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Congress, the Supremacy Clause, and the Implementation of Treaties

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Abstract

This Article intervenes in the self-execution debate by revisiting the early American understandings of treaty implementation in the decades before Foster. I first assess the significant materials from the founding era, some of which have never before been discussed in this context. I also critique the interpretations of other commentators who have been too quick to find support for a broad notion of self-execution in the historical materials. Although I conclude the founding generation generally assumed treaties would be law without congressional intervention, I emphasize that the ordinary story of consensus on these issues is inaccurate. Second, I analyze post-ratification controversies over these issues. The period between ratification and Foster saw sharp dispute about the scope of the treaty power and Supremacy Clause, particularly on issues the framers and ratifiers left unresolved. Contemporary accounts often ignore or minimize the importance of this period, which is unfortunate, because it complicates the history of treaty implementation in important ways. Third, this Article recovers an important aspect of the debate that contemporary scholars downplay: the role of Congress. Congress—and not the framers, ratifiers, or Supreme Court—most fully considered the problems of treaty implementation in this period.

CONGRESS, THE SUPREMACY CLAUSE, AND THE IMPLEMENTATION OF TREATIES

*John T. Parry**

I. INTRODUCTION

The President has power to make treaties with the advice and consent of two-thirds of the Senate.¹ Once made, the Supremacy Clause declares treaties “the supreme law of the land.”² One might therefore assume treaties have the same status in the U.S. legal system as federal statutes; once adopted, they operate as law for all relevant purposes. One scholar has even argued that “it is difficult to imagine that something shall be supreme federal ‘law of the land’ but not operate directly as ‘law’ except by believing in one of the most transparent of judicial delusions.”³

But the treaty power and Supremacy Clause are deceptively clear. The Constitution also vests Congress with the power to legislate in specific areas, such as the authority “to lay and collect taxes, duties, imposts and excises,” and “to regulate commerce with foreign nations.”⁴ Congress’s Article I powers risk colliding with the Article II powers of the President and Senate. What happens when a treaty purports to control a matter within the legislative jurisdiction of Congress? What if the treaty conflicts with an existing statute, or if a subsequent statute conflicts with an existing treaty?

In 1829, the Supreme Court gave a partial answer to these questions when it announced in *Foster v. Neilson* that treaties fall into two categories for judicial purposes:

* Professor of Law, Lewis & Clark Law School. I am grateful for the comments, thoughts, and assistance of Curtis Bradley, Jacob Katz Cogan, Neal Devins, Louis Fisher, Calvin Johnson, Martin Lederman, Jules Lobel, Pauline Maier, Michael Ramsey, Andrew Shankman, David Sloss, and Seth Barrett Tillman, as well as participants in the 2008 International Law in Domestic Courts Workshop at Temple Law School. Lynn Williams at Lewis & Clark’s Boley Law Library provided invaluable assistance with hard-to-find materials.

1. U.S. CONST., art. II, § 2, cl. 2.

2. *Id.*, art. VI, cl. 2.

3. JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 71 (2d ed. 2003).

4. U.S. CONST., art. I, § 8, cls. 1, 3.

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.⁵

This doctrinal statement means some treaty provisions go into effect as judicially enforceable law without implementing legislation, while other provisions require legislation. Further, some treaties may not be law for judicial purposes, but they may grant power directly to the executive branch without legislative intervention. That is to say, all treaties may be the supreme law of the land for the purpose of creating international legal obligations, but the precise domestic legal effect and status of their provisions—including their impact on existing law—is anything but uniform.⁶

In recent years, scholars have clashed over the best interpretation of *Foster*, including whether there should be a presumption for or against treaties having the status of judicially enforceable law—that is, as being self-executing.⁷ Although the weight

5. 27 U.S. (2 Pet.) 253, 314 (1829).

6. For general discussions, see Paul B. Stephan, III, *Open Doors*, 13 LEWIS & CLARK L. REV. 11 (2009); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

7. See generally Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999); Vasav Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006); Caleb Nelson, *The Treaty Power and Self-Execution: A Comment on Professor Woolhandler's Article*, 42 VA. J. INT'L L. 801 (2002); PAUST, *supra* note 3; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992) [hereinafter Vázquez, *Treaty-Based Rights and Remedies*]; Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter Vázquez, *Laughing at Treaties*]; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) [hereinafter Vázquez, *Treaties as Law of the Land*]; Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757 (2002); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism and the Constitution*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*]. A related debate concerns the interaction of the treaty power and federalism. See, e.g., Curtis A. Bradley, *The Treaty Power and Ameri-*

of scholarly assertion tends toward a presumption of self-execution as a matter of historical accuracy and normative desirability, the Supreme Court rejected this view last Term in *Medellin v. Texas*⁸ and came very close to establishing a presumption *against* self-execution.⁹ The Court declared a treaty is “of course, ‘primarily a compact between independent nations’” and “ordinarily ‘depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.’”¹⁰ “Only ‘[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment.’”¹¹ The text of the treaty is crucial. Courts must ask “whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”¹² In short, for the *Medellin* Court, treaties are a matter of international politics. Sometimes they also have a status similar to legislation, but only if the language of the treaty supports such an interpretation.¹³

This Article intervenes in the self-execution debate by revisiting the early American understandings of treaty implementation in the decades before *Foster*. I first assess the significant materials from the founding era, some of which have never before been discussed in this context. I also critique the interpretations of other commentators who have been too quick to find support for a broad notion of self-execution in the historical materials. Although I conclude the founding generation generally assumed treaties would be law without congressional intervention, I emphasize that the ordinary story of consensus on

can Federalism, 97 MICH. L. REV. 390 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

8. 128 S. Ct. 1346 (2008).

9. *Id.* at 1357.

10. *Id.* (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)).

11. *Id.* (quoting *Whitney v. Robinson*, 124 U.S. 190, 194 (1888)).

12. *Id.* at 1366.

13. The Court also said in a footnote that even when a treaty is self-executing, “the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’” *Id.* at 1357 n.3 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1986)). For some of the implications of this statement, see John T. Parry, *A Primer on Treaties and § 1983 after Medellin v. Texas*, 13 LEWIS & CLARK L. REV. 35 (2009).

these issues is inaccurate. On the issue of treaties and federalism, there was general agreement that the Supremacy Clause made treaties directly enforceable notwithstanding state law, including in judicial proceedings. The same was not true for separation of powers issues, however. The debates and discussions reveal not only a lack of consensus but also considerable confusion about how the treaty power, legislative powers, and Supremacy Clause would interact under the new Constitution.¹⁴

Second, I analyze post-ratification controversies over these issues. The period between ratification and *Foster* saw sharp dispute about the scope of the treaty power and Supremacy Clause, particularly on issues the framers and ratifiers left unresolved. Contemporary accounts often ignore or minimize the importance of this period, which is unfortunate, because it complicates the history of treaty implementation in important ways.¹⁵ Conflicts arose about neutrality, the extent of congressional discretion over appropriating funds to carry the Jay Treaty into effect, the extradition of Jonathan Robbins by the President and judiciary pursuant to the same treaty but without legislation, and the implementation of the 1815 commercial treaty with Great Britain. These controversies spurred arguments about nearly all aspects of treaty implementation at the federal level—not simply the issue of judicial enforcement. Indeed, to the extent the term “self-execution” has any relevance to these debates, it is less about judicial enforcement and more about the ability of treaties, first, to displace legislative power by creating legal rules or overriding existing federal statutes and, second, to grant power directly to the President.

Third, this Article recovers an important aspect of the debate that contemporary scholars downplay: the role of Congress. Congress—and not the framers, ratifiers, or Supreme Court—most fully considered the problems of treaty implementation in

14. Cf. Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 *PERSP. AM. HIST.* (N.S.) 233, 236 (1984) (“[I]n 1787 . . . the conduct of foreign relations was regarded as a problem more of federalism than of the separation of powers.”).

15. For a counter-example, see, e.g., David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 *ST. LOUIS U. L.J.* (forthcoming 2009). Other articles consider post-ratification events but do not focus on self-execution. See, e.g., Bradley, *supra* note 7; Golove, *supra* note 7; Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 *IND. L.J.* 319 (2005); Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 *VA. L. REV.* 1071 (1985).

this period. Extensive debates helped establish boundaries, crystallize issues, and clear the ground for the Court's subsequent decision in *Foster* and its adoption of the last-in-time rule for conflicts between treaties and federal statutes.¹⁶ Congress, in other words, played an important part in resolving ambiguity and developing constitutional doctrine—a role that went beyond “dialogue.”¹⁷

This expanded historical focus assists the unresolved debate over the law of treaty implementation. Originalist theories of constitutional interpretation have gained ground in recent years, but most scholars of constitutional law do not think the founding era provides the sole touchstone for constitutional meaning.¹⁸ Particularly for separation of powers doctrine, post-ratification historical practice is important.¹⁹ Moreover, the ambiguities of founding era history in this area mean that original understandings provide little traction for resolving many issues; other historical sources necessarily gain in stature.²⁰

Taken as a whole the historical materials tell a story of doctrinal development in response to changing circumstances and intense debate. Even for those who would look only to history, however, these materials mandate few solutions to issues of

16. For articles that recognize the historical link between self-execution and the last-in-time rule, see Ku, *supra* note 15, at 334-35; Lobel, *supra* note 15, at 1098 n.138; see generally Kesavan, *supra* note 7.

17. See, e.g., Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. REV. 1 (1990). To the extent treaties intersect with the scope of federal court jurisdiction—as with the Robbins extradition—my reference to theories of dialogue is more than suggestive.

18. For an overview of interpretive methods, see, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). For the resurgence of originalism in various hues, see, e.g., Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. Res. Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>. For exploration of the intersections between originalism and the law of foreign affairs, see, e.g., Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. (forthcoming 2009).

19. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

20. Thus, I strongly disagree with claims that post-ratification history is less important in this area. See Kesavan, *supra* note 7, at 1593; Yoo, *Globalism and the Constitution*, *supra* note 7, at 2074. Whether the goal is to understand how the *Foster* doctrine and last-in-time rule developed, or merely to support a theory about the “best” rule of constitutional law, the later history is critical. Cf. Martin S. Flaherty, *The Story of the Neutrality Controversy*, in PRESIDENTIAL POWER STORIES 21, 22 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (“History, especially an early constitutional struggle, may cast light on possible ‘original’ understandings of the Constitution. . . .”).

treaty implementation. Instead, they create a framework of ideas and arguments within which the discussion of these issues takes place. Thus, I depart from nearly every other commentator and insist that the result of historical inquiry in this context is less a conclusion for or against a presumption and more a conversation about constitutional law and politics.

Nor is there any reason to believe the conversation is over. Attention to history reveals the persistence of certain ideas and possible answers, suggests the dismissal of others, and indicates areas in which new ideas or understandings might find room to grow. This perspective also provides a way of understanding *Medellin* as simply the latest doctrinal contribution to an argument that is necessarily ongoing and unresolved. In the Conclusion, I suggest the implications of this approach for assessing contemporary treaty implementation doctrines in general, and *Medellin* in particular.

II. THE ORIGINAL UNDERSTANDINGS OF TREATY IMPLEMENTATION

This Part provides a critical account of the framing and ratification debate over the implementation of treaties. In brief, Federalists initially assumed that treaties automatically would operate as ordinary law under the new Constitution. This understanding was vague, however, at the separation of powers level because it derived from the federalism problem of treaty enforcement under the Articles of Confederation.²¹ Further, many Antifederalists objected to the treaty power and the apparent status of treaties under the Supremacy Clause.²² In response, many Federalists softened their position. The founding commitment to what we now call self-execution thus was not as solid as many commentators have suggested, and it had separation of powers weaknesses.²³ Practice and experience would be necessary to gain a more durable interpretation of the new Constitution.

21. See Flaherty, *supra* note 7, at 2128; Kesavan, *supra* note 7 at 1542-48; Yoo, *Globalism and the Constitution*, *supra* note 7, at 2041-43, 2045, 2048-49.

22. See Kesavan, *supra* note 7 at 1542-48; see generally Flaherty, *supra* note 7.

23. See Flaherty, *supra* note 7, at 2123-28; Kesavan, *supra* note 7 at 1542-48; Yoo, *Globalism and the Constitution*, *supra* note 7, at 2041-43, 2045, 2048-49.

A. *The Relevance of British Thought and Practice*

John Yoo begins his historical argument against self-execution with an account of British thought and practice.²⁴ He highlights the concerns of seventeenth and eighteenth century British writers—such as Locke and members of the country opposition to the Walpole government—about concentrations of executive power and resulting corruption, as well as the dangers created by standing armies.²⁵ Few doubt these writers heavily influenced the revolutionary generation.²⁶ Moreover, Yoo is correct that the writers of the country opposition focused heavily on the dangers to individual liberty created by the corruption that they associated with strong executive power.²⁷

The harder questions are how much the country influence continued in the United States through the framing and ratification of the Constitution and, more precisely, whether these ideas had much impact on the treaty power. Martin Flaherty argues these concerns applied against the monarchy and did not easily translate into the context of democratic government and debates about the power of a democratically accountable president.²⁸ His claim about the difficulties of translation is sound, but other writers have shown that the ideas and rhetoric of the country opposition helped shape American politics into the 1790s.²⁹ Traces of this rhetoric also resonated through the ratification debates and the fight over the Jay Treaty and extended

24. See, e.g., Yoo, *Globalism and the Constitution*, *supra* note 7.

25. See Yoo, *Globalism and the Constitution*, *supra* note 7, at 1990-94.

26. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22-54 (1992); PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION* 27-48 (1972); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 14-17 (1969); see also JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 140-87 (1992) (articulating theory of revolutionary ideas that makes more room for economic and social context and thought); Rakove, *supra* note 14, at 267 (cautioning against reliance on “the venerable authority of Locke, Montesquieu, Blackstone, or other writers” to determine what early Americans thought, especially on separation of powers).

27. See BAILYN, *supra* note 26, at 46-51; MAIER, *supra* note 26, at 42-45; WOOD, *supra* note 26, at 18-36.

28. See Flaherty, *supra* note 7, at 2105-08; cf. WOOD, *supra* note 26, at 561-64 (some Federalists denied any continuity between British and American constitutionalism).

29. See BAILYN, *supra* note 26, at 323; SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828*, at 79 (1999); STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 18-25 (1993).

through the debate over the 1815 commercial treaty.³⁰

With respect to British practice, Carlos Vázquez and Yoo, and to some extent Vasan Kesavan, argue that by the revolutionary era, Parliamentary action was necessary for a treaty to go into effect in Great Britain, although they draw different conclusions about what that means for the constitutional rule in the U.S.³¹ Flaherty, by contrast, argues a presumption existed for self-execution, although he admits British practice was evolving towards non-self-execution.³² Flaherty and Yoo agree that Parliament had substantial impact on the implementation of treaties because of its appropriations power, that Parliament was sometimes consulted about treaties, and that the framers and ratifiers knew about this practice.³³

Ultimately, as Vázquez notes, if the goal of this debate is to determine the original meaning or understanding of the treaty and Supremacy Clauses, then actual British practice is less important than what participants in U.S. constitutional debates believed it to be.³⁴ But British practice did not provide a clear baseline against which to measure the changes wrought by the Constitution. The available materials make clear that participants in the drafting and ratification of the Constitution were uncertain about British practice, even as they continued to refer to it—sometimes as a model, sometimes as a caution—during the founding period and, later, in Congress.³⁵

30. See Vázquez, *Treaties as Law of the Land*, *supra* note 7, at 614-18 (discussing the relevance of British thought and practice to the Supremacy Clause).

31. See Kesavan, *supra* note 7, at 1516-29; Yoo, *Globalism and the Constitution*, *supra* note 7, at 1997-2004; Vázquez, *Treaties as Law of the Land*, *supra* note 7, at 614-18; Vázquez, *Laughing at Treaties*, *supra* note 7, at 2158 & n.14.

32. See Flaherty, *supra* note 7, at 2109-12 & n.81.

33. See *id.* at 2110; Yoo, *Globalism and the Constitution*, *supra* note 7, at 2003-04.

34. See Vázquez, *Treaties as Law of the Land*, *supra* note 7, at 618; Vázquez, *Laughing at Treaties*, *supra* note 7, at 2158 n.14; *cf.* *Burnham v. Superior Court*, 495 U.S. 604, 611 (1990) (plurality opinion) (suggesting original understanding of legal rule is more important for determining its consistency with 14th Amendment due process than actual content of the rule).

35. Vázquez explains how an understanding that treaties were not self-executing in Britain need not support a similar presumption for the United States: for some Federalists, one goal of the Supremacy Clause may have been to adopt a new rule. In light of the fact that many participants expressed no opinion on the issue, his assertion that the majority understood British practice to require parliamentary approval is less convincing. See Vázquez, *Treaty-Based Rights and Remedies*, *supra* note 7, at 1110-14.

B. *Revolution and Confederation*

Noting that revolutionary thought focused on establishing democratic self-rule, which meant governments should be structured to give primacy to the legislature, Yoo asserts that a presumption of treaty self-execution is inconsistent with these ideas.³⁶ As Flaherty observes, however, the grievances that fanned revolution did not involve treaties or foreign affairs; revolutionary concerns about self-rule were directed more often at the tyranny of Parliament over colonists and their legislatures.³⁷

Yoo's effort to derive a rule about self-executing treaties from concerns about self-rule thus outreaches the scope of its premise. Still, his assertion deserves more attention than it receives from Flaherty.³⁸ Under the Articles of Confederation, Congress had the "sole and exclusive right and power" of enter-

36. See Yoo, *Globalism and the Constitution*, *supra* note 7, at 2005-09.

37. See Flaherty, *supra* note 7, at 2115-16.

38. Flaherty focuses on Yoo's description of the Articles of Confederation Congress as an executive entity in order to counter Yoo's theory about when modern notions of separation of powers developed. See Flaherty, *supra* note 7, at 2013; see also JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 383-87, 394* (1979) (arguing separation of powers ideas remained fluid and rudimentary into 1787, especially at national level); WOOD, *supra* note 26, at 449, 549 (arguing separation of powers became important only after 1776). Yoo suggests separation of powers theories flourished earlier, see Yoo, *Treaties and Public Lawmaking*, *supra* note 7, at 2231, but his sources are consistent with the claim that separation of powers thinking broadened and deepened under the Articles of Confederation. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 264-73* (Rita Kimber & Robert Kimber trans., 2001) (tracing changes in separation of powers thinking culminating with Madison); MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY 109-30* (1997) (providing general endorsement of Wood's views but suggesting early separation of powers thinking also included significant constraints on legislatures); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 80-87, 160* (1985) (suggesting early state constitutions recognized separation of powers but still gave bulk of power to legislatures). Importantly, Adams and Kruman focus on the thinking of those who adopted state constitutions, not the practices of state legislatures that often undermined constitutional ideals. See, e.g., MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY 36* (1997) (making this distinction and admitting legislatures sometimes violated state constitutions). Moreover, the brief attention paid by Adams and Kruman to the role of the judiciary and the near total absence of judicial review in their discussions, see WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 264-69* (Rita Kimber & Robert Kimber trans., 2001) (discussing judiciary and noting general absence of judicial review); MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY 122-23* (1997) (mentioning efforts to make judiciary more independent). These sources implicitly undermine Yoo's claim that separation of powers thinking was fully developed in the revolutionary period. For further analysis, see also

ing into treaties (with the consent of nine states).³⁹ At the same time, Congress lacked any power not “expressly delegated” and was barred from using commercial treaties to restrain “the legislative power of the respective states” over imposts, duties, or prohibitions on imports and exports.⁴⁰ Subject to this limitation, Congress arguably possessed the power to use treaties to restrict or override state legislative power on other issues.⁴¹ For example, Charles Thomson, the Secretary of Congress, declared the states were bound by treaties, had no right to interfere with them, and were required to remove all obstacles to their enforcement.⁴² George Mason expressed similar views in a letter to Patrick Henry.⁴³

Text notwithstanding, Congress could not compel the states to implement treaties and could not implement them itself, in part because it depended on the states for revenue.⁴⁴ Indeed, Thomson’s and Mason’s assertions came in the face of state legislation that hindered the efforts of British creditors to vindicate their rights under the Treaty of Paris.⁴⁵ A “Grand Committee” of Congress proposed several amendments to the Articles in August 1786, including the creation of “a federal Judicial Court,” the jurisdiction of which would include appeals from state courts “in all Causes wherein questions Shall arise on the meaning and construction of Treaties entered into by the United States with any foreign power, or on the Law of Nations.”⁴⁶ Congress never debated these amendments, in part because of the controversy over the proposed treaty with Spain, which would have limited

John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 967 n.27 (2002).

39. See ARTICLES OF CONFEDERATION, art. IX.

40. See *id.* arts. II, IX.

41. See SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 32-34 (2d ed. 1916) (making this argument); RAKOVE, *supra* note 38, at 343-45, 384-85 (noting the argument and related claims).

42. See *id.* at 344.

43. *Id.*

44. See CRANDALL, *supra* note 41, at 34; RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 364 n.5 (1987); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 27 (1996).

45. See *Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Br.*, art. IV, 8 Stat. 80, 82. For the problems with treaty enforcement and related issues under the Articles, see RAKOVE, *supra* note 44, at 27; Golove, *supra* note 7, at 1104-32.

46. Amendments to the Articles of Confederation Proposed by a Grand Committee of Congress (Aug. 7, 1786), *reprinted in* 1 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 163, 167 (Merrill Jensen ed., 1976).

access to the Mississippi River.⁴⁷

John Jay, who as Secretary for Foreign Affairs endured British complaints about state noncompliance and the outrage of Southerners over his negotiations with Spain, reported to Congress in October 1786 on his view of the appropriate status of treaties under the Articles. “When therefore a treaty is made, ratified and published by Congress,” he insisted, “it immediately becomes binding on the whole nation, and super-added to the laws of the land, without the intervention, consent or fiat of State legislatures.”⁴⁸ As had the Grand Committee, Jay sought to transform contentious political debates about treaties into judicial issues. Doubts over the meaning of a treaty, he wrote, “like all doubts respecting the meaning of a law, are in the first instance mere judicial questions; and are to be heard and decided in the Courts of Justice having cognizance of the causes in which they arise”—a view seconded by Alexander Hamilton.⁴⁹ Jay also pressed Congress to assert its rights by resolving that, “on being constitutionally made, ratified and published, [treaties] become, in virtue of the confederation, part of the laws of the land, and are not only independent of the will and power of [state] legislatures, but also binding and obligatory on them.”⁵⁰

Two months before the Constitutional Convention (“Constitutional Convention” or “Convention”), Congress unanimously adopted Jay’s resolutions and declared treaties “the law of the land” and “binding and obligatory” on state legislatures—although it followed that declaration with a recommendation that

47. See *id.* at 164. For the importance of this controversy, see LANCE BANNING, *THE SACRED FIRE OF LIBERTY* 66-71 (1995); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1281-86 (2008); Rakove, *supra* note 14, at 272-75.

48. See generally Report of John Jay, Secretary for Foreign Affairs, to Congress (Oct. 13, 1786), reprinted in 31 *JOURNALS OF THE CONTINENTAL CONGRESS* 781, 798 (John C. Fitzpatrick ed., 1934) [hereinafter Report of John Jay].

49. *Id.* at 798-99. Alexander Hamilton attempted in *Rutgers v. Waddington* to establish that treaties trump conflicting state laws, but the court decided the case on a narrower ground. Even so, the New York assembly censured the court, and Mayor James Duane faced threats of removal from office. See JULIUS GOEBEL, JR., 1 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 132-37 (1971); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 194-201 (2005); MORRIS, *supra* note 44, at 126-27.

50. See Report of John Jay, *supra* note 48, at 870.

the states repeal “improper” obstructive laws.⁵¹ Congress also approved a letter to be sent to each state along with the resolutions. The letter proclaimed that a ratified treaty is “binding on the whole nation and superadded to the laws of the land, without the intervention of state legislatures,” and it insisted that questions of treaty interpretation “[i]n cases between individuals” were for the courts.⁵²

At least six states acted to repeal legislation in conflict with the treaty, although the extent to which state officials accepted the legal assertions in the resolutions and letter is not clear, and actual recovery of debts remained difficult.⁵³ Scholars disagree on whether this incident proves or disproves self-execution and the supremacy of treaties under the Articles.⁵⁴ For his part, writing five years later, Secretary of State Thomas Jefferson declared, “It resulted from the instrument of Confederation among the States, that treaties made by Congress, according to the confederation, were superior to the laws of the States.”⁵⁵ Congress’s resolutions and the states’ acts of repeal, he suggested, merely demonstrated the truth of the principle.⁵⁶ Four years after that, Justice James Iredell reached a different conclusion: Congress’s request for repeal of inconsistent state laws was an admission that state action was necessary.⁵⁷

51. See Resolutions of March 21, 1787, *reprinted in* 32 *JOURNALS OF THE CONTINENTAL CONGRESS* 124-25 (Roscoe R. Hill ed., 1936).

52. See Letter to the States to Accompany the Resolutions Passed the 21st Day of March 1787 (Apr. 13, 1787), *reprinted in* 32 *JOURNALS OF THE CONTINENTAL CONGRESS* 177-79.

53. See 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 1411 n.11 (John P. Kaminski et al. eds., 1993); see also CRANDALL, *supra* note 41, at 36-42; MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789*, at 169, 281 (1950); MORRIS, *supra* note 44, at 201-02.

54. Compare Yoo, *Globalism and the Constitution*, *supra* note 7, at 2019-20 (arguing that it proved non-self-execution), with EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* 27-28 (1913) (arguing that it proved supremacy of treaties), and CRANDALL, *supra* note 41, at 42 (arguing that it established self-execution). See MORRIS, *supra* note 44, at 202 (“This resolution laid the foundation for the inclusion in the federal Constitution of the Supremacy Clause.”). For a useful analysis of this incident from the perspective of the last-in-time rule, see Ku, *supra* note 15, at 365-69.

55. See Letter to [British Minister] George Hammond (May 29, 1792), in 23 *THE PAPERS OF THOMAS JEFFERSON* 551, 579 (Charles T. Cullen et al. eds., 1990).

56. See *generally id.* Discussing Article V of the Peace Treaty, Jefferson also noted “the difference between enacting a thing to be done and recommending it to be done.” *Id.* at 555.

57. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 256, 276 (1796) (reprinting Iredell’s circuit opinion).

These disagreements suggest several conclusions. First, the status of treaties and the subsidiary question of self-execution were controversial. Second, although few were willing to take a legal stand against the supremacy of treaties, a difference remained between the form and practice of supremacy.⁵⁸ Third, and more important at the time, this incident confirmed that the formal legal status of a treaty under the Articles mattered less than the federal government's inability to enforce it. Compliance with treaties necessarily became a question of state politics, which in turn reflected the goal of avoiding concentration of power in the national government and resulting tyranny (or trampling of state interests, which may have been the same thing to many state officials). Under the Articles, in short, treaties were generally not self-executing as a matter of practice, and state legislative primacy was an important part of the reason.

The problem for opponents of self-execution is that the link between the rights of state legislatures and non-enforcement of treaties weakened both ideas during the Articles of Confederation period. In addition to problems with treaty enforcement, the Articles period also witnessed what some observers characterized as abuses of legislative power by the states—in the form of confiscation of property, overreaching debtor relief, and a proliferation of changing laws—as well as aggregation of judicial and executive power into the state legislatures.⁵⁹ Nascent Federalists in turn equated legislative primacy with too much democracy—that is, with legislative and, in particular, democratic tyranny.⁶⁰

The initial wave of state constitutions displayed relatively lit-

58. For a roughly similar view, see Vázquez, *supra* note 6, at 698 & nn.17-18.

59. See McDONALD, *supra* note 38, at 154-57, 164-65, 175-79; RAKOVE, *supra* note 44, at 250; WOOD, *supra* note 26, at 403-09.

