafter Yoo, *Continuation of Politics*]; John C. Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 Hastings Int’l & Comp. L. Rev. 747 (1997); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 Const. Commentary 87 (1998).

10. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 1959 (1999) [hereinafter Yoo, *Globalism*]; see Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987); Henkin, *supra* note 4, at 198–204.

11. Yoo, *Globalism*, *supra* note 10, at 1962.

with the Framers' notions of democratic self-government and popular sovereignty."¹²

Take "Globalism and the Constitution" on its own originalist terms; how does it fare? The short answer is that while the work is better than most such efforts, it is still not good enough. Professor Yoo's account is neither "law office history,"¹³ "history 'lite,'"¹⁴ nor the otherwise substandard tales that the legal community too often peddles as "original understanding."¹⁵ Yoo's superior rigor yields a revisionist interpretation that cannot be dismissed out of hand. Yet arguable interpretation does not mean convincing interpretation. Greater attention to, among other things, the general scholarly narrative of the period yields a compelling story that makes better sense of the very sources Yoo cites, often incompletely, in a way that supports time-tested assumptions.

Absent these and other problems, Professor Yoo's account could still not hope to do much more than render the historical background "as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."¹⁶ Even without the additional support I offer here, too much supports the orthodox view to permit the new revisionist challenge to supplant it. Yet even if Professor Yoo could achieve the more modest goal of muddying what once were clear historical waters, originalism would still prove inadequate to the modern doctrinal position that he seeks. Assuming historical confusion, originalism would by definition cease to support any view and so leave his position exposed to the type of powerful objections based upon constitutional practice, structure, and text advanced here and elsewhere by Professor Vázquez.¹⁷ At least as used in this in-

12. *Id.* at 1961.

13. "Law office history" generally refers to the use of historical materials to support a preconceived legal conclusion. See Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-In-Law*, 71 *Chi.-Kent L. Rev.* 909, 917-18 (1996).

14. "History 'lite'" refers to a good-faith use of history to seek a legal conclusion which nonetheless falls short of even the most minimal standards used by historians. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523, 526 (1995) [hereinafter Flaherty, *History "Lite"*].

15. A classic scholarly example is Robert H. Bork, *The Tempting of America* (1990). On Bork's use of history, see Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 *Yale L.J.* 1419, 1420 (1990) ("[J]udging from Bork's performance, the time isn't ripe for a Great Crusade. Bork has succumbed to his own temptation. Proclaiming his fidelity to history, his constitutional vision is radically ahistorical."). Recent examples from the Supreme Court include *Alden v. Maine*, 119 S. Ct. 2240, 2247-53 (1999) and *Printz v. United States*, 521 U.S. 898, 905-25 (1997). For a historical critique of *Printz*, see Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 *U. Colo. L. Rev.* 1277, 1281-96 (1999) [hereinafter Flaherty, *Are We to Be a Nation?*].

16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

17. See Carlos Manuel Vázquez, *Laughing at Treaties*, 99 *Colum. L. Rev.* 215 (1999) [hereinafter Vázquez, *Laughing at Treaties*]. Professor Vázquez has previously elaborated his textual, structural, and doctrinal arguments elsewhere. See Vázquez, *Four Doctrines*, *supra* note 6, 695, 697-700; Vázquez, *Self-Executing Character*, *supra* note 6, at 44-49; Vázquez, *Treaty-Based Rights*, *supra* note 6, at 1101-10.

stance, moreover, originalism would fail to establish Professor Yoo's result even if his history were beyond all doubt. As Professor Vázquez also argues, Yoo's brand of contractual originalism is deeply problematic in purely theoretical terms. In effect, it would award the right to determine constitutional meaning to scattered dissenters in less than a handful of states rather than defer to the general understanding of the time, which for most originalists is the point of originalism.¹⁸

This article suggests how history clearly supports the self-execution orthodoxy after all.¹⁹ In this effort, it will generally track the historical portion of Professor Yoo's sensible presentation. Part I critiques Professor Yoo's historical methodology, arguing that the work merits far greater consideration than uses of history commonly deployed by the legal community. Turning to the substance of Yoo's thesis, Part II reviews Professor Yoo's treatment of eighteenth-century thought and British practice. Part III proceeds to America to relate Yoo's analysis of the Revolutionary era and the Critical Period to mainstream scholarly treatments of these periods. Turning to the Constitution itself, Part IV examines Yoo's assertions regarding the Federal Convention while Part V takes on the same task concerning the Ratification Debates. This Response concludes that an examination of both the context and sources on which Yoo relies indicates that his revisionist conclusions are untenable. In the end, his thesis undermines the very fidelity to Founding understandings and values that he prizes.²⁰ Notwithstanding this false turn, Professor Yoo's inquiry enriches constitutional discourse even when it yields problematic conclusions in specific instances. For this, Professor Yoo's effort should be congratulated even as its conclusions should be challenged.

I. HISTORICAL METHOD

More than constitutional text, structure, or precedent, Professor Yoo's project flourishes or fails on its history. History matters, on his view, first because "the Supreme Court's renewed interest in the struc-

18. See Vázquez, *Laughing at Treaties*, *supra* note 17, at 2158–68. For present purposes, I take no position on the authority of "original understanding," as opposed to its general value as relevant history. I do, however, agree with Professor Vázquez that the contractual version of originalism on which Professor Yoo relies is inconsistent with the ostensible democratic premises that are generally used to justify originalist arguments. See *id.*

19. In his *Rejoinder*, Professor Yoo reads me as agreeing that the matter is "no longer settled." John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *Colum. L. Rev.* 2218, 2218 [hereinafter Yoo, *Treaties and Public Lawmaking*]. This is true only in the modest sense that few specific historical claims in a subject as complex as the Founding can be said to be "settled." That said, the more I have looked into this area the more I am convinced that a Founding understanding that treaties would be self-executing is about as clear as most matters in this period can be.

20. But see Michael J. Klarman, *Antifidelity*, 70 *S. Cal. L. Rev.* 381, 387 (1997) (arguing that fidelity to original understanding, among other interpretive methods, is a shibboleth).

tural elements of the Constitution has relied in part upon the original understanding."²¹ The past further counts since "writers on foreign affairs, especially those in favor of the doctrine of self-executing treaties, anchor their arguments upon the original understanding."²² Unfortunately, Yoo is all too correct about the Court. Generally bereft of text, structure, *or* precedent, thin majorities have recently concocted various constitutional rules based mainly on questionable tales of original intent.²³ By contrast, writers who favor self-execution do not rely on history—whether good or bad—to anything like the same extent. As Professor Vázquez points out, these scholars instead appeal to the past mainly to underscore points better supported through other interpretive means.²⁴ This emphasis does not mean that the historical record should not be corrected. But it does suggest one further reason why Yoo may believe history matters. Against substantial arguments sounding in other methods, a clear picture of the original understanding may be the best and perhaps only hope of tipping the scales against what, among other things, the Constitution's text seems clearly to say.

Professor Yoo realizes that his history had therefore better be good. Unlike many originalists, he acknowledges that "good" history rarely results without a serious historical approach. "Whether one wants to develop rules for originalists, or measure the use of historical sources by the basic standards of the historical profession," Yoo argues that "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."²⁵ "Globalism" could well have made more of this. The point is as important as it is rarely appreciated. The article, moreover, follows its own advice. Yoo's command of context and sources has produced a piece that crosses the threshold separating typical lawyer's history and serious historical revisionism. That said, the account does make certain missteps that herald problems of substance later on.

Previously in these pages I argued that assessing how well a scholar has used history presupposes that there are standards for making that assessment, and that these standards most convincingly come from the discipline of history itself.²⁶ This prescription may sound like common

21. Yoo, *Globalism*, *supra* note 10, at 1982.

22. *Id.* at 1983.

23. Nowhere has the Court relied on history "lite" more heavily than in its recent federalism decisions. See *supra* note 15. For critiques, see Flaherty, *Are We to Be a Nation?*, *supra* note 15, at 1289–96; Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. Kan. L. Rev. 993, 995–96 (1997).

24. See Vázquez, *Laughing at Treaties*, *supra* note 17, at 2158 & n.8.

25. Yoo, *Globalism*, *supra* note 10, at 1985.

26. See Flaherty, *History "Lite," supra* note 14, at 551. I elaborated on this idea in Martin S. Flaherty, *The Practice of Faith*, 65 Fordham L. Rev. 1565 (1997).

sense, and that is how it has been received outside the legal community.²⁷ When invoking history, legal academics have often ignored the standards of historical research. But the point still follows even for law professors. A historical interpretation that relies extensively on primary sources, demonstrates a command of the secondary literature, and receives glowing reviews from professional historians should, and on reflection does, command greater respect than one that cuts and pastes from *The Federalist*, cites to no secondary literature, and would receive a barely passing grade if submitted in an undergraduate survey course. All this pertains, moreover, regardless of the theoretical weight one assigns to history. So long as one believes history is important enough to invoke, it is important enough at least to attempt to get it "right." To his credit, Yoo, for whom history is especially important, does not disagree.

To the contrary, Yoo frequently notes the specific standards that follow. Though my terms and not his, these tenets may be usefully thought of as procedural and substantive. "Procedural" standards first of all mean simply getting basic facts correct, a demand that legal scholarship does not meet as automatically as one might expect.²⁸ More importantly, credible historical procedure requires a concern for context. Originalist scholarship often fails to address a context broad enough to make sense of developments that are otherwise misleading when taken in isolation. The term "Executive Power," for example, may seem clear-cut looking at just the summer of 1787 (and not even then), but begins to look far less settled when viewed in light of the previous twenty years of constitutional development. Originalists likewise tend not to address context deeply enough either, at least in the sense of sources. The Supreme Court may believe that *The Federalist No. 81* supports a vigorous states' rights doctrine.²⁹ A more complete reading of those essays, other primary sources, and—perhaps most compelling—secondary sources that represent years of work surveying such sources, would quickly dispel such a tidy misreading.³⁰

27. Within the legal community is another matter. See, e.g., Cass R. Sunstein, *The Idea of a Useable Past*, 95 Colum. L. Rev. 601, 601–02 (1995) (arguing that the use of history in legal discourse need not meet the standards employed by historians); Tushnet, *supra* note 13, at 932 (same).

28. See Flaherty, *History "Lite," supra* note 14, at 552–53 & n.131 ("[G]etting a basic fact right [can be thought of as] a matter of 'procedure' or method rather than 'substance' because the accuracy of such a fact does not reflect on the substance of a larger assertion so much as indicate the methodological rigor underlying the assertion."). Getting at least a non-material fact wrong does not by itself invalidate a historical conclusion. See, e.g., Tushnet, *supra* note 13, at 932–34 (discounting Cass Sunstein's misattribution of a quotation from the Founding). It does, however, often flag more substantive problems.

29. See *Alden v. Maine*, 119 S. Ct. 2240, 2248 (1999); *The Federalist No. 81* (Alexander Hamilton).

30. See Richard B. Morris, *The Forging of the Union, 1781–1789*, at 308–09 (1987) [hereinafter Morris, *Union*]; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution 161–202* (1996) [hereinafter Rakove, *Original Meanings*].

"Substantive" standards are less intuitive but in the present case are more important. Canvassing the secondary works on a particular era may sometimes reveal little more than disagreement and debate, or what Professor White has characterized as "blah."³¹ Such circumstances alone should be enough to put any good-faith originalist on guard. Sometimes, however, scholarship on a period indicates broad agreement, or at least accord on a general framework for more particular disputes. In this situation, anyone exploring a specific issue has good cause to worry if his or her conclusions buck an overall historical narrative. As will be seen, the Founding falls closer to this end of the spectrum. This is not to say that exceptions to a general pattern cannot be uncovered.³² Nor is it to say a good piece of revisionism cannot expose problems with a reigning model—that is one way in which good historical scholarship advances.³³ Either way, however, a provocative account will need a lot of explaining, work, or both.

Professor Yoo's article often meets these demands well. This is especially true on the procedural side. For starters, Professor Yoo commits no obvious, basic, or telltale error of fact. Instead, he typically handles various complex historical episodes in an informed manner. His treatment of the Pennsylvania ratifying convention, for example, accurately focuses on that body's distinctive importance and ably recounts its main incidents. At the other end of the time line, the article ably summarizes the fairly broad and complex topic of seventeenth-century English constitutional politics.

These examples in turn suggest an expansive approach to context. Yoo's net is nothing if not wide.³⁴ He addresses not just the framing and

31. G. Edward White, *Public Remarks at the University of Colorado School of Law Symposium on Foreign Affairs Law and the Constitution* (Jan. 1999).

32. For instance, debate surrounding the original understanding of "declare War" in the War Powers Clause has elicited arguments challenging the prevailing historical narrative. U.S. Const. art. I, § 8, cl. 11. See, e.g., William Michael Treanor, *Fame, The Founding and the Power to Declare War*, 82 *Cornell L. Rev.* 695, 699–701 (1997). For revisionist challenges, see Yoo, *Clio at War*, *supra* note 9, at 1172–75; Yoo, *Continuation of Politics*, *supra* note 9, at 172–75. Even here, however, Yoo simply disagrees with the prevailing understanding, rather than that an understanding exists.

33. Though not generally by lawyers or even legal academics. For a superb counterexample, see Larry D. Kramer, *Madison's Audience*, 112 *Harv. L. Rev.* 611 (1999).

34. On this point, Yoo castigates Professor Vázquez for preferring the records of the Federal Convention over the debates in the several ratifying conventions. See Yoo, *Treaties and Public Lawmaking*, *supra* note 19, 2222 n. 17. I agree that the ratification debates should command greater interpretive authority, mainly on the theoretical ground that the Constitution, when it was put forward by the Convention, was simply a proposal. Nonetheless, I read Vázquez as merely stressing the widely accepted point that the record and nature of the ratification debates makes them problematic sources and that this is an additional reason that a contractual theory of originalism that accords great weight to the objections of a small number of identifiable dissenters should be viewed as more problematic still. See Vázquez, *Laughing at Treaties*, *supra* note 17, at 2162–63. More importantly, the distinction between the views at the Convention and the views of the ratification debates is overblown, if not false. It would have been odd if the understanding

ratification of the Constitution, but the constitutional development that led to it; not just the American developments, but the baseline under the British Constitution; not just the law of these periods, but relevant thought and theory. Good historical treatments of related subjects have done just this.³⁵

Better still, Yoo considers these topics in a depth usually absent from law reviews. Not one to leave his case solely to *Federalist* bytes, he instead relies on a wide array of original sources. Beyond this, he is aware that the reliability of even the same sources can vary greatly depending upon the edition³⁶—although here some discussion of the generally spotty nature of the records on ratification in general would have shown even greater prudence.³⁷ In like fashion, Yoo also displays an exemplary knowledge of leading historians and their works. It is refreshing enough to encounter major historians whom the legal world at least sometimes acknowledges, such as Gordon Wood, Edmund Morgan, Bernard Bailyn, Jack Rakove, or J.G.A. Pocock, but even more so to see peers of theirs who remain underappreciated, such as John Phillip Reid, Lance Banning, Forrest McDonald, Jack P. Greene, and John Murrin, to name a few.³⁸ Likewise, it is almost water in the desert to see reliance on history journals such as the *William and Mary Quarterly* rather than on Supreme Court

of what the Constitution meant—as opposed to whether it commanded support or not—significantly diverged between the Framers in Philadelphia and the nation in general. Moreover, the distinction simply does not exist in this case. As I attempt to show, the Convention clearly expressed the idea that treaties would be self-executing, and that those who debated the Constitution overwhelmingly took this plain meaning as the point of departure in arguing whether the framework did or did not deserve support.

35. See, e.g., Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* (1913); Felix Gilbert, *To the Farewell Address: Ideas of Early American Foreign Policy* (1961); Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (Scholarly Resources Inc. 1986) (1973); Richard B. Morris, *The American Revolution Reconsidered* (1967) [hereinafter Morris, *American Revolution*]; Paul A. Varg, *Foreign Policies of the Founding Fathers* (1963).

36. See Yoo, *Globalism*, *supra* note 10, at 1984 n.130.

37. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1, 1–6 (1986) [hereinafter Hutson, *Documentary Record*] (discussing problems with relying upon Convention records).

38. An unscientific “poll” of the number of law review citations to major historians revealed the following results: Gordon Wood, 780; Edmund Morgan, 430; Bernard Bailyn, 420; Jack Rakove, 273; J.G.A. Pocock, 272; Forrest McDonald, 250; John Phillip Reid, 125; Lance Banning, 89; Jack P. Greene, 75; John Murrin, 55. This “survey” was conducted most recently on December 23, 1999 simply by searching for citations to the full name of each professor in the “ALLREV” database on Lexis. As such, it should be taken as providing only a very rough idea of how frequently legal academics employ the work of each scholar. This point applies with additional force since the Lexis “ALLREV” database generally goes back no farther than the early 1980s and varies by individual law review. Crude as they are, the results nonetheless accord with my own impressions in reading historical articles that appear in law journals.

opinions by Justices Scalia, O'Connor, or Kennedy (or, to give the left its due, Hugo Black).³⁹

Yet, curiously, "Globalism" fails to fully deliver on the substantive side. One sign of trouble may be that the leading secondary works recede at just the points where one would expect them to confirm Yoo's thesis. As a result, this thesis tends to clash with the basic thrust of the prevailing historical narrative. The details of this framework will become apparent upon examining Yoo's detailed interpretations. Suffice it to say for now that historians of the Founding generally tell a story of revolutionary development and reaction. This account holds that Americans entered the Revolution convinced that they had the British Constitution on their side,⁴⁰ that independence led to experimentation with radical republicanism,⁴¹ that the Federal Convention reflected a reaction to these perceived localist and democratic excesses,⁴² and that ratification confirmed this reaction more than it tempered it.⁴³

Yoo's story of the Treaty Clause, by contrast, tends to emphasize clarity and continuity (emphasizing the hold of British concepts on the Founders) and restoration (positing a successful Antifederalist reaction to

39. See Yoo, *Globalism*, *supra* note 10, at 1985 n. 132. Cf. Flaherty, *History "Lite," supra* note 14, at 572 (surveying and praising Sunstein's use of historical sources).