60. See WOOD, *supra* note 26, at 409-13; see also RAKOVE, *supra* note 38, at 390-93; RAKOVE, *supra* note 44, at 44-45, 48-49 (discussing Madison's developing views on separation of powers). State constitution makers in this period tended to distrust and sought to limit all forms of concentrated government power. Still, although state constitutions limited legislative power through bills of rights, restrictions on taxation and amendments, annual elections, and the people's right to instruct representatives, see KRUMAN, *supra* note 38, at 35-59, 76-86; see also HULSEBOSCH, *supra* note 49, at 173-89 (discussing 1777 New York Constitution, which gave greater power to the Governor and a council of revision), legislatures were the primary wielders of power in most states, especially under the early constitutions. See McDONALD, *supra* note 38, at 160. Legislative primacy did not always lead to populism, however; elites found ways to exercise influence. See RAKOVE, *supra* note 38, at 121-23.

the concern for separation or balance of powers.⁶¹ But by the time of the 1783 peace treaty with Britain, some states had rewritten or given serious thought to changing their constitutions to fix perceived imbalances of power.⁶² These efforts sought to strengthen the executive at the expense of the legislature, while also making the judiciary more independent. Meanwhile, judges in other states were taking tentative steps towards enforcing constitutional limits on legislative power.⁶³ In short, changing ideas about separation of powers were beginning to result in qualified rejection of legislative primacy.⁶⁴ Defenders of legislative primacy put up a bitter resistance that prefigured the debate over the federal constitution.⁶⁵

C. *Writing the Constitution*⁶⁶

State non-compliance with treaties was an important issue at the Constitutional Convention, even as delegates sought to accommodate the interest of states in the treaty power.⁶⁷ Efforts to strengthen national power also show awareness of and desire to avoid the perceived pitfalls of legislative primacy. Thus, the establishment of a stronger national government resulted in a net shift away from legislative power and towards executive and judicial power, even as it also created a stronger national legisla-

61. See WOOD, *supra* note 26, at 409-13; see also RAKOVE, *supra* note 38, at 390-93; RAKOVE, *supra* note 44, at 44-49.

62. See ADAMS, *supra* note 38, at 264-73; BANNING, *supra* note 47, at 132; RAKOVE, *supra* note 44, at 252-53; WOOD, *supra* note 26, at 430-37.

63. See generally RAKOVE, *supra* note 44.

64. See ADAMS, *supra* note 38, at 264-73; BANNING, *supra* note 47, at 88, 132 (discussing the 1783 effort to revise Virginia Constitution); RAKOVE, *supra* note 44, at 252-53; WOOD, *supra* note 26, at 430-37, 446-63.

65. See WOOD, *supra* note 26, at 437-38, 459.

66. This section and much of the next rely on notes taken by people who attended the Constitutional Convention and state ratification conventions. James Hutson has warned of the "problems with most of" these records; "some have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans. To recover original intent from these records may be an impossible hermeneutic task." James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *TEX. L. REV.* 1, 2 (1986). The *Documentary History of the Ratification of the Constitution* has expanded the available materials, but it cannot fill all the holes or correct all the errors and deliberate misstatements. These sections are therefore necessarily contingent in ways familiar to historians but frustrating to lawyers.

67. See generally Solomon Slonim, *Congressional-Executive Agreements*, 14 *COLUM. J. TRANSNAT'L L.* 434 (1975).

ture.⁶⁸ In some rough sense, then, the Constitutional Convention sought to create an efficient and forceful national government while at the same time limiting legislative power.⁶⁹

The net shift in power away from legislatures provides a context for reading both the treaty clause and the Supremacy Clause. Together, they give the President and Senate the power to make treaties that will be the supreme law of the land, apparently on the same footing as the Constitution and federal statutes, while saying nothing about a role for the House in making treaties. Read against the clear desire to ensure federal power to implement treaties, one would expect to find the House mentioned if it were to have a significant role. The absence of any obvious textual role supports at least a reasonable inference that there would be nothing for the House to do with respect to the legal status of treaties.⁷⁰

This inference receives significant support from events at the Convention. The problem of treaty implementation appeared quickly. Edmund Randolph raised it in his initial speech on May 29, 1787, while Charles Pinckney and James Madison included state interference with treaties in their June 8 lists of reasons for giving Congress the power to negative state laws.⁷¹ The New Jersey plan of June 15 included a provision declaring treaties the supreme law of the land and would have established a "federal Judiciary" to hear appeals in several categories of cases, including those involving "the construction of any treaty."⁷²

The question of treaties emerged more fully during a debate on August 7 over a proposal that the House and Senate be able to negative each other's actions. Gouverneur Morris sought

68. See Rogan Kersh et al., "More a Distinction of Words than Things": *The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 19-20 (1998).

69. See McDONALD, *supra* note 38, at 291; RAKOVE, *supra* note 44, at 254-87 (discussing sense that stronger executive was necessary); WOOD, *supra* note 26, at 503-08 (noting Madison's concern about property and Federalist desire for worthy people in government); *id.* at 551 (noting desire for stability and energetic executive).

70. For a similar view, see Flaherty, *supra* note 7, at 2123.

71. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19, 164, 316 (Max Farrand ed., rev. ed. 1937) (Madison).

72. *Id.* at 244 (Madison). The Virginia plan did not include a Supremacy Clause or a specific reference to federal court jurisdiction over treaties, but it provided for appeals to a "National Judiciary" in cases that raised "questions which may involve the national peace and harmony," and declared "the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union." *Id.* at 22 (May 29, 1787) (Madison).

an amendment to limit the negative to legislative actions. Several delegates commented on the amendment, with George Mason objecting that it "extended too far."⁷³ He explained, "Treaties are in a subsequent part declared to be laws, they will be therefore subjected to a negative, altho' they are to be made as proposed by the Senate alone."⁷⁴ Morris responded, "Treaties . . . were not laws."⁷⁵ The delegates then rejected Morris's amendment and approved an amendment by James Madison to strike the entire clause, apparently because it was repetitive and confusing.⁷⁶

A week later, the status of treaties came up again. During a debate on limiting the power of the Senate, Mason spoke in favor of preventing it from originating revenue bills, and he said it "could already sell the whole Country by means of treaties."⁷⁷ John Mercer picked up on this reference and declared "the Senate ought not to have the power of treaties. This power belonged to the Executive department Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority. This was the case of treaties in Great Britain."⁷⁸ Mason clarified he "did not say that a Treaty would repeal a law; but that the Senate by means of a treaty might alienate territory &c. without legislative sanction."⁷⁹ The motion passed, and there is no indication this exchange was critical to that decision, although it certainly indicates discomfort on Mercer's side with what he saw as the scope of the treaty power, and a limited sense

73. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 196-97 (Max Farrand ed., 1966) (Madison).

74. *Id.* at 197. Sometime after August 6, Mason annotated his copy of the Committee of Detail's report with the following observation: "As treaties are to be laws of the Land and commercial Treaties may be so framed as to be partially injurious, there seems to be some necessity for the same Security upon the Subject as in the 6th section of the 6th Article." *SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 209 (James H. Hutson ed., 1987) [hereinafter *SUPPLEMENT*]. Mason was referring to what was actually Article VII of the report. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 73, at 177 n.3, 181 n.5. Section 6 of that article provided, "No navigation act shall be passed without the assent of two thirds of the members present in each House." *Id.* at 183. For the link between treaties and navigation laws, see Slonim, *supra* note 67, at 440-43.

75. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 73, at 197 (Madison).

76. *See id.*

77. *Id.* at 297 (Madison).

78. *Id.*

79. *Id.*

on Mason's part of how treaties—which he recognized would operate as law in some fashion—would interact with existing laws.⁸⁰

After another week, and shortly after it approved an early version of the Supremacy Clause,⁸¹ the Convention considered a proposal to give Congress the power “[t]o call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.”⁸² Morris moved to strike the words “enforce treaties” as “superfluous since treaties were to be ‘laws.’”⁸³ The motion passed without dissent.⁸⁴ Because the motion came almost immediately after discussion of the Supremacy Clause, the inference seems clear that the delegates understood treaties would have the same status as legislation—in other words, that they would be self-executing and enforceable where appropriate in judicial proceedings or through executive action. The Supremacy Clause discussion may also explain the shift in Morris's opinion about the legal status of treaties.

At this point, however, the power to make treaties still belonged solely to the Senate. Soon after his first motion passed, Morris proposed another:

Mr. Govr. Morris did not know that he should agree to refer the making of Treaties to the Senate at all, but for the present wd. move to add as an amendment to the section, after “Treaties”—“but no Treaty shall be binding on the U.S. which is not ratified by a law.”⁸⁵

Morris's goal was to put obstacles in the way of making treaties.⁸⁶ Madison objected that this requirement would be “inconvenienc[t] . . . for treaties of alliance for the purposes of war &c. &c.”⁸⁷ James Wilson agreed with Morris that allowing the Senate alone to make treaties was risky:

In the most important Treaties, the King of G. Britain being

80. *See id.*

81. *See id.* at 389 (Aug. 23, 1787). For the background of the Supremacy Clause, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 235-53 (2000); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies*, *supra* note 7, at 1104-08.

82. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 389 n.9.

83. *See id.* at 389-90.

84. *See id.* at 390.

85. *Id.* at 392.

86. *See id.* at 392-93.

87. *Id.* at 392.

obliged to resort to Parliament for the execution of them, is under the same fetters as the amendment of Mr. Morris will impose on the Senate. It was refused yesterday to permit even the Legislature to lay duties on exports. Under the clause, without the amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port.⁸⁸

Despite concerns about the extent of the Senate's treaty power, the motion lost by a vote of eight to one.⁸⁹ Read together with its unanimous adoption of Morris's first amendment, the Convention appears twice to have embraced an idea of self-execution even when the treaty power was lodged in the Senate alone.⁹⁰

Morris's motion was bracketed by James Madison's effort to include the President in the treaty power. Immediately before Morris's motion, Madison had suggested that "the President should be an agent in Treaties."⁹¹ After the Convention defeated Morris's motion, Madison "hinted for consideration, whether a distinction might not be made between different sorts of Treaties—Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms—and requiring the concurrence of the whole Legislature in other Treaties."⁹² The Convention did not take up Madison's suggestion and instead referred the clause to the committee of five for further consideration.⁹³ But Madison's distinction would soon resurface.

88. *Id.* at 393. In response, William Johnson disputed Wilson's analysis of British practice. *See id.*

89. *See id.* at 393-94. Yoo stresses the discussion of British practice during this debate and suggests Morris and Wilson spoke for the Convention when they sought to limit the domestic status of treaties. *See Yoo, Globalism and the Constitution, supra* note 7, at 2033-34. Not only did every effort to impose such limits fail, but this discussion took place against the assumption that only the Senate would make treaties, with the result that much of the debate focused on a problem that was later addressed by including the President in the treaty process rather than by including the House. Put differently, Yoo's analysis proves dissatisfaction with Senate control over treaties but does not prove the Convention opposed self-execution. At most, he demonstrates delegates were confused about British practice and some may not have understood the full implications of the provisions they were adopting.

90. *See Flaherty, supra* note 7, at 2123-24 (making the same point).

91. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 392 (Madison).

92. *Id.* at 394. On September 7th and 8th, Madison again distinguished between types of treaties, with the goal of relaxing the ratification requirements for and the President's involvement in peace treaties. *See id.* at 540-41, 547-49 (Madison); *see also* BANNING, *supra* note 47, at 178.

93. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 394

Another two weeks passed, during which the Convention modified the treaty power to give the President the ability to make treaties with the Senate's advice and consent. Wilson then moved to include the House in the advice and consent process. He explained, "As treaties . . . are to have the operation of laws, they ought to have the sanction of law also."⁹⁴ The motion lost ten to one, at least in part because the delegates believed the larger House would not be able to maintain the secrecy required for approval of some treaties.⁹⁵ The Convention apparently also discussed that day a proposal by Madison to require House consent to treaties that modified national boundaries or abridged navigation or fishing rights.⁹⁶

The strongest interpretation of the available Convention records is that a clear majority of delegates assumed, at least once the Supremacy Clause was adopted, that treaties would immediately and automatically operate as enforceable federal law.⁹⁷ Several delegates opposed or raised questions about the Constitution's approach to treaty implementation, or attempted to distinguish between different kinds of treaties, but their concerns were brushed aside—perhaps ill-advisedly in light of later developments. Critically, the records do not reveal any meaningful debate about *how* treaties would operate as law, and at least some delegates appear to have been confused or uncertain on this issue.⁹⁸ Nor was there any exploration of how the treaty power would interact with Congress's Article I powers. The Convention reached an agreement on treaties, but it failed to explore the implications of that agreement.

(Madison). Kesavan draws on McHenry's notes to suggest this episode can be seen as the articulation by Madison, Morris, and Wilson of a doctrine of "partial self-execution." See Kesavan, *supra* note 7, at 1534-35.

94. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 538 (Sept. 7, 1787) (Madison).

95. See *id.* For additional analysis of the Morris and Wilson proposals, see Vázquez, *Laughing at Treaties*, *supra* note 7, at 2160 n.20. For the importance of secrecy to the decision to exclude the House from treaty-making, see Curtis Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 629 (2004); Hathaway, *supra* note 47, at 1278-79; Rakove, *supra* note 14, at 246-47. For stress on the federalism aspects of excluding the House, see generally Slonim, *supra* note 67.

96. See SUPPLEMENT, *supra* note 74, at 262 (Sept. 7, 1787). Madison drafted a motion but did not move its consideration. See SUPPLEMENT, *supra* note 74, at 262 n.2.

97. See Rakove, *supra* note 14, at 264 ("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.").

98. See Ku, *supra* note 15, at 369-70 (noting lack of discussion of last-in-time issues).

D. Ratification

Ratification revealed the complexities surrounding the legal status and implementation of treaties, but the nature of the process complicates efforts to sort out who thought what about specific constitutional provisions and to determine the relative importance of topics such as treaty implementation.⁹⁹ Nonetheless, concern about the treaty power was an important part of the antifederalist critique of the proposed Constitution. Many Antifederalists believed the treaty power threatened individual liberty and risked tyranny, particularly because the Senate and President, neither of which would be popularly or directly elected, would be able to make treaties that would have the force of law.¹⁰⁰

1. George Mason's Objections

George Mason began the attack. He had refused to sign the Constitution at the Convention, and he quickly became a leading antifederalist.¹⁰¹ His *Objections to the Constitution* began circulating in manuscript soon after the Convention ended in mid-September 1787 and was widely reprinted.¹⁰² The document included the claim that, “[b]y 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.”¹⁰³ This statement indicates Mason read the treaty and Supremacy Clauses broadly, and his earlier support for bind-

99. See, e.g., Vázquez, *Laughing at Treaties*, *supra* note 7, at 2162-65.

100. See BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 110 (2003); CORNELL, *supra* note 29, at 30-31; ROBERT W. HOFFERT, *A POLITICS OF TENSIONS: THE ARTICLES OF CONFEDERATION AND AMERICAN POLITICAL IDEAS* 175-78 (1992); WOOD, *supra* note 26, at 513-16, 519-23; Flaherty, *supra* note 7, at 2128; Kesavan, *supra* note 7, at 1542-48; Yoo, *Globalism and the Constitution*, *supra* note 7, at 2041-43, 2045, 2048-49.

101. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 73, at 648-49 (Sept. 17, 1787) (Madison).

102. With thirty reprintings, Mason's "Objections" was one of the most influential Antifederalist publications. See CORNELL, *supra* note 29, at 309-15.

103. 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 et al. eds., 1981). "[P]roper distinctions with respect to treaties" likely refers to distinctions among different kinds of treaties, along the lines he and Madison expressed at the Convention.

ing the states to treaties under the Articles of Confederation shows that he did not object to the idea of supremacy in general. Instead, his objections went to the process by which some treaties would become supreme law. The House should be involved where possible and depending on the kind of treaty. Further, the role of the House should not merely be to participate in passing legislation that implemented the treaty but to vote on the treaty in the same way the Senate would.

Other writers quickly took up Mason's themes. An Old Whig wrote in a Philadelphia paper that "the approbation of the legislature ought to be had, before a treaty should have the force of law."¹⁰⁴ He also contended "no treaty ought to be suffered to alter the law of the land, without the consent of the continental legislatures."¹⁰⁵ More significantly, the Federal Farmer declared:

[T]reaties also made under the authority of the United States, shall be the supreme law . . . and when these treaties shall be made, they will also abolish all laws and state constitutions incompatible with them. This power in the president and senate is absolute, and the judges will be bound to allow full force to whatever rule, article or thing the president and senate shall establish by treaty, whether it be practicable to set any bounds to those who make treaties, I am not able to say: If not, it proves that this power ought to be more safely lodged.¹⁰⁶

104. An Old Whig III (Oct. 20, 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 103, at 425, 426; *see also* Cato VI (Dec. 13, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 428, 431-32 (John P. Kaminski et al. eds., 1983) (stating the House should participate in making treaties).

105. An Old Whig III, *supra* note 104, at 426. For possible authors of the Old Whig letters, *see* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 103, at 376.

106. Letter from the Federal Farmer IV (Oct. 12, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 104, at 42, 43-44. Melancton Smith of New York may be the strongest candidate for author of the "Federal Farmer" essays. *See* CORNELL, *supra* note 29, at 83, 88, 315 n.5; *see also* EMPIRE AND NATION vii-viii (Forrest McDonald ed., 2d ed. 1999) (advocating Richard Henry Lee); 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 104, at 16 (noting challenges to Lee); 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 205 (John P. Kaminski et al. eds., 2003) (suggesting Smith and Elbridge Gerry). The significance of these letters to ratification outside New York is unclear. *Compare* Yoo, *Globalism and the Constitution*, *supra* note 7, at 2058 & n.490 (arguing they deserve special weight), *with* CORNELL, *supra* note 29, at 25-26, 88 (arguing their impact was "more circumscribed"). The first set of letters was reprinted five times, but the second only once (compared to Mason's thirty). *See* CORNELL, *supra*

Seven months later, after several states had ratified but before the New York and Virginia conventions, the Federal Farmer backed away from a general attack on the treaty power.¹⁰⁷ Paralleling Mason's desire to make "proper distinctions" among different kinds of treaties, the Federal Farmer admitted the House should have no involvement with peace treaties or treaties of alliance.¹⁰⁸ For commercial treaties, however, the Federal Farmer claimed the Constitution would require the consent of the entire Congress. He explained commercial treaties are more legislative and less executive than treaties of peace or alliance because

they consist of rules and regulations respecting commerce; and to regulate commerce, or to make regulations respecting commerce, the federal legislature, by the constitution, has the power. I do not see that any commercial regulations can be made in treaties, that will not infringe upon this power in the legislature: therefore, I infer, that the true construction is, that the President and Senate shall make treaties; but all commercial treaties shall be subject to be confirmed by the legislature.¹⁰⁹

In short, the Federal Farmer conceded that treaties automatically would operate as law in some instances, but he contended that Congress's commerce power meant it would have to implement commercial treaties.¹¹⁰

Leading antifederalist writers thus understood the Supremacy Clause to mean that treaties would be similar to legislation even though they would be approved only by the Senate

note 29, at 309-15; *see also* *EMPIRE AND NATION* xv (Forrest McDonald ed., 2d ed. 1999) (suggesting second series "was not nearly so successful as the first, and it soon fell into obscurity.").

107. The Federal Farmer's overall stance toward ratification in the second series was more nuanced: "[T]his system affords, all circumstances considered, a better basis to build upon than the confederation." The primary issue was "whether we will put the system into operation, adopt it, enumerate and recommend the necessary amendment, which afterwards . . . may be ingrafted into the system, or whether we will make amendments prior to adoption." Letter from the Federal Farmer VI (Dec. 25, 1787), *reprinted in* 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 268, 269 (John P. Kaminski et al. eds., 1995).

108. *See* Letter from the Federal Farmer XI (Jan. 10, 1788), *reprinted in* 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 107, at 301, 308-09.

109. *Id.* at 309-10.

110. *Id.*

and President, and that both would trump state law. The Federal Farmer, however, also drew on Mason to suggest a different understanding for commercial treaties.¹¹¹ His efforts may have had an impact on the Virginia debates, and they later became an important part of the republican approach to the treaty power.

In response, several Federalist writers reinforced a broad understanding of supremacy and self-execution. Civis Rusticus, for example, gave this response to Mason: "The infraction of the present treaty [between the U.S. and Britain] shews the necessity of treaties having the force of laws."¹¹² The writer went on to stress the foreign policy risks of requiring the popular branch of a legislature to approve treaties.¹¹³ James Iredell endorsed John Jay's views on treaties as law of the land, noted the impracticability of involving the House in the treaty process, and insisted, "from the nature of the thing, that when the constitutional right to make treaties is exercised, the treaty so made should be binding upon those who delegated authority for that purpose."¹¹⁴

These statements, however, do not represent the full range of federalist responses on treaty issues. A broader, more ambiguous, and sometimes conciliatory set of interpretations emerged as the debates continued. No Federalist denied treaties were self-executing at the federalism level, but as some Antifederalists reframed their federalism concerns about treaties in separation of powers terms, many Federalists responded by suggesting an important role for the House of Representatives in treaty implementation.¹¹⁵

2. State Ratification Debates

Pennsylvania. At the Pennsylvania convention in late 1787, several speakers raised concerns about the legal status and effect of treaties. Some participants suggested that the President and Senate acting together might have a greater treaty power than

111. *Id.*

112. Civis Rusticus, To Mr. Davis (Reply to Mason's Objections) (Jan. 30, 1788), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 331, 337 (John P. Kaminski et al. eds., 1988).

113. *See id.*

114. Marcus III (James Iredell), Answer to Mr. Mason's Objections to the New Constitution (Mar. 5, 1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 322, 325 (John P. Kaminski et al. eds., 1986).

115. Bradley & Flaherty, *supra* note 95, and Kesavan, *supra* note 7, also describe how the nature of the treaty power was an issue during ratification.

the King of England, and for that reason they urged inclusion of the House in the treaty process.¹¹⁶ But participants also appeared to understand that the process as set out in the Constitution would mean that treaties would be treated as supreme federal law.¹¹⁷

James Wilson, who supported House participation at the Constitutional Convention, admitted, "I wish the powers of the Senate"—including its role in making treaties—"were not as they are."¹¹⁸ Yet he spoke strongly in favor of ratification and made long statements about the status of treaties. In one speech, he noted the failure of the states to comply with the 1783 peace treaty and lauded the extension of the judicial power to treaties, "for the judges of the United States will be enabled to carry them into effect, let the legislatures of the different states do what they may."¹¹⁹

In a second speech, Wilson moved from federalism to separation of powers, and his comments were less clear. He began by stating that, "under this constitution, treaties will become the supreme law of the land," but he continued with the assertion that although "treaties are to have the force of laws," they are different from legislation because, as agreements with other countries they are more like "contracts, or compacts."¹²⁰ Yoo suggests Wilson meant to say that treaties are not really laws at all, while Flaherty stresses Wilson's insistence that treaties are "supreme law" and have the "force of laws."¹²¹

But Wilson was not finished. He went on to discuss the role of the House of Representatives in treaty implementation:

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

116. See 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 459-61 (Merrill Jensen ed., 1976) (Dec. 3, 1787) (William Findley, John Smilie, and Robert Whitehill); *id.* at 512-14 (Dec. 7, 1787) (Whitehill) (expressing concern about treaty power).

117. See *id.* at 460 (Dec. 3, 1787) (Whitehill and James Wilson), 466 (Dec. 4, 1787) (Smilie).

118. *Id.* at 491 (Dec. 4, 1787).

119. *Id.* at 518 (Dec. 7, 1787).

120. *Id.* at 562 (Dec. 11, 1787).

121. Compare Yoo, *Globalism and the Constitution*, *supra* note 7, at 2046-47, with Flaherty, *supra* note 7, at 2132.

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?¹²²

Yoo argues this statement consciously avoided broad claims for the legal status of treaties and instead reassured Antifederalists that treaties would need implementing legislation.¹²³ Flaherty concedes Wilson's statement is ambiguous, but suggests the best reading is simply that Wilson was advocating prudence before agreeing to treaty provisions that would displace existing laws.¹²⁴ As Kesavan recognizes, neither argument is entirely convincing.¹²⁵ Wilson's statement is ambiguous precisely because he appears to be hedging—first stating treaties are laws but then suggesting they will not trump existing laws (although Wilson also does not foreclose the possibility that some treaties could be self-executing if no laws stood in their way—a point Yoo ignores).

After a 46-23 vote in favor of ratification, a minority published their dissenting views, which included the assertion—roughly consistent with the statements of An Old Whig—"[t]hat no treaty which shall be directly opposed to the existing laws of the United States in Congress assembled, shall be valid until such laws shall be repealed or made conformable to such treaty; neither shall any treaties be valid which are in contradiction to the constitution of the United States, or the constitutions of the several states."¹²⁶ Flaherty's interpretation of Wilson's comments

122. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 116, at 562-63 (Dec. 11, 1787) (emphasis added).

123. See Yoo, *Globalism and the Constitution*, *supra* note 7, at 2047-48.

124. See Flaherty, *supra* note 7, at 2133.

125. See Kesavan, *supra* note 7, at 1566-67, 1569-71.

126. Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 116, at 618, 624-25, 634-35. Cornell argues the "Dissent" was one of the most "effective" Antifederalist documents; it was reprinted twenty times. See CORNELL, *supra* note 29, at 26, 309.

receives some support from the dissenters if one reads their statement as a concession that treaties would trump state laws and an effort to prevent them from also trumping federal law. Perhaps they were simply seeking to clarify an ambiguity, but the fact that they felt a need to propose a limit on the Supremacy Clause suggests concern it would sweep broadly despite Wilson's hedging.¹²⁷

Pennsylvania held a second convention—dominated by Antifederalists, including Albert Gallatin—in September 1788 to consider amendments to the Constitution, in keeping with the strategy of many Antifederalists of accepting ratification but seeking a second constitutional convention to change the document.¹²⁸ Among the amendments that the convention recommended was that no treaty could “alter or affect any law of the United States, or of any particular State, until such treaty shall have been laid before and assented to by the House of Representatives in Congress.”¹²⁹ This amendment went further than the proposal in the *Dissent*, and it shows that the treaty power remained an issue of concern for Antifederalists for some time after ratification.

Connecticut. Connecticut's political class conducted little discussion of the proposed Constitution, let alone of the treaty and Supremacy Clauses. Writing as “A Landholder,” Oliver Ellsworth offered a strong justification for the Supremacy Clause and a federal judiciary that would help “carry into effect the laws of the nation.”¹³⁰ Responding specifically to Mason's *Objections*,

127. For William Findley's later explanation of the dissenters' intentions, which is consistent with both possibilities, see 5 *ANNALS OF CONG.* 592 (1796). Kesavan suggests the dissenters reflected a general view of the Pennsylvania convention in favor of partial self-execution. See Kesavan, *supra* note 7, at 1567-69. I think he tries to prove too much. More likely, many of the participants came away with the belief that the House would have some role with treaties but were uncertain about exactly what that role would be. Nor does the second convention, which was largely an Antifederalist affair, assist his assertion about the overall opinion of Pennsylvania ratifiers.

128. See *PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788*, at 553-64 (John B. McMaster & Frederick D. Stone eds., 1888); CORNELL, *supra* note 29, at 136-42; Steven R. Boyd, *Antifederalists and the Acceptance of the Constitution: Pennsylvania, 1787-1792*, 9 *PUBLIUS* 123, 132-34 (1979).