40. See John Adams, *Novanglus* (1775), reprinted in 4 *Works of John Adams* 11, 117, 131 (Charles Francis Adams ed., Books Libraries Press 1969) (1850); Bernard Bailyn, *The Ideological Origins of the American Revolution* 176–98 (1967) [hereinafter *Bailyn, Ideological Origins*]; Thomas Jefferson, *A Summary View of the Rights of British America*, reprinted in 1 *The Papers of Thomas Jefferson* 121, 131–35 (Julian P. Boyd et al. eds., 1950); Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 141 (1988) [hereinafter *Morgan, People*]; John Phillip Reid, 4 *Constitutional History of the American Revolution: The Authority of Law* 4–5 (1993) [hereinafter *Reid, Authority of Law*]; Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 349 (1953); Gordon S. Wood, *Creation of the American Republic 1776–1787*, at 11–13, 44–45, 200–02 (1969) [hereinafter *Wood, American Republic*]; James Otis, *The Rights of the British Colonies Asserted and Proved* (1764), reprinted in 1 *Pamphlets of the American Revolution 1750–1776*, at 408 (Bernard Bailyn ed., 1965) [hereinafter *Bailyn, Pamphlets*]; James Otis, *Vindication of the British Colonies* (1765), reprinted in *Bailyn, 1 Pamphlets*, *supra*, at 545.

41. See Alexander Hamilton, *Continentalist No. I* (1789), reprinted in 2 *The Papers of Alexander Hamilton Papers*, 649, 649–50 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter *Hamilton Papers*]; Alexander Hamilton, *Second Letter from Phocion* (1784), reprinted in 3 *Hamilton Papers*, *supra*, at 530, 550; Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 143–83 (1985) [hereinafter *McDonald, Novus*]; Morgan, *People*, *supra* note 40, 263–68; Rakove, *Original Meanings*, *supra* note 30, at 28–31; Wood, *American Republic*, *supra* note 40, at 404–14; *The Federalist No. 48* (James Madison).

42. See Alexander Hamilton, *Second Letter from Phocion*, reprinted in 3 *Hamilton Papers*, *supra* note 41, at 550; Letter from James Iredell to Hannah Iredell (May 18, 1780), in 1 *Life and Correspondence of James Iredell: One of the Associate Justices of the Supreme Court of the United States* 446 (Griffith J. McRee ed., 1949); McDonald, *Novus*, *supra* note 41, at 143–83; Morgan, *People*, *supra* note 40, 263–67; Rakove, *Original Meanings*, *supra* note 30, at 28–31; Wood, *American Republic*, *supra* note 40, at 404–14; *The Federalist No. 48* (James Madison).

43. See Rakove, *Original Meanings*, *supra* note 30, at 131–60.

whatever innovations the Framers attempted as the price of ratification—in this case self-executing treaties). Yoo's case is not wrong just because of this emphasis. It is counterintuitive, however, not merely because it challenges the legal orthodoxy, but, more importantly, because it cuts against the dominant historical narrative. As such, the author of this thesis will have a good deal of work and convincing to do.⁴⁴

II. EIGHTEENTH-CENTURY THOUGHT AND PRACTICE

The first place Professor Yoo runs into these difficulties is in his account of eighteenth-century thought and practice. In each regard, he sees a baseline pointing to non-self-execution from which American constitutionalists would have found it hard to depart and to which they would have thought it easy to return. Yoo is right—and exceptional—in seeking to reconstruct “the context within which the Framers would have approached the new Constitution.”⁴⁵ Unfortunately, his particular reconstruction too often emphasizes only certain aspects of the sources and then projects the results onto later contexts without fully considering how intervening circumstances changed.

Consider first the thinkers. Yoo rightly turns to Grotius, Vattel, Locke, Montesquieu, and Blackstone as writers who exerted substantial influence on the American Founders.⁴⁶ As his readings are sufficiently

44. Employing a type of foreign affairs exceptionalism in its own right, Yoo's Rejoinder attempts to deflect the relevance of this scholarship on the conceded ground that it focuses on domestic developments rather than foreign affairs. See Yoo, *Treaties and Public Lawmaking*, *supra* note 19, at 2225. One exception, however, is the well-known frustration that constitutional reformers had with state violations of national treaties. See, e.g., Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 *Persp. Am. Hist.* 233, 267–68 (1984) [hereinafter Rakove, *Constitutional Puzzle*]. More importantly, the dominant theme of this scholarship—disillusionment with the perceived democratic excesses of state legislatures—sets up a contextual presumption that the same pattern would be evident with regard to international concerns absent some reason to think otherwise. As it happens, Professor Yoo has offered no reason to think otherwise other than asserting that foreign and domestic affairs are not the same thing. To the contrary, the evidence—both the familiar consternation about treaty violations together with a careful and full reading of the numerous statements on point—fits comfortably with the dominant scholarly narrative. Just as the Constitution repudiated perceived democratic excesses on domestic matters, so too did a commitment to self-executing treaties attempt the same type of reform in our international relations.

45. Yoo, *Globalism*, *supra* note 10, at 1986.

46. Cf. Bailyn, *Ideological Origins*, *supra* note 40, at 22–54 (1967) (describing how the Framers used these writings as a framework for a comprehensive theory of American Politics); Rakove, *Original Meanings*, *supra* note 30, at 18 (stating that “there can be no question that the framers and many of their contemporaries were familiar . . . with the great works of such luminaries as Locke, Hobbes, Montesquieu, Hume, and Blackstone”); Clinton Rossiter, 1787: *The Grand Convention* 70–71 (1966) (stating that the Framers were “persuade[d]” by the “‘celebrated Montesquieu’ and the ‘judicious Locke’”); Wood, *American Republic*, *supra* note 40, at 355 (describing the effect of Vattel's writing on the Framers in constructing the Articles of Confederation). “Founders” is the more appropriate term since “Framers,” strictly speaking, refers only to the participants in the

close, any sketch of Yoo's own summary cannot do it justice. Nonetheless, his account in general stresses how all of these men expressed concern for some type of popular check on executive actions that would cede domestic control over sovereign matters to foreign authority.

The great international lawyers Grotius and Vattel achieved this end by conceding that the people of a nation could delegate sovereign power in foreign affairs to a monarch, but the people retained some discretion to limit the monarch's alienation of that sovereignty in treaties. Yoo argues that, for modern purposes, this position suggests that "international agreements that transfer sovereignty cannot be made by unilateral actions of the executive."⁴⁷

For their part, the celebrated "English" constitutionalists, Locke and Montesquieu,⁴⁸ distinguished between executive authority in the domestic realm and foreign affairs power, but observed that the two are almost always combined on the grounds that foreign affairs, unlike domestic matters, are too fluid for regulation by a legislature. Yoo transposes this position into the modern context as a principle that questions multilateral treaties precisely because they regulate traditionally domestic concerns.⁴⁹ In contrast, Blackstone saw foreign affairs authority as quintessentially executive, in large part because the king embodies British sovereignty.⁵⁰ Since Blackstone described British law far more closely than the two philosophers, analysis of his thinking is better left combined with subsequent analysis of British practice.⁵¹

Yoo reports on these thinkers faithfully, but his interpretations run into difficulties that plague his project again and again. Consider first the problem of emphasis, which in modern political thought might be termed "spin." While Grotius and Vattel did point to certain popular checks on executive alienation of sovereignty, these remain narrow exceptions to a general rule allowing for extensive delegation of foreign affairs authority. As Yoo reports, when Grotius worried about the alienation of "sovereignty," what he had in mind was territory or people.⁵² Vattel for his part did create a kind of presumption against a monarch unilaterally alienating sovereignty, but so too did he allow for that presumption to be overcome by prior delegation and practice.⁵³

Philadelphia Convention of 1787. See Flaherty, History "Lite," *supra* note 14, at 527 n.17; Laura Kalman, *The Strange Career of Liberal Constitutionalism* 261 n.42 (1996).

47. See Yoo, *Globalism*, *supra* note 10, 1989.

48. The phrase "English" applies to Montesquieu insofar as he famously analyzed the English Constitution.

49. See Yoo, *Globalism*, *supra* note 10, at 1990–92.

50. See *id.* at 1995–96.

51. See *infra* text accompanying notes 54–70.

52. See Yoo, *Globalism*, *supra* note 10, at 1988; Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, bk. III, ch. XX, § V, at 805–06 (Francis W. Kelsey trans., Bobbs-Merrill 1925) (1646).

53. See Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature* §§ 61–71, at 24–32 (Joseph Chitty, Esq. ed., T. & J. W. Johnson 1852) (1758).

More problematic, however, is the application of these ideas to later periods. If the alienation of sovereignty as territory or people is “roughly similar” to the loss of lawmaking authority in modern treaties, the analogy would appear to be extremely rough.⁵⁴ Far more important is the nature of the beast that would be doing the alienating. When Grotius and Vattel discuss the need for popular checks, they assume an unelected monarch or aristocracy, not a democratically-elected executive who would conclude treaties in conjunction with a legislative body that is itself democratically accountable. Whether the Founders did—or we should—view the President and Senate as presenting the same need for a popular check as a “Prince” is not the open-and-shut case that Yoo implies.

Similar difficulties arise when moving to the English constitutionalists. With regard to emphasis, Locke paired the “federative” or foreign affairs power with executive power at least somewhat more strongly than Yoo contends. To his credit, Yoo does stress Locke’s main link between these powers—the relative incapacity of legislatures to regulate foreign affairs because nations remain in a state of nature to one another. This is a rationale with a deep and obvious resonance in Locke’s theory. Locke, however, further argues that the two powers should be placed in the same hands to prevent conflict. It would be “almost impracticable,” Locke declares, “that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin.”⁵⁵

More importantly, Yoo does not fully translate what, in this instance, he does properly emphasize. For us (and for the Founders?), he argues, the executive should not bind the nation to multilateral treaties that regulate domestic concerns because—unlike war and peace—exactly these matters are “capable to be directed by “antecedent, standing, positive laws”⁵⁶ readily passed by the legislature. But mere legislative capacity without more is only the necessary condition for removing a matter from federative concern. Such a concern must also not implicate “the rest of mankind.”⁵⁷ Society remains in a state of nature with foreigners and is therefore less equipped to predict the uncertain actions, designs, and interests that come from abroad.⁵⁸ A more faithful translation of Locke’s argument would be that once nations make a matter one of international concern—say, the local property rights of defeated loyalists in a successful war of independence—that item becomes open to the unsettled vagaries of foreign affairs and so is a federative issue better handled by the execu-

54. Yoo, *Globalism*, *supra* note 10, at 1989.

55. John Locke, *Two Treatises of Government*, § 148, at 196 (Hafner Press 1947) (1690).

56. Yoo, *Globalism*, *supra* note 10, at 1992 (quoting Locke, *supra* note 55, § 147, at 196 (internal quotation marks omitted)).

57. Locke, *supra* note 55, § 145, at 195.

58. See *id.*

tive rather than the legislature. Nor does Locke's "broader goal"⁵⁹ of restricting arbitrary executive power necessarily tip the balance the other way. In what will soon become a familiar chorus, here Yoo again takes an eighteenth-century concern about hereditary royal power and applies it wholesale to a modern executive that is somewhat more accountable to the people than were Stuart or Hanoverian monarchs.⁶⁰

All this is still mainly preface, however, since the stakes become somewhat higher in turning from Enlightenment thought to British practice. As Jack Rakove argues, "recourse to the standard authorities does not reveal a clearly articulated or accepted doctrine of executive power that the Framers could have readily applied. The control of foreign relations was a problem that neither Locke nor Montesquieu had considered carefully."⁶¹ Yoo implicitly concedes this by spending far more time arguing how the thinkers he considers should influence us today rather than demonstrating how they specifically influenced the Founders. In this regard, the contemporary "blah" to which Rakove refers only serves to enhance the truism that experience furnished the most important source for the generation that established the Constitution.⁶² For many Founders, that experience began with the history and customs they shared with England.

Yoo may not agree about the ambiguity of foreign affairs thought, but unlike many legal academics, he appreciates the need "to retrace the British political history of the seventeenth and eighteenth centuries as it related to treaty-making and lawmaking."⁶³ This is necessary for reasons beyond determining the doctrinal baseline that Americans inherited. Recovering this baseline is critical to Yoo, as he argues that when Federalists such as James Wilson were confronted with fears about self-executing treaties under the new constitution, they fell back upon precisely this inheritance. Here, however, many of the key claims made about British practice are unclear. More to the point, the problem of initial spin followed by presentist analogy becomes far more serious.

These difficulties arise, and become relevant, starting with Yoo's handling of the Glorious Revolution settlement. On Yoo's account, the Crown retained a formal monopoly on foreign affairs that Parliament checked with increasing effectiveness as the eighteenth century progressed. These checks included the use of legislation and funding "to repudiate treaties with more regularity"; the outright rejection of at least one treaty; the impeachment of officials involved in making bad treaties;

59. Yoo, *Globalism*, *supra* note 10, at 1992.

60. See *id.* at 1992–93.

61. Rakove, *Constitutional Puzzle*, *supra* note 44, at 261.

62. Cf., e.g., *The Federalist* No. 6, at 59 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing lessons of history); McDonald, *Novus*, *supra* note 41, at 2, 143–83 (recounting how the founding generation drew upon their own recent history).

63. See Yoo, *Globalism*, *supra* note 10, at 1998.

and the financial and political support to encourage certain treaties.⁶⁴ Blackstone's work reflected this reality. On the one hand, he went further than Locke in justifying a near-absolute royal prerogative over treaties on grounds of sovereignty. But on the other hand, Blackstone was also the prophet of Parliament's sovereignty in domestic affairs. From this Yoo concludes that Blackstone never fully reconciled royal treaty power with Parliament's domestic sovereignty.⁶⁵ British practice, however, accommodated these competing claims by providing the legislature with a "significant role" in treatymaking that reserved parliamentary control "over implementing legislation and financial support" of treaties.⁶⁶ The shared history, then, "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."⁶⁷

Yoo deserves congratulations for avoiding the presentist pitfall of assuming that British practice of that era always reflected the clear doctrine of non-self-execution that applies today. However, significant problems of overstatement and overemphasis remain.

Consider first formal British doctrine. Passing references do not fully convey the extent to which foreign affairs remained a last bastion of the royal prerogative. Nor do they convey how the formal rule appeared to presume self-execution. On this point Blackstone declared:

It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; *and then it is binding on the whole community*: and in England the sovereign power, *quoad hoc*, is vested in the person of the king. *Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul.*⁶⁸

Blackstone did countenance one safeguard, "lest this plenitude of authority should be abused to the detriment of the public," and that was "parliamentary impeachment" of "such ministers as advise and conclude any treaty, which shall afterward be judged to derogate from the honour and interest of the nation."⁶⁹ On one reading, this passage could have meant nothing more than that treaties made by the Crown could absolutely bind the realm in international rather than the domestic law. Yet the sweeping tone of Blackstone's language clearly points to the opposite conclusion that treaties would indeed be self-executing. This, at any rate,

64. Id. at 2002.

65. See id. at 1995–96.

66. Id. at 2004.

67. Id.

68. 1 William Blackstone, *Commentaries on the Laws of England* 249 (1979 facsimile ed.) (1765–69) (emphasis added).

69. Id.

would be how leading American constitutionalists would understand the passage during the ratification debates.⁷⁰

Practice did indeed soften this extreme doctrine, but not nearly to the extent that Yoo implies. His account gives a nod to recent historiographical trends rediscovering parliamentary influence in foreign affairs that had largely been ignored. Yet that work stands mainly for the proposition that while Parliament had a larger role than previously believed, that role was largely indirect.⁷¹ Parliament debated foreign policy, for example, but the ministry had to defend its decisions in Parliament only on occasion.⁷² For the most part, the Crown formally consulted Parliament about treaties only intermittently, and then mainly when an international agreement required the raising of revenue.⁷³ Moreover, commercial treaties as a practical matter depended on Parliament passing revenue measures, but not only were funds almost always appropriated, the practice reflected the constitutional principle that revenue represented a "free gift" from the Commons of the realm to the Crown, and so had to be granted by Parliament.⁷⁴

What this work does not demonstrate is that Parliament regularly threatened to use its domestic authority to dictate foreign policy, that Parliament exercised a significant role in treaty-making, or that legislation was required to implement treaties. To take one late and striking example, one of the first significant debates concerning the need for legislation arose out of the 1783 Treaty of Paris. Echoing Vattel, opposition arose mainly because under that agreement Britain ceded vast stretches of territory that had once been the thirteen colonies.⁷⁵ Even with regard to this issue at this late date, the question remained unclear.⁷⁶

70. See *infra* text accompanying notes 151–154, 205–210 (discussing American understandings of Blackstone during ratification in New York and Virginia).

71. See Jeremy Black, *British Foreign Policy in the Age of Revolutions, 1783–1793*, at 491–92 (1994) [hereinafter *Black, Age of Revolutions*]; Jeremy Black, *British Foreign Policy in the Age of Walpole 76–80* (1985) [hereinafter *Black, Age of Walpole*]; G.C. Gibbs, *Laying Treaties Before Parliament in the Eighteenth Century*, in *Studies in Diplomatic History* 116, 119 (Ragnhild Hatton & M.S. Anderson eds., 1970).

72. See Black, *Age of Revolutions*, *supra* note 71, at 491–92; Jeremy Black, *A System of Ambition? British Foreign Policy 1660–1793*, at 54 (1991); Gibbs, *supra* note 71, at 119–20, 133–35.

73. See Gibbs, *supra* note 71, at 119–23, 129–31.

74. The doctrine of "free gift" reflected the belief that discretion in granting revenue to the Crown was a parliamentary power more fundamental than even the authority to legislate. See Black, *Age of Walpole*, *supra* note 71, at 75; Morgan, *People*, *supra* note 40, at 239; Edmund S. Morgan & Helen M. Morgan, *The Stamp Act Crisis 88–91* (1995 ed.) [hereinafter *Morgan & Morgan, Crisis*]. For the definitive works on taxation and legislation in eighteenth-century British and American thought, see 3 John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (1991) [hereinafter *Reid, Authority to Legislate*]; 2 John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Tax* (1987) [hereinafter *Reid, Authority to Tax*].

75. See Black, *Age of Revolutions*, *supra* note 71, at 475–76.

76. See Gibbs, *supra* note 71, at 123–25, 132–37.

Once more, Yoo's attempt to link the historical account with modern thinking compounds the problems, only here the process runs in the other direction. Where earlier Yoo projects the past onto the present without fully taking into account all the relevant changed circumstances, here he analyzes past practice against a modern template that did not apply at the time. He does this by assuming that British practice reflects the type of separation-of-powers framework that Americans have come to know. On this assumption, it follows that the king's foreign affairs prerogatives amount to executive power that runs up against Parliament's legislative authority with less and less success.

But this is not how eighteenth-century Britain worked. Starting no later than the rise of Robert Walpole in the 1720s, British policy was essentially dictated by a small group of Parliamentary "grandees" in partnership with monarchs whose power eroded as the century progressed. As one English historian put it, "[i]n William III's reign, the initiative in policy lay with the King; in Anne's reign, it lay with those who could command her favour; in the 1720s and 1730s, it lay with Walpole."⁷⁷ This was true whether the policy was domestic or foreign, "legislative" or "executive." This system, which save for brief interruptions lasted through American independence, among other things meant that confrontations between the Crown and Parliamentary majorities were almost unheard of, since a ministry by definition controlled those majorities, usually through patronage, and had obtained or coerced the approval of the king.⁷⁸

Nor do the difficulties end here. Throughout this period ministerial patronage—"corruption" to use the term of the day—was sufficiently effective that parliamentary opposition to the ministry was rarely in any position to assume power or otherwise create a constitutional crisis. In part, this state of affairs reflected the notoriously unrepresentative and corrupt nature of the House of Commons at the time.⁷⁹ These fairly settled truisms, far from undercutting the recent scholarship on which Yoo relies, tend to confirm it by demonstrating how practice could differ from doctrine. They do, however, undermine any argument that views the

77. Betty Kemp, *Sir Robert Walpole* 45 (1976).

78. See Black, *Age of Revolutions*, supra note 71, at 472–75; Black, *Age of Walpole*, supra note 71, at 75–76. For works on eighteenth-century parliamentary politics generally, see John Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (1989); H.T. Dickinson, *Walpole and the Whig Supremacy* (1973); Geoffrey Holmes & Daniel Szechi, *The Ages of Oligarchy: Preindustrial Britain 1722–1783* (1993); Kemp, supra note 77; J.H. Plumb, *The Growth of Political Stability in England* [hereinafter *Plumb, Growth*] (1967); J.H. Plumb, *Sir Robert Walpole, The Making of a Statesman* (1956) [hereinafter *Plumb, Walpole*].

79. See H.T. Dickinson, supra note 78, at 66–70, 74–81, 140–47, 152–54; Plumb, *Growth*, supra note 78, at 55–57; Plumb, *Walpole*, supra note 78, at 34–44.

eighteenth-century British Parliament as a growing “legislative” check against the Crown’s “executive” foreign affairs monopoly.⁸⁰

In all these ways, the eighteenth-century world offers little clear evidence for the non-self-execution thesis and undermines it as often as it provides assistance. The great thinkers hint at popular restraint, but their suggestions are vague and narrow, appear not to have influenced the Founders, and translate poorly to modern doctrine. British doctrine actually points toward self-execution, while practice shows largely informal Parliamentary involvement that cuts across modern separation-of-powers categories. If the eighteenth century bequeathed the Founders a powerful legacy against self-executing treaties, it has yet to be uncovered.⁸¹

III. THE REVOLUTION AND CRITICAL PERIOD

More important in any case was the Founders’ own experience. Professor Yoo commendably approaches this topic from a broad perspective, starting with American constitutional understandings during the Revolution and “Critical Period.”⁸² Here the basic thesis is that Americans viewed local legislative power over internal matters as a check on “metropolitan”⁸³ executive authority over foreign affairs until Madison advocated a metropolitan legislature for the United States that would, like Parliament, directly participate in treatymaking and implementation. Yoo delivers this interpretation with rigor and erudition. It is just here, however, where some of the difficulties evident earlier first lead him to

80. Interestingly, Yoo offers a trenchant summary of the patronage system in a long footnote. See Yoo, *Globalism*, *supra* note 10, at 2003 n.233. He does not, however, integrate it into his general analysis.

81. As the preceding paragraph should make clear, my claim is hardly that British history demonstrates that treaties were “forever self-executing.” Yoo, *Treaties and Public Lawmaking*, *supra* note 19, at 2226. Rather, it is that the domestic effect of treaties in British law in the eighteenth century remains understudied; that contrary to the assumptions made by American legal academics, the story is not neat at all; and that there is a significant body of evidence, not least Blackstone, to suggest that British practice was evolving from self-execution to non-self-execution as an elected Parliament inexorably supplanted the power of an unelected monarch. All this is merely to demonstrate that it cannot be said that the Founders would have had to have departed from a clearly settled British commitment to non-self-execution since, at the time of the Founding, that commitment had yet to be clear. Yoo’s reliance on English legal historians describing the state of British doctrine in the twentieth century to support his argument about the eighteenth century, moreover, is not only irrelevant but typical of the sort of anachronistic originalist argument that I credit his work with usually avoiding. By contrast, Yoo still needs to come to terms with the Blackstone passage that deals with exactly this point, and to acknowledge that many of the leading Founders, including Wilson, Madison, and Hamilton, relied on Blackstone to support their understanding that treaties in British law did not require parliamentary implementation.

82. The phrase originally comes from a commencement address John Quincy Adams delivered upon his graduation from Harvard in July 1787. See Robert A. East, *John Quincy Adams: The Critical Years: 1785–1794*, at 85 (1962) (quoting Adams).

83. Used here to mean both “imperial” and “continental.” Cf. Yoo, *Globalism*, *supra* note 10, at 1986.

contest the prevailing scholarly account of American constitutional development with conclusions that he fails to support or justify.

Yoo's story proceeds in three parts. Closely following the leading authorities, his treatment of the Colonial and Revolutionary eras rightly contends that American assemblies effectively exercised the authority to tax and legislate with regard to their internal⁸⁴ affairs both in practice and on their conception of the "imperial"⁸⁵ constitution. Only when the imperial government in London attempted to encroach upon this system with the Sugar Act in 1764 did the resistance that led to independence proceed. On Yoo's account, this resistance resulted, in part, from alarm over that apparent conspiracy of the Crown and its ministers to wield absolute power, much as the Commonwealth writers whom Americans read had predicted. Colonial opposition further came in response to Parliament's perceived violation of the imperial constitution, which Americans understood to subject the colonies to the King's authority alone. Finally, Parliament's assertions also represented an alarming attempt to sidestep local control of royal governors by colonial assemblies.⁸⁶ While not always clear, the relevance for foreign affairs in all this follows from the view that London, by attacking the colonies' legislative authority over their domestic affairs, was in effect also attempting to eliminate a significant check on the Crown's "executive" foreign affairs authority.

The second part of the story proceeds to the Critical Period and replicates these themes. This is because, on Yoo's account, Americans replicated the imperial system under the Articles of Confederation. The Crown's executive authority over foreign affairs passed to the Continental Congress, which in truth was not a legislature at all, but a plural executive. At the same time previous legislative checks on this authority—funding and implementing laws passed by Parliament and the colonial assemblies—passed to the new state legislatures. In this way, the United States reproduced the vertical separation of powers just seen in the British Empire. Then again, this new/old framework produced unforeseen problems, not least of which was that any regional block of five states could block any treaty that the Congress negotiated.⁸⁷

The account of the period just preceding the Federal Convention anticipates the solutions to this and other problems, especially those solutions consistent with legislative participation in treaty-making, which by then should have appeared to have had a rock-solid foundation. Yoo cor-

84. See Morgan, *People*, supra note 40, at 239–62; Morgan & Morgan, *Crisis*, supra note 74, at 288–89.

85. See Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. Pa. L. Rev. 1157, 1158–62 (1976) [hereinafter Black, *Constitution of Empire*]; Martin S. Flaherty, Note, *The Empire Strikes Back: Annesley v. Sherlock and the Triumph of Imperial Parliamentary Supremacy*, 87 Colum. L. Rev. 593–94 (1987) [hereinafter, Flaherty, *Empire Strikes Back*].

86. See Yoo, *Globalism*, supra note 10, at 2007–08.

87. See *id.* at 2013.

rectly points to the crippling effect that resulted from Congress's inability to command state compliance with the treaties it did make. Future Framers posited different and seemingly exclusive remedies. A false start came from Jay and Hamilton, who advocated that treaties made by the unrepresentative, executive Congress should be (and should have been) treated as self-executing by the state courts. The more promising fix came from Madison, who proposed a national government that possessed a true legislature and embodied separation of powers more generally. This new national legislature could then replace the state legislatures as a less divisive check, even as a partner, in executive treaty-making and so could accord the United States something like the protections exercised by Parliament against the Crown. Continuity, once more, prevails.⁸⁸

There is a better story. For all its sophistication, "Globalism's" thesis sits uneasily beside the prevailing historical narrative. This occurs in part because Yoo again overemphasizes key items and, more importantly, projects a present in which we have internalized separation of powers onto a past that was only just getting around to it. By contrast, the historians on whom Yoo relies point not to continuity, but to rapid change and development.⁸⁹

88. See *id.* at 2034.

89. Yoo's Rejoinder at several points attempts to rehabilitate his overreliance on separation of powers. He again offers it as the primary way contemporaries understand the British Constitution and again implies that the doctrine was thoroughly developed. See Yoo, *Treaties and Public Lawmaking*, *supra* note 19, at 2223. They did not, and it was not. He then compounds this problem by further claiming that separation of powers analysis fits the mixed-government model quite well by applying separation of powers terminology to the mixed-government system. See *id.* This merely demonstrates that separation of powers analysis did not fit well since the mixed-government conception by definition turned not on the allocation of legislative or executive power but on a balance between types of government associated with social class. The Rejoinder also repeats the assertion that the state legislatures could have been understood as a legislative check on foreign affairs authority, which the main article vests in the "executive" Continental Congress. See *id.* at 2226; Yoo, *Globalism*, *supra* note 10, at 2009. Once more, however, Yoo simply provides no evidence that anyone at the time applied this vertical conception of separation of powers at any point. Finally, the Rejoinder, with certain deft phrasing, attempts to make separation of powers appear central to American constitutional practice almost from independence. See Yoo, *Treaties and Public Lawmaking*, *supra* note 19, at 2231 n.47. But the point is not that the doctrine did not "flourish[]" before 1787. *Id.* The point is that most historians, including the ones Yoo cites, agree that the early state constitutions concentrated powers in the legislatures; that separation of powers concerns became dominant as a result in a way that they could not have been before; and that resulting attempts to apply the doctrine revealed fundamental disagreement on issues that we today would consider clear, settled, and axiomatic. None of this is to say that separation of powers analysis was absent or unimportant, even in mid-eighteenth century Britain. It is to say that for much of the period Yoo describes, it was neither so central, worked out, or internalized that it can serve as the key to unlocking what is a far more complex story. Unfortunately, the belief that it can causes Yoo to misinterpret numerous pieces of evidence, large and small. For my own previous efforts to support the fairly standard claims that I make here, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1755-77 (1996) [hereinafter Flaherty, *Most Dangerous Branch*].

Stated too briefly, this account begins by stressing “Mixed Government” rather than Montesquieu. Constitutionalists in the English-speaking world were familiar with separation-of-powers analysis, but more generally understood the King, Lords, and Commons to reflect a balance of monarchy, aristocracy, and democracy, forms of government associated with social class rather than governmental function. On independence, “Mixed Government” gave way at times to radically republican experiments in the new state governments in which power devolved to the legislatures. Perceived excesses by these assemblies, seen to be dominated by demagogic factions, led to fateful calls for reform that were based to a significant extent on separation-of-powers analysis, which only at this juncture began to assume a central place in American thinking.⁹⁰ Leading scholars for the most part have concentrated on the domestic side of these developments.⁹¹ Work on foreign affairs nonetheless makes for a good fit insofar as state frustration of national treaty commitments was among the most important of the excesses that led to the Federal Convention.⁹² This narrative suggests certain difficulties with “Globalism’s” three episodes.

On the Revolution, Yoo’s separation-of-powers lens distorts the role of colonial assemblies as a check on the King’s foreign affairs prerogatives. “Globalism” simply fails to demonstrate that legislative power over internal matters constituted a critical counterbalance to either the monarch or the royal governors. This is not to say that the assemblies did not play a role, in particular through the indirect means of withholding revenue.⁹³ Any concern about Parliament’s encroachment on this function, which does not appear to have been widely expressed, would have quickly given way to weightier fears.

These fears had less to do with separation-of-powers concerns than with English mixed-government conceptions in the imperial context. As Yoo somewhat indicates,⁹⁴ the colonists opposed Parliament’s assertion of

90. I have attempted to summarize this interpretation at greater length elsewhere. See Flaherty, *History “Lite,”* *supra* note 14, at 547–50; Flaherty, *Most Dangerous Branch*, *supra* note 89, at 1763–74.

91. Works reflecting the domestic focus include: Bailyn, *Ideological Origins*, *supra* note 40; McDonald, *Novus*, *supra* note 41; Morgan, *People*, *supra* note 40; Rakove, *Original Meanings*, *supra* note 30; Wood, *American Republic*, *supra* note 40. At least one scholar, who shares the domestic focus, argues that the more forward, more complex, less “republican” constitutions came even earlier than these scholars contend. See Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (1997).

92. See Corwin, *supra* note 35, at 59–78; Gilbert, *supra* note 35, at 88–89; Marks, *supra* note 35, at 3–15; Morris, *American Revolution*, *supra* note 35, at 137–39; Varg, *supra* note 35, at 59–66.

93. See Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689–1776*, at 297–306 (1963).

94. See Yoo, *Globalism*, *supra* note 10, at 2007–08.

control, first over the assemblies' exclusive power to tax⁹⁵—seen as the core power of any representative body—and then the power to legislate.⁹⁶ This followed because American Whigs viewed the lower and upper houses of the assemblies, together with royal governors, as replicating the Commons, Lords, and King in Britain.⁹⁷ Custom, charters, precedent, and theory all confirmed that the monopoly to raise revenue and pass laws over internal matters should fall to the colonies' respective "commons."⁹⁸

What did not follow was opposition to the Crown or to the King's "executive" foreign affairs authority. To the contrary, under the "Imperial Constitution," Americans conceded that authority to the Crown.⁹⁹ A standard trope of American resistance in fact became denunciations of Parliament coupled with protestations of loyalty to the King.¹⁰⁰ This stance persisted even after Lexington and Concord, when it became painfully clear that George III would never support the Americans' constitutional vision.¹⁰¹ The need to break this final link helps explain the anti-

95. See Bailyn, *Ideological Origins*, supra note 40, at 209–19; John Dickinson, Letter II, reprinted in *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* 20, 24 (The Outlook Co. 1903) (1768); Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788*, 79–97, 110–24 (1986) [hereinafter Greene, *Peripheries*]; Reid, *Authority to Tax*, supra note 74, at 14–16, 188–89; Wood, *American Republic*, supra note 40, at 176–177, 348–54; John Dickinson, *An Essay on the Constitutional Power of Great Britain Over the Colonies in America*, reprinted in 3 *Pennsylvania Archives* 565, at 569–89, 603 (John B. Linn & William H. Egle eds., 2d ser. 1875); see generally Edmund S. Morgan, *Colonial Ideas of Parliamentary Power, 1764–1766*, 5 *Wm. & Mary Q.* 311 (1948) (examining the colonial ideas of Parliamentary power in the period of the Stamp Act crisis).

96. See Bernard Bailyn, *The Origins of American Politics* 7–10, 67–72 (1965); Greene, *Peripheries*, supra note 95, at 71, 98–104, 134; Morgan, *People*, supra note 40, at 243–45; Rakove, *Original Meanings*, supra note 30, at 211–12; Reid, *Authority to Legislate*, supra note 74, at 19, 80–81, 99; Wood, *American Republic*, supra note 40, at 349–50.

97. See Bailyn, *Ideological Origins*, supra note 40, at 72, 273–81; Reid, *Authority of Law*, supra note 40, at 14–16; Flaherty, *Empire Strikes Back*, supra note 85, at 600.