129. *PENNSYLVANIA AND THE FEDERAL CONSTITUTION*, *supra* note 128, at 564.

130. A Landholder V (Dec. 3, 1787), *reprinted in* 3 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 480, 483 (Merrill Jensen ed., 1978). For the attribution of “A Landholder” to Ellsworth, see 3 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 398 (Merrill Jensen ed., 1978).

he declared the House could not be involved in making treaties “which are often intricate and require much negotiation and secrecy,” and he suggested state governments would adequately check the Senate.¹³¹

Little of the debate at the state ratifying convention survives on any topic, but Ellsworth said in one speech that the failure to perform treaties had been a problem under the Articles, and—repeating the point he had made as A Landholder—that the United States needed “a power in the general government to enforce the decrees of the Union.”¹³² After a few days of proceedings, the convention approved the Constitution by a vote of 128-40.¹³³

Massachusetts. George Mason’s arguments circulated broadly in Massachusetts.¹³⁴ Equally important, however, were the objections of Elbridge Gerry, who—like Mason—had refused to sign the Constitution at the convention.¹³⁵ Gerry presented his objections at the convention and elaborated on them in a letter to the Massachusetts General Court that subsequently appeared in all but one Massachusetts newspaper and in numerous others outside the state.¹³⁶ Two of his objections were “that the Judicial department will be oppressive [and] that treaties of the highest importance may be formed by the president with the advice of two thirds of a *quorum* of the Senate.”¹³⁷ His concern about treaties seems only to encompass the number of senators (too few) who could approve a treaty, and it does not

131. A Landholder VI (Dec. 10, 1787), *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 130, at 487, 490-91.

132. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 130, at 282-91 (Jan. 4, 1788). “[T]here were several speakers for and against the Constitution,” but “the newspapers reported only” six speeches by Federalists and “a single-paragraph account of one” Antifederalist speech. *See id.* at 535.

133. *See id.* at 562 (Jan. 9, 1788).

134. *See* George Mason and the Constitution, 20 November–3 December, *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 282-91 (John P. Kaminski et al. eds., 1997).

135. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 648-49 (Sept. 17, 1787) (Madison). Ellsworth’s “A Landholder V” was a response to Gerry. *See* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 130, at 476-77, 480.

136. *See* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 134, at 96.

137. Elbridge Gerry, Letter to the General Court (Oct. 18, 1787), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 134, at 94, 98-99.

touch upon the role of the House or the legal status of treaties. One could construe his concern about the judiciary as an attack on the Supremacy Clause or Article III, but, even so, it is not clearly directed at treaties.¹³⁸ Other writers also raised general concerns about the Supremacy Clause.¹³⁹

Discussion of treaties is sparse in the surviving records of the Massachusetts ratifying convention debates. On January 28, 1788, an “old man” declared, “When we give power to make treaties we give power to fulfill.”¹⁴⁰ He was referring to the federal government’s ability to use the militia and perhaps, therefore, to the possibility of treaties being self-executing for the executive branch. Theophilus Parsons responded with the assertion “[t]hat treaties unless approved by the Legislature will be void,” but William Wedgery contradicted him, stating “all treaties made by the President & senate shall be the supream Law of the Land & therefore need not the Legislature to Confirm it.”¹⁴¹ No other significant discussion appears, and Massachusetts ratified the Constitution by a vote of 187-168.¹⁴² The delegates proposed

138. Another writer recognized that the judicial power encompassed treaty issues, and he claimed litigation in federal court would be “long and expensive” and “gives every advantage to British and other foreign creditors to embarrass the American merchant.” *Candidus I* (Dec. 6, 1787), reprinted in 4 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 134, at 392, 397. The assumption that treaties would be enforceable in federal courts suggests *Candidus* also thought treaties would operate as law without Congressional intervention.

139. See Michael Allen Gillespie, *Massachusetts: Creating Consensus, in RATIFYING THE CONSTITUTION* 138, 164 n.35 (Michael Allen Gillespie & Michael Lienesch eds., 1989).

140. *Justus Dwight Journal*, 7 January–9 February 1788, reprinted in 7 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 1814 (John P. Kaminski et al. eds., 2001); see also 6 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 1364 (John P. Kaminski et al. eds., 2000) (official journal not available for January 29).

141. 7 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 140, at 1814-15.

142. See 6 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 140, at 1487 (Feb. 6, 1788). During the Jay Treaty debates, William Lyman quoted statements that he said came from the Massachusetts convention:

In those debates, one member, Mr. [Rufus] King, said: “That the Treaty-making power would be found as much restrained in this country as in any country in the world.” Another member, Mr. [John] Choate: “That as the regulation of commerce was under the control of Congress, it could not be regulated by Treaty without their consent and concurrence.”

5 *ANNALS OF CONG.* 608 (1796). Lyman was not a delegate to the convention, and I have not found either statement in the records of debates. Yet Fisher Ames and Theodore Sedgwick were at the convention and also took part in the Jay Treaty debate, and

several amendments, but none of them touched the treaty power or the Supremacy Clause.¹⁴³

South Carolina. No reported discussion of treaties survives from the South Carolina convention, which approved the Constitution by a vote of 149-73 on May 23, 1788.¹⁴⁴ But the status of treaties came up in the legislative session that established the convention. Rawlin Lowndes objected to the Supremacy Clause because, “when the Constitution came to be established, the treaty of peace might be pleaded against the relief which the law afforded.”¹⁴⁵ Later in the debate, “He explained his opinion relative to treaties to be, that no treaty concluded contrary to the express laws of the land could be valid.”¹⁴⁶ Several members of the legislature disagreed with Lowndes. On the first point, Charles Cotesworth Pinckney declared the peace treaty was already the law of the land in South Carolina, and he denied “any individual state possessed a right to disregard a treaty made by Congress” under the Articles.¹⁴⁷ The Supremacy Clause, he insisted, “is only declaratory of what treaties were, in fact, under the old compact. They were as much the laws of the land under that Confederation as they are under this Constitution.”¹⁴⁸ Charles Pinckney also made clear his understanding that the status of treaties as law made them judicially enforceable, for “without it we could not expect a due observance of treaties.”¹⁴⁹ Yet two other members of the legislature provided more ambiguous endorsements. John Pringle observed: “[a]lthough the treaties

neither of them disputed Lyman’s quotations, even though they and Lyman were on opposite sides. In any event, the statement by King—who attended the Constitutional Convention, joined with Hamilton to write the Camillus essays, and cast votes inconsistent with a role for the House during the 1816 debate, see 29 ANNALS OF CONG., (1816) (voting to reject House implementing legislation)—is too general to be useful. Choate’s statement, on the other hand, tends to support later republican claims.

143. See Form of Ratification [Massachusetts], 6-7 February, reprinted in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 140, at 1468.

144. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 338-41 (Jonathan Elliot ed., 2d ed. 1836) (May 23, 1788).

145. *Id.* at 266 (Jan. 16, 1788).

146. *Id.* at 271.

147. *Id.* at 266.

148. *Id.* at 278 (Jan. 17, 1788). David Ramsay supported Pinckney by asking what the point would be of having treaties that were not superior to local laws. See *id.* at 270 (Jan. 16, 1788); see also *id.* at 293 (Jan. 17, 1788) (Robert Barnwell) (treaties were meant to be law).

149. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 258 (Jonathan Elliot ed., 2d ed. 1836).

they [the President and Senate] make may have the force of laws when made, they have not, therefore, legislative power. It would be dangerous indeed to trust them with the power of making laws to affect the rights of individuals."¹⁵⁰ John Rutledge agreed that "every treaty was law paramount and must operate," but he also insisted "there was an obvious difference between treaties of peace and those of commerce, because commercial treaties frequently clashed with the laws upon that subject."¹⁵¹

At least some of the issues raised by the treaty and Supremacy Clauses were clear, therefore, when the South Carolina ratifying convention took place, and there seems to have been a basic acceptance that treaties would trump state law. The details of treaty implementation, however—apparently including the role of the House and the relationship of treaties to existing federal law—were less clear.¹⁵²

Maryland. The Maryland convention lasted only a few days, and Federalists prevailed by a vote of 63-11.¹⁵³ Records are sparse, but at least two Antifederalists spoke against the treaty power. John Mercer, who had attended the constitutional convention but left before its completion, objected to the status of treaties as supreme law.¹⁵⁴ His *Address to the Members of the New York and Virginia Conventions* probably overlaps with what he said, and it also indicates he adhered to his views at the constitutional convention: "Treaties are expressly declared paramount to the Constitutions of the several States & being the *supreme Law*, must

150. *Id.* at 269.

151. *Id.* at 267.

152. Some of South Carolina's support for the treaty power hinged on the belief that the two-thirds requirement in the Senate would prevent treaties that limited slavery or the slave trade. See Robert M. Weir, *South Carolina: Slavery and the Structure of the Union*, in *RATIFYING THE CONSTITUTION* 201, 219-20 (Michael Allen Gillespie & Michael Lienesch eds., 1989). Whether Pringle's and Rutledge's hesitations also derived from concern about slavery is unclear.

153. 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 547-56 (Jonathan Elliott ed., 2d ed. 1836); Gregory Stiverson, *Necessity, the Mother of Union: Maryland and the Constitution, 1785-1789*, in *THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION* 131, 147 (Patrick T. Conley & John P. Kaminski eds., 1988) [hereinafter *THE CONSTITUTION AND THE STATES*].

154. See Gregory A. Stiverson, *Maryland's Antifederalists and the Perfection of the U.S. Constitution*, 83 *MD. HIST. MAG.* 18, 29 (Spring 1988) [hereinafter Stiverson, *Maryland's Antifederalists*]. For Mercer's decision to leave the Constitutional Convention, see Letter from J.B. Cutting to Thomas Jefferson (July 11, 1788), reprinted in 3 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 339 (Max Ferrand ed., 1966).

of course control the national legislature”¹⁵⁵

Perhaps more important are the statements of future Supreme Court Justice Samuel Chase. In his speech against ratification, he objected that “2/3 of the Senate present and the president may make treaties of commerce, and the treaties are to be the supreme law of the land.” Although Chase disliked the fact that federal courts would have “jurisdiction in controversies between our citizens and subjects of Great Britain or any other foreign state,” he admitted the judicial power should include (in fact, be “confined to”) “the decision of cases arising on treaties.”¹⁵⁶

Federalists closed debate and conducted a vote before Antifederalists could offer amendments; Chase and Mercer voted against ratification.¹⁵⁷ After the vote, Federalists agreed to a committee that would consider amendments, and Chase and Mercer were two of the four Antifederalists on the committee.¹⁵⁸ Their colleague William Paca offered an amendment that addressed part of Mercer’s concern and was also similar to the amendment urged by the Pennsylvania dissent: “No Law of Congress, or Treaties, shall be effectual to repeal or abrogate the Constitutions, or Bill of Rights, of the States, or any of them, or any Part of the said Constitutions or Bills of Rights.”¹⁵⁹ A major-

155. Address to the Members of the New York and Virginia Conventions, *reprinted in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 107, at 255, 259. Luther Martin’s twelve-part *The Genuine Information*, Delivered to the Legislature of the State of Maryland, was more important as a statement of Maryland Antifederalist views, and it says nothing about the treaty power or the Supremacy Clause. For a general discussion of *The Genuine Information*, see 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 146 (John P. Kaminski et al. eds., 1984). Martin also attended and left the Constitutional Convention. See Letter from J.B. Cutting to Thomas Jefferson (July 11, 1788), *reprinted in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 339 (Max Ferrand ed., 1966).

156. James A. Haw, *Samuel Chase’s “Objections to the Federal Government,”* 76 MD. HIST. MAG. 272, 279, 282 (Fall 1981). For an account of the speech, see Stiverson, *Maryland’s Antifederalists*, *supra* note 154, at 26, 28.

157. See 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 103, at 453 n.15.

158. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 549 (Jonathan Elliott ed., 2d ed. 1836); Stiverson, *Maryland’s Antifederalists*, *supra* note 154, at 30-32.

159. See Amendments of the Minority of the Maryland Convention (Apr. 29, 1788), *reprinted in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 107, at 236, 241; Stiverson, *Maryland’s Antifederalists*, *supra* note 154, at 34-35 n.25. On the use of the word “repeal” to describe the impact of federal law on state law and of later in time statutes on earlier statutes, see Nelson, *supra* note 81, at 252-53.

ity of the committee rejected the treaty amendment (and most others).¹⁶⁰ The available records do not reveal specific votes, but Chase, Mercer, and Paca later declared that they “remain persuaded [of] the importance of the alterations proposed.”¹⁶¹

Three points deserve mention. First, participants in the Maryland debates probably had at least a bare understanding of the legal status of treaties, and Antifederalists lost overwhelmingly on all issues, including this one. Second, the process and outcome of the Maryland convention was an important lesson for Virginia Antifederalists.¹⁶² Third, future Justice Samuel Chase did not like the way in which treaties would become the law of the land; he was willing to consider distinctions between different kinds of treaties; and he supported an amendment to limit the federalism aspects of the treaty power. Yet he also was comfortable with federal court adjudication of treaty questions, which almost certainly means he contemplated that federal courts would be able to implement at least some treaty provisions against states.

Chase’s later opinion on the treaty power in *Ware v. Hylton*¹⁶³ partly reflects and partly is in tension with his views during ratification. His biographers suggest adoption of the Bill of Rights and Washington’s election as President helped reconcile Chase to the new federal government, even though he retained his concerns about its broad powers.¹⁶⁴ The French revolution, support among some Americans for French revolutionary ideas, and resulting hostility in some quarters toward England (including in Baltimore, Chase’s home) helped drive Chase into Federalist arms, and he became a strong proponent of upholding a properly ordered and British-derived liberty over French-in-

160. See 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 552-53 (Jonathan Elliott ed., 2d ed. 1836).

161. *Id.* at 556.

162. See Stüverson, *Maryland’s Antifederalists*, *supra* note 154, at 33 (showing that Chase and Paca made sure their list of amendments was “distributed in Virginia”); see also Gregory A. Stüverson, “To Maintain Inviolable Our Liberties”: *Maryland and the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* 370, 394 (Patrick T. Conley & John P. Kaminski eds., 1992) [hereinafter *THE BILL OF RIGHTS AND THE STATES*].

163. See generally *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); see *infra* notes 274-306 and accompanying text (discussing the case).

164. See generally JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 165 (Md. Hist. Soc’y, 1980).

spired radicalism.¹⁶⁵

Virginia. The treaty power played its most prominent role in the Virginia ratification debates. George Mason had already made treaties an issue in his *Objections*.¹⁶⁶ Writing to Governor Edmund Randolph a month after the constitutional convention, Richard Henry Lee continued the theme with the observation, "In the new constitution, the president and senate have all the executive and two thirds of the legislative power. In some weighty instances (as making all kinds of treaties which are to be the laws of the land) they have the whole legislative and executive powers."¹⁶⁷ For his part, Randolph—who like Mason and Gerry had attended the convention but not signed the Constitution—had previously written that he hoped for "abridging the power of the Senate to make treaties the supreme laws of the land" and "limiting and defining the judicial power,"¹⁶⁸ and his sentiments were reprinted two months later in pamphlet form.¹⁶⁹ Several people also wrote privately to James Madison to complain about exclusion of the House from making treaties that would be the supreme law of the land.¹⁷⁰

Although the *Federalist* essays were written primarily for a New York audience, some of the essays on the treaty power and

165. *Id.* at 169-70. For a discussion of Chase's "ideological odyssey" that focuses on his judicial career, see STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 37 (1991).

166. George Mason, *Objections to the Constitution* (Oct. 7, 1787), reprinted in 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 103, at 346.

167. Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), reprinted in 14 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 104, at 364, 367.

168. Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), reprinted in 14 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* *supra* note 104, at 117, 134; see also 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 73, at 648-49 (Sept. 17, 1787) (Madison) (discussing Randolph's decision not to sign).

169. Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787), reprinted in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 112, at 260, 273.

170. See Letter From Joseph Jones to James Madison (Oct. 29, 1787), reprinted in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 112, at 129; Letter from George Lee Turberville to James Madison (Dec. 11, 1782), reprinted in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 112, at 231; Letter from Joseph Spencer to James Madison (Feb. 28, 1788), reprinted in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 112, at 425.

Supremacy Clause, including those by Madison, had circulated in Virginia by the time the ratifying convention began.¹⁷¹ Discussing the Supremacy Clause in *Federalist 44*, Madison stressed it was necessary to ensure “a treaty or national law of great and equal importance to the States” would be equally valid and applicable in all of them.¹⁷² Writing in *Federalist 53* about the powers of the House of Representatives and against annual elections, Madison stated:

In regulating our own commerce [a member of the House] ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. . . . And although the House of Representatives is not immediately to participate in foreign negotiations and arrangements, yet from the necessary connection between the several branches of public affairs, those particular branches will frequently deserve attention in the ordinary course of legislation and will sometimes demand particular legislative sanction and co-operation.¹⁷³

This statement does not deny the legal status of treaties as supreme law once ratified, which Madison had affirmed in *Federalist 44*, but one easily can read it as consistent with Madison’s suggestion at the convention that commercial treaties might require different treatment.

As the state ratifying convention drew closer, other writers joined the fray. “Cassius” declared that in most countries the executive alone makes treaties, so including the Senate in the process was a democratic innovation.¹⁷⁴ His claim drew a response from “Brutus,” who insisted that allowing only the Senate

171. See 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 103, at 490-92. Despite their wide circulation, the importance of *The Federalist* to ratification is far from clear. See HULSEBOSCH, *supra* note 49, at 209-10 (stating that “[a]s campaign material, *The Federalist* failed” in New York, and it is possible that it “did not affect ratification elsewhere, either.”).

172. *THE FEDERALIST* NO. 44 (James Madison) (Jan. 25, 1788), *reprinted in* 15 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 155, at 469, 474. Madison also referred to treaties in *The Federalist* No. 42. 15 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 155, at 469, 474.

173. *THE FEDERALIST* NO. 53 (James Madison) (Feb. 9, 1788), *reprinted in* 16 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 114, at 97, 100.

174. Letter from Cassius To Richard Henry Lee (Apr. 2, 1788), *reprinted in* 9 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 641, 644-45 (John P. Kaminski et al. eds., 1990).

to participate in making treaties would not protect the interests of the people.¹⁷⁵ A "Society of Western Gentlemen" repeated the call for including the House in the treaty-making process.¹⁷⁶

Alexander White wrote that including treaties in the Supremacy Clause "is no more than declaring that the law of nations shall take place in America" and insisted "if you do not provide the means to carry . . . treaties into effect, you subject yourself to all the horrors of war."¹⁷⁷ "A Native of Virginia" approved of making treaties the law of the land but muddied the issue by giving reasons similar to those of South Carolina's John Pringle: "When we consider the subject matter of treaties are always of national import, and cannot affect the interests of individuals, we have no reason to fear that they will be made improvidently, or converted into instruments of oppression."¹⁷⁸

On the eve of the convention, Madison wrote a letter to George Nicholas that went further than his discussion three months earlier in *Federalist 53*:

It is true that [the House of Representatives] 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. . . . [U]nder the new System, every Treaty must be made by 1. the authority of the Senate in which the States are to vote equally. 2. that of the President who represents the people & the States in a compounded ratio. And 3. under the influence of the H. of Reps. who represent the people alone.¹⁷⁹

Again, Madison did not deny the words of the Supremacy

175. *Brutus*, VA. INDEP. CHRON. (May 14, 1788), reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 174, at 798, 801.

176. *Society of Western Gentlemen Revise the Constitution*, VA. INDEP. CHRON. (Apr. 30, 1788), reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 174, at 769, 777.

177. Alexander White, *To the Citizens of Virginia* (1788), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 112, at 438, 442.

178. *A Native of Virginia, Observations upon the Proposed Plan of Federal Government*, reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 174, at 655, 690.

179. Letter from James Madison to George Nicholas (May 17, 1788), reprinted in 9

Clause, but he anticipated a role for the House before some treaties could fully be law of the land. To at least some extent, this statement is consistent with his suggestion at the Constitutional Convention, as well as Wilson's statement at the Pennsylvania Convention, but it may also have responded to more recent Anti-federalist concerns.

At the convention, Antifederalists raised a series of objections to the treaty power. The first was that only two-thirds of a quorum of the Senate would be enough to ratify a treaty.¹⁸⁰ This concern shaded into a second issue, that the treaty power would allow the federal government to relinquish rights to navigate the Mississippi, which was a subject of deep concern in Virginia.¹⁸¹

Responding to these concerns, Madison argued—as he had in *Federalist 53* and his letter to Nicholas—that the House “will have a material influence on the Government” with respect to treaties “and will be an additional security in this respect.”¹⁸² Patrick Henry immediately objected:

The Honorable Gentleman has said, that the House of Representatives would give some curb to the business of treaties, respecting the Mississippi. This to me is incomprehensible. He will excuse me, if I tell him, he is exercising his imagination and ingenuity. Will the Honorable Gentleman say, that the House of Representatives will break through their balances and checks, and break into the business of treaties? He is obliged to support this opinion of his, by supposing, that the

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 174, at 804, 808-09.

180. See 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 965 (June 5, 1788) (Patrick Henry); 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1192 (June 12, 1788) (William Grayson); 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1211 (June 12, 1788) (Patrick Henry).

181. See 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1230-35 (June 13, 1788) (Patrick Henry); 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1243-44 (June 18, 1788) (William Grayson); 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1380 (June 18, 1788) (George Mason); see also *supra* note 47 and accompanying text (noting the importance of this issue).

182. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1241 (June 13, 1788) (James Madison); see also BANNING, *supra* note 47, at 257 (arguing for the importance of Madison's speech); HUGH BLAIR GRIGSBY, THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788, at 232 (R.A. Brock ed., 1890) (asserting this sequence of speeches was “one of the most intensely interesting and thrilling scenes in our history.”).

checks and balances of the Constitution are to be an impenetrable wall for some purposes, and a mere cobweb for other purposes. What kind of Constitution can this be? I leave Gentlemen to draw the inference.¹⁸³

Henry had gotten to the heart of the issue. He understood the text to mean the President and Senate alone would be able to make treaties that would have the force of law. He objected precisely because the text gave the House no role, and he rejected Madison's effort to explain the problem away.¹⁸⁴

Critically, however, Henry did not go unanswered. George Nicholas responded that the House would have an influence, just as Parliament had an influence on the King of England's treaty power.¹⁸⁵ Francis Corbin went further: "Treaties are generally of a commercial nature, being a regulation of commercial intercourse between different nations. In all commercial treaties it will be necessary to obtain the consent of the representatives."¹⁸⁶ While intended as a defense of Madison's position, Corbin seemed to adopt some of the arguments made by Mason and the Federal Farmer.

Treaties also came up during the convention's discussion of the Supremacy Clause. Henry objected that under the Constitution, "Treaties were to have more force here than in any part of Christendom. . . . To make them paramount to the Constitution and laws of the states, is unprecedented."¹⁸⁷ Madison responded, "If they are to have any efficacy, they must be the law of the land,"¹⁸⁸ and Nicholas repeated the point.¹⁸⁹ But Randolph's effort to provide a more conciliatory response recalled the pamphlet by A Native of Virginia: "neither the life nor property of a citizen . . . can be affected by a treaty . . . which [is] binding on the aggregate community in its political, social capacity."¹⁹⁰ Corbin then stated that treaties "are to be binding on the states only."¹⁹¹ He went on to assert "the difference between a

183. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1247 (June 13, 1788) (Patrick Henry).

184. For Henry's insistence on giving a role to the House, see *id.* at 1395.

185. See *id.* at 1251.

186. *Id.* at 1256.

187. *Id.* at 1382.

188. *Id.*

189. See *id.* at 1383; see also *id.* at 1389.

190. *Id.* at 1385.

191. *Id.* at 1392.

commercial treaty and other treaties,” and repeated his point that commercial treaties require “the consent of the House of Representatives . . . because of the correspondent alterations that must be made in the laws.”¹⁹²

At that point Madison again stressed the supremacy of treaties over state law—without mentioning their relation to federal statutes—and he declared Corbin’s statement that treaties were binding only on the states was “rational.”¹⁹³ Madison seems to have been reaching for a middle position, one that preserved the federalism function of the Supremacy Clause without taking a clear stand on the separation of powers aspects of the treaty power. It is difficult to know the impact of Madison’s statements—or those of Corbin. Indeed, no clear understanding of the treaty power and Supremacy Clause emerges from this part of the debate beyond the federalism idea that treaties would bind the states.¹⁹⁴

As the Convention wound to a close, Antifederalists continued to object to the treaty power and Supremacy Clause. Henry insisted that because treaties would be the supreme law of the land, “[o]ne amendment which has been wished for . . . is, that no treaty shall be made without the consent of a considerable majority of both Houses.”¹⁹⁵ On June 24, he proposed a list of amendments that included alterations in the treaty power, and he asserted adoption of these amendments should be a requirement of ratification.¹⁹⁶ Madison objected to conditioning ratifi-

192. *Id.* at 1392-93.

193. *Id.* at 1395-96.

194. Julian Ku draws the conclusion that Virginia Federalists supported the last-in-time rule. See Ku, *supra* note 15, at 373-75. However, I read these statements differently, especially in light of Madison’s later statements in the Jay Treaty debates.

195. 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 53, at 1535-36 (June 25, 1788) (Patrick Henry). In a statement that seems more directed at federalism than separation of powers concerns, John Tyler declared “the supremacy of the laws of the Union, and of treaties, are exceedingly dangerous.” 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 53, at 1528 (June 25, 1788) (John Tyler). Not surprisingly, many of the Antifederalist statements blended federalism and separation of powers criticisms.

196. 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 53, at 1479 (June 24, 1788) (Patrick Henry). Henry’s amendments were not included in the journal of that day’s proceedings. The reporter noted they were “nearly the same as those ultimately proposed by the Committee.” *Id.* The amendments were based on a list prepared by a group of Antifederalists in early June and shared with Antifederalists in New York. See Letter from George Mason to John Lamb (June 9, 1788), reprinted in 9 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*.

cation on acceptance of amendments and spoke against some of Henry's amendments (none involving treaties). But he also expressed his willingness to support amendments "as seemed in his judgment, to be without danger."¹⁹⁷

On June 25, the convention voted 89-79 to ratify the Constitution unconditionally but with proposed amendments.¹⁹⁸ The vote on proposing amendments does not survive, but James Madison, John Marshall, and George Nicholas (as well as William Grayson, Patrick Henry, George Mason, and Edmund Randolph) were appointed to the committee that drafted them.¹⁹⁹ Two days later, the committee reported a list of recommended amendments.²⁰⁰ The whole convention approved them the same day, and again no record exists of the exact vote.²⁰¹

TION, *supra* note 174, at 818; 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1514 (discussing the similarities); Alan V. Brice-land, *Virginia: The Cement of the Union*, in THE CONSTITUTION AND THE STATES, *supra* note 153, at 201, 217. The amendments in the Mason letter include an amendment about treaties, "not yet finally agreed upon by the Committee," that is very similar to the one ultimately proposed by the convention except that it would have required House approval of all commercial treaties. See Letter from George Mason to John Lamb (June 9, 1788), reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 174, at 822.

197. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1507 (June 24, 1788) (James Madison) (stating he would accept amendments that are "not objectionable or unsafe . . . Not because they are necessary, but because they can produce no possible danger.").