98. See Bailyn, *Ideological Origins*, supra note 40, at 210–19; Greene, *Peripheries*, supra note 95, at 83–97; Reid, *Authority to Legislate*, supra note 74, at 71–74; Black, *Constitution of Empire*, supra note 85, at 1203; Flaherty, *Empire Strikes Back*, supra note 85, at 598–99; Jack P. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 *S. Atlantic Q.* 56, 66 (1986).

99. Greene, *Peripheries*, supra note 95, at 76, 120–23, 134–35. Indeed, Americans had gone beyond this and long conceded that Parliament had the authority to regulate imperial matters by binding the colonies through trade and navigation measures. See Morgan & Morgan, *Crisis*, supra note 74, at 125.

100. See Reid, *Authority of Law*, supra note 40, at 151–62. For famous examples of eleventh-hour American protests that nonetheless protested loyalty to the King, see Novanglus (John Adams), *To the Inhabitants of the Colony of Massachusetts-Bay*, Mar. 6, 1775, reprinted in 2 *Papers of John Adams* 320–21 (Robert J. Taylor ed., 1977); Thomas Jefferson, *A Summary View of the Rights of British North America*, reprinted in *Thomas Jefferson: Writings* 105, 105–06, 120–22 (Merrill D. Peterson ed., 1984).

101. See Greene, *Peripheries*, supra note 95, at 144. On this point, Yoo confuses American Whig criticism of "ministerial corruption" and "conspiracy," which was directed

royal vehemence of *Common Sense*,¹⁰² not to mention that of the Declaration of Independence.¹⁰³

"Globalism" runs into similar problems with the Critical Period. Here the article makes perhaps its greatest overstatement in reducing the Confederation Congress to an executive branch, the state assemblies as kind of a collective national legislative branch, and attributing this view to the founding generation. There is no doubt that Congress of necessity assumed a monopoly over "executive" foreign affairs authority. Nor is there doubt that it lacked the power either to force the states to implement its policies or to implement its policies directly. But this does not mean that the Congress was merely a plural executive or that it lacked legislative or judicial powers. Instead, historians of the era conventionally point out that the Confederation Congress possessed a jumble of all three powers. Even if Americans at this point understood the idea of separation of powers in a sharp, well-defined fashion, Congress under the Articles of Confederation did not provide them with much of a basis for conceptualizing the nation's government as divided between a national executive and thirteen state legislatures.

The truth is that Americans, who only recently had operated mainly under a mixed-government conception, had yet to work out the idea of separation of powers to the extent that Yoo assumes. The scholarship of the last several generations has stressed that American constitutionalists embraced independence by creating state frameworks that concentrated power in republican state legislatures in ways that most modern analysts would find jarring.¹⁰⁴ At the extreme, some states governed with unicameral legislatures which wielded substantial power, including the authority to select, and otherwise control, weak plural executives and dependent judiciaries.¹⁰⁵

In many ways, American separation-of-powers analysis came into its own only when it became clear that the concentration of power that the

at the King's advisors, with criticism of the King and his constitutional authority with regard to the colonies. Yoo, *Globalism*, supra note 10, at 237–42. Ironically, the American position on the King's imperial authority in one sense seemed to be embarrassingly monarchical, as certain British Parliamentarians gleefully pointed out. See Reid, *Authority of Law*, supra note 40, at 152–55.

102. Thomas Paine, *Common Sense* (1776), reprinted in *The Thomas Paine Reader* 71–79 (Michael Foot & Isaac Kramnick eds., 1987).

103. The Declaration of Independence, paras. 3–28 (U.S. 1776). On the constitutional significance of the Declaration, see John Phillip Reid, *The Irrelevance of the Declaration in Law in the American Revolution and the Revolution in Law* 46–48 (Hendrik Hartog ed., 1981).

104. For a summary, see Flaherty, *Most Dangerous Branch*, supra note 89, at 1758–63.

105. *Id.* at 1760–63. Pennsylvania, famously, was one of the most extreme examples in concentrating power in a unicameral assembly that was essentially unchecked by either the executive or judiciary. See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 174–80 (Rita & Robert Kimber trans., Univ. of N.C. Press 1980); Wood, *American Republic*, supra note 40, at 83–90.

states had adopted had begun to produce “democratic despotism” despite extensive electoral safeguards. Preoccupation with the state constitutions tended to preclude integrated analysis about state and national governments until fairly late in the game when thinkers like Madison filled this void. The vertical separation-of-powers vision that Yoo describes may be insightful modern analysis. But he has yet to demonstrate that it prevailed during the Founding or carried over similar, separation-of-powers understandings about the imperial or British frameworks, understandings which themselves remain unproven.

Yoo’s final episode does better reflect the period’s central concerns, just not enough. The treaty system under the Articles of Confederation, however characterized, in practice meant that the United States entered into treaties that the states would refuse to enforce, which in turn gave European powers the excuse to violate commitments they had made to the United States. As Yoo points out, nowhere did the situation prove more embarrassing than with regard to the Treaty of Paris, a point underscored by his insightful discussion of *Rutgers v. Waddington*, the celebrated case in which Hamilton argued for the supremacy of treaties under the Articles.¹⁰⁶ Yet on this point Yoo, if anything, understates the crisis. According to one leading authority, these and other foreign policy concerns “were not only important in shaping constitutional reform,” but were of “overwhelming significance.”¹⁰⁷ The state legislatures’ ability to frustrate foreign policy, moreover, dovetailed with the other great impetus to constitutional reform—the state legislatures’ majoritarian infringement of basic liberties within their own borders.¹⁰⁸ Madison, for one, had both pathologies in mind when he referred to the “imbecility” of government under the Articles.¹⁰⁹

With this more compelling background in mind, the solutions offered by Hamilton, Jay, and Madison appear complementary rather than contradictory. As for the ever “internationalist” New Yorkers, so great was their concern over U.S. treaty violations, and so slight was their regard for any inherited tradition of legislative foreign policy checks, that they boldly argued that treaties should be considered self-executing even under the Articles. What is striking is not that states violated this conception but that the argument carried the weight it did in a local judgment

106. See Yoo, *Globalism*, *supra* note 10, at 2017–18.

107. Marks, *supra* note 35, at x. On this point, see Corwin, *supra* note 35, at 21–30; Gilbert, *supra* note 35, at 66–75; Morris, *American Revolution*, *supra* note 35, at 152–57; Varg, *supra* note 35, at 46–47; Rakove, *Constitutional Puzzle*, *supra* note 44, at 267–68.

108. See Wood, *American Republic*, *supra* note 40 at 404–07.

109. See 3 *Records of the Federal Convention of 1787*, at 547 (Max Farrand ed., 1911) [hereinafter *Farrand, Records*]. For Madison’s classic diagnosis of government failings during the Critical Period, see James Madison, *Vices of the Political System of the United States*, in 9 *The Papers of James Madison* 348, 348–53 (Robert A. Rutland et al. eds., 1975) [hereinafter *Madison Papers*].

such as *Rutgers*.¹¹⁰ Looking ahead, Madison went Hamilton and Jay one better in proposing a reformed national government equipped with courts in part to ensure treaty enforcement. Why Madison's colleagues would have done anything other than welcome national courts as an additional and more effective means to fight state recalcitrance—which is just what Hamilton and Jay did¹¹¹—remains a mystery.

In the end, Madison's reform proposals reflect the conventional wisdom, both historical and legal. Madison's genius was to envision a national republic that implemented hard-earned lessons about separation of powers, including a legislature that would act upon and be elected by the American people directly. The overwhelming thrust of relevant evidence, scholarship, and the proposals themselves points to Madison's frustration, if not disgust, with the unreformed state governments of his day in matters both domestic and foreign.¹¹² By contrast there are hardly any materials showing that Madison's desire to ground national power on a representative foundation had anything to do with a desire to preserve the legislative involvement in foreign affairs. In theory such involvement would be less problematic on the national level, but so too would it be

110. *Rutgers v. Waddington* (N.Y. City Mayor's Ct. Aug. 27, 1784), reprinted in 1 *The Law Practice of Alexander Hamilton* 393 (Julius Goebel Jr. et al. eds., 1964) (construing New York Trespass Act in light of concerns about the law of nations and the Treaty of Paris of 1783).

111. See, e.g., *The Federalist* No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) ("Under the national government, treaties and articles of treaties, as well as the law of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent; and that, as well from the variety of independent courts and judges appointed by different and independent governments as from the different local laws and interests which may affect and influence them. The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot too much be commended."); *The Federalist* Nos. 78–83, at 465–510 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (extolling the federal judiciary generally). See also *infra* text accompanying notes 180–193 (discussing Hamilton's defense of self-executing treaties).

112. See James Madison, Proposed Amendment of Articles of Confederation, Mar. 12, 1781, in 3 *Madison Papers*, *supra* note 109, at 17 (allowing Congress to use its armed forces "to compel" delinquent states to "fulfill their federal engagements"); Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 *Madison Papers*, *supra* note 109, at 350–57; Rakove, *Original Meanings*, *supra* note 30, at 35–56; Wood, *American Republic*, *supra* note 40, at 467, 477; Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *Beyond Confederation: Origins of the Constitution and the American National Identity* 69, 73–77 (Richard Beeman et al. eds., 1987) (quoting letter from James Madison to Thomas Jefferson (Apr. 16, 1781)); Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *William & Mary Q.* 215, 217–226 (1979); *The Federalist* No. 10 (James Madison); McDonald, *Novus*, *supra* note 41, at 204–05; Morgan, *People*, *supra* note 40, at 267–77. For a nuanced and partially revisionist account, see Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 98–102 (1995) [hereinafter Banning, *Sacred Fire*].

less necessary, depending on the representative foundations of those who would make treaties. Just this was the resolution at Philadelphia.

IV. THE FEDERAL CONVENTION

Most writing about the Treaty Clause may have focused on the role of the Senate, but that does not mean that it has failed to address self-execution altogether. Jack Rakove, among the acknowledged authorities on the Founding, takes the doctrine as a given in declaring:

Whatever uncertainty might have persisted about the precise allocation of the authority to make treaties, the framers were virtually of one mind when it came to giving treaties the status of law. . . . The imperative need to make treaties legally binding on both the states and their citizens was widely recognized by 1787. The major consequence of this perception was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts.¹¹³

Rakove's observation follows directly from current historical understandings. The available evidence and resulting interpretations indicate almost with one voice that the delegates at the Federal Convention battled long and hard over who would make treaties precisely because they realized that self-execution, the solution to state recalcitrance, made the stakes so high. These battles were driven by divergent concerns: loathing of the states, whose interests were to be safeguarded in the Senate, and fear of the proposed office of Chief Executive, which came to possess a leading treaty-making role. By contrast, "Globalism" asserts that Convention debates reveal a central concern over the "traditional" legislative role regarding treaties ostensibly exercised by Parliament and the state legislatures. Professor Yoo's otherwise nuanced analysis of the well-worn sources offers little to verify his reading. Like a ship that steered wrongly by one degree early in its course, his interpretation shows the problems that can arise when reviewing sources in light of previous debatable conclusions.

However novel his gloss, Yoo narrates the drama in several familiar acts. The first episode runs from May through mid-July as the delegates discuss the Virginia Plan, which provided for a proportionally-elected bicameral national legislature that would in turn select a true national executive and judiciary. Here the account makes no apparent claims for non-self-execution other than, perhaps, to note that the Convention extended Madison's famous legislative negative on state legislation in order to protect treaties, and to observe that disunity reigned as to whether the foreign affairs power should be treated as executive or legislative. The next phase occurs during the third week of July, as the small states counterattacked with the New Jersey Plan, which eventually resulted in equal state

113. Rakove, *Constitutional Puzzle*, *supra* note 44, at 264.

suffrage in the Senate. "Globalism" characterizes these developments as supplanting Madison's vision and leaving in its place the "Hamilton-Jay" approach of relying on state courts to enforce Federal treaties. Finally, the Madisonian approach came back into its own as the summer drew to a close. In the debates over the Treaty Clause proper, the forces of popular sovereignty failed in certain initiatives, but succeeded in assigning a treaty-making function to the President as well as preserving a key treaty-making role for the House through its power over domestic legislation.¹¹⁴

Professor Yoo's rendition of the Virginia Plan, which makes few novel claims, raises few red flags. Then and now observers have taken the series of proposals as the embodiment of Madison's scheme to create a truly national government with a proportional legislature as its centerpiece.¹¹⁵ If anything, the article seems to lose its characteristic grasp of detail by according too much credit to Randolph, whom most historians view more as Madison's front man than as an original thinker in his own right.¹¹⁶

That said, "Globalism" does emphasize some specific points at the expense of larger ones, as if to set the stage for the later acts. The Virginia Plan's robust nationalism, as reflected in the proposed veto of state legislation, clearly follows in no small part from Madison's disgust with the state assemblies, including their destructive role in foreign policy. Conversely, nowhere is there evidence that the proposals reflected a concern for carrying over legislative checks on foreign policy that the states, or Parliament, previously exercised. To his credit, Yoo makes no such argument at this stage, though a careless reader may make the inference. More seriously, the article claims that the delegates viewed treaty-making as an executive function devolved from the Crown that required checking. Not only do the debates fail to support this argument, they instead dramatically show that disagreement continued to dominate American separation-of-powers analysis, nowhere more so than in foreign affairs. Ironically, "Globalism" notes exactly this, but fails to acknowledge its significance.¹¹⁷

Matters do not really start to go awry until the next stage. The New Jersey Plan episode suggests only that those Framers most concerned with chronic treaty violations sought a national solution, not that they believed such a solution necessarily entailed a legislative role for treaty enforcement. Still less does the New Jersey Plan indicate a considered view that the only alternative to national legislative enforcement would be judicial

114. See Yoo, *Globalism*, *supra* note 10, at 2040.

115. See Morgan, *People*, *supra* note 40, at 270–74; Morris, *Union*, *supra* note 30, at 275–76; Rakove, *Original Meanings*, *supra* note 30, at 59–63.

116. Randolph's primary contribution was to offer his prestige as Governor of Virginia (and as a Randolph) in proposing a plan conceived by Madison. See Morris, *Union*, *supra* note 30, at 271–72.

117. See Yoo, *Globalism*, *supra* note 10, at 1981.

enforcement by state, rather than national, courts. It would come as no small surprise to Hamilton and Jay to read that the New Jersey Plan put forward “their” remedy for the treaty problem. In reality, William Paterson’s state-oriented counter to the Virginia proposals undercut nearly everything towards which Hamilton, Jay, and Madison were working. By 1787, all of these reformers had committed to the enforcement of treaties, and national policy more generally, in the context of a strong national government that would operate directly on its citizens.¹¹⁸ Before June was out Hamilton in particular would famously articulate a vision that was so nationalist—and not incidentally, sufficiently indifferent to representative principles—that it nearly left the Convention speechless.¹¹⁹

In this context, Madison’s idiosyncratic legislative negative on state laws simply offered a novel means for the national enforcement of national interests that led each of these men to abandon the Articles in the first place. For his part, Madison favored his innovation for many reasons, but mainly for its anticipated effectiveness.¹²⁰ Conversely, there is not the slightest indication that Madison favored the idea out of a desire to elevate the state legislatures’ purported foreign policy role to the federal level. Nor is there any indication of a belief that the legislative negative precluded judicial enforcement.¹²¹ To the contrary, three of the five delegates who spoke during the debate on the negative—Madison, Gouverneur Morris, and Roger Sherman—expressly assumed that the national judiciary would have the power to set aside state laws that violated the proposed constitution or treaties; nor did the two others contradict

118. See Forrest McDonald, *Alexander Hamilton: A Biography* 95–115 (1979); Richard B. Morris, *John Jay: The Nation and the Court* 25–37 (1967).

119. See 1 Farrand, *Records*, *supra* note 109, at 282–301; Rossiter, *supra* note 40, at 178. .

120. Madison “considered the negative on the laws of the States as essential to the efficacy & security of the Genl. Govt.” 2 *id.* at 27. Madison stewed over this point long after the Convention rejected his legislative negative. As he later wrote to Jefferson,

A Constitutional negative on the laws of the States seems equally necessary to secure individuals against encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 *The Republic of Letters: The Correspondence between Jefferson and Madison 1776–1826*, at 500 (James Morton Smith ed., 1995).

121. The Virginia Plan hints at this in proposing that the national judiciary’s jurisdiction extend to “questions which may involve national peace and harmony.” 1 Farrand, *Records*, *supra* note 109, at 21–22.

this assumption.¹²² Not surprisingly, when Madison's idea went down in defeat, the Supremacy Clause, which expressly stipulated judicial enforcement by the state courts and implicitly did the same with regard to the national judiciary, immediately followed as the best remaining solution.¹²³

With the final chapter, however, "Globalism" at last turns the evidence on its head. Yoo correctly observes that the transformation of the Senate, which was the New Jersey Plan's chief legacy, profoundly affected the delegate's conception of the body's foreign affairs role. He is also clearly correct that the change in the Senate prompted repeated efforts to inject a more popular element into treaty-making, though the statements on point emphasize suspicion of the states and the Senate far more than they extol popular majoritarianism.¹²⁴ Finally, the account makes clear that the President assumed a central role in treaty-making, in part because other developments had worked to make that office, rather than the Senate, the representative of the people. Yet as Professor Rakove indicates, the machinations over who would make treaties assumed importance in large part because the delegates themselves already presupposed that treaties would operate as law of their own force without implementing legislation.