198. See *id.* at 1540.

199. See *id.* at 1541.

200. The records do not reveal divisions of opinion within the committee, but Madison, Marshall, Nicholas, and Randolph later voted to strike one of the amendments. See The Virginia Convention Debates, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION *supra* note 53, at 1556-57. After the convention, Madison wrote that "several" or "many" of the amendments were "highly objectionable." Letter from James Madison to Alexander Hamilton (June 27, 1788), reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1688; James Madison, Letter to George Washington (June 27, 1788), reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1688. Corbin wrote, "This whole business was ludicrous and is absurd in the Extreme. . . I wish our friend Madison had not been of the Committee—I am sure he blushes when it is talked of." Letter from Francis Corbin to Benjamin Rush (July 2, 1788), reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1697. As I suggest in the text, however, it is less likely that all of the treaty amendments would have been "highly objectionable" to Madison or to Corbin.

201. The Virginia Convention Debates, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1558 ; see also RICHARD R. BEEMAN, THE OLD DOMINION AND THE NEW NATION, 1788-1801, at 11-12 (1972).

The proposed seventh amendment dealt directly with treaties:

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, of their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in case 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.²⁰²

This amendment covers some of the issues about navigation and fishing that Madison raised at the Constitutional Convention. It also addressed antifederalist concerns about approving treaties by a two-thirds vote of a quorum and navigation rights on the Mississippi. It is plainly a compromise, however, because it failed to satisfy all of the antifederalist concerns about the House's role in making treaties. Commercial treaties would require House participation only if they regulated rights to fish American seas or navigate American rivers, and the House would have no role in treaties left out of the amendment. Further, any treaty that did not require House participation would be supreme law upon ratification.

The fourteenth proposed amendment touched more tangentially on treaties. It addressed concern that the Supremacy Clause would subject people to suit in federal courts that had not existed when they took actions (presumably including the failure to pay British creditors) that formed the basis of a cause of action: "the Judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of the Constitution."²⁰³ Finally, the convention instructed its representatives in Congress that, until these amendments were adopted, they were "to conform to the spirit

202. The Virginia Convention Debates, *reprinted in* 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 53, at 1554.

203. *Id.* at 1555. For Henry's speech on this issue, see 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 53, at 1422 (June 20, 1788) (Patrick Henry). Rhode Island proposed the same amendment when it ratified in 1790. See WILLIAM R. STAPLES, *RHODE ISLAND IN THE CONTINENTAL CONGRESS, 1765-1790*, at 678 (1870).

of [them] as far as the said Constitution will admit.”²⁰⁴

By the end of debate, any delegate paying attention probably had a general understanding of what was at stake with the treaty and Supremacy Clauses. But the numerous evasions, odd statements, or inconsistencies undermine the likelihood of a clear and specific understanding of these issues. Lance Banning’s conclusion about the convention in general applies equally well to this specific issue: “The victory at Richmond was conditional and incomplete.”²⁰⁵ The delegates voted to ratify with proposed amendments that would alter a treaty power that was not fully understood, and they agreed Virginia’s members of Congress would adhere to those amendments to at least some extent.²⁰⁶

New York. Whatever their importance in other states, the Federal Farmer essays, which raised a series of concerns about the treaty power, were important in New York.²⁰⁷ Expressing views similar to those of the Federal Farmer, Cato (who was likely Governor George Clinton or Abraham Yates, Jr.), stated the House of Representatives should participate in making treaties if they are to be supreme law.²⁰⁸ Writing in support of the Constitution, Americanus defended the power of the President and Senate to make treaties that would be the supreme law of the land, but he admitted, “So far as an article of a treaty may be opposed to, or in any way contravene an existing law of the land, so far perhaps the concurrence of the whole Legislature might

204. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 1556.

205. BANNING, *supra* note 47, at 264; *see also* BEEMAN, *supra* note 201, at 12, 21-23 (reaching a similar conclusion). I agree with Kesavan that other commentators overstate the ability of this evidence to support a presumption for or against self-execution and that a middle position is more reasonable, but I disagree that the best conclusion is clear support for partial self-execution in the sense Kesavan defines it. *See* Kesavan, *supra* note 7, at 1584-86. Uncertainty demands a far larger share in any conclusion.

206. Madison’s work on behalf of a bill of rights is consistent with this pledge, and one could interpret his role in the Jay Treaty debates in the same way.

207. For the importance of the first series in New York, see 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 203-07. For the second series, see 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 553 (John P. Kaminski ed., 2004). For a useful overview of the dominant themes in the New York ratification debate, see HULSEBOSCH, *supra* note 49, at 209-53.

208. Cato VI, N.Y. J. (Dec. 13, 1787), *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 416, 419-20. For attribution, see 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 58-59.

be proper to give it validity.”²⁰⁹

Writing in support of a bill of rights, Brutus (who was likely Robert Yates or Melancton Smith) also objected to the treaty power. He could “not find any limitation, or restriction, to the exercise of this power,” even though treaties would “supersede the constitutions of all the states.”²¹⁰ He later made clear his understanding—and his objection based on it—that treaties would be enforceable by individuals in judicial proceedings: “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.”²¹¹ Another writer expressed concern about the relationship of the Constitution, laws, and treaties under the Supremacy Clause. He wondered how they could all be supreme at the same time, and whether treaties or laws would trump provisions of the Constitution.²¹² DeWitt Clinton worried about the ability of treaties and laws to override state constitutions under the Supremacy Clause.²¹³

In *Federalist 64*, John Jay drew a clearer line, consistent with his earlier views: “Some are displeased with” the treaty power “because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority.”²¹⁴ Analogizing the treaty power to the power of

209. *Americanus VII*, N.Y. DAILY ADVERTISER, (Jan. 21, 1788), reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 207, at 629, 632. There is no evidence this series of letters had significant impact. See 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 171.

210. *Brutus II*, N.Y. J. (Nov. 1, 1787), reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 154, 159. For attribution, see 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 103.

211. *Brutus XIII*, N.Y. J., (Feb. 21, 1788), reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 207, at 795. *Cincinnatus* objected that “the unlimited power . . . of making treaties,” threatened freedom of speech. *Cincinnatus I*, To James Wilson, Esq., N.Y. J. (Nov. 1, 1787), reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 160, 163.

212. *A Countryman IV* (Hugh Hughes), N.Y. J. (Dec. 15, 1787), reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 106, at 424, 426.

213. *A Countryman IV* (DeWitt Clinton), N.Y. J. (Jan. 19, 1788), reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 207, at 597.

214. THE FEDERALIST No. 64 (John Jay) (March 5, 1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 114.

courts to make binding decisions, Jay observed that not all legal rules must be created by legislatures.²¹⁵ He went on to address the concern that treaties would be “the *supreme* laws of the land” and the claim that “treaties, like acts of assembly, should be repealable at pleasure.”²¹⁶ He responded by arguing that, because “a treaty is only another name for a bargain,” the consent of both parties to a treaty is “essential . . . to alter or cancel them.”²¹⁷ This characteristic, combined with their status as supreme law, put them “beyond the lawful reach of legislative acts.”²¹⁸ That is to say, Jay asserted treaties would trump federal and state legislation, but neither state nor federal laws could affect a treaty.

For his part, Alexander Hamilton wrote in *Federalist 22* about the struggle to obtain state compliance with treaties. The primary difficulty, he wrote, was “the want of a judiciary power [in the Articles of Confederation]. Laws are a dead letter without courts to expound and define their true meaning and operation.”²¹⁹ Hamilton then laid down what he believed was the essential rule:

The 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. To produce uni-

215. *See id.*

216. *See id.* (emphasis in original).

217. *Id.*

218. *Id.* Kesavan and Ku suggest this passage applies only to state law. *See Kesavan, supra* note 7, at 1552; Ku, *supra* note 15, at 376. I do not find their arguments persuasive in light of Jay’s assertion that only the treaty partners could “alter or cancel” a treaty. My interpretation also makes Jay’s views consistent with later Federalist positions. Worth noting is that Jay’s “Address to the People of the State of New York” was probably more influential in the New York ratification debate. In that essay, he mentioned “treaties of commerce” briefly, when describing the problems of treaty enforcement under the Articles of Confederation. *See A Citizen of New York, An Address to the People of the State of New York (April 15, 1788), reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra* note 207, at 922, 930. The general thrust of his essay was pragmatic: whatever its flaws, the proposed constitution was the best that could be expected, and it was unlikely anything better would result from starting over. Melancton Smith’s important essay opposing unconditional ratification, which does not mention treaties, argued that a better deal was possible. *See A Plebian, An Address to the People of the State of New York (April 17, 1788), reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra* note 207, at 942-62.

219. THE FEDERALIST NO. 22 (Dec. 14, 1787), *reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra* note 104, at 437, 442.

formity in these determinations, they ought to be submitted in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves.²²⁰

Hamilton's focus was on the federalism aspects of the treaty power under the Supremacy Clause, in light of the need to make treaties directly enforceable. But his broad language seems to encompass separation of powers issues as well, such that treaties simply will be federal law, will apply directly to individual legal rights, and will be enforced by federal courts.²²¹

220. *Id.*; see also THE FEDERALIST NO. 80 (Alexander Hamilton) (May 28, 1788), reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 96, 98 (John P. Kaminski et al. eds., 1995) (giving federal courts jurisdiction over treaties was appropriate because "the peace of the whole ought not to be left at the disposal of a part"). Yoo argues Hamilton was addressing the deficiencies of the Articles of Confederation in *Federalist 22*, and non-self-execution was irrelevant to Hamilton's concern about uniform interpretation of federal law. See Yoo, *Globalism and the Constitution*, *supra* note 7, at 2056-57. As Flaherty points out, Yoo's argument can succeed only by ignoring Hamilton's specific assertion that treaties would be the law of the land, subject to interpretation by courts, "as far as respects individuals." See Flaherty, *supra* note 7, at 2135-36.

221. In *Medellin v. Texas*, the Supreme Court cited Hamilton's *Federalist 33*, which the Court described as "comparing laws that individuals are 'bound to observe' as 'the supreme law of the land' with 'a mere treaty, dependent on the good faith of the parties.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1357 (2008) (quoting THE FEDERALIST NO. 33 (Alexander Hamilton) (Jan. 2, 1788), reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 155, at 216, 222. But Hamilton was not discussing the status of treaties under the Supremacy Clause in *Federalist 33*. He was discussing the importance of the Supremacy Clause, and he insisted federal laws must be supreme if they are to be laws at all. He illustrated his point in the following way:

A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.

THE FEDERALIST NO. 33 (Alexander Hamilton) (Jan. 2, 1788), reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 155, at 216, 222. Hamilton plainly is not referring to the legal effect of treaties under the Constitution. Rather, he is distinguishing the impact of the Constitution from that of a treaty. Treaties in general, without regard to the Supremacy Clause, do not create governments, whereas the Constitution would. As a result, it and the laws enacted under it must be supreme. The *Medellin* majority distorted Hamilton's meaning by using it as raw material for a more useful quotation, which allowed it to cite *The Federalist* as clear

On the role of the House, however, Hamilton arguably hedged a bit in *Federalist 69*. Discussing the British version of the treaty power, he observed:

The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In 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.²²²

Hamilton seems to admit U.S. treaties would have the same force as British treaties, but only with Senate consent, while in England the King did not need Parliamentary consent. Congress as a whole might also have a role in treaty implementation—in “adjusting” the laws—although that role, like Parliament’s, would be supplementary. Hamilton likely was admitting simply that some treaties require legislation to be implemented fully and was not adopting Madison’s comments in *Federalist 53*.²²³

Hamilton’s final significant statement on treaties is enigmatic. He wrote in *Federalist 75* that the treaty power “partake[s] more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them.”²²⁴ The goals of treaties:

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 from the sovereign to the subject but

support for its conclusion. Although other passages of *The Federalist* provide modest support for the Court’s reasoning, the Court’s version of *The Federalist* is inaccurate.

222. THE FEDERALIST NO. 69 (Mar. 14, 1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 114, at 387, 390.

223. See Kesavan, *supra* note 7, at 1553-55.

224. THE FEDERALIST NO. 75 (Alexander Hamilton) (Mar. 26, 1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 114, at 481, 482.

agreements between sovereign and sovereign. . . . [T]he vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them.²²⁵

Although the Senate was well suited for this task, the House was not, because its members would not be as wise, and its numbers would create “inconvenience and expense.”²²⁶ This passage seems to assume treaties would operate directly as laws but obfuscates the issue by suggesting they would not operate as rules binding on individuals.²²⁷

The records of the New York convention are incomplete. Antifederalists held a large majority as the convention began, but most of them supported the general idea of the Constitution and sought primarily to condition ratification on a series of prior amendments.²²⁸ Robert Livingston led off the proceedings with a lengthy speech in support of the Constitution. Among other things, he noted the problem that under the articles, Congress could make treaties, “but of what avail is it for Congress to make treaties without being able to compel an observance of them?”²²⁹

225. *Id.*

226. *Id.* Hamilton assumed the Senate’s power of advice and consent would include participation in negotiations, so that including the House in a process of this kind would indeed add “inconvenience and expense.”

227. See Flaherty, *supra* note 7, at 2138-39 (arguing *Federalist 75* did not back away from self-execution). In *Federalist 78* Hamilton discussed the last-in-time rule in the context of statutes and said it would not apply between the Constitution and federal statutes because “the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority.” THE FEDERALIST NO. 78 (Alexander Hamilton) (May 28, 1788), reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 220, at 87, 90. Kesavan takes this as instructive for treaty-statute conflicts. See Kesavan, *supra* note 7, at 1492-93. Hamilton’s later Camillus essays suggest he thought treaties were superior to federal statutes and the last-in-time rule did not apply to conflicts between them. See 1 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 449-450 (1902) (arguing Hamilton believed treaties to be superior to statutes).

228. See LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK STATE AND THE CONSTITUTION 175-79 (1966); John P. Kaminski, *New York: The Reluctant Pillar*, in THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 48, 114 (Stephen L. Schechter ed., 1987); cf. Robin Brooks, *Alexander Hamilton, Melancton Smith, and the Ratification of the Constitution in New York*, 24 WM. & MARY Q. 340, 344, 346 (1967) (questioning De Pauw’s assertions that issue of when to amend “‘was almost trivial” and Antifederalists intended to ratify in any event,” but also noting “many Antis could live with the Constitution, whereas Federalists could not or would not live without it—a factor which told in the end.”).

229. 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 1694.

He also declared a federal judiciary was necessary for “the construction of treaties and other great national objects.”²³⁰ But the convention quickly bogged down in a clause-by-clause examination of the constitution—urged by Federalists who wanted to draw out the proceedings while waiting for word first from New Hampshire and then from Virginia.²³¹

On July 2, news arrived that Virginia had ratified. It was now clear not only that the Constitution would go into effect (thanks to New Hampshire’s ratification), but also that the other pivotal states had signed on. Federalists stopped debating (and delaying), and they made little response to the series of amendments submitted by Antifederalists.²³² Thus, when John Lansing proposed an amendment on July 7 that would modify the Supremacy Clause with respect to treaties—“no treaty ought to operate so as to alter the constitution of any state; nor ought any commercial treaty to operate so as to abrogate any law of the United States”²³³—no response appears in the Convention records. Lansing’s proposal had common elements with the suggestion of the Pennsylvania minority but did not go as far.

Over the next two days, Antifederalists caucused and agreed to support ratification on the condition that the federal government’s power over the state would be limited until four specific amendments were adopted after a second convention.²³⁴ They also submitted a long list of explanatory statements and recommended amendments. One of the recommended amendments was a less aggressive revision of the treaty amendment: “That no treaty is to be construed to operate so as to alter the Constitution of any state.”²³⁵ The reasons for the change are unclear. Deletion of the clause on commercial treaties may have been strategic, or Antifederalists may have determined it was not necessary.

230. *Id.* at 1687.

231. See DE PAUW, *supra* note 228, at 193.

232. See 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 107; DE PAUW, *supra* note 228, at 216.

233. 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 2108.

234. See 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 107-08; DE PAUW, *supra* note 228, at 219-20; see also 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 2113-14 (reprinting relevant portions of newspaper reports).

235. 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 2121.

The remaining days of the convention were devoted to the form of ratification. Eventually, a handful of Antifederalists led by Melancton Smith decided to vote for ratification without specific conditions precedent or subsequent—not because they converted to the federalist cause, but because they concluded a defective constitution was better than nothing.²³⁶ On July 26, the Convention voted 30-27 to ratify “in confidence” that the proposed amendments, including the treaty amendment, would “receive an early and mature consideration.”²³⁷ Linda De Pauw suggests the thirty-two recommended amendments, which included the treaty amendment, were not as important as the twenty-three explanatory amendments (many of which ended up in the Bill of Rights).²³⁸ Whether or not she is correct, adoption of the Bill of Rights undermined efforts to seek more fundamental changes in the document.²³⁹

North Carolina. Treaties were a frequent topic of debate during the first North Carolina convention. William Lenoir led off by objecting that the President could join the Senate in making treaties “which are to be the supreme law of the land. This is a legislative power given to the President.”²⁴⁰ Although Lenoir appears to have thought treaties would have the same status as laws, the response from Archibald Maclaine confused the issue. In part repeating the claim made in South Carolina by John Pringle and in Virginia by A Native of Virginia and Edmund Randolph, Maclaine declared treaties were supreme law “for the most obvious reasons”:

that laws, or legislative acts, operated upon individuals, but that treaties acted upon states—that, unless they were the supreme law of the land, they could have no validity at all—that the President did not act in this case as a legislator, but rather in his executive capacity.²⁴¹

236. See Brooks, *supra* note 228, at 356; DE PAUW, *supra* note 228, at 252-54; 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 228, at 114.

237. See New York Ratifies the Constitution (July 26, 1788), *reprinted in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 220, at 294, 300.

238. DE PAUW, *supra* note 228, at 259-60.

239. See *id.* at 274.

240. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 27 (Jonathan Elliot ed., 2d ed. 1836) (July 24, 1788).

241. *Id.* at 28.

Responding to the ambiguities of Maclaine's statement, James Iredell stated that Lenoir's understanding was correct (even as he disagreed with Lenoir on the larger issue): "When treaties are made, they become as valid as legislative acts. I apprehend that every act of the government, legislative, executive, or judicial, if in pursuance of a constitutional power, is the law of the land."²⁴² At this point, according to the notes, "[s]everal members expressed dissatisfaction at the inconsistency (as they conceived it) of the expressions."²⁴³

On July 28, William Porter objected:

[T]here is a power vested in the Senate and President to make treaties, which shall be the supreme law of the land. Which among us can call them to account? I always thought there could be no proper exercise of power without the suffrage of the people; yet the House of Representatives has no power to intermeddle with treaties.²⁴⁴

Porter later repeated his point with greater clarity: "as treaties were the supreme law of the land, the House of Representatives ought to have a vote in making them, as well as in passing them."²⁴⁵ William Davie conceded the premise that treaties are "the supreme law of the land" and "paramount to an ordinary act of legislation," but he insisted the same was true in "[a]ll civilized nations."²⁴⁶ He added that the peace treaty was also the supreme law of the land under the Articles, even though some states disagreed or (in North Carolina) treated it as such only after passing implementing legislation,²⁴⁷ but he never addressed Porter's conclusion that the status of treaties as supreme law made the House's involvement necessary.

As the Convention went on, Iredell continued to assert that treaties automatically would operate as enforceable law, but he softened the argument with an analogy to British practice, which he understood to include a role for Parliament in adjusting the laws "to make alterations in a particular system which the change of circumstances requires."²⁴⁸ Addressing the more general

242. *Id.*

243. *Id.* (parenthetical in original).

244. *Id.* at 115.

245. *Id.* at 119.

246. *Id.*

247. *See id.* at 120.

248. *Id.* at 128.

question of the relative powers of the House and Senate, he suggested the House would be as powerful as the Senate because the House would have the appropriations power and “may at any time compel the Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to.”²⁴⁹ Samuel Spencer responded, “If the whole legislative body—if the House of Representatives do not interfere in making treaties, I think they ought at least to have the sanction of the whole Senate.”²⁵⁰

Treaties came up again during discussion of the Supremacy Clause. Defending the clause in its entirety, Iredell asked, “What is the meaning of this, but that as we have given power we will support the execution of it?”²⁵¹ Davie made clear the legal status of treaties as supreme law equated with the ability of courts—preferably federal courts—to implement them: “It was necessary that treaties should operate as laws upon individuals. They ought to be binding upon us the moment they are made. . . . [T]here ought, therefore, to be a paramount tribunal, which should have ample power to carry them [treaties] into effect.”²⁵² Maclaine agreed that “[t]he treaty of peace with Great Britain was the supreme law of the land; yet it was disregarded, for want of a federal judiciary.”²⁵³ On July 30, William Lancaster summed up the antifederalist view of these assertions:

Treaties are to be the supreme law of the land. This has been sufficiently discussed: it must be amended in some way or other. If the Constitution be adopted, it ought to be the supreme law of the land, and a perpetual rule for the governors and governed. But if treaties are to be the supreme law of the land, it may repeal the laws of different states, and render nugatory our bill of rights.²⁵⁴

249. *Id.* at 129. Note Iredell did not speak of “influence” in the way that Wilson, Madison, Nicholas, and Corbin had. His statements are more in line with Hamilton’s in *Federalist* 69. THE FEDERALIST NO. 69 (Mar. 14, 1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 114, at 387, 390.

250. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 131 (Jonathan Elliot ed., 2d ed. 1836).

251. *Id.* at 178 (July 29).

252. *See id.* at 158, 160 (“It is necessary that the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed. These ends can only be accomplished by a general paramount judiciary.”).

253. *See id.* at 164; *id.* at 188 (Samuel Johnston).

254. *Id.* at 215 (July 30).

The convention rejected ratification by a vote of 184-84.²⁵⁵ It also insisted on several amendments as a condition of any future ratification. Two of the amendments were identical to Virginia's proposals on adoption of treaties and the judicial power.²⁵⁶ The North Carolina convention added a third that was similar to the one proposed by the Pennsylvania dissenters and the initial version of the New York proposal:

That no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed, or made conformable to such treaty; nor shall any treaty be valid which is contradictory to the Constitution of the United States.²⁵⁷

These proposed amendments arguably suggest a shared understanding that, unless changed, the proposed Constitution would make treaties self-executing and superior to federal statutes to at least some degree. But the amendments also reflect the concern and uncertainty attached to these issues and could simply have sought to achieve clarity about the interaction of treaties with state and federal law.²⁵⁸

North Carolina ultimately ratified by a large margin in November 1789. No records were kept of the debates at the second convention,²⁵⁹ but treaties remained an issue. James Gallaway sought to make ratification conditional upon the adoption of five amendments, including the earlier proposed amendment on the relationship between treaties and federal statutes.²⁶⁰ The convention soundly rejected the proposal and voted to accept

255. See *id.* at 250-51.

256. See North Carolina Convention Amendments (Aug. 2, 1788), reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 220, at 204-205, 312, 317-18; 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 245-46 (Jonathan Elliot ed., 2d ed. 1836).

257. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 246 (Jonathan Elliot ed., 2d ed. 1836)).

258. Yoo suggests Iredell's and Davie's statements have little value because they contributed to North Carolina's initial decision not to ratify. See Yoo, *Globalism and the Constitution*, *supra* note 7, at 2070-72. The treaty power was obviously controversial, but other writers identify economic concerns, fear of centralization, and support for a bill of rights as key factors in the convention's decision. See ELKINS & MCKITRICK, *supra* note 29, at 59, 62; WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 226-27 (1989); WILLIS P. WHICHARD, JUSTICE JAMES IREDELL 65-67, 69, 85 (2000).

259. See POWELL, *supra* note 258, at 228-29.

260. Journal of the Convention of the State of North Carolina, Nov. 21, 1789, at 6 (1789).

the Constitution.²⁶¹ Gallaway then moved to recommend the same five amendments to Congress, and his proposal was referred to a committee.²⁶² Two days later, the committee proposed eight amendments to which the convention agreed—but the treaty amendment was not in the final list.²⁶³ To the extent that amendment had reflected concerns about regulation of commerce, its place may have been taken by the sixth proposed amendment, which declared “[t]hat no navigation law, or law regulating commerce, shall be passed, without the consent of two-thirds of the members present in both Houses.”²⁶⁴ Of course, the amendment on commercial legislation would likely satisfy concerns about treaties only if the delegates believed commercial treaties would not be self-executing.

Several years later, during the Jay Treaty debates, James Holland gave a version of how concerns about the treaty power were resolved, and his version provides a link between commercial treaties and commercial legislation:

at the Convention of North Carolina, this clause, which gives the Treaty—making power to the President and Senate, was considered by some as an exceptionable part, on account of the indefiniteness and generality of the expression. It was said, that the President, with two-thirds of the Senate, could make Treaties and make stipulations unfavorable to commerce. But those in favor of its adoption (of which I had the honor to be a member) said, that commercial regulations had been previously and expressly given to Congress, and to them secured. Under that conception I was in its favor; but should have been opposed to it upon the other construction.²⁶⁵

Holland’s account is consistent with the convention journal and with the attitudes of many North Carolina Federalists.²⁶⁶ Beyond that, its accuracy is difficult to confirm or challenge.

Most histories of North Carolina ratification suggest the state’s change of heart had little to do with the treaty power and

261. *Id.* at 6-7, 13.

262. *Id.* at 13-14.

263. *Id.* at 15 (Nov. 23).

264. *Id.* The link between treaties and navigation acts was a concern of Mason’s at the Constitutional Convention and resurfaced at the Virginia Convention.

265. 5 *ANNALS OF CONG.* 546 (1796).

266. See Powell, *supra* note 258, at 230-31.

instead derived from Congress's approval of the proposed Bill of Rights in September 1789 and the fact that the new nation had established a working government. Because much antifederalist rhetoric in North Carolina had focused on the absence of a bill of rights, its imminent inclusion in the Constitution made their continued opposition politically impossible in the now isolated state—even though many of the amendments they had demanded, including the treaty amendments, involved structural issues.²⁶⁷

The Remaining States. A writer in the *New Jersey Journal* admitted that the President and Senate might abuse their power to make treaties that would be the supreme law of the land, but he insisted that abuse was possible under any system of government and the remedy for such abuses lay with the people.²⁶⁸ The published proceedings of the remaining states do not reveal any discussions of the Supremacy Clause or treaty power; nor is there any evidence that either topic was an important issue.²⁶⁹

267. See Whichard, *supra* note 258; Michael Lienesch, *North Carolina: Preserving Rights*, in *RATIFYING THE CONSTITUTION* 343, 363-64 (Michael Allen Gillespie & Michael Lienesch eds., 1989); William S. Price, Jr., "There Ought to Be a Bill of Rights": *North Carolina Enters a New Nation*, in *THE BILL OF RIGHTS AND THE STATES*, *supra* note 162, at 424, 438-40; Alan D. Watson, *States' Rights and Agrarianism Ascendant*, in *THE CONSTITUTION AND THE STATES*, *supra* note 153, at 251, 264-65; see also POWELL, *supra* note 258, at 228-29 (suggesting Bill of Rights was not as powerful as an influence).

268. Reply to George Mason's Objections to the Constitution, N.J. J., Dec. 26, 1787, reprinted in 3 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 130, at 154, 159. The New Jersey convention proceedings reveal no substantive debate of any kind and there was little opposition or conflict. See 3 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 130, at 177-88; see also Sara M. Shumer, *New Jersey: Property and the Price of Republican Politics*, in *RATIFYING THE CONSTITUTION* 71 (Michael Allen Gillespie & Michael Lienesch eds., 1989); Eugene R. Sheridan, *A Study in Paradox: New Jersey and the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES*, *supra* note 162, at 246, 270.

269. Ratification materials from Delaware are "scant." "Both political factions supported the Constitution, and the vote . . . was unanimous." Gaspare J. Saladino, *Delaware: Armed in the Cause of Freedom*, in *THE BILL OF RIGHTS AND THE STATES*, *supra* note 162, at 274, 298. Political self-interest, financial implications, and economic connections with Pennsylvania appear to have been controlling. See Gaspare P. Saladino, *Delaware: Independence and the Concept of a Commercial Republic*, in *RATIFYING THE CONSTITUTION* 29, 43-46 (Michael Allen Gillespie & Michael Lienesch eds., 1989). Georgia also ratified by a unanimous vote, and "[l]ittle is known about the public debate over the Constitution or the debate that took place in the state ratifying convention." Kenneth Coleman, *Frontier Haven: Georgia and the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES*, *supra* note 162, at 455; see also Edward J. Cashin, *Georgia: Searching for Security*, in *RATIFYING THE CONSTITUTION* 93, 111 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (asserting the primary issue "was a search for security, not only freeing them from very immediate fears, but also opening them to vast new opportunities."). New Hamp-

The question, then, is what this silence means. These states voted to ratify without conditions, which indicates at least general agreement with the terms of the Constitution. But the failure to debate specific issues suggests many people in these states never became aware of or grappled with the ambiguities of the document, including the complexities of the treaty and Supremacy Clauses that emerged in other state debates. In the absence of a clear default position—such as adopting or rejecting a clearly understood British practice—the existence of some kind of public debate is critical to recovering a useful original understanding in these states. Without that debate, no specific set of understandings may ever have existed. Nor can the debates in other states simply substitute for this absence. In a critical number of states, all we have are generalities that undermine the effort to apply original understandings to specific issues of constitutional interpretation.

E. *Summing Up*

The extant debates reveal several federalist positions on implementation of treaties. First, nearly everyone who addressed federalism issues agreed treaties would bind the states and override conflicting state law. Second, several argued simply that treaties would be self-executing as federal law. Many of these participants suggested that treaties would trump federal statutes. Others, such as Hamilton, Iredell, Madison, and Wilson, affirmed self-execution while also stressing the practical power the

shire held an initial convention, at which it became clear there were not enough votes to ratify. The delegates adjourned for several months before ratifying in June 1788 by a vote of 57-47, with proposed amendments that ignored the treaty power and Supremacy Clause. No record of proceedings was kept. The debates in Massachusetts were influential “because ties between the two states were close, and Massachusetts newspapers circulated widely in New Hampshire,” but religion, slavery, and the lack of a bill of rights were the primary issues. Jean Yarbrough, *New Hampshire: Puritanism and the Moral Foundations of America*, in *RATIFYING THE CONSTITUTION* 235, 236-37 (Michael Allen Gillespie & Michael Lienesch eds., 1989). In Rhode Island, the primary issues were state debt and paper money. See John P. Kaminski, *Rhode Island: protecting State Interests*, in *RATIFYING THE CONSTITUTION* 368 ((Michael Allen Gillespie & Michael Lienesch eds., 1989)); see also PATRICK T. CONLEY, *First in War, Last in Peace: Rhode Island and the Constitution, 1786-1790*, in *THE CONSTITUTION AND THE STATES*, *supra* note 153, at 269, 285. For ratification proceedings in Rhode Island, see Staples, *supra* note 203, at 633-80; see generally THEODORE FOSTER’S *MINUTES OF THE CONVENTION HELD AT SOUTH KINGSTOWN, RHODE ISLAND, IN MARCH, 1790, WHICH FAILED TO ADOPT THE CONSTITUTION OF THE UNITED STATES* (Robert C. Cotner ed., 1929).

House would possess. Importantly, this position need not imply that legislative implementation is necessary for a treaty to become law. More likely, it reflects an appreciation of the practical realities of governing and legislating. Full implementation might require legislation—such as the creation of administrative mechanisms for efficient enforcement—but the treaty would be law whether or not these steps were taken.

This focus on practice shades into a final position that emerges in some of Madison's statements and in those of several other participants: the possibility that many treaties cannot be enforced without legislation, especially in the separation of powers context, because appropriations and administrative arrangements will be a necessary part of their implementation—something which seems particularly true of commercial treaties. For people with these views, the interaction between treaties and existing federal statutes under the Supremacy Clause was also unclear. More generally, as the debate shifted from federalism and general theoretical claims to separation of powers and the practical implications of declaring treaties to be supreme law, many participants suggested more nuanced positions that were not always internally consistent or consistent with the views of their allies.²⁷⁰

Antifederalists such as the Federal Farmer went through a similar process from a different direction. By the end of ratification, participants on both sides appear to have concluded that treaties would trump state law under the Supremacy Clause and would at least sometimes be enforceable in judicial proceedings regardless of state law.²⁷¹ On other issues, such as the role of the House of Representatives and the interaction between treaties

270. Madison continued to mull over these issues. Two years after ratification, he shifted his position on the Supremacy Clause and seemed to assume self-execution would be the norm: "As Treaties are declared to be the supreme law of the land, I should suppose that the words of the treaty are to be taken for the words of the law, unless the stipulation be expressly or necessarily executory." He went on, "[t]reaties as I understand the Constitution are made supreme over the constitutions and laws of the particular States, and, like a subsequent law of the U.S., *over pre-existing laws of the U.S.* provided however that the Treaty be within the prerogative of making Treaties, which no doubt has certain limits." Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), *reprinted in* 13 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 342-44 (1981) (emphasis added). Five years later, however, in the Jay Treaty debates, he argued that the Supremacy Clause was about federalism and rejected the idea that treaties displace federal statutes. *See* 5 ANNALS OF CONG. 488-93 (1796).

271. *See* Golove, *supra* note 7, at 1132-33.

and federal law, no consensus emerges, in part because some Antifederalists turned their federalism concerns into separation of powers arguments.²⁷² Numerous participants agreed that some treaties could not function as law by themselves, with the result that legislation—and thus House participation—would be necessary. Although tensions existed in the federalist position, and some points of agreement were loose and tentative, the turn to a more nuanced view of treaty implementation prefigured the self-execution doctrine ultimately adopted by the Supreme Court, while the lack of any consensus on the interaction between treaties and federal statutes set the stage for the last-in-time rule.

Every state ultimately adopted the Constitution as written. Although the treaty power and Supremacy Clause were controversial, and amendments were proposed, no changes were made to the document. Yet Federalists made enough ambiguous statements about treaties that the ultimate failure to enact an amendment cannot be conclusive. Further, the close votes in several states made many participants aware that compromises would have to emerge as the new government got underway—a government whose ranks would include Antifederalists as well as Federalists. That is to say, Federalists won the important victory of getting the Constitution ratified, but their victory was less clear on the equally important questions of what it would mean in practice. Indeed, the idea that the meaning of the Constitution should emerge from the dialogue between Federalists and Antifederalists had resonance well beyond the debate over treaties and became an important part of the Jeffersonian realignment of American politics that began in the late 1790s.²⁷³

III. *INTERLUDE: WARE V. HYLTON—TREATIES AND FEDERALISM*

During the Revolution, many states confiscated the property of loyalists and interfered with efforts by British creditors to col-

272. *See id.* at 1132-34.

273. For an insightful discussion of these issues, including the reminders that neither "Federalists" nor "Antifederalists" were fixed groups with defined memberships and consistent ideologies, and that the process of putting the Constitution into practice created realignments and comprises almost immediately, see DAVID J. SIEMERS, *RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME* (2002); see also Cornell, *supra* note 29, at 189, 191, 225-26, 244-45.

lect debts.²⁷⁴ In response, the 1783 peace treaty declared, "It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."²⁷⁵ State enforcement of this provision was spotty under the Articles, but after adoption of the Constitution some creditors saw a new opportunity to obtain payments.²⁷⁶ Artful litigation and judicial reluctance to decide constitutional issues delayed the day of reckoning,²⁷⁷ and the debt issue was ultimately resolved by subsequent treaties.²⁷⁸

The conflict among the 1783 treaty, the Supremacy Clause, and state law came to the Supreme Court in 1796, in *Ware v. Hylton*.²⁷⁹ A British creditor sued a Virginia debtor in the federal circuit court, seeking payment on a 1774 debt. The debtor argued the debt had been partially discharged by his compliance with the Virginia sequestration statute—which allowed debtors to pay some or all of the debt to the state and receive a discharge—while the creditor claimed the peace treaty repealed the Virginia statute and nullified all proceedings under it. The circuit court agreed with the debtor's discharge claim.²⁸⁰

274. See ELKINS & MCKITTRICK, *supra* note 29, at 90-91; GOEBEL, *supra* note 40, at 749-50; JENSEN, *supra* note 53, at 276, 278; McDONALD, *supra* note 38, at 151-52.

275. Definitive Treaty of Peace, *supra* note 45, art. 4.

276. See GOEBEL, *supra* note 49, at 742; R. KENT NEW-YEAR, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 97 (2001).

277. See *id.* at 101; DAVID ROBARGE, A CHIEF JUSTICE'S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT 133-35 (2000). In addition, Congress's decision not to provide federal district courts with subject matter jurisdiction over federal questions, and its imposition of a US\$500 amount in controversy requirement for diversity cases, meant that many—perhaps most—cases that implicated the treaty were relegated to state court. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 44 (2009).

278. The Jay Treaty of 1794 created an arbitration commission for unsettled debts, with payment by the government rather than by the debtors. See Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, U.S.-U.K., art. 6, 1794, 8 Stat. 116, 119-20; GOEBEL, *supra* note 49, at 749. The commission ran into problems, and an 1802 treaty provided for a lump sum payment by the United States to settle outstanding claims. See Convention Between the United States and Great-Britain, U.S.-U.K., 1802, 8 Stat. 196; GOEBEL, *supra* note 49, at 755-56.

279. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

280. See GOEBEL, *supra* note 49, at 748, 750. On the discharge issue, Justice Iredell and District Judge Cyrus Griffin sided with the debtor (Hylton), while Chief Justice Jay dissented in favor of the creditor (Ware). The court found for Ware on the remaining issues. See *id.* at 750. By the time the case reached the Supreme Court, Jay had resigned, and Chief Justice Ellsworth had yet to take his seat. See *id.* at 749, 751 & n.126.

The Supreme Court reversed. As the junior member of the Court, Justice Chase delivered the first opinion. On the question of the treaty's impact on Virginia law, he declared it was "superior to the laws of the states" under the Articles of Confederation.²⁸¹ Even if there were doubts on that issue, the Supremacy Clause of the Constitution had settled the matter: "A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way."²⁸² He went on to emphasize the sweeping nature of the Supremacy Clause: "on the same ground that a treaty can repeal a law of the state, it can nullify it."²⁸³ The result was that the 1783 treaty did not merely preempt the Virginia sequestration statute; it also retroactively nullified all acts taken under it that were inconsistent with the treaty.

Even as he espoused a strong view of the Supremacy Clause—consistent with his interpretation of the Constitution at the Maryland convention—Chase also gestured toward a more complex position. Twice, he distinguished between treaty provisions that merely agree certain actions shall be taken, and provisions that provide a clear directive courts can apply immediately.²⁸⁴ Chase appears to have accepted the rule of treaty interpretation that the language of a treaty provision might indicate it

Ellsworth's opinion in *Hamilton v. Eaton*, 11 F. Cas. 336, 339-40 (C.C.D. N.C. 1796) (No. 5980), suggests he would have voted to reverse.

281. *Ware*, 3 U.S. (3 Dall.) at 236.

282. *Id.*

283. *Id.* at 242. On the use of the word "repeal," see Amendments of the Minority of the Maryland Convention, reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 107.

284. *See id.* at 240:

It is expressly contracted . . . that certain things shall not take place. This stipulation is direct. The distinction is self-evident, between a thing that shall not happen, and an agreement that a third power shall prevent a certain thing being done. The first is obligatory on the parties contracting. The latter will depend on the will of another; and although the parties contracting, had power to lay him under a moral obligation for compliance, yet there is a very great difference in the two cases.

See id. *See also id.* at 244:

The fourth article . . . is not a stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual states, to do those acts; . . . it is an express agreement, that certain things shall not be permitted the American courts of justice; and . . . it is a contract, on behalf of those courts, that they will not allow such acts to be pleaded in bar, to prevent a recovery of certain British debts.

See id.

requires implementation by the political branches, but that provisions capable of operating without legislation go into effect immediately.²⁸⁵ While plainly an endorsement of the view that some treaty provisions will therefore be self-executing in constitutional terms, Chase also recognized the Supremacy Clause could not convert treaty language into something it was not.²⁸⁶ Moreover, Chase suggested that self-execution doctrine—consistent with the Supremacy Clause—would operate most powerfully at the federalism level, so that states are more likely than Congress to be bound by treaty provisions.²⁸⁷ This approach to self-execution is consistent with and may draw on Chase's past concerns about commercial treaties.

With the exception of James Iredell, the other justices were more succinct. Justice Patterson, for example, declared "Congress could, by treaty, repeal the act, and annul every thing done under it."²⁸⁸ Because the clear aim of the treaty was "to restore the creditor and debtor to their original state" by "repeal[ing] the legislative act of Virginia . . . and with regard to the creditor annul[ing] every thing done under it,"²⁸⁹ he voted to reverse. Justice Wilson—who had made nuanced statements about the treaty power at the Pennsylvania convention—said simply, "Independent of the Constitution," the treaty "annuls the confiscation" because the state of Virginia "was a party to the making of the treaty."²⁹⁰ Justice Cushing observed that Virginia could make whatever rules it pleased, "[b]ut here is a treaty, the su-

285. See Sloss, *Non-Self-Executing*, *supra* note 7, at 19-21 (noting the importance of this distinction for treaty interpretation).

286. As Yoo observes, Chase's opinion "contained language that suggests that treaties calling for legislative action still must be implemented by Congress." Yoo, *supra* note 7, at 2080.

287. Thus, Chase's insistence that in the revolutionary era Congress possessed "the great rights of external sovereignty," while the states "retained all internal sovereignty," supports his self-execution discussion. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 232 (1796). The states, having no foreign policy power, would be bound by treaties, while Congress would be less likely to be bound since it shared federal power over foreign affairs. He did suggest the treaty could override "the common law, or acts of Parliament, or acts of Congress, or acts of any of the States, then in existence, or thereafter to be made," which can be read to reject a last-in-time rule for treaties and federal statutes and would be consistent with Chase's conversion from antifederalism to strong federalism. *Id.* at 240.

288. *Id.* at 249. Whether Patterson meant to say the Senate instead of Congress, or that Congress could pass a statute to implement the treaty, is unclear.

289. *Id.* at 251, 256.

290. *Id.* at 281; see also Vázquez, *Treaty-Based Rights and Remedies*, *supra* note 7, at

preme law, which overrules all State laws upon the subject, to all intents and purposes; and that makes the difference.”²⁹¹ Aside from Chase, none of the voting justices gave extended consideration to the complexities of treaty interpretation or the implications of those complexities for judicial enforcement of treaties under the Constitution.

Adhering to the Court’s early practice, Justice Iredell did not cast a vote, but he read his opinion from the circuit court and confirmed that his view of the case remained the same.²⁹² Iredell first considered the treaty’s effect under the Articles of Confederation, stating the provision on debts “could not at that time be carried into effect in any other manner, than by a repeal of the statutes of the different States . . . and the passing of such other acts as might be necessary to give the recovery entire efficacy, in execution of the treaty.”²⁹³

Iredell then discussed the nature of treaties, “speaking generally, independent of the particular provisions on the subject, in our present Constitution, the effect of which I shall afterwards observe upon.”²⁹⁴ In general, treaty provisions could be divided into two categories, roughly similar to those described by Chase. The first was “executed articles,” so-called “because, from the nature of them, they require no further act to be done.”²⁹⁵ The second category was “executory,” which divided into three parts: “Those which concern either, 1st, the Legislative Authority. 2nd. The Executive. 3rd. The Judicial.”²⁹⁶ The debt article, in his view, was addressed to the legislature, so that “the manner of giving effect to this stipulation is by that power which possesses the Legislative authority, and which consequently is authorized to prescribe laws to the people for their obedience.”²⁹⁷ He added that a treaty is always “valid and obligatory, in point of moral obliga-

1112 n.120 (suggesting Wilson believed the treaty was directly binding on the individual debtor).

291. *Ware*, 3 U.S. (3 Dall.) at 282; see also *id.* at 284 (invoking Supremacy Clause again).

292. See *id.* at 256. Iredell explained he would have participated in the decision only if the court had been evenly divided without his vote. See *id.*

293. *Id.* at 271.

294. *Id.* at 271-72.

295. *Id.* at 272.

296. *Id.*; see also Sloss, *Non-Self-Executing*, *supra* note 7, at 19-21 (canvassing sources to conclude “executed” meant self-execution, while “executory” meant non-self-execution).

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

tion, on all, as well on the Legislative, Executive, and Judicial Departments . . . as on every individual of the nation”²⁹⁸ Iredell also contended his general view of treaties “derives considerable weight from the practice in Great Britain,” which he interpreted as rejecting self-execution.²⁹⁹

Iredell next considered the impact of the Supremacy Clause on these general interpretive principles. Noting the inadequacies of treaty implementation under the Articles, he conceded, “Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for, and it was so before in a moral sense.”³⁰⁰ Applying this principle, which “extends to subsisting as well as to future treaties,” Iredell asserted that “the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor’s recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.”³⁰¹

Iredell turned finally to the words of the treaty, to see what impact they would have under the Supremacy Clause. He insisted treaties should be construed with a presumption against the relinquishment of private rights, such as the rights of debtors under the Virginia sequestration statute:³⁰²

If [the treaty makers] wanted a further act of legislation, grounded not merely on ordinary legislative authority, but upon power to destroy private rights acquired under legisla-

298. *See id.* Iredell asserted a treaty provision requiring the freeing of prisoners of war would be executory with respect to the executive branch, so that the commander in chief could not release prisoners without authority from Congress, and an inferior officer could not release prisoners without authority from the commander in chief. *See id.* at 273. Similarly, judges could not order the release of prisoners pursuant to a treaty without legislation or an executive pardon. *See id.* at 273. Executed provisions included “the acknowledgment of independence,” “the permission to fish,” in certain areas, and “the acknowledgment of the right to navigate the Mississippi.” *See id.* at 272.

299. *See id.* at 273. With this statement, Iredell departed from his assertion in the first North Carolina ratification convention that treaties were largely self-executing in Britain. *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 128 (Jonathan Elliot ed., 2d ed. 1836).

300. *See Ware*, 3 U.S. (3 Dall.) at 277.

301. *See id.*

302. *See id.* at 279.

tive faith, long since pledged and relied on, very special words were proper to effect that object, and neither in one country nor the other could it have been effected with the least colour of justice, but by providing at the same time the fullest means of indemnification.³⁰³

Iredell concluded that the treaty, through the Supremacy Clause, effectively repealed all statutes that blocked recovery of debts, but he denied the language of the treaty also nullified rights that had become vested under those statutes.³⁰⁴ Thus, an executory treaty provision that in other countries would require legislative implementation would be immediately enforceable under the Supremacy Clause—at least so long as it did not conflict with vested rights.³⁰⁵

These opinions—particularly those of Chase and Iredell—generate strong controversy among commentators who view the case as a critical precedent.³⁰⁶ And the case offers something to both sides of the self-execution debate. *Ware* confirmed that the Supremacy Clause makes provisions of some treaties self-executing without legislation, but Chase and Iredell made clear distinctions between types of treaty provisions, and Chase also stated that some treaty provisions would require implementation by Congress or the President and could not be implemented directly by courts.³⁰⁷ Further, the Court applied the treaty to over-

303. *Id.*

304. *See id.* As a southerner, Iredell may have been sensitive to the issue of pre-war debts and concerned about debtors. *See* WHICHARD, *supra* note 258, at 171. As North Carolina Attorney General, Iredell had defended specific seizures of British property. *See id.* at 11. In private practice, however, Iredell represented British landowners whose property had been confiscated. *See id.* at 7-8. As in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and consistent with other North Carolina Federalists, he also sought to protect state sovereignty. *See* POWELL, *supra* note 258, at 230-31; WHICHARD, *supra* note 258, at 110-11, 130, 166, 170-71.

305. *See Ware*, 3 U.S. (3 Dall.) at 279. Iredell was less clear about executory provisions that required executive or judicial action. When he considered examples in his general discussion, he was emphatic about the need for legislative authority in addition to treaty authority, and he never returned to those examples in his discussion of the Supremacy Clause. *See id.* at 273.

306. Compare Yoo, *Globalism and the Constitution*, *supra* note 7, at 2079-80 (arguing Iredell concluded treaty was not self-executing and was unclear on whether Supremacy Clause changed British practice), with Vázquez, *Treaty-Based Rights and Remedies*, *supra* note 7, at 1111-12 (contending Iredell concluded treaty execution in the United States depended largely upon treaty language and Supremacy Clause, which departed from British law), and Vázquez, *Laughing at Treaties*, *supra* note 7, at 2196-97, 2217 n.172 (same), and PAUST, *supra* note 3, at 56-57 (similar).

307. *See Ware*, 3 U.S. (3 Dall.) at 199.

ride state law, but it did not discuss the impact of treaties on federal law.³⁰⁸ Nor did it discuss the role of the House of Representatives in treaty implementation beyond recognizing that federal legislation would sometimes be necessary.

Even as the Court embraced self-execution in a federalism context,³⁰⁹ therefore, the search for an accommodation between federalist and antifederalist visions of the treaty power continued. Chase and Iredell's discussions in particular set the stage for subsequent separation of powers debates. First, if some treaties require legislation to be supreme law of the land, what is Congress's role? Must it pass such legislation, or may it decide for itself whether to take the final steps to carry a treaty into effect? The House debate over the Jay Treaty and the 1816 debate over the commercial treaty—and to some extent the debate over the Robbins extradition—would address this issue. Second, how much power does the President have to implement a treaty if Congress has not legislated? The Robbins debate would turn squarely on that point. Third, if some treaties are self-executing, what happens when they conflict with existing federal law? The Jay debates and the 1816 debate would address that issue repeatedly. By the time the Court returned to these issues, the result was not in serious doubt.

Ware contains a further wrinkle. John Marshall, then a state legislator and lawyer in private practice, represented the debtor—indeed, representation of debtors against British creditors was a large part of his practice.³¹⁰ Yet to the extent his sympathies lay with his clients, the causes likely were concerns about vested legal rights (including discharges of debts) and the economic well-being of Virginia—not opposition to treaty self-execution.³¹¹ Moreover, at the same time he was representing a debtor in *Ware*, Marshall was also representing a British landowner. Marshall had a personal interest in upholding the landowner's interests, because he had negotiated the purchase of

308. *See id.*

309. *See id.*

310. *See* NEWMYER, *supra* note 276, at 97; ROBARGE, *supra* note 277, at 132-33.

311. *See* NEWMYER, *supra* note 276, at 97-98; ROBARGE, *supra* note 277, at 133; *see also infra* notes 348-50 and accompanying text (discussing Marshall's views during the Jay Treaty debates). Whether this means Marshall supported Virginia's fourteenth proposed amendment that would have limited federal court jurisdiction in cases of vested rights is unclear.

land contingent on the validity of the title.³¹² Relying on this information, as well as Marshall's political activities and his reputation as a solid, if somewhat moderate, federalist, his biographers conclude that at that time he did not oppose judicial enforcement of treaties to preempt state law under the Supremacy Clause.³¹³

Notably, Marshall did not even ask the Court to deny its ability to enforce the treaty notwithstanding state law. He first argued compliance with the Virginia statute had extinguished the debt.³¹⁴ He then declared the treaty could not repeal the Virginia statute without express language, and he suggested that the government's ability to take away the debtors' vested rights was "questionable." Any recovery on debts extinguished by the sequestration statute should come directly from Virginia.³¹⁵ Marshall's argument is broadly consistent with Iredell's opinion.³¹⁶ And Iredell, in turn, noted the distinction between executory and executed treaty provisions that Chief Justice Marshall would later draw upon in *Foster v. Neilson*;³¹⁷ he also supported what appears to be a presumption in favor of self-execution while making room for vested rights claims. To the extent Marshall's experience in *Ware*—perhaps combined with his experiences in Virginia politics—affected his views on self-execution, it supports the conclusion that he recognized both the significance of the Supremacy Clause and a need for pragmatic approaches to the problems of treaty implementation.

312. See ROBARGE, *supra* note 277, at 165-72. This was an early part of the protracted litigation that resulted in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). For extensive discussion, see Golove, *supra* note 7, at 1192-1205.

313. See NEWMYER, *supra* note 276, at 100; ROBARGE, *supra* note 277, at 169. Although he does not say so directly, Yoo leaves open the possibility that Marshall's participation on the debtor's side is consistent with his later opinion in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), and thus that *Foster* should be read to create a presumption against self-execution. See Yoo, *Globalism and the Constitution*, *supra* note 7, at 2077-78.

314. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 212-13 (1796); see also GOEBEL, *supra* note 49, at 750 (stating notes of Marshall's argument are sketchy and unreliable).

315. See *Ware*, 3 U.S. (3 Dall.) at 213-14.

316. Cf. ROBARGE, *supra* note 277, at 135 (noting Iredell was impressed by arguments of Marshall and his co-counsel).

317. See Sloss, *supra* note 7, at 19-21. Iredell's category of executory treaties in *Ware* was larger than Marshall's in *Foster*, however, because it included treaties that required judicial or executive acts. See *id.* at 23-24.

IV. CONGRESS DEBATES THE TREATY POWER

Beginning in 1796, a series of foreign policy issues led members of Congress into extensive debates about the place of treaties in the U.S. constitutional order, particularly at the separation of powers level. Building on moderate federalist statements during ratification and possibly also the opinions of Chase and Iredell in *Ware v. Hylton*,³¹⁸ these debates prefigured the Supreme Court's decision in *Foster v. Neilson*³¹⁹ and its adoption of the last-in-time rule.

A. Prologue: Neutrality and the Pacificus—Helvidius Debate

On April 22, 1793, President Washington issued the Neutrality Proclamation, which declared the United States would not take sides in the conflict between England and France.³²⁰ Although the idea of neutrality was not controversial, the President's decision to proclaim it in an official executive branch document raised separation of powers issues.

The debate over the proclamation included a series of opposing essays by Alexander Hamilton and James Madison. Although most of their debate focused on other issues, both writers also addressed the treaty power. Writing as "Pacificus," Hamilton stated the executive branch is "the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government . . ." ³²¹ This statement assumes some treaties will operate as law that courts can apply, but concedes that not all treaty provisions will work in this way. For these other provisions, the President's constitutional duty to execute the laws includes the power to interpret and execute treaties.³²² Implicit in this statement is not only the idea that treaties are largely self-executing

318. See *Ware*, 3 U.S. (3 Dall.) at 199.

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

320. See Proclamation of Neutrality, 11 Stat. 753 (1793); see also Flaherty, *supra* note 20, at 23-26.

321. See Alexander Hamilton, *Pacificus Number I*, in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-94: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 8, 11 (Morton J. Frisch ed. 2007) [hereinafter THE PACIFICUS-HELVIDIUS DEBATES]. For discussion of how Hamilton's stress on executive power in these essays departs from his views of the treaty power in *Federalist 75*, see Rakove, *Solving a Constitutional Puzzle*, *supra* note 14, at 254-55.

322. See Alexander Hamilton, *Pacificus Number I*, in THE PACIFICUS-HELVIDIUS DEBATES, *supra* note 321, at 16. This argument is roughly consistent with Iredell's state-

at the separation of powers level, but also that under the Supremacy Clause a treaty can be self-executing as a grant of power directly to the President.