Professor Yoo's recitation serves only to confirm this conclusion, especially when considered with evidence that has been left out. Ordinarily it might seem that the two failed attempts to involve the House in the treaty-making process would not only resolve that issue, but would confirm the supposition that the delegates believed that treaties would be self-executing. To specify one mode for making treaties that omitted the House,¹²⁵ only to accord the House the ability to block the implementation of that treaty domestically, would have been—and would still be—a formula for exactly the type of popular yet chronic treaty violations that led the Framers to Philadelphia in the first place.

But we do not need to rely on inference. On August 23, before addressing who would make treaties, Gouverneur Morris made clear what he thought treaties would do. Noting that the current draft of the Consti-

122. "Mr. L. Martin considered the power as improper & inadmissible. Shall all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate? . . . Mr. Pinkney urged the necessity of the Negative." 2 id. at 27–28.

123. See 2 id. at 28–29.

124. In particular, Madison, who was troubled by the Senate's retreat from majoritarianism, grew further disenchanted with the the body's new composition on the ground that the northern states would dominate to the detriment of the regional interests of the South. See Banning, *Sacred Fire*, supra note 112, at 168.

125. When Morris made his proposal, the power to make treaties lay exclusively with the Senate. See 1 Farrand, *Records*, supra note 109, at 392. When Wilson attempted to involve the House, the treaty-making power had been allocated to the President with the advice and consent of two thirds of the Senate. See 1 id. at 538.

tution accorded Congress an enumerated power “to enforce treaties,”¹²⁶ “Morris moved to strike the following words out of the 18 clause ‘enforce treaties’ as being superfluous *since treaties were to be ‘laws’* which was agreed to nem: contrad.”¹²⁷ Only then does Morris move on to propose that both Houses of Congress ratify treaties before they would be deemed binding on the United States. A similar scene played out on September 7. Undaunted by the fate of the Morris proposal, James Wilson also moved that the House join the Senate for treaty-making purposes. His rationale related the need for greater popular input to self-execution even more directly: “*As treaties . . . are to have the operation of laws, they ought to have the sanction of laws also.*”¹²⁸

Two of the men most concerned about popular control of treaties, in short, each declared his assumption that treaties would be self-executing on the same day they sought additional popular control. “Globalism” attempts to minimize at least Wilson’s statement by asserting that the delegates did not focus on the issue of self-execution.¹²⁹ But in fact they did. The Convention in effect unanimously endorsed the view that the two Framers held when it adopted Morris’s suggestion that giving Congress the power to “enforce treaties” was “superfluous[,] since treaties were to be ‘laws.’”¹³⁰ Nor is there any indication that “laws” in this context was understood in any but its usual sense, which includes enforcement in courts.¹³¹

126. 2 id. at 182. The provision to which Morris referred at the time provided that Congress would have the power: “To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.” Id.

127. 2 id. at 389–90 (emphasis added) (double ellipsis in original).

128. 2 id. at 538 (emphasis added).

129. See Yoo, *Globalism*, supra note 10, at 2036.

130. 2 Farrand, *Records*, supra note 109, at 390.

131. Sometimes it is better to simply acknowledge the existence of contrary evidence and move on than to venture credibility by attempting to minimize the evidence in strained ways. Professor Yoo’s Rejoinder tries to sidestep the Morris amendment in several ways. First, he interprets the motion as “stylistic” since the record shows no debate, in contrast to the lengthy debate over the “substantive” efforts of Madison and Wilson to involve the House in treaty-making. Yoo, *Treaties and Public Lawmaking*, supra note 19, at 2231 n.48. Whether the amendment was stylistic or substantive is beside the point. However characterized, it expressly reflected the understanding that treaties would be on the same footing as laws. That it was passed unanimously and without apparent debate can only mean, at least on any fair reading, that this understanding was generally shared. By contrast, Wilson and Madison’s efforts to involve the House produced debate, and went down to defeat, precisely because they were controversial.

Next, the Rejoinder argues that since the Morris amendment sought to amend not the Treaty or Supremacy Clauses, but was instead tied to a provision calling out the militia, the motion somehow “underscored the Framers’ belief that the political branches, particularly Congress, would be responsible for treaty implementation.” Id. A close, even not so close, reading of the clause that Morris altered instead demonstrates that treaties and federal laws would be treated on exactly the same footing. The clause in question provided that congressional authorization would be necessary before resorting to the extreme measure of calling out the militia for certain specified purposes. The first purpose for which Congress could call out the militia was “to execute the laws.” 2 Farrand, *Records*, supra

All of this resonates perfectly well with what we know of the ideas, events, and context that brought the Framers to this point. Constitutionally-minded Americans celebrated, then necessarily abandoned, the dominant English mixed-government conceptions under which they lived upon independence.¹³² Their initial experiments in republican government yielded representative frameworks dominated by legislatures, which soon produced unforeseen results. Among the most important of these was state-government recalcitrance that produced repeated violations of critical international obligations that the new nation had made. This state of affairs led the country's most original thinkers to seek a stronger national government that would feature separation-of-powers principles that had been ignored in fashioning the existing national government, including an enhanced executive and judiciary. It follows from these general developments that the Framers would allow for judicially enforceable treaties made by a strong, yet representative, President and a supermajority of a Senate that, however beholden to the states, nonetheless constitutes the upper chamber of the national legislature.¹³³

That said, much else in Professor Yoo's treatment remains convincing and valuable. Most tellingly, it offers a rigorous and nuanced account of how suspicion of the state-oriented Senate helped clear the way for the treaty-making role of the Chief Executive, who could plausibly be held out as a national representative once the Convention solved the thorny issue of presidential selection.¹³⁴ Yet in a larger context, even these well-told developments undercut Yoo's central thesis. The Convention's final scheme signaled that the President's newly representative character suf-

note 109, at 182. Morris moved to strike the phrase immediately following, to "enforce treaties," as superfluous on the grounds that treaties were to operate as laws. *Id.* The only plausible interpretation of this change is that Morris, and the delegates who approved the motion, agreed that federal laws and treaties were to have the same status, just as the Supremacy Clause already stated. See *id.* at 183.

Finally, the Rejoinder contends that "[c]ertainly other Framers later did not find Morris's amendment to be as significant as Flaherty does," then cites to Washington's failure to mention it during the Jay Treaty controversy of 1786. Yoo, *Treaties and Public Lawmaking*, *supra* note 19, at 2131 n.48. It would take too much space to unpack the weaknesses of this argument. Suffice it to say that it rests upon the speculative enterprise of negative inference, and that much more likely explanations for Washington's "failure" are available, including the fairly obvious point that the debates over the Wilson and Madison proposals were more relevant to the power of the House to review treaty negotiations, which was the issue confronting Washington. For the record, the first President took the position, based on original understanding, that treaties were self-executing. See Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* 156–57 (1999).

132. The most celebrated exception in this regard was John Adams, who clung to mixed-government conceptions long after fellow constitutional thinkers in America moved onward. See Wood, *American Republic*, *supra* note 40, at 567–92.

133. For a useful account demonstrating that the Senate was not seen solely as an assembly of state sovereigns, see Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. Rev. 1, 26–34 (1996).

134. See Yoo, *Globalism*, *supra* note 10, at 2032–37.

ficed to allay the delegates' concerns about a popular check on the Senate, which retained some representative aspects itself, however muted. It also rendered parallels to the hereditary British monarchy, or the indirectly elected Continental Congress, largely beside the point, even assuming a problematically anachronistic separation-of-powers analysis.

When the delegates left Philadelphia, they put before the nation a document that declared treaties would be "the supreme Law of the Land."¹³⁵ This language in turn reflected express statements, and at least one vote, that declared treaties would be "law." This position in turn reflected imperatives that made enforcing treaties as law appear both necessary and consistent with the rapid constitutional developments of the period. Not for nothing have leading American historians assumed that "the framers were virtually of one mind" in making this proposal.¹³⁶

V. THE RATIFICATION DEBATES

Confronted with this "one mind," the last, best hope for any interpretation pointing toward non-self-execution becomes the ratification debates. This hope becomes especially pressing given that what writing there is tends to indicate that the ratifying conventions, whether consciously or not, arrived at the same position adopted by the drafters in Philadelphia.¹³⁷ Only if it can be shown fairly clearly that ratification somehow transformed the Framers' original understanding of the Constitution's seemingly plain provisions on treaties can the non-self-execution thesis prevail even as a matter of history. In theory this hope is not idle. Professor Yoo is correct to note that scholarship in this area has yet to do justice to the ratification debates.¹³⁸ He might have added that original¹³⁹ and modern¹⁴⁰ understandings of interpretive authority privilege

135. U.S. Const. art. VI, § 2.

136. Rakove, *Constitutional Puzzle*, *supra* note 44, at 264.

137. See Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 *Seton Hall L. Rev.* 527, 574–60 (1974); Rakove, *Constitutional Puzzle*, *supra* note 44, at 250–57; Vázquez, *Treaty-Based Rights*, *supra* note 6, at 1097–1110.

138. See Yoo, *Globalism*, *supra* note 10, at 2040.

139. Madison, among others, famously articulated this view. See 5 *Annals of Cong.* 774–76 (1796) (statement of James Madison) ("If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution."); see generally Rakove, *Original Meanings*, *supra* note 30, at 352–53, 362–64 (discussing Madison's reliance, in constitutional interpretation, on published records of state ratification debates); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *Const. Commentary* 77, 79–111 (1988) (discussing early attitudes towards ratifiers' intent, including Madison's).

140. See, e.g., Bruce Ackerman, *I We the People: Foundations* 165–86, 266–67 (1991) (focusing on ratification materials to derive constitutional meaning); Lofgren, *supra* note 139, at 77–79; (arguing that the ratification debates carry more weight than the Philadelphia Convention for the purposes of original intent); Henry P. Monaghan, *Our*

the public ratification debates over the closed proceedings of the Convention.

Generally speaking, the ratification debates did not produce the type of transformation that Yoo's thesis needs. Instead, the process tended to confirm the terms of the debate evident at the Convention, with Antifederalists overstating what the Constitution would do in often hysterical or contradictory ways and Federalists understating its impact.¹⁴¹ When the Constitution's more moderate opponents felt they had not received sufficient assurance, they soon hit on the device of recommending amendments to be taken up once the new government was in place.¹⁴²

Though impressively researched, Professor Yoo's detailed reconstruction of the several most important debates does not demonstrate that the issue of treaties broke this pattern. If anything, the debates demonstrate that the Antifederalists had put the nation on notice about the consequence of self-executing treaties and that the requisite majorities of We the People ratified the proposal anyway. The evidence fails to show anything like a consensus, or even a widely held view, that treaties would operate in any way other than as laws in the way the Convention had understood when Morris made his August 23 proposal, and still less in a manner different from what "was understood by the convention in framing it, and by the people in adopting it."¹⁴³

Professor Yoo's alternative thesis covers a great deal of ground with sophistication and dash. At its heart, however, is a thrice-told tale that begins with a survey of the principal Antifederalist objections to the treaty power. Skeptics believed that the Constitution violated the separation of powers by according both the President and Senate a share of treaty-making authority, which was either wholly executive or legislative. The opposition also pointed out that the treaty-making power appeared unlimited in a way that the carefully enumerated powers of Congress were not. Finally, the Constitution rejected the "Anglo-American" distinction between treaties and domestic legislation in depriving the House of a direct checking function. Faced with these weighty objections, Federalists backtracked first in Pennsylvania, again in New York, and once more in Virginia. In each instance, the Constitution's supporters so downplayed the Supremacy Clause that the treaty power could be popularly understood as having two tracks. As ratified, the Constitution meant that treaties could be enforced either of their own force or through legislation, with the document leaving "open for future Presidents and Congresses the deci-

Perfect Constitution, 56 N.Y.U. L. Rev. 353, 375 n.130 (1981) (accepting weight of ratifiers' intent but deferring to Framers' intent for practical reasons).

141. See Rakove, *Original Meanings*, *supra* note 30, at 131–60.

142. This practice arose during the Massachusetts Ratifying Convention, which would not have ratified the Constitution without recommended amendments. Of the seven remaining conventions, only Maryland's failed to adopt the device thereafter. See Morris, *Union*, *supra* note 30, at 303–05.

143. Rakove, *Original Meanings*, *supra* note 30, at 135.

sion whether to choose between these two approaches to treaty enforcement.”¹⁴⁴

A. *The Self-Execution Assumption*

“Globalism” faithfully reports the initial Antifederalist objections to the treaty power, but resists the plain conclusion that nearly everyone who addressed the matter assumed that treaties would be self-executing. As Yoo notes, the influential George Mason made this point expressly, which is more striking when quoted in full:

By declaring all treaties supreme laws of the land, the Executive and the Senate have, in many cases, an exclusive power of legislation; which might have been avoided, by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety.¹⁴⁵

Other prominent Antifederalists made the obvious assumption even plainer. New York’s Brutus, for example, observed that “I can 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 have rights or privileges secured by treaty, will have aid of the courts of law, in recovering them.*”¹⁴⁶ Brutus made this observation as a predicate to criticizing the Constitution for apparently granting the courts equitable power under treaties.¹⁴⁷ But for present purposes it is the predicate that matters.

Whatever else they did, general Federalist defenses to these general objections proceeded on exactly the same premise. Directly responding to Mason, James Iredell, the future Supreme Court Justice, echoed Hamilton and Jay in arguing that treaties by nature had to be self-executing:

Did not Congress very lately unanimously resolve in adopting the very sensible letter of Mr. Jay, that a treaty when once made pursuant to the sovereign authority, *ex vi termini* became immediately the law of the land? It seems to result unavoidably from the nature of the thing, that when the constitutional right to

144. Yoo, *Globalism*, supra note 10, at 2040.

145. George Mason, *Objections to the Constitution* (Oct. 7, 1787), reprinted in 13 *The Documentary History of the Ratification of the Constitution* 346, 350 (John P. Kaminski & Gaspare J. Saldino eds., 1983) [hereinafter *Documentary History*]; Yoo, *Globalism*, supra note 10, at 2042.

146. “Brutus” XIII, *The Judicial Power: Can an Individual Sue a State?* (N.Y.J., Feb. 21, 1788), reprinted in 2 *The Debate on the Constitution* 222 (Bernard Bailyn ed., 1993) [hereinafter *Debate*] (emphasis added).

147. In making this criticism, Brutus again emphasized that treaties would provide judicially enforceable rights without reference to implementing legislation:

But I do not understand, what is meant by equity arising under a treaty. *I presume every right which can be claimed under a treaty, must be claimed by virtue of some article or clause contained in it, which gives the right in plain and obvious words; or at least, I conceive, that the rules for explaining treaties, are so well ascertained, that there is no need of having recourse to an equitable construction.*

Id. at 222–23 (emphasis added).

make treaties is exercised, the treaty so made should be binding upon those who delegated authority for that purpose.¹⁴⁸

Then, alluding to the problem that helped lead to the new Constitution, Iredell asked, "If it was not, what foreign power would trust us?"¹⁴⁹

These and other statements make clear that the Convention's understanding that treaties would be presumptively self-executing extended into the ratification process. They also make it that much less likely that it changed. Popular objections to the proposed treaty-making scheme would have had to have been so widespread, and Federalist backtracking so clear and consistent, that only then could it be said that treaties "as supreme law of the land" came to mean something different from the initial understanding.

B. *Pennsylvania*

Such cannot be said for Pennsylvania, and this is in many ways the arena which provides the non-self-execution thesis its best evidence. "Globalism" properly notes that Pennsylvania merits close attention for its importance, its symbolism, and its role as the first convention at which the Constitution faced significant opposition.¹⁵⁰ The state's Antifederalists, moreover, clearly made an issue of Article II's treaty-making scheme on several grounds. They indeed feared the concentration of treaty-making authority in the President and the Senate.¹⁵¹ Some also went further to decry the mixing of the "executive" power to make treaties with the "legislative" power to implement them, a violation of one fairly rigid understanding of the separation of powers that the Antifederalists deployed to criticize the Constitution generally.¹⁵² At least two went so far as to contrast this separation-of-powers violation with British practice on the understanding that royally-made treaty provisions required an Act of Parliament for domestic effect.¹⁵³ In each of these instances, Antifederalist fears again proceeded on the standard assumption that treaties would be self-executing.

148. "Marcus" (James Iredell), *A System of Government Which I Am Convinced Can Stand the Nicest Examination* (Norfolk & Portsmouth J., Mar. 5, 1788), reprinted in 1 *Debate*, supra note 146, at 383.

149. *Id.*

150. Yoo, *Globalism*, supra note 10, at 2043–44.

151. See *An Old Whig III* (Phila. *Indep. Gazetteer*, Oct. 20, 1787), reprinted in 13 *Documentary History*, supra note 145, at 426.

152. See *Speech by William Findley at the Pennsylvania Convention* (Dec. 3 1787), reprinted in 2 *Documentary History*, supra note 145, at 459.

153. See *An Old Whig* (Phila. *Indep. Gazetteer*, Oct. 20, 1787), reprinted in 13 *Documentary History*, supra note 145, at 426; *Speech by William Findley at the Pennsylvania Convention* (Dec. 3, 1787), reprinted in 2 *Documentary History*, supra note 145, at 459.