For his part, writing as “Helvidius,” Madison sought to counter Hamilton’s conception of executive power with a strong defense of legislative power. He agreed the President had the power to execute treaties, but he constrained that power by drawing a distinction between making and executing treaties.³²³ He also discussed the impact of treaties, stating that “treaties, particularly treaties of peace, have sometimes the effect of changing not only the external laws of the society, but operate also on the internal code, which is purely municipal, and to which the legislative authority of the country is of itself competent and [complete].”³²⁴ Madison went on to say that “treaties when formed according to the constitutional mode, are confessedly to have the force and operation of *laws*, and are to be a rule for the courts in controversies between man and man, as much as any *other laws*. They are even emphatically declared by the constitution to be ‘the supreme law of the land.’”³²⁵ Madison thus agreed that treaties could be self-executing—indeed, to a degree that arguably creates tension with his arguments in the later Jay Treaty debates—but he also continued to qualify that position with the idea that not all treaties have the same kind of impact on domestic law.³²⁶ Flaherty suggests that Madison’s “cat-

ment in *Ware* that some treaty provisions require executive action to go into effect. See *Ware*, 3 U.S. (3 Dall.) at 272.

323. See James Madison, *Helvidius Number I*, in *THE PACIFICUS-HELVIDIUS DEBATES*, *supra* note 321, at 55, 59; see also James Madison, *Helvidius Number III*, in *THE PACIFICUS-HELVIDIUS DEBATES*, *supra* note 321, at 74.

324. See Madison, *Helvidius Number I*, in *THE PACIFICUS-HELVIDIUS DEBATES*, *supra* note 321, at 59.

325. See *id.* at 61. This statement is generally consistent with but certainly more vague than Madison’s 1791 letter to Edmund Pendleton. See James Madison, Letter to Edmund Pendleton (Feb. 13, 1791), in 1 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 528 (1865); see also *supra* note 270 and accompanying text.

326. See Madison, *Helvidius Number I*, in *THE PACIFICUS-HELVIDIUS DEBATES*, *supra* note 321, at 61. Madison also suggested requiring consent to treaties by two-thirds of the Senate is “a substitute or compensation for the other branch of the legislature, which on certain occasions, could not be conveniently a party to the transaction.” See *id.* This statement arguably conflicts with his support for requiring House approval for commercial treaties—after all, there is no need for the House if the supermajority requirement in the Senate already compensates for the absence of the House. See *id.* Madison created additional problems when he stated, “A concurrent authority in two independent departments to perform the same function with respect to the same thing,

egorical arguments about core legislative powers” helped “establish the convention of defending congressional authority based upon specific grants of power.”³²⁷

Thomas Jefferson also articulated a larger role for Congress. In 1792, as Secretary of State, he advised President Washington that:

A treaty is a law of the land, but prudence will point out this difference to be attended to in making them, viz. where a treaty contains such articles only as will go into execution of themselves, or be carried into execution by the judges, they may be safely made: but where there are articles which require a law to be passed [afterwards] by the legislature, great caution is requisite.³²⁸

This distinction between types of treaties is not very different from Justice Chase’s subsequent opinion in *Ware* and seems based on the same interpretive idea that Chase and Iredell both articulated. More to the point, Washington relied on this advice and included the House in the treaty process by requesting an appropriation of funds before negotiating a treaty for the ransom and return of Americans held hostage in Algiers.³²⁹

More than a year later, during a cabinet debate over the Neutrality Proclamation, Jefferson wrote that Hamilton “entered pretty fully into all the argumentation of *Pacificus*,” including the argument that the treaty power allowed the President and Senate to “take from Congress the right to declare war” and “exercise any powers whatever, even those exclusively given by the

would be as awkward in practice, as it is unnatural in theory.” See Madison, *Helvidius Number II*, in *THE PACIFICUS-HELVIDIUS DEBATES*, *supra* note 321, at 65, 68-69. He was discussing the power to make war and the risk of contradictory statements by the legislature and executive, but the statement is in tension with his support for giving the House a role in implementing commercial treaties. Federalists would later argue that requiring legislative approval for treaties would violate separation of powers, create tensions, and undermine the conduct of foreign affairs. See *infra* notes 355-75 and accompanying text.

327. See Flaherty, *supra* note 20, at 49; see also Bradley & Flaherty, *supra* note 95, at 685 (suggesting Madison’s *Helvidius* arguments were “atypically . . . essentialist” and “formal”).

328. Thomas Jefferson, Memorandum of Conference with the President on Treaty with Algiers (Mar. 11, 1792), in 23 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 55, at 256.

329. For a narrative of these events, see LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 30-33 (2004).

const[itution] to the H[ouse] of representatives.”³³⁰ Jefferson contended in response that the treaty power should be construed narrowly to include only the powers that the President and Senate could exercise—which did not include “treaties of neutrality, treaties offensive and defensive.”³³¹ He ultimately sided with Attorney General Edmund Randolph, however, who articulated a position somewhere between Jefferson’s 1792 view and one of the arguments republicans later made in the Jay Treaty debates:

where they undertook to do acts by treaty (as to settle a tariff of duties) which were exclusively given to the legislature, that an act of the legislature would be necessary to confirm them, as happens in England when a treaty interferes with duties established by law.³³²

According to Jefferson, Washington “did not decide” between Hamilton’s and Randolph’s arguments.³³³

B. *The Jay Treaty Debates*

1. The Beginning of the Controversy

Soon after the neutrality debate, and at the same time the Supreme Court was considering the status of treaties in *Ware v. Hylton*, controversy broke out over the 1794 Jay Treaty between the United States and Great Britain.³³⁴ The Jay Treaty generated opposition in many parts of the country for a variety of reasons, including the mere fact of concluding a friendly treaty with

330. See Thomas Jefferson, Notes of Cabinet Meeting on the President’s Address to Congress (Nov. 21, 1793), in 27 *THE PAPERS OF THOMAS JEFFERSON* 411-12 (John Catanzariti ed., 1997). The cabinet also touched on separation of powers issues during a November 18 discussion of the proclamation, but Jefferson’s notes reveal no specific discussion of the treaty power. See Thomas Jefferson, *Notes of Cabinet Meetings on Edmond Charles Genet and the President’s Address to Congress* (Nov. 18, 1793), in 27 *THE PAPERS OF THOMAS JEFFERSON*, *supra*, at 399-401.

331. See Thomas Jefferson, *Notes of Cabinet Meeting on the President’s Address*, in 27 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 330, at 412.

332. *Id.*

333. *Id.*

334. See generally Treaty of Amity, Commerce and Navigation, *supra* note 278. *Ware v. Hylton* received little mention in the House debate over the Jay Treaty. See GOEBEL, *supra* note 49, at 754-55. James Hillhouse cited it as confirming treaties bind the states and are superior to state law. See 5 *ANNALS OF CONG.* 665 (1796). James Holland may have had it in mind when he suggested that “the late determinations in the Federal Courts . . . are in favor of Treaties and ancient claims” to property. See 5 *ANNALS OF CONG.* 1137 (1796).

Great Britain and the commercial concessions Jay made to the British.³³⁵ Concern also arose from the decision to keep the treaty's text secret until after the Senate had given its advice and consent.³³⁶ Once the text became public in July 1795, opponents organized protests and published numerous petitions and pamphlets against it, but President Washington ratified it on August 14.³³⁷

At the same time, Alexander Hamilton and Rufus King developed a forceful defense of the treaty in a series of essays written under the name Camillus.³³⁸ Most of the essays focused on the general desirability of the treaty, but Hamilton also discussed the treaty power and its interaction with legislative authority. On the scope of the treaty power, Hamilton was uncompromising:

A power 'to make treaties,' granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess. The power 'to make,' implies a power to act *authoritatively* and *conclusively*; independent of the after clause which expressly places treaties among the Supreme Laws of the land. The thing to be made is a Treaty; With regard to the objects of the Treaty, there being no specification, there is of course a *charte blanche*. . . . The only constitutional exception to the power of making Treaties is that it shall not change the constitution³³⁹

He rejected the idea that treaties cannot regulate commerce with foreign nations: "This is equivalent to affirming that all the objects upon which the legislative power may act in relation to our own Country are excepted out of the power to make Treaties. . . . [T]he construction resulting from such a doctrine would defeat the power to make Treaties."³⁴⁰

335. See ELKINS & MCKITRICK, *supra* note 29, at 415, 417-18; Golove, *supra* note 7, at 1155-56.

336. See ELKINS & MCKITRICK, *supra* note 29, at 417-21. The Senate did not consent to Article 12 of the treaty. *See id.* at 419.

337. *See id.* at 426. For discussion of reactions in Kentucky and Virginia, including the Virginia legislature's proposal of a constitutional amendment requiring House consent to treaties, see Golove, *supra* note 7, at 1162 n.261; Terri D. Halperin, *The Special Relationship: The Senate and the States, 1789-1801*, in *THE HOUSE AND SENATE IN THE 1790s* 287-90 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

338. For the division of labor, see ELKINS & MCKITRICK, *supra* note 29, at 435.

339. Alexander Hamilton, *The Defence No. XXXVI* (Jan. 2, 1796), in *20 THE PAPERS OF ALEXANDER HAMILTON* 3, 6 (Harold R. Syrett ed., 1974).

340. *See id.* at 7.

Hamilton explained legislation “can have no obligatory action whatsoever upon a foreign nation or any person or thing within the jurisdiction of such foreign Nation,” while treaties “establish rules binding upon *two* or *more* nations their respective citizens and property.”³⁴¹ Treaties are contracts with other countries and as such are a different kind of government power from legislation. Although “a Treaty may effect what a law can” do, a treaty can also “do what [legislation] cannot do.”³⁴² Therefore, the fact that the Jay Treaty regulated commerce was not a valid basis for objecting to it, because the treaty regulated by means of a contract between nations and accomplished what a congressional statute could not. Not even the claim that a treaty sought to appropriate funds would suffice. The treaty power is “concurrent and coordinate” with the legislative authority over “expenditures of money,” although Hamilton conceded “[a]n appropriation by law will still be requisite for actual payment.”³⁴³

Hamilton then explained what was left for Congress once a treaty had regulated in an area of concurrent authority:

[T]he Power of Treaty is the power of making exceptions in particular cases to the power of Legislation. The stipulations of Treaty are in good faith restraints upon the exercise of the last mentioned power. Where there is no Treaty it is completely free to act. Where there is a Treaty, it is still free to act in all the cases not specially excepted by the Treaty.³⁴⁴

These statements suggest Congress has no legitimate power to legislate contrary to a treaty. But Hamilton was very clear about the impact of a treaty on federal statutes. “In our constitution, which gives *ipso facto* the force of law to Treaties, making them equally with Acts of Congress, the supreme law of the land, a Treaty must necessarily repeal an antecedent law contrary to it; according to the legal maxim that ‘*leges posteriores priores contrarias abrogant.*’”³⁴⁵ Going further, and perhaps responding to republican arguments derived from the Virginia debates on the treaty,

341. *See id.* at 8.

342. *See id.*

343. *See* Alexander Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), in 20 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 339, at 13, 20-21.

344. *Id.* at 21. Kesavan and Ku’s analyses of Hamilton as open to the last-in-time rule do not address this passage and focus instead on the quotation that follows. *See* Kesavan, *supra* note 7, at 1607; Ku, *supra* note 15, at 382.

345. *See* Alexander Hamilton, *The Defence No. XXXVII*, in 20 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 339, at 16. Hamilton made the same point in a July 1796

he insisted Congress had “a constitutional obligation to observe the injunctions of a preexisting law [specifically including treaties] and to give it effect. If they act otherwise they infringe the constitution; the theory of which knows in such case no discretion on their part.”³⁴⁶ In light of his statements about appropriations, it seems clear that he thought Congress also had no discretion concerning appropriation of funds authorized by a treaty or necessary to its implementation.

In other words, Hamilton argued the treaty power and the Supremacy Clause create a one-way ratchet. Treaties override legislation and bind Congress to implement or support them where necessary. They also strip Congress of its legislative power over issues already covered by treaties. Hamilton further insisted these conclusions were consistent with the intentions of the framers and the understandings of the ratifiers.³⁴⁷ These ideas—including the original understanding claim—would recur in the statements of Federalists during the House debates, and Republicans would strive to refute them.

Hamilton’s arguments were roughly consistent with those of Jay in *Federalist* 64. But his was not the only influential view in circulation. The Virginia House of Delegates debated the constitutionality of the treaty, and opponents contended a treaty that overlapped with legislative powers required House participation or consent—a view that ultimately led to a proposed constitutional amendment requiring House consent to treaties.³⁴⁸ In response, John Marshall asserted the discussion was inappropriate, primarily because—like Hamilton—he believed the treaty power encompassed commercial issues. If opponents wanted to pursue their goals in a constitutional manner, he declared, they should ask the federal House of Representatives “to render the treaty inoperative by refusing to appropriate the necessary funds for its

memorandum to President Washington supporting ratification of the treaty. See Golove, *supra* note 7, at 1160-61.

346. See Alexander Hamilton, *The Defence No. XXXVI*, in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 339, at 4; see also Alexander Hamilton, *The Defence No. XXXVII*, in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 339, at 16 (Congress is “bound in good faith . . . to lend its authority to remove obstacles.”).

347. See Alexander Hamilton, *The Defence No. XXXVIII* (Jan. 9, 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 339, at 22-25.

348. See *supra* note 337.

implementation.”³⁴⁹ Marshall presumably believed—contra Hamilton—that the House had the discretion to refuse funds, but his goal was to forestall action at the state level in the hope that Federalists would prevail in Congress.³⁵⁰

2. The Jay Treaty in the House of Representatives

On February 29, 1796, after ratification by Britain, Washington issued a proclamation that the Jay Treaty had entered into force, and he asked Congress to appropriate funds to implement the treaty.³⁵¹ On March 2, Representative Edward Livingston of New York introduced a motion requesting documents about the treaty negotiations from the President.³⁵² Federalists demanded the reasons for requesting documents about negotiation of a treaty that was already ratified. Livingston explained he sought information, and the “principal reason” was his “firm conviction that the House were vested with a discretionary power of carrying the Treaty into effect, or refusing it their sanction.”³⁵³ For the next two and a half weeks, the House debated its role in making and implementing treaties, including whether it was obligated to appropriate the necessary funds or whether it could make its own independent assessment of the treaty when it considered implementing legislation. The discussion of the treaty power, Supremacy Clause, and treaty implementation was far more extensive than any of the framing or ratification debates.³⁵⁴

349. See BEEMAN, *supra* note 201, at 145-46; see also ALBERT BEVERIDGE, 2 *THE LIFE OF JOHN MARSHALL* 133-35 (1916); ROBARGE, *supra* note 277, at 157.

350. See BEEMAN, *supra* note 201, at 146.

351. See ELKINS & MCKITRICK, *supra* note 29, at 444.

352. See 5 *ANNALS OF CONG.* 424, 426 (1796). The *Annals of Congress* “were compiled between 1834 and 1856, using the best records available, primarily newspaper accounts. Speeches are paraphrased rather than presented verbatim.” See *Annals of Congress—Home Page*, <http://memory.loc.gov/ammem/amlaw/lwac.html>.

353. See 5 *ANNALS OF CONG.* 427-28 (1796); see also 5 *ANNALS OF CONG.* 428 (William Lyman, stating that “another consideration of vast importance . . . was, whether the Treaty had not encroached upon the Legislative powers of the Constitution.”). Livingston and his older brother Robert had already written a series of essays raising this issue as well as states-rights claims largely abandoned by the time the House debate began. See Golove, *supra* note 7, at 1164-66.

354. See CORNELL, *supra* note 29, at 222-30; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 212-13 (1997); ELKINS & MCKITRICK, *supra* note 29, at 433-36, 444; JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 141-60 (1999); RAKOVE, *supra* note 44, at 357-58; GOLOVE, *supra* note 7, at 1174-78; Kesavan, *supra* note 7, at 1583-86. The issue of

Federalist arguments often paralleled earlier statements by Hamilton, Iredell, and Jay, as when William Vans Murray responded to Livingston by asserting the House had “no right to investigate the merits of the Treaty” unless there was some basis to believe it was contrary to the Constitution.³⁵⁵ If the Treaty was valid, “then there was no discretionary power in the House.”³⁵⁶ Other federalists insisted variously that the House was “bound,” “obliged,” or had a “duty” to implement treaties in nearly all circumstances regardless of the terms or merits of the treaty.³⁵⁷

To counter these claims, Republicans noted, in the words of Albert Gallatin, that:

[C]ertain powers are delegated by the Constitution to Congress. They possess the authority of regulating trade. The Treaty-making power delegated to the Executive may be considered as clashing with that. The question may arise whether a Treaty made by the President and Senate containing regulations touching objects delegated to Congress, can be consid-

House discretion over implementation of funds, including the contention that treaties of commerce should be treated differently from treaties of peace, first came up in Congress in 1789, when the House debated whether to appropriate funds to implement a number of Indian treaties. See 1 ANNALS OF CONG. 719-20 (Joseph Gales ed., 1789).

355. See 5 ANNALS OF CONG. 439 (1796)

356. See *id.* at 429-30, 436-37.

357. See *id.* at 439 (Jeremiah Smith, stating House has “no right to investigate the merits of the Treaty; it is the law of the land, and they are bound to carry it into effect, unless they intended to resist the constituted authorities”); *id.* at 456 (Nathaniel Smith, noting the House is “bound” to consider the treaty “as well done” and has no right “to judge of its merits”); *id.* at 481 (Roger Griswold, emphasizing it is “their duty and their business to make the necessary appropriations . . . if they did not execute it, they violated the trust reposed in them”); *id.* at 498 (William Smith, stating “when a Treaty was concluded . . . the discretion of the House (unless it was intended to violate our faith) could not determine whether the moneys contracted for should be paid, but the mode, the fund, and such questions of detail, would alone be considered”); *id.* at 529 (Theodore Sedgwick, pointing out that treaties “might require Legislative provision to carry them into effect; but this neither implied nor authorized the exercise of discretion, as to refusal”); *id.* at 531 (Samuel Lyman, arguing the House has only “ministerial” power and is “bound to obey” the treaty “and to carry it into complete execution”); *id.* at 647, 650 (John Williams, emphasizing the House is “obliged” and “implicitly bound” to implement “all Treaties constitutionally and completely made”); *id.* at 655-56 (Joshua Coit, highlighting the “duty” or “obligation” to implement a treaty unless it was “ruinous” or corruptly made); *id.* at 683 (Ezekiel Gilbert, noting the “duty” to execute); *id.* at 696 (Murray, using similar language of “duty” and “bound”); *id.* at 714 (Daniel Buck, emphasizing the House has a “duty” to appropriate); *id.* at 725 (Chauncey Goodrich, using the phrase “a perfect obligation”). Robert Goodloe Harper was more nuanced: the House was not bound, but the fact that “the national faith” had been pledged by a treaty “will always, and with all persons, be a powerful reason for it; in almost every case the reason would be conclusive.” See *id.* at 750-51.

ered binding without Congress passing laws to carry it into effect.³⁵⁸

As the debate continued, they sharpened this argument into a theory, first, that treaties could not provide for or override House discretion to decide on appropriations³⁵⁹ and, second, that no treaty could go into effect without House consent if it sought to regulate an area—such as the power “[t]o regulate Commerce with foreign Nations”³⁶⁰—that fell within the enumerated legislative powers of Congress.

Thus, again according to Gallatin:

[I]f a Treaty embraces objects within the sphere of the general powers delegated to the Federal Government, but which have been exclusively and specifically granted to a particular branch of Government, say to the Legislative department, such a Treaty, though not unconstitutional, does not become the law of the land until it has obtained the sanction of that branch.³⁶¹

Madison generally agreed with Gallatin and noted, “taken literally, and without limit,” the treaty and legislative powers “must necessarily clash with each other.”³⁶² William Giles suggested the primary check on the treaty power:

[C]onsists in the necessary concurrence of the House to give efficacy to Treaties; which concurrent power they derive from the enumeration of the Legislative powers of the House. Where the Treaty-making power is exercised, it must be under the reservation that its provisions, so far as they interfere with the specified powers delegated to Congress, must be

358. *Id.* at 437; *see also id.* at 437-38 (James Madison, stating the issue was “whether the general power of making Treaties supersedes the powers of the House of Representatives, particularly specified in the Constitution, so as to take to the Executive all deliberative will, and leave the House only an executive and ministerial instrumental agency?”).

359. *See id.* at 509 (William B. Giles, noting appropriations power is a check on the treaty power); *id.* at 565 (John Page, making a similar point); *id.* at 583 (William Brent, stating the same). John Nicholas, whose brother George had played an important role alongside Madison at the Virginia Convention, declared “the House had a voice” on treaties and the treaty-making power was subject to “qualifications in matters of money; and unless the House chose to grant that money, it was so far no Treaty.” *See id.* at 444, 446.

360. U.S. CONST. art. I, § 8, cl. 3.

361. 5 ANNALS OF CONG. 465 (1796); *see id.* at 483-84 (Jonathan N. Havens, agreeing with Gallatin).

362. *See id.* at 488.

so far submitted to the discretion of that Department of the Government.³⁶³

Gallatin and Giles stressed they “did not claim for the House a power of making Treaties, but a check upon the Treaty-making power—a mere negative power; whilst those who are in favor of a different construction advocate a positive and unlimited power.”³⁶⁴ Speaking in support of these points, several representatives analogized to British practice, which they understood to require parliamentary assent to most treaties,³⁶⁵ or relied on the idea that a specific grant of power—the detailed list of enumerated legislative powers—must necessarily control the more general grant of the treaty power.³⁶⁶

In an effort to defeat the republican suggestion of Congressional power over treaties that regulated areas within Congress’s legislative powers, most federalists argued—again tracking Hamilton—that the treaty power was virtually unlimited in scope.³⁶⁷ A few hedged on the issue of appropriations by falling back on the claim that the House was bound to assist a treaty,³⁶⁸ and

363. *Id.* at 508; *see id.* at 575-76 (Brent); *id.* at 632-33 (Livingston); *id.* at 651 (John Milledge).

364. *See id.* at 467, 513 (Giles, arguing he was merely claiming a negative for the House, in contrast to the Federalist claim that the treaty power can “supersede the specific authority delegated to the Legislature in all cases whatever.”); *id.* at 745 (Gallatin, repeating the claim).

365. *See id.* at 540 (Abraham Baldwin); *id.* at 543 (James Holland); *id.* at 633 (Livingston); *id.* at 728-29 (Gallatin).

366. *See id.* at 540 (Baldwin, asserting treaty power is “qualified by the powers specifically given to Congress.”); *id.* at 560 (Page); *id.* at 576 (Brent); *id.* at 589 (William Findley); *id.* at 602 (William Lyman).

367. *See id.* at 517 (Sedgewick, stating treaty power is “unlimited by the Constitution, and he held too, that in its nature . . . it was illimitable.”); *id.* at 597 (Jeremiah Smith, stating treaty power extends “to most, if not all,” of the legislative powers and is limited by the inability to alter the Constitution); *id.* at 614-15 (Uriah Tracy, stating treaty power is not limited); *id.* at 679. Gilbert, stating that treaty power:

[I]s the power of the nation, to be exercised for the nation, it has a right to use all the things or means belonging to the nation, reasonable and fit, and which are necessary to accomplish the great objects of the nation, beyond the jurisdiction and power of any other national power, or organ

Id. at 689 (Murray, stating every nation must have the complete treaty power lodged somewhere). James Hillhouse was more modest:

Nothing can . . . come within the Treaty-making power but what has a relation to both nations, and in which they have a mutual interest. . . . All laws regulating our own internal police, so far as the citizens of the United States alone are concerned, are wholly beyond its reach.

Id. at 662.

368. *See supra* notes 356-57; *see also* 5 ANNALS OF CONG. 598 (1796) (Jeremiah

others tried to argue the treaty power was not truly legislative and so did not conflict with congressional power.³⁶⁹ They cited antifederalist complaints during ratification about the scope of the treaty power as proof that their claims, which confirmed those fears, best reflected the meaning of the Constitution.³⁷⁰ They also rejected analogies to British practice.³⁷¹ Not only did treaties automatically become law by virtue of the Supremacy Clause, but they also “repealed” or “annulled” prior inconsistent federal statutes, such that, “in the exercise of that power which related to the intercourse with foreign nations, the Treaty-making was paramount to the Legislative power; and . . . the positive institutions of the Legislature must give place to compact.”³⁷² Implicit in this version of the treaty power was the inability of Congress to override treaties through legislation, and some members made the point explicitly.³⁷³ The federalist position, in short, was that treaties could be made on any subject, once made they trumped federal legislation, federal legislation was in-

Smith, indicating a treaty can stipulate for payments but Congress retains the power to pass the actual appropriation).

369. *See* 5 *ANNALS OF CONG.* 596 (1796). Chauncey Goodrich suggested—consistent with Hamilton—that although treaties and statutes are both legislative in some sense, they are ultimately different kinds of power and operate in different ways and on different objects, and thus the specific legislative powers could not limit the general treaty power. *See id.* at 718, 722-23. Harper once again followed a more nuanced line of argument than most of his fellow Federalists. He suggested treaties are laws with respect to the law of nations, but that on other topics:

Treaties . . . can never, in their nature, operate as laws, can never produce the effect of legislation: they are compacts and nothing more, and, in the sphere of compacts, they are supreme and unlimited. . . . [B]ut they cannot encroach on the Legislative power, cannot produce a Legislative effect.

See id. at 749.

370. *See id.* at 495-96 (William Smith); *id.* at 520-25 (Sedgwick); *id.* at 567-72 (Benjamin Bourne); *id.* at 616-17 (Tracy); *id.* at 649 (Williams); *id.* at 667-68 (Hillhouse); *id.* at 700-01 (Murray); *id.* at 703 (Buck).

371. *See id.* at 454 (Nathaniel Smith); *id.* at 647 (Williams); *id.* at 659 (Coit); *id.* at 698 (Murray); *id.* at 710 (Buck); *id.* at 751-52 (Harper).

372. *See id.* at 477 (Griswold); *id.* at 531 (Samuel Lyman); *id.* at 549, 552-53 (Theophilus Bradbury); *id.* at 595 (Jeremiah Smith); *id.* at 670 (Hillhouse); *id.* at 680 (Gilbert); *id.* at 688, 696 (Murray); *id.* at 712 (Buck). Again, Harper took a different course, suggesting the issue whether a treaty repeals a law was not necessary to the debate and was in any event a judicial question, and he suggested that although the doctrine appeared to be that treaties could repeal state and federal laws, he had doubts about it. *See id.* at 755, 758.

373. *See id.* at 499 (William Smith); *id.* at 595 (Jeremiah Smith); *id.* at 644 (Williams).

effective against them, and Congress was bound to pass laws to assist the execution of treaties.

One Federalist gave a suggestive spin to his reasoning. In the course of explaining the interaction of the treaty and legislative powers, Chauncey Goodrich declared:

Treaties in other countries, by binding the public faith, impose an obligation on the body politic to provide law; with us, so far as they are perfect, and the provisions can execute themselves, they need no auxiliary laws. If imperfect and destitute of necessary provisions, like other laws in themselves imperfect, they require further laws.³⁷⁴

This statement may have drawn on Chase's opinion in *Ware*,³⁷⁵ and it is generally consistent with Jefferson's views as Secretary of State, but the structure of the passage is also striking for its similarity to Chief Justice Marshall's language years later in *Foster v. Neilson*.³⁷⁶ The difference—and it is an important one—is that Goodrich also argued, as Iredell seems to have done in *Ware*, that the House was bound to pass any laws necessary to implement the treaty. Marshall, by contrast, was already on record in favor of discretion—at least on the issue of appropriations.

None of these arguments swayed the republicans, who continued to insist treaties could not go into effect without House approval if they sought to regulate topics within the enumerated powers of Congress.³⁷⁷ Any other view would lead to executive aggrandizement.³⁷⁸ Thus Gallatin gave up a bit of ground in concession to the text of the Supremacy Clause but reasserted his basic point that a treaty that touched on legislative power was

in some respects, an inchoate act. It was the law of the land, and binding upon the American nation in all its parts, except so far as related to those stipulations. Its final fate in case of refusal, on the part of Congress, to carry those stipulations into effect, would depend on the will of the other nation.³⁷⁹

374. *Id.* at 722.

375. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 240, 244 (1796) (opinion of Chase, J.).

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

377. See 5 ANNALS OF CONG. 741-42 (1796) (Gallatin, arguing the Federalist view assumed its conclusion by starting from the position that treaties can bind the nation in areas within the legislative power).

378. See *id.* at 467 (Gallatin); *id.* at 727 (Gallatin); *id.* at 490-93 (Madison); *id.* at 506 (Giles).

379. *Id.* at 745 (Gallatin).

Several speakers rejected the claim that their assertion of discretionary authority would destroy the treaty power, stressed that much room remained for executive action, and noted that their interpretation of the Constitution still allowed certain treaties, such as peace treaties, to become law without congressional intervention.³⁸⁰

Republicans also dismissed the idea that treaties could override existing federal statutes. The Supremacy Clause, they noted, was directed at the states and said nothing about the relative priority of different sources of federal law.³⁸¹ Indeed, they suggested their claim of House authority obviated the Supremacy Clause argument, because treaties that trespassed on legislative territory would need legislative sanction, which would remove most conflicts between treaties and statutes.³⁸² As for the ratification debates, Republicans relied on the conciliatory arguments in various states by proponents of the Constitution—statements that conflicted with the claims Federalists were making in the current struggle.³⁸³

Almost no one on either side of the debate spoke in support of a last-in-time rule for conflicts between treaties and statutes.

380. *See id.* at 546-47 (Holland); *id.* at 576 (Brent); *id.* at 653 (Aaron Kitchell). Gallatin, for example, insisted the power claimed for the House had no impact on peace treaties or on aspects of commerce and navigation treaties that dealt with the law of nations. All of these would be supreme law of the land without legislative intervention. "Within that class might be included all those conditions, which provided for the cases of shipwrecks, salvage, assistance to be given vessels driven in ports, and all the duties of neutral nations within their territory," as well as "the use of what belonged to all, of the sea, and consequently the rights of fisheries," and

the duties and rights of neutral nations, in their intercourse out of their own territory, with nations at war; which included all the stipulations relating to what should be deemed contraband goods, to the question whether free bottoms should make free goods

Id. at 744-45. He also admitted that although a treaty provision stipulating Congress would not take certain actions might not be binding, "the House had not the power to impede its execution." *See id.* at 745.

381. *See id.* at 450 (John Swanwick); *id.* at 468-69 (Gallatin); *id.* at 488 (Madison); *id.* at 506 (Giles); *id.* at 539 (Baldwin); *id.* at 558 (Page); *id.* at 577 (Brent). Livingston suggested that if the Supremacy Clause was at all relevant, then it clearly placed federal statutes ahead of treaties. *See id.* at 631-32; *see also id.* at 450 (Swanwick, arguing Supremacy Clause made treaties inferior to federal statutes by placing them last).

382. *See id.* at 575-77 (Brent); *id.* at 590 (Findley); *cf. id.* at 493 (Madison); *id.* at 738-45 (Gallatin).

383. *See id.* at 502 (Giles); *id.* at 546 (Holland); *id.* at 564 (Page); *id.* at 579-82 (Brent); *id.* at 592 (Findley); *id.* at 608 (William Lyman); *id.* at 635 (Livingston); *id.* at 734-37 (Gallatin); *see also id.* at 487 (Havens).

Gallatin declared laws could not repeal treaties and treaties could not repeal laws because the last-in-time rule works only within categories of legal regulation, not across them.³⁸⁴ Madison asserted the last-in-time rule “involved the absurdity of an *imperium in imperio*, of two powers both of them supreme, yet each of them liable to be superseded by the other.”³⁸⁵ The dominant federalist position—that treaties trumped laws but laws could not trump treaties—also had no room for the last-in-time rule. As Daniel Buck explained, even if Congress had the raw power to override treaties, the actual exercise of that power would “break and violate the treaty,” and undermine “the plighted faith of the nation pledged in the most solemn manner.”³⁸⁶ Only Federalist James Hillhouse spoke in favor of a last-in-time rule.³⁸⁷

Ultimately, the House voted 62-37 to request the papers.³⁸⁸ Despite the fact that he had shared documents with the House about the treaty negotiations over American hostages,³⁸⁹ President Washington refused to provide the Jay Treaty documents. He gave several reasons but paid particular attention to the House’s role in implementing treaties. He asserted every treaty “becomes the law of the land. . . . [W]hen ratified by the President, with the advice and consent of the Senate, they become obligatory.”³⁹⁰ Accusing the House of departing from past practice, Washington claimed that, “until now, without controverting the obligation of such Treaties, they [the House] have made all the requisite provisions for carrying them into effect.”³⁹¹ Finally, relying on the records of the Constitutional Convention, he stated “the assent of the House of Representatives is not necessary to the validity of a Treaty.”³⁹²

384. *See id.* at 466, 742.

385. *See id.* at 489.

386. *See id.* at 712.

387. *See id.* at 670. Treasury Secretary Oliver Wolcott also accepted the legitimacy of a last-in-time rule. *See infra* note 392.

388. *See id.* at 759 (1796); *see also id.* at 760 (request sent to Washington).

389. *See* 4 ANNALS OF CONG. 20-21 (1793); *see also* JOSEPH RALSTON HAYDEN, THE SENATE AND TREATIES, 1789-1817: THE DEVELOPMENT OF THE TREATY-MAKING FUNCTIONS OF THE UNITED STATES SENATE DURING THEIR FORMATIVE PERIOD 48, 51-52 (1920).

390. *See* 5 ANNALS OF CONG. 761 (1796).

391. *See id.*

392. *See id.* Washington consulted with Hamilton, the cabinet, and newly appointed Chief Justice Ellsworth, all of whom agreed the House request was inappropriate, the treaty power was exclusively vested in the President and Senate, and “treaties

The House then considered how to respond to Washington. During the debate, Madison denied the records of the Constitutional Convention were useful or relevant to constitutional interpretation; “the sense of that body could never be regarded as the oracular guide in expounding the Constitution.”³⁹³ Instead, Madison argued the ratification debates provided the key evidence of the Constitution’s meaning, and he cited the debates in Pennsylvania, Virginia, and North Carolina as evidence that Washington’s interpretation was incorrect.³⁹⁴ He also denied that the House sought any role in consenting to or ratifying treaties.³⁹⁵ At the same time, however, he asserted “no Treaty shall be operative without a law to sanction it . . . in any case . . . where Legislative objects are embraced by [it].”³⁹⁶ Madison insisted this position was consistent with principles of separation of powers and limited government:

[T]hat construction ought to be favored which would preserve the mutual control between the Senate and House of Representatives, rather than that which gave powers to the Senate not controllable by, and paramount over those of the House of Representatives, whilst the House of Representatives could in no instance exercise their powers without the participation and control of the Senate.³⁹⁷

thus concluded were legally binding on all bodies of men within the jurisdiction of the United States.” See *GRANDALL*, *supra* note 41, at 120; *KU*, *supra* note 15, at 378-83. Ellsworth strongly rejected the last-in-time rule, but Treasury Secretary Wolcott accepted it. See *KU*, *supra* note 15, at 379-81. Not surprisingly, Thomas Jefferson, who was no longer part of the administration, wrote several letters stating that treaties overlapping with legislative powers required some kind of House consent. See *GRANDALL*, *supra* note 41, at 122-23; Golove, *supra* note 7, at 1178-79 (suggesting Jefferson’s views changed). His subsequent *Manual of Parliamentary Practice*, written while he was Vice-President under John Adams, makes an awkward gesture at evenhandedness without distinguishing between making and implementing treaties. See *THOMAS JEFFERSON, A MANUAL OF PARLIAMETARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES* § 52 (2d ed. 1812); see also Golove, *supra* note 7, at 1187-88.

393. See 5 *ANNALS OF CONG.* 776 (1796). Madison also noted his own reference to the Constitutional Convention during the debate over the Bank of the United States, and he claimed other members had reacted negatively at the time. See *id.* at 775-76. For sympathetic accounts of Madison’s attempts in Congress to articulate a coherent theory of constitutional interpretation, see *BANNING*, *supra* note 47, at 382-84; *SIEMERS*, *supra* note 273, at 105-21, 132-33. For critical assessments, see Golove, *supra* note 7, at 1183 n.333.

394. See 5 *ANNALS OF CONG.* 775-79 (1796).

395. See *id.* at 774-76.

396. See *id.* at 776.

397. *Id.* at 780; see *CORNELL*, *supra* note 29, at 223 (noting that the Republican

Finally, Madison denied there was any relevant past practice to serve as a precedent for the House's proper role, because "this was the first instance in which a foreign Treaty had been made since the establishment of the Constitution; and . . . this was the first time the Treaty-making power had come under formal and accurate discussion."³⁹⁸

On April 6, William Blount proposed two resolutions that responded to Washington's denial. The first, which the House approved the following day by a vote of 57-35, declared the scope of its power over treaties that encroach on the legislative powers of Congress:

[T]he House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.³⁹⁹

This resolution is more moderate than some republican statements during the debate. Perhaps recognizing some force in Washington's letter but also consistent with Madison's reply, the resolution stops short of embracing all of Gallatin's views, and it says nothing about the interaction of treaties and existing federal statutes. Indeed, its basic claim overlaps with Marshall's argument in the Virginia legislature. Still, the resolution plainly repudiates federalist claims of a broad treaty power that could displace legislative power—including by annulling existing federal statutes—and relegate the House with a ministerial role in treaty implementation.

Having asserted its power, the House turned to the question of appropriating funds to implement the treaty. Early on, the

position sought to harmonize the treaty power with the House's constitutional function).

398. See 5 ANNALS OF CONG. 781 (1796); *id.* at 539 (Baldwin, insisting that this was the first full discussion of the issue).

399. See *id.* at 771, 782-83. The reporter declared that six of the absent members would have voted for the resolution and one would have voted against. See *id.* The second resolution, approved by the same vote, related to the form of requests for information from the President. See *id.* at 771, 783.

Committee of the Whole voted 48-40 to change the language of the pending resolution from a statement proposed by Massachusetts federalist Theodore Sedgwick—that “provision *ought* to be made by law” to carry the treaty into effect—to one that read “it is *expedient* to pass the laws necessary” to do so.⁴⁰⁰ Gallatin explained the original wording was flawed because it “seemed to imply that they were not at liberty to pass or not to pass laws or carry the Treaties into effect,” while the new language would match the resolution that had just passed the House.⁴⁰¹ The House confirmed the committee’s vote by a larger margin.⁴⁰² After more than two weeks of debate on the merits of the treaty—with some additional discussion of the constitutional issues⁴⁰³—the House passed a resolution to carry the treaty into effect by a vote of 51-48.⁴⁰⁴ The House passed an appropriations bill on

400. *Compare id.* at 940 (“provision ought to be made by law”) (emphasis added), *with id.* at 943, 950 (motion and successful committee vote to substitute “it is expedient” for treaty with Spain) (emphasis added), *and id.* at 966 (motion and successful vote to substitute “it is expedient” for remaining three treaties). There was also extended debate about whether to vote appropriations for four treaties at once, or to proceed one by one, and the latter view prevailed. *See id.* at 966.

401. *See id.* at 966. As Jeremiah Crabb declared earlier in the debate, “this House may save the Constitutional principle, and feel themselves at perfect liberty to pass the necessary laws to carry these Treaties into complete effect, without conveying the implication, that they think they are bound so to do, and have not a Constitutional right to reject and refuse.” *Id.* at 766.

402. *See id.* at 974 (rejecting Federalist effort to restore original wording by 55-37 vote).

403. For federalist statements, see *id.* at 1016-17 (Zephaniah Swift, stating “a Treaty can repeal an act of Congress” but “Treaties with foreign nations cannot be repealed by an act of the Legislature,” and the House was “bound to make all the appropriations necessary.”); *id.* at 1105 (Bourne, stating a ratified treaty is “binding” on the House); *id.* at 1160-62 (Thomas Henderson, stating treaties are supreme law, require nothing from the House, and are superior to federal statutes, while republican view finds no support in text and would destroy checks and balances); *id.* at 1243-44 (Fisher Ames, stating a treaty is already binding law, House is obliged to implement it, and British practice is not a good analogy and does not support the republican position); *id.* at 1269 (Nathaniel Smith, stating the house is bound by the treaty). For Republican statements, see *id.* at 1107 (Findley, stating the House has discretion because the test of the Constitution is explicit when House lacks discretion); *id.* at 1133 (Holland, denying broad treaty power and insisting on House discretion).

404. *See id.* at 1291. The vote in the committee of the whole was 49-49, and the chairman cast the tie-breaking vote to send the treaty to the House. *See id.* at 1280. The reporter suggested there would have been “an actual majority of the House against the expediency of carrying the Treaty into execution” if absent members had voted. *See id.* On the question whether voting to appropriate funds was consistent with voting for the resolution declaring the House’s discretion, consider the comments of Samuel Smith:

he did believe that [voting in favor of the appropriation] would tend to re-

May 3 by an unrecorded vote, and the Senate quickly agreed.⁴⁰⁵

In an odd conclusion, Charles Butler declared this episode “a distinct victory for the Executive.”⁴⁰⁶ His claim is true only in the sense that the House voted the necessary appropriations. But his claim that the House “recognized the sound basis on which the President’s reply was based”⁴⁰⁷ finds little support in the records of the debates and votes.⁴⁰⁸ Still, the debate over the Jay Treaty was one of the most partisan episodes in Congress’s then-short history. Republicans were looking for ways to limit

store harmony and unanimity to our public measures; a House so nearly divided against itself could never thrive: Because the most material articles will expire in two or three years; and, from the great and serious opposition to them, as well among the people, as in this House, he did not believe they would ever again be renewed: Because, he did believe that the President and Senate had conceived that they had a right to make all Treaties, without the concurrence of this House, and had, under that impression, committed the faith of the nation: and, because, that he believed it to be the opinion of the great majority of the people of Maryland, whom he had the honor to represent, that, although their dislike to the Treaty continues, yet that less evils will grow out of its adoption than may be apprehended from its rejection.

Id. at 1157. Aaron Kitchell, who did not vote on the resolutions but apparently would have voted yes, said “[h]e felt himself under a moral obligation to vote for the Treaty, because he believed it for the good of the United States that it should go into effect.” *See id.* at 783, 1175. But, “if he supposed a principle was to be sanctioned by carrying [it] into effect . . . that the House had not the right to deliberate upon the propriety of passing laws to carry into effect all Treaties which came before them, he would also vote against it.” *See id.* at 1175; CURRIE, *supra* note 354, at 215 (as Congress debated, “petitions began to pour in, most significantly from the republican West, urging that Congress appropriate the necessary funds.”); ELKINS & MCKITRICK, *supra* note 29, at 432 (suggesting increases in trade and prosperity shifted in popular sentiment in favor of the treaty).

405. *See* 5 ANNALS OF CONG. 1295 (1796); *id.* at 80; 1 Stat. 459 (1796).

406. *See* 1 BUTLER, *supra* note 227, at 428.

407. *See id.*

408. Other commentators take a variety of positions. Because he focuses on the federalism aspects of the debate, Golove treats this episode as a victory for Federalists. He is correct that House Republicans did not advance the states-rights arguments made in earlier pamphlets and the House ultimately voted to appropriate funds to implement the treaty, but he also recognizes that the separation of powers debate was more significant. *See* Golove, *supra* note 7, at 1157-58. Michael Ramsey admits the arguments of House republicans were “not without some basis,” but he suggests the vote to appropriate was more important. *See* MICHAEL RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 316 (2007). David Currie’s assessment seems most apt: “the episode ended in a standoff on the constitutional questions.” CURRIE, *supra* note 354, at 215 (suggesting Republicans were correct about appropriations and similar Congressional prerogatives but incorrect about commerce); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 194-95, 204-06 (2d ed. 1996) (articulating a similar view); Vázquez, *Laughing at Treaties*, *supra* note 7, at 2177-78, 2181 (distinguishing appropriations from treaty provisions that contemplate legislation).

executive power and gain issues for use in the next election, and they employed arguments selectively and instrumentally to advance these goals.⁴⁰⁹ Washington disagreed with the House majority, many Senators likely disagreed as well, the Supreme Court that had just decided *Ware* was unlikely to accept the republican position wholesale, and not all republicans agreed with the most far-reaching claims of people like Gallatin. In addition, and critically, nothing in the debates undermined the founding understanding that treaties would override state law and bind the states, including through judicial enforcement in cases brought by or against individuals.

But federalists also played politics with their arguments, and many of their claims were at least as extreme as those of the most partisan republicans. At the crucial points, a large majority of House members voted to limit the treaty power by restricting the ability of treaties to be self-executing at the separation of powers level. While the focus was on appropriations, the discussion and resolution covered broader territory and sought to limit the power of the President and Senate to make law through the treaty power.⁴¹⁰ The House debate did not explicitly concern self-execution in the sense in which we now discuss it—that is, with reference to the courts—because the focus was on the allocation of power between the President and Congress (or, more precisely, between the President and Senate as treaty-makers, and the House as essential part of the legislative process). Yet the House resolution, if accepted as the proper interpretation of the treaty power and Supremacy Clause, would also limit the ability of treaties to be self-executing as rules of decision when their provisions overlap with congressional power and in so doing would also obviate the need for a last-in-time rule in most instances.

In short, the House was working out the details of the treaty power and separation of powers doctrine in the middle of a po-

409. See ELKINS & MCKITRICK, *supra* note 29, at 441-42; LYNCH, *supra* note 354, at 141-60.

410. Indeed, Butler recognized that the House gained something from the debate: it was practically decided that although a treaty becomes the supreme law of the land as soon as it is ratified as to every provision which can be enforced without legislation, it remains ineffectual as to those matters which do require legislation, or the appropriation of money, and can only be enforced after *both* Houses of Congress enact appropriate legislation

1 BUTLER, *supra* note 227, at 430.

litical debate.⁴¹¹ The result was partisan rancor but also serious constitutional debate that set the stage for the series of compromises that are familiar today as settled doctrine: the last-in-time rule, reliance on congressional-executive agreements, and the doctrine that some but not all treaties are self-executing. The full scope of the republican position would not survive, but they won on the issue of appropriations. Their insistence that treaties often require discretionary House participation to be fully implemented as supreme law would persist and ultimately prevail. Portions of the federalist position also survived. For example, a few years later the Supreme Court appears to have extended *Ware* and allowed a treaty establishing the “rights of parties litigating” in court to override a decision based on a prior federal statute.⁴¹² But the House decisively rejected Hamiltonian federalist claims of how the treaty power, legislative power, and Supremacy Clause interact.

The House’s action quickly became an article of republican faith. Going beyond the text of the resolution—perhaps to include Gallatin’s views—St. George Tucker wrote in his *View of the Constitution of the United States* that a treaty containing “stipulations on legislative acts” is an “inchoate act.”⁴¹³ Tucker explained such a treaty “is the law of the land, and binding upon

411. See Gerhard Casper, *Executive-Congressional Separation of Powers During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473, 473 (1995) (“In the early years . . . under the Constitution, there was no consensus about the precise institutional arrangement required to satisfy the separation of powers concept.”); see also *supra* note 20.

412. See *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch.) 103, 110 (1801). For the argument in favor of interpreting *United States v. The Schooner Peggy* in this way, see David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 510-11 (2007). Chief Justice Marshall included the following comments:

The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. . . . [W]here a treaty is the law of the land, and as such affects the rights of the parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress

. . . .
5 U.S. at 109-10; see Sloss, *supra* note 15 (discussing lower court decisions in 1790s that applied a treaty provision to limit the scope of subject matter jurisdiction granted by federal statutes). *Cook v. United States*, 288 U.S. 102 (1933), may be the only Supreme Court decision clearly to decide that a treaty trumped a statute.

413. See ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES* 276 (1803) (Liberty Fund 1999). Tucker’s discussion of the Constitution originally appeared as appendices to his edition of Blackstone’s *Commentaries on the Laws of England*. See *id.* at vii.

the nation in all its parts, except so far as relates to those stipulations,” which in turn become the law of the land only if Congress “carr[ies] those stipulations into effect.”⁴¹⁴ In short, the first influential treatise on constitutional law—and one self-consciously opposed to federalist claims—took the position that any doctrine of treaty self-execution must be limited to matters that do not overlap with the powers of Congress.

Soon after Tucker wrote, the executive branch adopted a more moderate approach during the Louisiana Purchase. In the draft of his message to Congress about the purchase, and to some extent consistent with his views as Secretary of State, President Jefferson “indicated his intention of laying the treaties before both Houses of Congress at once.”⁴¹⁵ Secretary of State Madison objected, stating the House should not influence the Senate’s deliberation on a treaty, but he also noted the House would have its own role to play after ratification.⁴¹⁶ Treasury Secretary Gallatin agreed that “[t]he rights of Congress in its legislative capacity do not extend to making treaties,” but he went on to stress the House’s constitutional role of “giving or refusing their sanction to those conditions [of a treaty] which come within the powers granted by the Constitution to Congress.”⁴¹⁷ Gallatin had backed away from some of his claims during the Jay Treaty debate, but he adhered to the central one—that Congress had a role in implementing treaties that overlap with legislative power, regardless of what the Supremacy Clause seems to say. Jefferson agreed with their advice, and his October 17, 1803, message to Congress stated that, once the Senate had given its advice and consent, the treaty would “without delay be communicated to the Representatives also for the exercise of their functions as to those conditions which are within the powers vested by the Constitution in Congress.”⁴¹⁸

414. *See id.* at 276. Tucker also urged adoption of an amendment to require Congressional consent for commercial and some other treaties, as the Virginia Convention and the initial version of the New York treaty amendment had urged, and roughly consistent with the proposals of the Pennsylvania minority and the first North Carolina convention. *See id.* at 308. For the importance of Tucker’s *View*, see CORNELL, *supra* note 29, at 263-72.

415. *See* HAYDEN, *supra* note 389, at 139; *see also* CRANDALL, *supra* note 41, at 172-73; Casper, *supra* note 411, at 492-94.

416. *See* HAYDEN, *supra* note 389, at 140.

417. *See id.*

418. *See id.* at 142. Some Federalists who opposed the purchase also sought consis-

C. *The Robbins Affair: Treaties and Executive Power*

The Jay Treaty required the extradition of murderers and forgers, but Congress never passed legislation to implement the extradition article.⁴¹⁹ The process for—indeed, even the possibility of—extraditions thus remained unclear when Thomas Nash, alias Jonathan Robbins, was arrested in 1799 in Charleston, South Carolina and held by federal authorities on the charge that he committed murder during a mutiny on the British ship *Hermione*.⁴²⁰ Although British officials sought custody of Robbins, District Judge Thomas Bee made clear he wanted to hear from the administration before complying.⁴²¹ Soon thereafter, Secretary of State Timothy Pickering transmitted to Judge Bee the “advice and request” of President Adams that Robbins be handed over.⁴²²

In the subsequent proceedings, Robbins challenged the court’s jurisdiction and made several other arguments against extradition, all of which Judge Bee rejected in the course of ordering Robbins’ surrender to British authorities (who promptly tried, convicted, and executed him).⁴²³ On the issue of jurisdiction, Judge Bee declared:

When application was first made, I thought this a matter for the executive interference, because the act of congress respecting fugitives from justice, from one state to another, refers it altogether to the executive of the states; but as the law and the treaty are silent upon the subject, recurrence must be had to the general powers vested in the judiciary by law and

tency. One stated he was bound by a ratified treaty to support implementation, while others argued they could vote against implementation only because the treaty was unconstitutional. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 99 & n. 95 (2001). In 1834, President Andrew Jackson apparently adopted a view similar to that of Jefferson. See 1 BUTLER, *supra* note 227, at 437.

419. See Treaty of Amity, Commerce and Navigation, *supra* note 278, art. 27. By contrast, Congress consistently passed legislation to implement agreements for the return of deserting sailors to their home countries. See John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT’L L. 93, 114 n. 111 (2002).

420. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 237, 286-87 (1990) (discussing the Robbins extradition); see also Parry, *supra* note 419, at 108-14. The convention among commentators is to use “Robbins” to refer to Thomas Nash/Jonathan Robbins even though his name is spelled “Robins” in the case caption. See *United States v. Robins*, 27 F. Cas. 825 (D.S.C. 1799); Parry, *supra* note 419, at 108-09.

421. See Wedgwood, *supra* note 420, at 288.

422. See *id.* at 288-92.

423. See *Robins*, 27 F. Cas. at 825.

the constitution, the 3d article of which declares the judicial power shall extend to treaties, by express words. The judiciary have in two instances in this state, where no provisions were expressly stipulated, granted injunctions to suspend the sale of prizes under existing treaties. If it were otherwise, there would be a failure of justice.⁴²⁴

Because there was no statute implementing the treaty and no general federal question statute in 1799, Judge Bee's jurisdictional ruling meant either that Article III was self-executing for lower federal courts under some circumstances—which is the natural reading of his holding—or that the treaty itself was self-executing as a conferral of subject matter jurisdiction. His decision to hand over Robbins depended on the assumption that the extradition article of the treaty was also self-executing as a rule of decision.

The Robbins extradition sparked a political firestorm.⁴²⁵ Although controversy centered on the possibility that Robbins was a citizen, Judge Bee's jurisdictional holding also came in for criticism.⁴²⁶ In his widely-circulated *Letters of a South Carolina Planter* of October 1799, Senator Charles Pinckney argued "no possible construction" of Article III could justify Judge Bee's assertion of jurisdiction because Article III "leaves the boundaries of [federal court jurisdiction] to be ascertained by Congress."⁴²⁷ Pinckney called for Congress to fix the extradition process by passing legislation to govern future cases.⁴²⁸ But he also argued that other provisions of the Jay Treaty should serve as rules of decision for British judges hearing cases about the seizure of American vessels.⁴²⁹ Thus, some provisions of the treaty were self-executing for courts, while others—perhaps specifically those that impact

424. *Id.* at 833.

425. *See* Wedgwood, *supra* note 420, at 304-08, 321.

426. *See id.* at 303-04. Judge Bee decided several years earlier that a treaty could limit the scope of subject matter jurisdiction conferred by a statute. *See* Sloss, *supra* note 15, at 33-34. As the quotation from *Robins* indicates, he seems to have believed that allowing the treaty to expand the jurisdictional grant was a natural corollary. *See* THOMAS SERGEANT, *CONSTITUTIONAL LAW* 399-400 (1822).

427. CHARLES PINCKNEY, *THREE LETTERS, WRITTEN AND ORIGINALLY PUBLISHED, UNDER THE SIGNATURE OF A SOUTH CAROLINA PLANTER* 12-13 (1799); *see also* Wedgwood, *supra* note 420, at 331-32 (discussing Pinckney's arguments).

428. *See* PINCKNEY, *supra* note 427, at 3, 19-20. Pinckney argued Congress should require a grand jury indictment as a prerequisite to extradition. *See id.* at 19-20.

429. *See id.* at 32-33.

constitutional arrangements involving individual liberty or federal court jurisdiction—were not.