Were the Federalists forced to convince them otherwise?¹⁵⁴ This conclusion becomes plausible only by overreading evidence that is at best ambiguous compared to the express understanding that treaties would apply as laws. Consider, for example, the convention debate on December 3, 1787. Here Antifederalist William Findley suggested that the Treaty Clause departed from British practice in which the king made treaties ministerially and the legislature confirmed them.¹⁵⁵ But Federalist Timothy Pickering in no way retreated to argue that treaties under the Constitution would not have the force of law. Rather, he merely contended that treaties are not part of the executive power. This observation did nothing more than parry Findley's separation-of-powers argument by suggesting that treaties were commonly understood as executive in nature.¹⁵⁶ Pickering at no point accepted the understanding of British law that Findley put forward. To the contrary, later in the same debate, he stated that "[i]n Great Britain treaties are obligatory."¹⁵⁷ Nor does any other delegate, even among Findley's allies, at least not without either significant qualification, confusion, or both.¹⁵⁸ As became clear as the ratification debates progressed, more learned legal minds would articulate a far different understanding of British doctrine.¹⁵⁹

All of which brings matters to James Wilson. Wilson furnishes one statement in particular that comes closer than any other made during any of the ratification debates to supporting the thesis that the Federalists retreated to a British position of non-self-execution. Coming from one of the most prominent Federalists, in the most important debate to date, the concession would be significant. The only problem is that Wilson simply did not make such a concession, and certainly not clearly. Instead, he defended the allocation of treaty-making authority on several bases, one of which was that the House could use its formal powers to influence treaty-making informally. That said, even his most important and detailed

154. At least for the Convention, it is challenging to conclude anything with a high degree of confidence. As "Globalism" partially indicates, the surviving records, even as pulled together in the Documentary History, are especially sketchy. See Yoo, *Globalism*, supra note 10, at 2046 n.423. Among other reasons, the Pennsylvania records suffer because the chief reporter for the debates, Thomas Lloyd, was undertrained, partisan, and would later suffer from excessive drinking. See Hutson, *Documentary Record*, supra note 37, at 20–23, 36–38.

155. Remarks by William Findley at the Pennsylvania Convention (Dec. 3, 1787), reprinted in 2 *Documentary History*, supra note 145, at 459.

156. Remarks by Timothy Pickering at the Pennsylvania Convention (Dec. 3, 1787), reprinted in 2 *Documentary History*, supra note 145, at 459.

157. 2 *id.* at 460.

158. John Smilie asserted that an Act of Parliament was "frequently" necessary for execution of a treaty. Remarks by John Smilie at the Pennsylvania Convention (Dec. 3, 1787), reprinted in 2 *Documentary History*, supra note 145, at 459. Robert Whitehill was even more tentative, asserting that British treaties did not bind the people "if unreasonable." Remarks by Robert Whitehill at the Pennsylvania Convention (Dec. 3, 1787), reprinted in 2 *Documentary History*, supra note 145, at 460.

159. See supra text accompanying notes 148–149 (describing Iredell's analysis).

statement is a study in ambiguity, perhaps intentionally so. That ambiguity stands for non-self-execution, however, only by projecting one of several understandings of separation of powers onto British practice, and then one of several understandings of British practice onto Wilson's words.

Wilson's initial remarks actually support self-execution rather than repudiate it. His famous State House speech suggests that the House would play an important yet informal role. The Senate, he declared, "in its legislative character . . . 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."¹⁶⁰ Nor did Wilson reverse field at the Convention. Here he again faced rigid separation-of-powers thinking, such as Antifederalist John Smilie's assertion that "[s]upreme laws cannot be made ministerially, but legislatively."¹⁶¹ By contrast, Wilson responded to this line of argument by stating that "[t]reaties in all countries have the force of laws."¹⁶² Both to make his meaning plain and refute Antifederalist misunderstanding of British doctrine, Wilson added a citation to "1st Blackstone [I, 252–57],"¹⁶³ which includes the *Commentaries*' sweeping declaration that treaties made by the sovereign are "binding upon the whole community . . . [which] no other power in the kingdom can legally delay, resist, or annul."¹⁶⁴ The pattern of leading Federalists responding to Antifederalists in exactly this way would be repeated in both New York and Virginia.¹⁶⁵

This leaves Wilson's most considered statement on treaties, which was delivered on December 11. Again defending the blending of powers in the Senate,¹⁶⁶ Wilson turned to the treaty-making framework by noting the President's checking function as "nearly the immediate representative of the people."¹⁶⁷ Then comes the critical statement in which Wilson

160. Remarks of James Wilson at a Public Meeting in Philadelphia (Oct. 6, 1787), in 13 *Documentary History*, supra note 145, at 341 (emphasis added).

161. Remarks of John Smilie at the Philadelphia Convention (Dec. 3, 1787), in 2 *Documentary History*, supra note 145, at 460. I am indebted to Professor Vázquez for alerting me to Smilie's remark. Given the common assumption about self-execution—as well as Smilie's own diffidence about the extent to which British doctrine may have been self-executing, see supra note 158—this statement may be read as simply pointing out that when the Senate and President made treaties as supreme law, they were acting in their legislative capacity.

162. Remarks of James Wilson at the Philadelphia Convention (Dec. 3, 1787), in 2 *Documentary History*, supra note 145, at 460.

163. *Id.*

164. Blackstone, *Commentaries*, supra note 68.

165. See infra Part IV.C, D.

166. See Remarks of James Wilson at a Public Meeting in Philadelphia (Oct. 6, 1787), in 13 *Documentary History*, supra note 145, at 341.

167. Remarks of James Wilson at the Pennsylvania Convention (Dec. 11, 1787), in 2 *Documentary History*, supra note 145, at 561.

ostensibly gives away the game. Since Yoo forces this passage to bear considerable weight,¹⁶⁸ it is best quoted at some length:

There is no doubt, sir, but under this Constitution, *treaties will become the supreme law of the land*; nor is there any doubt but the Senate and President possess the power of making them. But though *treaties are to have the force of laws*, they are in some important respects very different from *other acts of legislation*. In making laws, our own consent alone is necessary. In forming treaties, the concurrence of another power becomes necessary; treaties, sir, are truly contracts, or compacts, between the different states, nations, or princes, who find it convenient or necessary to enter into them. *Some gentlemen are of opinion, that the power of making treaties should have been placed in the legislature at large*; there are, however, reasons that operate with a great force on the other side.¹⁶⁹

A fair reading of the statement to this point would suggest that treaties will function as laws once the President and Senate have acted. Wilson affirmatively *said* they will be laws not one, or two, but three times, stating they will be “supreme law,” have “the force of laws,” and are equivalent to “legislation.” And while he stated that treaties will be “in some important respects very different from other acts of legislation,” he did not mean that they are but contracts between sovereign nations without the force of law that he had just repeatedly mentioned.

The point he instead sought to make goes to the safety of the process. The nation should not worry that treaties, which will have the force of laws, are made in this unusual way since a treaty must meet the additional requirement of receiving the assent of another sovereign nation. Wilson acknowledged that in an ideal world, an instrument having the force of law might be best placed in the entire legislature (otherwise, why make the proposal?). That is, after all, what he sought at the Federal Convention, where treaties had also been assumed to be self-executing. The good Federalist soldier, Wilson went on to point out that there were sound reasons for rejecting this notion, among them the need for diplomatic secrecy, reasons he proceeded to develop at some length.¹⁷⁰

After that digression, Wilson’s defense returned to the role that the House will most likely play.¹⁷¹ It is at this point that the hard work of understanding British practice paid dividends:

168. See Yoo, *Globalism*, *supra* note 10, at 2046–48.

169. Remarks of James Wilson of the Pennsylvania Convention (Dec. 11, 1787), in 2 *Documentary History*, *supra* note 145, at 562 (emphasis added).

170. Other reasons included: the difference between treaties, as international compacts, and simple laws, the expectation that treaty negotiations would typically outlast sessions of the national legislature, and—after considering the role of the House—that other state conventions would oppose diminishing the Senate’s power. See *id.* at 562–63.

171. As Professor Vázquez emphasizes, Wilson’s remarks about the House appear as predictions of institutional behavior rather than as strictures on the legal status of treaties. See Vázquez, *Laughing at Treaties*, *supra* note 17, at 2166 & nn. 47–48.

It well deserves to be remarked, that though the *House of Representatives possess no active part in making treaties*, yet their *legislative authority will be found to have strong restraining influence* upon both President and Senate. In England, if the king and his ministers find themselves, *during their negotiation*, to be embarrassed, because an existing law is not repealed, or a new law is not enacted, *they give notice to the legislature of their situation and inform them 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? Shall less prudence, less caution, less moderation take place *among those who negotiate treaties* for the United States, than among those who negotiate them for the other nations of the earth?¹⁷²

Wilson's first observation about the House is that it has no "active part" in treaty-making, but will have "strong restraining influence" through its legislative power. Based on his previous statements, this logically means that the House may deploy its authority to influence treaty-making informally. More specifically, the passage suggests that this influence will be exercised *ex ante*, to "restrain" treaties as they are being negotiated. This is the theme he pursues when he at last turns to England. Here he states that at times the king and his ministers will be "embarrassed" during treaty negotiations because the terms they seek to settle either conflict with a law or will require a law "before the treaty can operate." In such instances, they typically go to Parliament and "inform" it that it is necessary to either repeal an existing law or enact a new one, "before the treaty can operate." This could mean that treaties require implementing legislation, as Yoo indicates. Without more, this interpretation might well be compelling.

But Wilson's preceding statements, and the focus on timing, suggest a narrower reading. On this view, Wilson suggested no more than that when treaty-makers have reason to believe that the legislature will oppose a treaty obligation, they will not pursue the measure out of prudence without a tangible show of support. This practice would create little difficulty with regard to laws that needed to be made, typically funding measures. With regard to laws already on the books, treaty-makers would consult the legislature not because treaties would not subsequently be law, but because consciously concluding a treaty provision contrary to a statute would be neither prudent, cautious, nor moderate.¹⁷³ Against this of course is the phrase, "before the treaty can operate." In its favor, among other things, would be preserving the coherence of Wilson's argument taken as a whole.

Yet even assuming the broader reading, this latter part of Wilson's remarks cannot do the work that "Globalism" would have it perform. In

172. Remarks of James Wilson at the Pennsylvania Convention, (Dec. 11, 1787), in 2 Documental History, *supra* note 145, at 562–63.

173. See Vázquez, *Laughing at Treaties*, *supra* note 17, at 2166 n.49.

the whole of the ratification debates, Wilson's ambiguous and perhaps contradictory performance is as close as anyone comes to clearly stating that the House may prevent a treaty from "operating as law." Contrary to this passage are numerous express statements by both sides stating the opposite conclusion, repeated Federalist defenses that concentrate solely on such safeguards as the representative nature of the Presidency, as well as different and more elaborate analyses of British practice. Against this backdrop, as well as the more general story to this point, to take Pennsylvania as establishing that the Federalists contorted the Supremacy Clause to return to a contested British separation-of-powers baseline as a price for ratification would appear to be an overstatement.

C. *New York*

New Yorkers addressed the treaty power in greater depth than their countrymen in Pennsylvania. In part for this reason the ratification debates in New York both confirm and clarify the Federalist commitment to treaties as laws. Once again, Antifederalists' fears centered on who would make treaties largely because they understood that treaties would have domestic effect. Once more, Federalists responded by seeking to assure skeptics that any blending of powers in this area was irrelevant, the President and Senate would check one another, and that any democratic deficit in the process was offset by the representative qualities of the Senate and Presidency. When pressed, New York Federalists did acknowledge a role for the House based upon British analogies. That role, however, did not amount to a formal check based upon a non-self-execution option. Instead, Federalists did no more than intimate that the House of Representatives—as, on their understanding, the House of Commons—could play an informal role by withholding funds or refusing legislation for those treaties that called for affirmative steps by the respective nations.

Some Federalists did not even go this far. As "Globalism" observes, the most notable responses to the Constitution's opponents came primarily through *The Federalist* essays. Of these, the first number devoted entirely to the treaty power, though not the first important discussion of treaties, appeared in No. 64 by John Jay, which was not surprising given his diplomatic credentials.¹⁷⁴ Professor Yoo insightfully notes that Jay's defenses of treaty-making authority were fairly high-flying. Echoing older mixed-government conceptions, Jay extolled the Senate's almost aristocratic "abilities," "talents," and "virtue."¹⁷⁵ On a less old-fashioned note, he also sounded the standard theme about the need for diplomatic secrecy and dispatch precluding the House.¹⁷⁶

What "Globalism" fails to make entirely clear, however, is that Jay expressly premised his discussion on the understanding that treaties

174. See Yoo, *Globalism*, *supra* note 10, at 2049.

175. *The Federalist* No. 64, at 391–92 (John Jay) (Clinton Rossiter ed., 1961).

176. See *id.* at 392–93.

would be self-executing. Dismissing the separation-of-powers objection, Jay observed that not all binding legal norms came from the legislature, including “judgments of our courts, . . . the commissions constitutionally given by our governor,” as well as treaties.¹⁷⁷ It followed that treaties could properly “have the force of laws” even though they would come from the President and Senate.¹⁷⁸ In passing, Jay went on to reject another Antifederalist notion in suggesting that treaties could only be repealed or altered by the sovereign nations themselves rather than an American legislature.¹⁷⁹

Hamilton may have not gone down these byways, but he wrote nothing to suggest that he thought Jay’s views did not square with his own. Hamilton considered treaties, briefly, well before Jay, in the oft-cited *Federalist* No. 22.¹⁸⁰ Read in context—even read out of context—Hamilton’s remarks were exactly about treaties having direct domestic effect. He began by illustrating why scholars emphasize treaty enforcement as a principal theme leading to the Constitution. A crowning defect of the Articles of Confederation, he opined, is “the want of a judiciary power,” because “[l]aws are a dead letter without courts to expound and define their true meaning and operation.”¹⁸¹ The first example where this defect mattered was treaties. As he put it, “[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.”¹⁸² On this basis, he proceeded to extol the idea of a supreme court that would render uniform interpretations of treaties, as well as “all other laws,” throughout the republic. Hamilton, in other words, expressly stated that treaties must be self-executing to have any force at all. Coming from the man who, among other things, argued *Rutgers v. Waddington*, any other assumption would be astonishing.¹⁸³

Professor Yoo attempts to sidestep this clear declaration with the argument that Hamilton’s comments merely go to the lack of a national judicial power and that he does not refer to the proposed Constitution. Yet Hamilton specifically equated treaties with other judicially enforceable laws, the better to argue that lack of uniformity is a problem which is even worse in the treaty context. And while he did not refer to the pro-

177. *Id.* at 394.

178. *Id.*

179. See *id.*

180. See Jordan J. Paust, *Self-Executing Treaties*, 82 *Am. J. Int’l L.* 760, 762 (1988); Vázquez, *Treaty-Based Rights*, *supra* note 6, at 1109; Yoo, *Globalism*, *supra* note 10, at 1980–81, 2056–57.

181. *The Federalist* No. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

182. *Id.* (emphasis added).

183. *Rutgers v. Waddington* (N.Y. City Mayor’s Ct. Aug. 27, 1784), reprinted in 1 *The Law Practice of Alexander Hamilton* 393 (Julius Goebel Jr. et al. eds., 1964). *Rutgers* had established Hamilton as an advocate for the supremacy and justiciability of treaties even under the Articles of Confederation. See *supra* text accompanying notes 106–111.

posed Constitution by name, his reference to treaties "as part of the law of the land" would seem to echo the document in substance.

Lest there be any doubt, Hamilton made clear just what the pending Constitution would do when he returned to the treaty power in Federalist No. 69. In what should now sound like a Federalist *idée fixe*, Hamilton clearly stated that the Constitution would make treaties self-executing. Better still, he did this by rejecting what he believed were Antifederalist misunderstandings about British practice. On his view, the British monarch made self-executing treaties and so would the President and Congress, the main difference being that the American treaty-makers would be democratically accountable in the way the monarch was not.

Once again the critical text requires quotation at length. As if tutoring wayward law students in one of his main fields of expertise, Hamilton unpacked British doctrine in a way Wilson's cryptic comments did not:

The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But I believe this doctrine was never heard of until it was broached upon the present occasion. *Every jurist of that kingdom, and every other man acquainted with its Constitution knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction.*¹⁸⁴

Here Hamilton dropped a footnote—rare in *The Federalist*—citing Blackstone's discussion of treaties, which, among other things, states that a treaty "is binding on the whole community" since "in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul."¹⁸⁵ Hamilton then considered Parliament's role:

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

184. The Federalist No. 69, at 419–20 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added) (footnote omitted).

185. To be precise, Hamilton inserted a footnote stating, "*Vide* Blackstone's *Commentaries*, Vol I., p. 257" immediately after "Every jurist." *Id.* at 419. On the Blackstone passage, see *supra* text accompanying notes 68–70.

new provisions and precautions to the new state of things, to keep the machine from running into disorder.¹⁸⁶

In contrast to Antifederalist claims, Hamilton's views approximated the conclusions of English historians seen earlier: At best, Parliament from time to time asserted a power to confirm treaties; further assertions that treaties could only become law upon parliamentary implementation were novel; more traditional views saw Parliament's confirming statutes in the nature of declaratory acts making clear how treaties were to operate, rather than as a condition upon their operation. Interestingly, Hamilton here resisted making the common Federalist concession that the legislature could always use its revenue power to influence treaty-making, though no one at the time appears to have questioned this power.¹⁸⁷

Having established that British treaties were self-executing, Hamilton concluded by praising the Constitution's approach. Its superiority, however, derived from those who had the power to make self-executing treaties, rather than from an option not to make treaties self-executing. As Hamilton put it, "[i]n this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature."¹⁸⁸

Hamilton's comments in *Federalist No. 75* contradict this position only if misread. In this essay, Hamilton returned to the "trite topic of the intermixture of powers" as they relate to the President.¹⁸⁹ With regard to treaties, Hamilton noted that among the objections to the Constitution's treaty-making authority is the argument that "the House of Representatives ought to have been associated in the business."¹⁹⁰ Referring back to his lawyerly hubris, he prefaced his ensuing remarks by declaring: "As I flatter myself the observations made in a preceding number upon this part of the plan must have sufficed to place it, to a discerning eye, in a very favorable light, I shall here content myself with offering only some supplementary remarks."¹⁹¹

These "supplementary remarks" went to the proposition that "the union of the executive with the Senate, in the article of treaties, is no infringement" of the separation of powers.¹⁹² Rather than concede the blending, as did many Federalists, Hamilton remarkably denied it. He simply placed treaty-making in a category separate from either legislation or execution. Significantly, he observed that if older, more rigid concep-

186. The *Federalist* No. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

187. Perhaps not surprisingly, one of the most recent analyses of early uses of original intent fully accords with the straightforward reading of Hamilton offered here. See Lynch, *supra* note 131, at 148–49.

188. The *Federalist* No. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

189. The *Federalist* No. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

190. *Id.* at 450.

191. *Id.*

192. *Id.*

tions of the doctrine were applied, the "operation" of the treaty-making power "will be found to partake more of the legislative than of the executive character," presumably because treaties have the operation of laws, "though it does not seem strictly to fall within the definition of either of them."¹⁹³ Then comes the tricky passage:

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 employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It 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.¹⁹⁴

Did Hamilton really mean to say that treaties will not have the operation, force, effect, or any other synonym, of domestic laws and thus not be judicially enforceable?

In a word, no. In *Federalist No. 75*, treaty-making's quasi-legislative corollary, the understanding that treaties will be self-executing, was not on the table. Hamilton dealt with that problem in *Federalist No. 69*,¹⁹⁵ and again alluded to that position in characterizing the "operation" of the treaty-making power as primarily legislative. Here he, for the moment, left the subject of how compacts would operate at home to focus on what kind of power was at issue when sovereigns made agreements with each other. *This* aspect of the power—treaty-making as viewed in international law from the perspective of sovereigns—was what he characterized as neither legislation nor execution, but as an international contract that embodied aspects of both powers.

At this point, Hamilton moved beyond treaty-making proper and returned to treaty-making's corollaries:

The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; *while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation*

193. *Id.*

194. *Id.* at 450–51.

195. Hamilton reaffirmed that earlier performance, not without a touch of arrogance, with his brief preface to these supplementary remarks.

*of the whole or a portion of the legislative body in the office of making them.*¹⁹⁶

On one hand, making treaties points to the secrecy and dispatch associated with the executive. On the other, public trust and “the operation of treaties” point to the participation of “the whole” *or* “a portion of the legislative body in the office of making them.” The Constitution deftly reflects these realities by vesting the treatymaking power in the Chief Executive and in the Senate. Properly read, the passage expressly confirms the view that treaties are self-executing. To read it otherwise simply ignores the careful wording and structure of the argument. No less important, it would also simply make a hash of everything Hamilton had been fighting for in the previous ten years.

Madison did not dissent. *Federalist No. 53*, which Yoo proffers as further evidence against treaties as laws,¹⁹⁷ simply repeated what by that time was the standard Federalist reassurance that the House would necessarily play an informal foreign affairs role. Most of the essay has nothing to do with treaties at all; instead, it defended biennial elections in the House against the Antifederalist’s Old Whig charge that only annual elections can prevent tyranny.¹⁹⁸ Madison turned the charge on its head, arguing that less frequent elections will enable representatives to climb the higher learning curve of national policy. One segment of this curve is foreign affairs. In words that suggest something less than complete confidence in the House’s potential to master this area, Madison noted that a representative should be “acquainted” with the nation’s treaties and commercial policy, and in addition “ought not to be altogether ignorant of the law of nations.”¹⁹⁹ In Madison’s view, this knowledge would, in the first instance, come in handy when Congress acted under the foreign aspect of the Commerce Clause.

It would also be useful concerning treaties, even though the House would not immediately participate in treatymaking. “[Y]et,” he continued, “from the necessary connection between the several branches of public affairs, those particular branches [i.e. commerce and treaties with foreign nations] will frequently deserve attention in the ordinary course of legislation and will sometimes demand particular legislative sanction and co-operation.”²⁰⁰ Here Madison not only failed to suggest an alternative to self-executing treaties, he soft-pedalled the informal influence the House would exert. Representatives would often have to pay attention to foreign affairs in ordinary legislation and would at times be called upon to offer legislative confirmation of foreign policy measures with domestic

196. The Federalist No. 75, at 451 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

197. See Yoo, Globalism, *supra* note 10, at 2052.

198. See The Federalist No. 53, at 330–34 (James Madison) (Clinton Rossiter ed., 1961).

199. *Id.* at 334.

200. *Id.*

implications and to cooperate in foreign affairs generally. Though these remarks anticipate Hamilton's analysis of Parliament's powers, this is not to say Madison denied the possibility of more proactive House involvement. It is to say that such involvement would not take the form of some alternative treaty-making option in which agreements with foreign nations would be the law of the land only if the House approved.

It follows from all of this that the Antifederalists did not accept Federalist arguments that treaties would require House confirmation for the simple reason that the Federalists did not make this argument. As noted, Antifederalists typically assumed that treaties would be laws of the land. Out of that assumption sprang most of their fears concerning treaty-making. Many of these were from New York, including the influential Brutus, mentioned earlier. In this regard, the maligned Anti-Cincinnatus—on whom “internationalists” have relied and whom “Globalism” seeks to marginalize²⁰¹—is important not in and of himself, but as a representative voice.

That said, “Globalism” does make an important contribution by highlighting the views of the Federal Farmer.²⁰² Lengthy quotations are unnecessary to agree that this influential Antifederalist attempted to reign in the treaty power with an argument that the foreign aspect of the Commerce Clause meant that commercial treaties would have to be confirmed by the House *before* they could operate as domestic laws.²⁰³ The Federal Farmer supported this structural argument by contending that treaties of commerce did not require the secrecy that treaties of peace and alliance did.²⁰⁴ Yet wherever else he got it, the Federal Farmer clearly did not derive this argument from the Federalists. Neither Hamilton nor Jay distinguished commercial treaties from other kinds. Nor did they ever suggest that the need for secrecy failed to extend to commercial agreements. As with the thesis against self-execution generally, “Globalism” offers no convincing evidence that panicky Antifederalists, or the Federalists themselves, widely adopted an understanding that commercial treaties, much less any treaty falling within Congress's Article I powers, would not function as the supreme law of the land.

D. *Virginia*

Virginia generally followed New York's lead, though distinctive regional pressures did make the state's position more equivocal and complex.

As Professor Yoo points out, the ratification struggle in Virginia merits close attention. The state was vital; the vote was close; the combatants

201. See Yoo, *Globalism*, *supra* note 10, at 2057.

202. See *id.* at 2058.

203. See Letter from the Federal Farmer to the Republican XI (May 2, 1789), reprinted in 17 *Documentary History*, *supra* note 145, at 309–10.

204. See *id.*

were impressive; the debates were often profound. Yoo's careful treatment of the Jay-Gardoqui controversy, moreover, demonstrates how concern over the Mississippi gave Virginians additional and powerful reasons to fear abuse of the treaty power.²⁰⁵

Despite this, "Globalism" itself offers nothing to show that Virginia's Federalists abandoned their commitment to treaties as laws of the land that would be judicially enforceable without further action from the House. Other evidence, however, does suggest that some prominent Federalists did waver. In particular, Madison near the end of the Convention debates appears to have accepted the suggestion that the supremacy of treaties did not apply to existing Federal statutes, though he continued to stress that they would trump state law without House confirmation.²⁰⁶ Taken as a whole, the debates nonetheless indicate that Virginians continued to understand the treaty power as mandating self-execution generally. The final amendments that the Virginia Convention proposed confirm this impression.

For the most part Virginia repeated the pattern seen again and again in other states. The state's Antifederalists attacked the treaty-making process precisely because they believed that the international compacts that resulted would be self-executing. Federalists responded with their usual array of assurances: the representative nature of the President, the legislative character of the Senate, the denial or irrelevance of mixing powers in violation of Montesquieu. When pressed, Federalists added to this list the informal influence that the House would possess through the power of the purse and in instances in which treaties themselves required affirmative legislative measures.

Madison held to the standard Federalist line throughout most of the proceedings. In particular, in his well-known²⁰⁷ letter to George Nicholas, Madison addresses the treaty power at far greater length than in Federalist No. 53, and to an extent elaborates on the passing remarks he made for the New York readership. Once more, however, a careful review of the entire argument along with close attention to specific words belies any notion of a House trump of treaties as laws.

The first half of the letter sounds a favorite Madisonian theme that the stronger national government promised by the Constitution will benefit both Virginia and the West.²⁰⁸ Greater nationalism and better security for Western land purchasers will prompt greater Western migration,

205. See Yoo, *Globalism*, *supra* note 10, at 2011–13.

206. See Remarks by James Madison at the Virginia Convention (June 19, 1788), in 10 *Documentary History*, *supra* note 145, at 1395–36. See *infra* text accompanying notes 202–204.

207. Bernard Bailyn, for example, reprints the letter in his highly useful and accessible *Debate on the Constitution*. See 2 *Debate*, *supra* note 146, at 443.

208. See Banning, *Sacred Fire*, *supra* note 112, at 178–80, 253–61. See also *id.* at 54–55, 66–71 (examining the origins of Madison's commitment to a stronger national government to safeguard the interests of Virginia and settlement in the Southwest).

which in turn will make navigation on the Mississippi “an object of national concern.”²⁰⁹ Madison then devotes the second half of the letter to how the “form of the new system” will prevent any treaties that sacrifice U.S. interests in the river.²¹⁰ As an initial matter, he states that “[t]he present Congress possess[es] the same powers as to treaties, as will be possessed by the New Government,”²¹¹ by which Madison means the belief—shared by Madison, Hamilton, and Jay—that treaties under the Articles were legally self-executing. He then goes on at great length to demonstrate how the Constitution’s requirement of a two-thirds majority of senators present will more effectively protect Western interests than the Articles’ requirement of two-thirds of the entire Confederation Congress. After this, he more briefly recapitulates the usual Federalist point about the President as national representative.²¹²

Only after all this does Madison consider “the House of Reps. as another ob[s]tacle afforded by the new Constitution.”²¹³ Following Professor Yoo’s thesis, one might think that Madison would flesh out any direct role for the House with at least the care he devotes to the quorum requirement for Senate ratification. At the very least, there should be some reference to the useful British analogy. Madison’s comments, however, are brief. And while clear, they are clear in the opposite direction:

It is true that this branch is not of necessity to be consulted in the forming of Treaties. But as its approbation and co-operation may often be necessary in carrying treaties into full effect; and as the support of the Government and of the plans of the President & Senate *in general* must be drawn from the purse which they hold, the sentiments of this body cannot fail to have very great weight, *even when the body itself may have no constitutional authority*.²¹⁴

The formula should be familiar. The House will be able to influence the treaty-making process: first, in the case of treaties that themselves require affirmative legislation to be carried into “full effect” (such as, for example, the enactment of commercial regulations); second, when treaties will require expenditures; and third, through use of both legislative and revenue authority on policies that the Senate and President pursue in general. Mindful of the need to calm Virginian apprehensions, Madison went beyond Federalist No. 53 to stress that these indirect influences have great weight even when, as in the case of treaties, the “body itself may have no constitutional authority.” After making all this clear, Madison then went on to describe how the House’s superior representa-

209. Letter from James Madison to George Nicholas (May 17, 1788), in 11 Madison Papers, *supra* note 109, at 46.

210. *Id.*

211. *Id.*

212. See *id.* at 48.

213. *Id.* (alteration in original).

214. *Id.* (emphasis added).

tive character will further safeguard Western interests against any possible sectional sellout.

If there is any lingering doubt, look closely at the words in Madison's summary:

[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* [i.e., the authority] 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.²¹⁵

Treaties must be made by the authority of the Senate, and by the authority of the President, yet only under the influence of the House. Given these words, the text of the document Madison was defending, and the story so far, it would be hard to discern a repudiation of the central Federalist goal to make treaties operate as the supreme law of the land.

George Nicholas, for one, understood no such rejection. As instructed, Nicholas dutifully employed Madison's arguments at the convention three weeks later.²¹⁶ In general, Nicholas followed these arguments in faithful, if rambling, fashion. Where he embellished them, his elaborations supported self-execution. Where Madison alluded to Congress's power to make treaties as laws under the Articles, Nicholas stressed how the republic's failure to enforce its treaty obligations allowed the British to occupy the American posts on the frontier. Nicholas lamented that "[t]he violation of the treaty on our part, authorises this detention in some degree."²¹⁷ Fortunately, "[b]y this Constitution treaties will be the supreme law of the land. The adoption of it therefore is the only chance we have of getting the Western posts."²¹⁸ Though not a model of precision, Nicholas earlier indicated that that this chance follows not because self-execution is a new idea, but because the country will be strong enough to enforce it.²¹⁹

Turning to treaty-making, Nicholas again followed Madison to argue that "[t]here are checks in this Constitution which will render the navigation of the Mississippi safer than it was under the Confederation."²²⁰ After running through the two-thirds requirement and the Presidency, he segued to the House. Nicholas declared:

If [the President] deviates from his duty he is responsible to his constituents. 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. He

215. Id. at 49 (emphasis added).

216. See Remarks of George Nicholas at the Virginia Convention (June 10, 1788), in 9 Documentary History, supra note 145, at 1129–31.

217. Id. at 1129.

218. Id.

219. In his proceeding remarks, Nicholas asserted that the Constitution would afford the West "ample security, because the General Government can command the whole strength of the Union to protect, any particular part." Id.

220. Id. at 1130.

will be absolutely disqualified to hold any place of profit, honor, or trust, and liable to further punishment, if he has committed such high crimes, as are punishable at common law. From the summit of honor and esteem, he will be precipitated . . . to the lowest infamy and disgrace.²²¹

This analysis immediately precedes Nicholas's general explanation of the House's role concerning treaties. "Although," he summed up, "the Representatives have no immediate agency in treaties, yet from their influence in the Government, they will direct every thing. They will be a considerable check on the Senate and President."²²² Based on his own examples, the primary influences Nicholas seems to have had in mind are low esteem and, echoing Blackstone, impeachment.

Echoing Nicholas echoing himself, Madison took up the Mississippi issue on June 13. The greater part of his remarks focused upon the protections that would be afforded by the new two-thirds requirement in the Senate, the representative qualities of the President, elections, and a stronger national government.²²³ In all this the House got two and one-half general sentences. Madison declared that it "will have a material influence on the Government, and will be an additional security in this respect."²²⁴ This would help safeguard Mississippi navigation because eastern-oriented commercial policy "will have less influence in the new system, than in the old" thanks to the increasing clout of settlers in the west on the House and President.²²⁵ After again considering the President and House, Madison ended his discussion of the House's role by noting that, "[a]s far as the influence of the Representatives goes, it will also be in favor of this right [of American navigation on the Mississippi]."²²⁶ If a new conception of the House's role in treaties were truly to be a lynchpin for winning over wavering delegates concerned about the West, the Convention's swing voters might have expected somewhat more on the subject. They did not get it until a week later, and it was anything but novel.

In the meantime, they would hear Madison defend self-executing treaties and demolish Antifederalist misconceptions about British doctrine in the process. Responding to yet another vintage tirade from Patrick Henry, Madison stated that treaties do and must apply domestically. The only concession he made concerns treaties that would "dismember" a country, an idea that was gaining currency in the convention in view of the Mississippi issue, as well as in Britain in light of the recent and controversial assertions that the King could unilaterally surrender great chunks

221. *Id.* at 1130–31.

222. *Id.* at 1131.

223. See Remarks of James Madison at the Virginia Convention (June 13, 1788), in 10 *Documentary History*, *supra* note 145, at 1241–42.

224. *Id.* at 1241.

225. *Id.*

226. *Id.*

of the Empire without some sort of confirmation from Parliament.²²⁷ In Madison's voice:

The Honorable Gentleman [Patrick Henry], says he, has said we are making great innovations in extending the force of treaties. Are not treaties the law of the land in England? I will refer you to a book which is in every man's hand—Blackstone's Commentaries. It will inform you that treaties made by the King are to be the supreme law of the land. If they are to have *any* efficacy, they must be the law of the land: They are so in every country. He thinks that by the power of making treaties, the empire may be dismembered in time of peace. The King of Great-Britain has the power of making peace but he has no power of dismembering the empire, or alien[at]ing any part of it. Nay, the King of France has no right of alien[at]ing any part of his dominions, to any power whatsoever. The power of making treaties does not involve a right of dismembering the Union.²²⁸

Madison's observations on British doctrine did not prompt wide disagreement. The next day the faithful George Nicholas, who had apparently flipped through the book in every man's hand, rose to quote the passage from Blackstone that Madison had in mind (which not surprisingly was the same section on which Hamilton relied in *Federalist No. 69*). Here he not only read out Blackstone's remarks on treaties as "binding upon the whole community," he also cited the book's discussion of impeachment as the only formal check on treaty-making that British law afforded.²²⁹ Henry did later ask if the Treaty of Paris, ending the Revolution, had not been confirmed by Parliament,²³⁰ a point that did not go unchallenged.²³¹ Henry's principal reaction, however, was to press the Federalists on whether a British or American treaty could violate constitutional norms, a query that surprisingly did not receive a clear answer.²³² More strikingly, Edmund Randolph asserted his view that "neither the life, nor property of any citizen, nor the particular right of any State, can be affected by a treaty," because "treaties . . . are binding on the aggregate community in its political social capacity."²³³ No one else appears to have endorsed this view, which, among other things, would have made the

227. See *supra* text accompanying notes 63–67.

228. Remarks of James Madison at the Virginia Convention (June 18, 1788), in 10 *Documentary History*, *supra* note 145, at 1382.

229. Remarks of George Nicholas at the Virginia Convention (June 19, 1788), in 10 *Documentary History*, *supra* note 145, at 1388–89.

230. See Remarks of Patrick Henry at the Virginia Convention (June 19, 1788), in 10 *Documentary History*, *supra* note 145, at 1394–95.

231. See Remarks of Francis Corbin at the Virginia Convention (June 19, 1788), in 10 *Documentary History*, *supra* note 145, at 1397.

232. See Remarks of Patrick Henry at the Virginia Convention (June 19, 1788), in 10 *Documentary History*, *supra* note 145, at 1393–95 (Patrick Henry, June 19, 1788).

233. Remarks of Edmund Randolph at the Virginia Convention (June 18, 1788), in 10 *Documentary History*, *supra* note 145, at 1385.

1784 Treaty of Paris unenforceable insofar as it protected pre-war British debts.

Beyond the specifics of British doctrine, concern about self-executing treaties remained but continued to lack unity and failed to suggest any one position to which the Federalists could retreat—even if they deemed it necessary to do so. Despite assurances to the contrary, Patrick Henry continued to believe that the treaty power could trump not only existing laws, but the Constitution itself. Francis Corbin, perhaps picking up on the ideas of the Federal Farmer, implied that a “common treaty” might be able to cede navigation rights on the Mississippi under the Constitution, but would be void under international law, while a “a commercial treaty” would require “the consent of the House of Representatives . . . because of the correspondent alterations that must be made in the laws.”²³⁴ Whether many other delegates held this view is another matter. When Corbin a few days earlier suggested that “[i]n all commercial treaties it will be necessary to obtain the consent of the [House of] Representatives,” the convention notes remark: “Here a storm arose, which was so violent as to compel Mr. *Corbin* to desist, and the Committee to rise.”²³⁵

Madison’s final remarks of any length on treaties brought together the themes of self-execution and the anticipated role for the House. On the first topic, he asserted that self-executing treaties were not dangerous even when made by a king, since, in contrast to domestic affairs, a monarch’s interests with regard to a foreign power are his nation’s interests.²³⁶ Shortly after this discussion, Madison returned to the subject of the House. “Suppose,” he said, “there should be a violation of right by the exercise of [the treaty-making power] by the President and Senate; if there was apparent merit in it, it would be binding on the people.”²³⁷ “But should it happen,” he continued, “there is a remedy.”²³⁸ This remedy turns out to be impeachment. Moreover, Madison added, impeachment will be more effective in the United States than in Britain because here the President is subject to it whereas the King is not. And if this were not enough, there is “an additional security by adding to him the Representatives.”²³⁹ Aware that the Senate might be reluctant to convict

234. Remarks of Francis Corbin at the Virginia Convention (June 19, 1788), in 10 Documental History, supra note 145, at 1392–93.

235. Remarks of Francis Corbin at the Virginia Convention (June 13, 1788, in 10 Documental History, supra note 145, at 1256.

236. As Madison put it:

Would it not be considered as a dangerous principle in the British Government, were the King to have the same power in internal regulations, as he has in the external business of treaties? Yet, as among other reasons, it is natural to suppose he will prefer the interest of his own, to that of another country, it is thought proper to give him this external power of making treaties.

Remarks of James Madison at the Virginia Convention (June 19, 1788), in 10 Documental History, supra note 145, at 1396.

237. *Id.*

238. *Id.* at 1397.

239. *Id.*

a President when a part of that body participated “in his crimes,” Madison counters with a two-fold protection. Those Senators still not “seduced” will come to their senses. Those who do not will be replaced through elections.²⁴⁰

Without more, Madison’s views on treaties would have been indistinguishable from Hamilton’s, down to their mutual assessment of British doctrine. Yet history is seldom neat, and neither were Madison’s final remarks. Before moving from British practice to impeachment, Madison made a short digression concerning the scope that self-executing treaties would have. He did this in reference to earlier remarks by Francis Corbin. Corbin had stated:

But, say Gentlemen, all treaties made under this Constitution, are to be the supreme law of nations; that is, in their way of construction, paramount to the Constitution itself, and the laws of Congress. It is as clear, as that two and two make four, that the treaties made are to be binding on the States only.²⁴¹

Under this formulation, treaties would remain self-executing with regard to inconsistent state law, and apparently would be non-self-executing as federal law without implementing legislation. Treaties could not, however, trump the Constitution or subsequent federal statutes—the Supreme Court’s modern position—nor federal laws already on the books, the important wrinkle that departs from current doctrine. After introducing this idea, Corbin sounded the familiar theme of state frustration of treaty obligations, among other things asking, “For, if any one State could counteract any treaty, how could the United States avoid hostility with foreign nations?”²⁴²

Madison’s final speech cited Corbin as if the idea were novel, with apparent approval, or at least openness. As Madison put it:

I think the argument of the Gentleman [Francis Corbin] who restrained the supremacy of these [treaties] to the laws of particular States, and not to Congress, is rational. Here the supremacy of a treaty is contrasted with the supremacy of the laws of the States.—It cannot be otherwise supreme. If it does not supercede their existing laws, as far as they contravene its operation, it cannot be of any effect. To counteract it by the supremacy of the State laws, would bring on the Union the just charge of national perfidy, and involve us in war.²⁴³

Madison’s statement is potentially significant, yet neither is it clear nor free of contradictions. Whatever else, Madison’s endorsement of Corbin’s distinction, which he calls no more than “rational,” is luke-

240. See *id.*

241. Remarks of Francis Corbin at the Virginia Convention (June 19, 1788), in 10 *Documentary History*, *supra* note 145, at 1392.

242. *Id.*

243. Remarks of James Madison at the Virginia Convention (June 19, 1788), in 10 *Documentary History*, *supra* note 145, at 1396.

warm.²⁴⁴ Nor does it undercut self-execution, an idea he had just steadfastly defended in explaining British practice, with regard to state laws or matters in which no federal legislation presented a conflict. Nowhere previously did Madison articulate this limitation, nor did he do so afterward.²⁴⁵

Madison's limitation aside, the Convention's final stance on treaties indicates that the delegates continued to reject a formal role for the House. On June 27, the Virginia gathering, following Massachusetts's sample, adopted twenty recommended amendments. The seventh dealt with treaties, proposing:

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.²⁴⁶

Contrary to "Globalism," the proposed amendment more importantly confirms that the general assumption of self-execution still attached. As Professor Yoo notes, this proposal came from an earlier draft for conditional amendments written by George Mason that further provided for formal participation of the House in treaty-making.²⁴⁷ Where the Federal Convention had voted down similar proposals, Virginia Antifederalists dropped it by the time the Convention considered the amendments that it would recommend. Turning the event on its head, "Globalism" reads this omission as proof that this part of Mason's proposal was no longer necessary since the Federalists had agreed that something like British-style House confirmation would be required for treaties to have domestic effect.²⁴⁸

244. *Id.*

245. Relying on Madison's position during the Jay Treaty controversy, Professor Yoo's Rejoinder dramatically declares that he will "take Madison" over internationalist law scholars when it comes to the original understanding of self-execution. Yoo, *Treaties and Public Lawmaking*, *supra* note 19, at 2233. This makes for nice rhetoric, but care should be taken in determining which "Madison" to take, the Founder of 1787–1788, or the later politician who modified many of his ideas about constitutional power in the face of Hamilton's ascendancy in the new government. During the Jay Treaty dispute, Madison was widely—and accurately—criticized for repudiating the position that he and the Virginia ratifying convention took in support of self-execution, and in rejecting the idea that treaties covering matters falling into Congress's Article I powers would require implementing legislation. See Lynch, *supra* note 131, at 149–55.

246. Proposed Amendments Adopted by the Virginia Convention (June 27, 1788), in 10 *Documentary History*, *supra* note 145, at 1554.

247. See Yoo, *Globalism*, *supra* note 10, at 2060–61.

248. See *id.* at 2068 n.552.

But that is just what the Federalists did not concede. Madison and Nicholas resolutely defended self-execution, and literally brought in their copies of Blackstone to set the Antifederalists right about British doctrine, much as Hamilton had in New York. In the face of disjointed opposition, they instead emphasized the usual Federalist themes, stressing that the treatymaking process itself would be sufficiently difficult and representative that self-executing treaties need not be a concern.

The treaty amendment, as finally recommended, simply sought to extend these protections to the areas that concerned Virginians the most. Accordingly, they sought to make the Senate hurdle even more daunting with regard to commercial treaties by requiring for passage a two-thirds majority of the entire Senate rather than merely of those Senators who were present for the vote. Presumably, if the House could block the ill effects of a commercial treaty by simply refusing to confirm it, it would have been unnecessary to tighten this. Conversely, the delegates did agree on a House role in requiring the assent of three-fourths of both Houses for treaties that might cede navigation rights or other territorial claims. This could be read as seeking to give one-third of the House a veto on such treaties where a super-majority would be needed for confirmation. Yet based on the previous clause, the Convention's obsession with the Mississippi, and the Federalists' defense of self-execution in Britain and America, the better and only plausible reading is that, on this issue, Virginians were not going to take any chances.

E. *A Coda from North Carolina*

Although the North Carolina Convention may have been aberrant in many ways, there is no evidence that its view on the treaty power was one of them.²⁴⁹

Acknowledging that internationalist scholars have put North Carolina sources to good use,²⁵⁰ "Globalism" seeks to discount the state's relevance for reasons that are either immaterial or speculative. Professor Yoo asserts that the North Carolina debates did not occur until after the necessary nine states had ratified the Constitution,²⁵¹ but why this should matter is unclear: The same is true of New York. Moreover, when the first North Carolina Convention rejected the Constitution, they were unaware that New York—considered by almost all essential to any Union—had ratified.²⁵² More relevantly, he also suggests that North Carolinians initially rejected the Constitution in significant part because of the hard

249. See Yoo, *Globalism*, *supra* note 10, at 2069–70.

250. See *id.*; see, e.g., Bestor, *supra* note 137, at 618 n.319 (quoting a North Carolina delegate's view of the Senate ratification process).

251. See Yoo, *Globalism*, *supra* note 10, at 2070.

252. See Clinton Rossiter, 1787: The Grand Convention 294 (W.W. Norton 1987) (1966).

line Federalists took on the treaty power.²⁵³ This claim is plausible yet remains unsupported.

It also appears less likely once the arguments made in North Carolina are compared with those that went before. As at the Federal Convention, in Pennsylvania, New York, and Virginia Federalists and Antifederalists alike considered the Constitution's treaty power on the understanding that treaties would be judicially enforceable as laws of the land without direct House involvement. Precisely this assumption led Antifederalists to demand assurances that the President and Senate would not abuse this authority. The same premise forced Federalists, among other things, to distinguish the President from a king and highlight the two-thirds requirement. "Globalism" cannot dismiss Antifederalist statements that make this assumption clear because, on the Article's own terms, this violation of legislative principles both underpinned Antifederalist opposition and enabled them to force the Federalist retreat to British practice.²⁵⁴ By the same token, Professor Yoo's attempts to minimize Federalist assertions stand at variance with the thesis that the Constitution's supporters in North Carolina defended the treaty power so powerfully that this led to that state's initial failure to ratify.²⁵⁵

In an already overly long response, fully reconstructing the arguments that the leading delegates made may be too much of a good thing. For that reason, a final lengthy quotation by James Iredell, the future Supreme Court Justice and prominent Federalist, must suffice. In analysis seen before, Iredell demonstrates his belief that treaties will apply as laws and, in the process, educates his opponents about British practice:

A gentleman from New-Hanover has asked, whether it is not the practice in Great-Britain to submit treaties to Parliament, before they are esteemed valid. The King has the sole authority, by the laws of that country, to make treaties. After treaties are made, they are frequently discussed in the two Houses of Parliament; where, of late years, the most important measures of government have been narrowly examined. 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, considers it as binding without any act of Parliament, unless an alteration by such is provided for in the treaty itself, which I believe is sometimes the case.²⁵⁶

253. See Yoo, *Globalism*, supra note 10, at 2070.

254. See id. at 2070–74.

255. See id. at 2070.

256. James Iredell, on Impeachment: "It Must Be for an Error of the Heart, and Not of the Head" (July 28, 1788), in 2 *Debate*, supra note 146, at 885 (emphasis added).

After observing that Acts of Parliament had not been required even to alienate territory,²⁵⁷ Iredell then offers reassurances. These do include a role for the House, but only the familiar indirect role as guardian of the purse:

The honourable Member from Anson said, that the accumulation of all the different branches of power in the Senate, would be dangerous. The experience of other countries shews that this fear is without foundation. What is the Senate of Great Britain opposed to the House of Commons, although it be composed of an hereditary nobility, of vast fortunes, and entirely independent of the people? Their weight is far inferior to that of the Commons. Here is a strong instance of the accumulation of powers of the different branches of government without producing any inconvenience. That Senate, Sir, is a separate branch of the Legislature, is the great constitutional Council of the Crown, and decides on lives and fortunes in impeachments, besides being the ultimate tribunal for trying controversies respecting private rights. Would it not appear that all these things should render them more formidable than the other House? Yet the Commons have generally been able to carry every thing before them. The circumstance of their representing the great body of the people, alone gives them great weight. This weight has great authority added to it, by their possessing the right (a right given to the people's Representatives in Congress) of exclusively originating money bills. *The authority over money will do every thing* Our Representatives may at any time compel the Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to.²⁵⁸

If Iredell was idiosyncratic, so too were the Federalists further north who went before him.

CONCLUSION

Sometimes the conventional wisdom really is wise. Internationalist scholars who have assumed that the founding generation meant what it said in the Supremacy Clause have no reason to fear close historical scrutiny. What does not withstand such scrutiny is the revisionist account offered in "Globalism and the Constitution."

The long journey resists summary, but a summary may be useful nonetheless. Eighteenth-century thinkers on the topic tended to be vague, were not widely invoked in the treaty debates, or if they were—as in the case of Montesquieu—were as likely to be disavowed as applied. British practice, while affording Parliament the informal roles of discussing treaties, using the revenue power to influence foreign policy, and bringing commercial regulations in line when treaties so required, had only begun moving toward the modern doctrine of non-self-execution by

257. See *id.*

258. *Id.* at 885–86 (emphasis added).

the time of the Founding. The dominance of mixed-government conceptions during the Revolution further muted the development of a notion that either Parliament or local assemblies had a direct checking function on treaty-making. Americans during the Critical Period did not generally view the states as legislative checks to an executive Confederation Congress in treaty-making, but instead came to view state frustration of treaty obligations as a primary reason for reforming the national government. The Federal Convention clearly adopted treaties as judicially enforceable laws of the land as a central solution to this problem. The ratification debates reveal Antifederalist nervousness with this solution, yet this opposition was neither strong, united, nor sophisticated enough to force a Federalist retreat to a conception of British doctrine that the Federalists themselves pointed out was erroneous.

A Response such as this, which has already overstayed its welcome, must leave post-ratification developments to another day. Still, the history to this point does suggest certain presumptions. Most obviously, attitudes toward the treaty power would have had to have changed dramatically to read *Foster v. Neilson* in the manner Professor Yoo advocates. Such a change, moreover, would have had to have been sanctioned by John Marshall himself, a man whose jurisprudence seldom deviated from the Founding Federalists' "new science of politics" as reconstructed by modern scholars.²⁵⁹ For the moment, what can be said is that the original understanding of the treaty power comports perfectly well with the traditional understanding of *Foster*. Treaties may be judicially enforced as the law of the land without further action by the House. Treaties in which the sovereigns agree to take further affirmative action to implement their terms will require legislation taking such steps. Most treaties—especially those defining individual rights—would fall into the first category rather than the second.

Do the problems with Professor Yoo's revisionist thesis suggest that in the end scholarly rigor does not guard against historical missteps any better than history "lite"? The question is troubling for anyone who cares about using history as a source for insights beyond the law, rather than merely a tool for predetermined legal conclusion. Yet the answer must be no. On one hand, Professor Yoo's interpretation runs into difficulties in part because it fails to attend sufficiently to "substantive" historical standards, that is, the framework and broad outlines of the period that scholars have generally set forth. Among other things, this problem prompts the account to see too many developments through the lens of a fairly formal conception of the separation of powers. This viewpoint, in turn, causes the presentation to overlook evidence that directly contra-

259. To cite one example, Marshall's views on national popular sovereignty as expressed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403–04 (1819), fit closely with Federalist views on the subject as reconstructed by Gordon Wood. See Wood, *American Republic*, *supra* note 40, at 524–32.

dicts the thesis it seeks to advance and even to miss other developments, such as Madison's limitation of supremacy, that point the other way.

On the other hand, Professor Yoo's efforts still pay ample dividends in a way that "law office history" cannot. He has clearly recaptured an important, even if not dominant, democratic theme in the evolution of the treaty power. Paradoxically, his work also helps demonstrate that the Founding generation opted for treaties as law notwithstanding this theme. Perhaps most important of all, "Globalism" will surely put the subject back on the scholarly agenda.