Soon thereafter, Congress convened, and on February 4, 1800, Edward Livingston offered a resolution “[t]hat provision ought to be made, by law, for carrying into effect” the extradition provisions of the Jay Treaty.⁴³⁰ On February 20, he introduced an additional resolution to censure President Adams for his “dangerous interference of the Executive with Judicial decisions.”⁴³¹

Albert Gallatin took the lead for the republicans in the subsequent debate.⁴³² He contended the President had no inherent power to execute the treaty’s extradition provisions and should have waited for Congress to implement that portion of the treaty through legislation.⁴³³ Although the President had a duty to execute the laws—including treaties—the power to execute did not include the power to fill gaps or “defect[s]” in the law.⁴³⁴ Any executive power to implement a treaty, therefore, was limited to provisions that were clear, complete, and specifically directed to the executive—and the extradition article did not meet this standard.⁴³⁵

John Marshall’s prominent role on the federalist side began before he took his seat in Congress, when he wrote a “Communication” to the *Virginia Federalist* in response to attacks on Adams in other papers.⁴³⁶ His argument centered on a strong view of

430. See generally 10 ANNALS OF CONG. 511 (1800). As he had during the Jay Treaty debate, Livingston also sought documents from the President concerning the extradition, which Secretary Pickering provided later that week. See *id.* at 511-15. Much of the reported debate consists of impassioned speeches about whether the House should seek additional documents. See *id.*

431. See *id.* at 533.

432. See *id.* at 586.

433. See *id.*

434. See Wedgwood, *supra* note 420, at 336-37 (analogizing to legislation implementing obligation to return deserting French sailors). The *Annals* do not reproduce Gallatin’s primary speech on these issues, but Wedgwood reconstructed it from his personal papers. See 10 ANNALS OF CONG. 596 (1800) (“Mr. Gallatin rose, and entered generally into the argument, in a speech of about two hours . . .”); Wedgwood, *supra* note 420, at 335-36.

435. See Wedgwood, *supra* note 420, at 336. After further criticizing Adams for interfering with the judiciary, Gallatin also asserted Judge Bee improperly decided the jurisdictional issues. See Wedgwood, *supra* note 420, at 338; see also 10 ANNALS OF CONG. 594 (1800) (“this man, by the advice of the President, was taken out of the hands of the Judiciary.”).

436. See John Marshall, Communication, in 4 THE PAPERS OF JOHN MARSHALL 23-28

presidential power to execute a ratified treaty. Because the treaty gave Britain the right to demand Robbins, “[t]here must therefore have been some mode of carrying the provision of the treaty in this respect into execution, or else the articles would be nugatory; and it would be absurd to suppose the parties meant to stipulate for a thing which could not be performed.”⁴³⁷ Marshall asserted the executive—“the only channel of communication between the nations”—was the obvious choice for “carrying the provision . . . into execution,” and the executive had “a right to decide whether a fugitive should be delivered up or not. For it is a mere question of state”⁴³⁸ Judge Bee was involved simply because he was the federal officer responsible for Robbins’ custody.⁴³⁹

Marshall recognized Judge Bee had asserted jurisdiction over the extradition as a case within the meaning of Article III. But he declared “this is a part of the opinion of the Judge, which seems liable to be questioned.”⁴⁴⁰ Contrary to the republican argument, however, the flaw was not the absence of a jurisdictional statute. Rather:

The Judge probably meant to say, that he once thought it a question which exclusively belonged to the Executive, and therefore, that he, as a Judge, could not in any manner be required to aid in the execution of the treaty. But finding, by recurrence to the Constitution, that the Judicial power extended to Treaties, he was then satisfied that the Judges might be called on where circumstances rendered it proper, to take the necessary steps, in order to have the Treaty carried into effect⁴⁴¹

Notably absent in Marshall’s first defense of Adams is any reference to Congress or federal legislation. For Marshall, the treaty was self-executing as a grant of power to the President,

(Charles T. Cullen & Leslie Tobias eds., 1984); *see also* Wedgwood, *supra* note 420, at 339 n. 422 (discussing attribution of the essay).

437. *See* John Marshall, Communication, in 4 *THE PAPERS OF JOHN MARSHALL*, *supra* note 436, at 24.

438. *See id.* at 24-26.

439. *See id.* at 26-27. Indeed, the extradition was not properly before Judge Bee until he received the President’s letter, which was “the very process, if I may use the expression, which brought the case before the Judge.” *See id.* at 27.

440. *See id.* at 28.

441. *Id.*

who could implement the treaty by enlisting judges to perform executive duties, even if those duties restricted individual liberty.

Marshall reprised his defense of Adams after he joined Congress. On March 7, 1800, Marshall argued extradition is “a case for Executive and not Judicial decision.”⁴⁴² He recognized Article III extends to cases arising under treaties, but he insisted an extradition decision is not “[a] case in law or equity” because it does not “assume a legal form for forensic litigation and judicial decision.”⁴⁴³ He admitted a case “may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court”—and he cited cases for recovery of debts under the 1783 treaty as an example.⁴⁴⁴ Yet Marshall contrasted provisions creating individual rights with “political compacts; as the establishment of the boundary line between the American and British dominions . . . [or] the case of the delivery of a murderer under the twenty-seventh article of our present Treaty with Britain,” to which “the Judicial power cannot extend,”⁴⁴⁵ to which “the Judicial power cannot extend.”⁴⁴⁶

To buttress his case for executive power, Marshall articulated a strong view of self-execution and its relationship to executive power. First, he distinguished extradition under the Jay Treaty from return of deserting sailors under the 1788 Convention with France, because the Convention specified that return “shall be performed . . . through the medium of the courts; but this affords no evidence that a contract of a very different nature is to be performed in the same manner.”⁴⁴⁷ He admitted “some legislative provision is requisite to carry the stipulations of the convention into full effect,” but he insisted the desirability of legislation was separate from the power and necessity of executing a

442. See 10 ANNALS OF CONG. 605 (1800).

443. See *id.* at 606; see also Wedgwood, *supra* note 420, at 345 (suggesting these claims are “the least successful . . . part of his House argument.”).

444. See 10 ANNALS OF CONG. 606 (1800). That is, Marshall appears to concede such provisions are self-executing, as the Supreme Court held in *Ware*. See *id.*

445. *Id.* at 607; see also Wedgwood, *supra* note 420, at 349 (agreeing not all treaties create individual rights but suggesting Marshall erred applying that idea to extradition).

446. 10 ANNALS OF CONG. 607; see Wedgwood, *supra* note 420, at 349 (agreeing not all treaties create individual rights but suggesting Marshall erred in applying that idea to extradition).

447. 10 ANNALS OF CONG. 608 (1800).

treaty.⁴⁴⁸ Indeed—and in tension with the Supreme Court’s much later executive power ruling in *Medellin*—the failure of Congress to pass appropriate legislation “by no means declar[es] the incompetency of a department to perform an act stipulated by treaty.”⁴⁴⁹

Second, Marshall asserted that the need to decide “points of law” to resolve an issue arising under a treaty does not make that issue into a judicial matter.⁴⁵⁰ After all, “[a] variety of legal questions must present themselves in the performance of every part of Executive duty, but these questions are not therefore to be decided in court.”⁴⁵¹ Picking up again on the distinction between enforceable rights and political obligations, Marshall insisted the issues in the Robbins extradition “were questions of political law, proper to be decided, and they were decided by the Executive, and not by the courts.”⁴⁵²

The central question, for Marshall, was whether “the nation has bound itself to act.”⁴⁵³ Put differently, “[t]he case was in its nature a national demand made upon the nation.”⁴⁵⁴ Not only must such a demand be made upon the President as “the sole organ of the nation in its external relations,” but because he is also the wielder of the executive power, “any act to be performed by the force of the nation is to be performed through him.”⁴⁵⁵ Echoing Hamilton’s and to some extent Iredell’s earlier statements, Marshall reminded the House that treaties are laws under the Supremacy Clause. Because the President “conducts the foreign intercourse” and has the constitutional duty to execute the laws, he was bound to execute the treaty and extradite Robbins:

448. *See id.*

449. *Id.*; *see* *Medellin v. Texas*, 128 S. Ct. 1346, 1367-72 (2008). This seems roughly consistent with Justice Iredell’s statement in *Ware* that an executory treaty might require action by the executive, judiciary, or legislature, although Marshall seemed less concerned than Iredell about the need for legislative authority as a precondition to executive action in some instances. *See* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272-73 (1796).

450. *See* 10 *ANNALS OF CONG.* 612 (1800).

451. *Id.*

452. *Id.* at 613.

453. *Id.*

454. *Id.*

455. *Id.* The Supreme Court has cited this passage numerous times to support broad executive power over foreign affairs, but it rarely considers the context. *See* Parry, *supra* note 419, at 113-14. Williams Vans Murray of Maryland used similar language in the Jay Treaty debate. *See* 5 *ANNALS OF CONG.* 692 (1796) (describing the President as “the organ of the nation’s sovereignty”).

The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.⁴⁵⁶

In other words, Britain had asserted its rights under the treaty, and the President acted to fulfill the national obligation. Implementing legislation may have been desirable, but the treaty was self-executing as a grant of power directly to the President, even in a case involving individual life and liberty.⁴⁵⁷

In sum, Congressman Marshall argued treaties bind the nation and are the supreme law of the land, but not all treaties are automatically enforceable in court. The President may be vested with power to execute certain treaty provisions, and others require congressional implementation. Further, if Congress fails in its duty to implement a treaty, then as a matter of necessity the President must execute it to avoid defaulting on an obligation to another nation.⁴⁵⁸ Thus, not only may a treaty grant power to

456. 10 ANNALS OF CONG. 614 (1800). Marshall went on to assert the executive was the proper department for the execution of extradition obligations because it had discretion to depart from treaty obligations in appropriate cases. *See id.* at 614-15; *see also* Parry, *supra* note 419, at 150-53, 160-69 (discussing the importance of executive discretion to disputes over the nature of judicial involvement in extraditions). On the judicial role in extradition, Marshall largely repeated his earlier argument. Deflecting Judge Bee's jurisdictional ruling, he suggested that, because the judicial power extends to treaties, judges may "perhaps . . . be called in" to help implement them. *See* 10 ANNALS OF CONG. 615 (1800). Similarly, he admitted an individual facing extradition "may perhaps bring the question of the legality of his arrest before a judge, by a writ of habeas corpus." *Id.* He also insisted President Adams had not interfered with Judge Bee's decision, because he simply determined Robbins should be extradited if sufficient evidence of his alleged conduct existed. *See id.* at 615-16.

457. David Barron and Marty Lederman suggest this statement is consistent with an idea of Congressional control over executive foreign affairs activity. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 970 n.88 (2008). I agree, but Marshall's claim that the executive, in the course of carrying out a treaty, may summarily dispose of the liberty of a citizen if Congress has done nothing is also consistent with a default presumption of broad sovereign discretion. As with so many separation of powers issues, the overlap in power provides opportunities for conflict or cooperation.

458. *See* NEWMYER, *supra* note 276, at 130, 140 (suggesting Marshall responded to a "crisis in social order" of the 1790's, which demanded "forceful and decisive executive leadership"); Wedgwood, *supra* note 420, at 339 (suggesting Marshall supported efficacy in the exercise of power).

the executive, but the President also has power to fill an enforcement vacuum left by congressional inaction. In this sense, Marshall's argument was the counter to Gallatin and Madison's arguments during the debate over the Jay Treaty: if the House claimed a role in the implementation of treaties, the President too could claim a role if Congress failed to act. Further, treaties not only require the House to pass implementing legislation but they also require the President to implement them where possible.

This version of self-execution doctrine looks very different from the one at the center of contemporary debates. Courts enter the picture largely at the behest of the President, who may ask them for assistance with the executive task of treaty implementation, and they act more as adjuncts or administrators than as independent judges.⁴⁵⁹ Courts will sometimes hear cases arising under treaties, but those cases are more the exception than the rule. Compare this view of the role of courts to the one suggested by Judge Bee, who arguably allowed the treaty to substitute for a jurisdictional statute. Few if any defended this holding on its own terms, and the idea that treaties can create federal subject matter jurisdiction has largely dropped from view.⁴⁶⁰

Marshall's argument changed few minds.⁴⁶¹ Republicans already had argued that not all treaties could operate as law without legislation, and his concession that Congress played a legitimate role in implementing treaties nodded in their direction. Similarly, republicans were unlikely to disagree with the relatively limited role he envisioned for courts. But although Gallatin admitted—as Madison had in his Helvidius essays—that the President had a duty to execute treaties in some instances, the

459. Marshall's argument that "the Judicial power cannot extend to political compacts" and does not include the power "to seize any individual and determine that he shall be adjudged by a foreign tribunal," 10 *ANNALS OF CONG.* 607 (1800), suggests that the judicial role in treaty implementation that he envisioned would include activities outside Article III. See Wedgwood, *supra* note 420, at 349-50.

460. For further discussion, see generally John T. Parry, *No Appeal: The U.S.-U.K. Supplementary Extradition Treaty's Effort to Create Federal Jurisdiction*, 25 *LOV. L.A. INT'L & COMP. L. REV.* 543 (2003).

461. The Committee of the Whole had already voted 58-34 to reject Livingston's censure resolutions. See 10 *ANNALS OF CONG.* 595 (1800). On the day after Marshall's speech, the House concurred by 61-35. *Id.* at 619; see also *id.* at 621 (62-35 Committee vote to end discussion). The margin of victory in these votes was not much larger than the federalists' 20 seat majority. See ROBARGE, *supra* note 277, at 207, 209 (discussing federalist strength in the Sixth Congress).

debates reveal no reason to believe republicans accepted Marshall's much broader views on the extent of this power. That is to say, although the Robbins affair confirmed that a treaty can be self-executing as a grant of power to the President, the more important question of the permissible scope of such grants remained unclear.⁴⁶²

Congress subsequently considered legislation to regulate extradition,⁴⁶³ and the Robbins affair provided an important and recurring issue for the election of 1800, which soundly rejected Adams and the high federalist executive power claims with which—perhaps unfairly—he was associated.⁴⁶⁴ Thus, while Marshall's speech has become a standard citation to support executive foreign affairs authority, the full scope of his argument was controversial at the time. The republican position of more limited executive power and broad congressional power with respect to treaties, argued most forcefully by Gallatin and reaffirming his and Madison's efforts in the Jay Treaty debate, also had substantial support—as the results of the 1800 election seem to confirm.

D. *The 1815 Commercial Convention with Great Britain*

The War of 1812 exacerbated sectional and political ten-

462. This issue received relatively little direct academic attention prior to *Medellin*. See NEWMYER, *supra* note 276, at 137 (recognizing Marshall was arguing in favor of self-execution); Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 140 (2007) (describing Marshall's argument as about executive power "to carry out" and implement an extradition treaty); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 353-59 (2008) (drawing on the Robbins affair to discuss presidential power to implement treaties); *infra* note 607 and accompanying text. At least one contemporary court has accepted the full force of Marshall's argument. In *Lo Duca v. United States*, 93 F.3d 1100, 1103-04 & n.2 (2d Cir. 1996), the Second Circuit declared that without a statute providing for judicial involvement in extradition, "the Executive Branch would retain plenary authority to extradite"—presumably pursuant to a treaty. For the numerous problems with statements of this kind, see generally Parry, *supra* note 419.

463. See 10 ANNALS OF CONG. 537, 654, 691 (1800); THE PAPERS OF JOHN MARSHALL, *supra* note 436, at 120, 146 (providing copies of amendments offered by Marshall). Congress was sharply divided over a republican effort to forbid extraditions where trial could be had in the United States, see 10 ANNALS OF CONG. 691 (1800), and it adjourned without further action, see 4 THE PAPERS OF JOHN MARSHALL, *supra* note 436, at 146 n.1. The United States did not extradite anyone else for more than forty years, and no extradition statute emerged until 1848. See Parry, *supra* note 419, at 114-15, 134-36.

464. See Wedgwood, *supra* note 420, at 354-62; see also ELKINS & MCKITRICK, *supra* note 29, at 691-94; see generally Casper, *supra* note 411 (describing Jefferson's concerns about executive power and his efforts to adhere to separation of powers principles).

sions. Federalists—especially those who represented shipping interests—tended to oppose the war, as did many orthodox southern Republicans.⁴⁶⁵ Moderate or nationalist Republicans, by contrast, supported it.⁴⁶⁶ The war and its aftermath were also the last years in which the Federalist Party had a significant national presence.⁴⁶⁷ The stresses of the war also led some hard-line New England Federalists to flirt with secession, and a group of influential party activists proposed extensive amendments to the Constitution in the 1815 report of the Hartford Convention.⁴⁶⁸

The war ended in a stalemate, which the 1814 Treaty of Ghent confirmed by essentially restoring the pre-war status quo.⁴⁶⁹ A few months later, the United States and Britain negotiated a commercial convention that established “a reciprocal liberty of commerce” and equalized duties and bounties imposed by the two countries.⁴⁷⁰ The Treaty was not controversial—it was neither “a victory for either side [n]or an important step in their commercial relations”—and the Senate gave its approval.⁴⁷¹

On December 23, 1815, President Madison notified Congress that the Treaty had been ratified, and he recommended “such legislative provision as the convention may call for on the part of the United States.”⁴⁷² Just over two weeks earlier, Madison had outlined an ambitious program for the rest of his

465. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 155-56 (2005).

466. See JAMES E. LEWIS, JR., *THE AMERICAN UNION AND THE PROBLEM OF NEIGHBORHOOD: THE UNITED STATES AND THE COLLAPSE OF THE SPANISH EMPIRE* 48-51 (1998); see also GEORGE DANGERFIELD, *THE ERA OF GOOD FEELINGS* 46 (1952) (explaining support or opposition to the war based on geographic location).

467. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 82, 90, 94-95 (2007); BRADFORD PERKINS, *CASTLEREAGH AND ADAMS: ENGLAND AND THE UNITED STATES, 1812-1823*, at 176 (1964).

468. See JAMES M. BANNER, JR., *TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815*, at 321, 326-46 (1970).

469. For extensive discussion of the treaty negotiations and terms, see DANGERFIELD, *supra* note 466, at 66-89; PERKINS, *supra* note 467, at 39-127. The Senate gave its unanimous advice and consent to the treaty on February 16, 1815. See *id.* at 144.

470. A Convention to Regulate the Commerce between the Territories of the United States and of his Britannick Majesty art. 1, July 3, 1815, 8 Stat. 228. For discussion of the negotiations, see PERKINS, *supra* note 467, at 167-70.

471. PERKINS, *supra* note 467, at 170.

472. 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 570 (James D. Richardson ed., 1897).

presidency, including reviving the national bank, a protective tariff, continued defense spending, and public works.⁴⁷³ In April 1816, Congress would approve the new bank and the tariff, but the debates would sharpen tensions between old agrarian Republicans and nationalist Republicans eager to support domestic manufacturing.⁴⁷⁴ Before it could address those issues, however, Congress turned first to the treaty.

On December 29, John Forsyth, a nationalist Republican, reported a bill from the House Committee of Foreign Relations “to carry into effect those parts of the treaty which require legislative interposition.”⁴⁷⁵ The first four sections of the bill declared that duties and bounties would be equal, while the fifth section provided “[t]hat so much of each and every act of Congress as is inconsistent with the provisions of this act be, and the same is hereby, repealed.”⁴⁷⁶ The bill did not provide for any appropriations.

Federalist William Gaston objected to the bill, “believing the convention, since its ratification in due form, had become a law of the land, and unable to perceive wherein it needed the help of an act of Congress to give it operation.”⁴⁷⁷ Consistent with the Jay Treaty resolution, Forsyth replied that the bill was “indispensable; because the power of legislation was vested in Congress, and could be exercised by no other authority.”⁴⁷⁸ Gaston continued his objection the next day by declaring the bill “pernicious” because the executive branch could carry the Treaty into effect

473. See *id.* at 562-69; HOWE, *supra* note 467, at 80-81; LEWIS, *supra* note 466, at 60-61.

474. See HOWE, *supra* note 467, at 82-86. For additional discussions of the tensions between old and new republicans, see LEWIS, *supra* note 466, at 66-67; DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 239-48 (1980); Andrew Shankman, “A New Thing on Earth”: Alexander Hamilton, Pro-Manufacturing Republicans, and the Democratization of American Political Economy, 23 *J. EARLY REPUB.* 323 (2003). Congress also passed legislation to fund roads and canals, but Madison vetoed it on constitutional grounds; although he supported the goal of the program, he believed a constitutional amendment was necessary to give Congress the power to implement it. See HOWE, *supra* note 467, at 88.

475. 29 *ANNALS OF CONG.* 455 (1816). For brief narratives of the debate, see BUTLER, *supra* note 227, at 432-37; CRANDALL, *supra* note 41, at 137-40. For Forsyth as nationalist republican, see HOWE, *supra* note 467, at 82.

476. 29 *ANNALS OF CONG.* 419-20 (1816).

477. *Id.* at 456.

478. *Id.* at 457; see also *id.* at 473 (discussing the resolution), *id.* at 653-54 (legislation required to execute treaty, not to make it valid).

without legislation.⁴⁷⁹ He characterized the Jay Treaty debate as a struggle over appropriations and insisted “[t]here could not have been a serious difference of opinion among the wise and able men of either side, whether a treaty constitutionally made, upon a subject fit for a treaty, was or was not a law; to be executed by the executive, expounded by the judiciary, as other laws made in other forms, prescribed by the Constitution.”⁴⁸⁰ He admitted that “treaties, like other laws, might be so made as to require the aid of supplemental legislation,” but that was not true for this Treaty, which “executes itself.”⁴⁸¹

Other members of the House quickly joined the debate, and many of their arguments repeated claims from the Jay Treaty debates. Thus, opponents of the bill (whether Federalists or nationalist Republicans⁴⁸²) made arguments similar to those made by Federalists in the Jay Treaty debate: treaties automatically override existing federal statutes,⁴⁸³ statutes cannot override treaties,⁴⁸⁴ and the House has little or no role in implementing treaties and may even be bound to act when it does have a role.⁴⁸⁵ Several opponents also relied on Washington’s response

479. *Id.* at 466.

480. *Id.* at 467.

481. *Id.* at 467-68.

482. In the Fourteenth Congress, the House had 117 Republicans (orthodox and national) and sixty-five Federalists, while the Senate had twenty-four Republicans and twelve Federalists. See *GRANDALL*, *supra* note 41, at 138 n.4.

483. See 29 *ANNALS OF CONG.* 493 (1816) (Enos Throop); *id.* at 570 (William Pinkney). Pinkney had been Attorney General in the Madison administration. PINKEY, William—Biographical Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000362> (last visited Feb. 1, 2009). See 29 *ANNALS OF CONG.* 606 (1816) (Alexander Hanson); *id.* at 643-44 (Joseph Hopkinson).

484. See *id.* at 485 (Thomas Gold); *id.* at 493 (Throop, saying a treaty is a compact and superior to a law). John Calhoun claimed treaties are “paramount to laws,” and ultimately asserted there could never be a true conflict between a treaty and a statute because although “[e]ach in its proper sphere operates with general influence . . . [a] treaty never can legitimately do that which can be done by law; and the converse is also true.” *Id.* at 529-32. Alfred Cuthbert suggested Calhoun was “perhaps, carried too strongly towards metaphysical subtlety and the soundness and completeness of theory.” *Id.* at 555. Henry St. George Tucker declared Calhoun’s views “more ingenious than solid.” *Id.* at 559. Henry St. George Tucker was St. George Tucker’s son. See David Cobin & Paul Finkelman, *Introduction to 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA*, at ii, vii (3d ed. 1998).

485. See 29 *ANNALS OF CONG.* 486 (1816) (Hopkinson, claiming there was no role for the House unless the treaty requires appropriations or a “collateral or extrinsic act”); *id.* at 491 (Gaston, saying the House was bound to appropriate if the treaty is in force and not overturned by statute); *id.* at 493-94 (Throop, declaring the House has no control over treaty making “unless it was in cases where the treaty could not execute

to the House's request for documents on the Jay Treaty.⁴⁸⁶

Supporters of the bill (old Republicans and many nationalist republicans) tended to repeat the standard republican arguments that a treaty cannot override a federal statute,⁴⁸⁷ the Supremacy Clause is about federalism only and does not place treaties over federal statutes,⁴⁸⁸ the House must legislate to carry a treaty into effect whenever the treaty overlaps with congressional power,⁴⁸⁹ and if treaties can create commercial laws they can create laws on any subject, including appropriations and declarations of war.⁴⁹⁰ Participants also continued to argue about British practice and whether it was relevant.⁴⁹¹

Several speakers made more telling arguments. For example, some opponents pointed out that—withstanding the insistence of the Jay Treaty resolution that the House sought no role in making treaties—passing a statute to carry a treaty into effect, where that treaty does not conflict with existing laws, “submits to the House the whole terms, the entire merits of the treaty” and thus is functionally a claim to share in the making of the treaty.⁴⁹² Thus, they did not merely suggest that the House had a limited role but also explained—as had some Federalists in the Jay Treaty debates—why a larger role could be in tension with the text and structure of the treaty power.

Other participants did not simply note the situations in

itself”); *id.* at 540 (Elijah Mills, stating “it was never the intention of the convention to vest the House of Representatives with any participation in the treaty-making power.”); *id.* at 567 (Pinkney); *id.* at 606-08 (Hanson); *id.* at 640-41 (Hopkinson); *id.* at 890, 894 (Asa Lyon, saying the House had “no right . . . to interfere with the treaty-making power” and was “bound” to pass legislation to carry treaties into effect where necessary).

486. *See id.* at 602-03 (Robert Wright); *id.* at 606 (Hanson); *id.* at 672 (Benjamin Huger); *id.* at 892 (Lyon). Lyon also referred to the Jay Treaty resolution as “the manoeuvre of a rear guard, to cover a retreat.” *Id.* at 885.

487. *See id.* at 477 (Forsyth); *id.* at 536 (John Randolph); *id.* at 559 (Tucker); *id.* at 628 (Richard Wilde); *id.* at 632 (Daniel Sheffey); *id.* at 665 (John Jackson).

488. *See id.* at 477 (Forsyth); *id.* at 479 (Philip Barbour); *id.* at 560 (Tucker); *id.* at 628 (Wilde); *id.* at 633 (Sheffey).

489. *See id.* at 478, 481 (Barbour); *id.* at 538 (Cyrus King); *id.* at 543 (James Reynolds); *id.* at 547-51 (Rufus Easton); *id.* at 562 (Tucker); *id.* at 632 (Sheffey); *id.* at 665 (Jackson); *see also id.* at 525 (Thomas Gholson, noting this view still left many areas of treaty-making outside the control of the House); *id.* at 539 (King, saying no House consent was required for treaties “respecting solely our external relations”).

490. *See id.* at 480-81 (Barbour); *id.* at 522-24 (Gholson); *id.* at 595 (Thomas Robertson); *id.* at 621 (John W. Taylor); *id.* at 628 (Wilde).

491. *See id.* at 471 (Wright); *id.* at 481-82 (Barbour); *id.* at 525 (Gholson); *id.* at 532 (Calhoun).

492. *See id.* at 483 (Gold); *see also id.* at 606 (Hanson).

which legislation was or was not necessary but also tried to articulate a broader rule for treaty implementation. As John Randolph, the leader of the old Republicans, recognized, “as there are treaties which are self-executory, there are others which require legislative enactment.”⁴⁹³ Supporters of the bill grounded their arguments on the republican view of congressional authority championed by Gallatin and Madison and articulated in the Jay Treaty resolution. Rufus Easton explained,

A treaty though made has not force . . . without a law of Congress . . . to carry it into effect . . . in all cases where the treaty in its provisions interferes with, or contravenes any of the powers expressly delegated to the legislative authority, or where from the nature of the treaty itself it requires legislative provision; but if the treaty is not contrary to the provisions of the Constitution, and does not contravene any of the powers delegated to Congress, and is of the description that it can be carried into effect by the President alone, or by the President and Senate, or by the judicial authority, without the aid of Congress, legislation in such cases becomes wholly useless. . . .⁴⁹⁴

Richard Wilde phrased the distinction between the two categories differently, as turning on whether “the stipulations of a treaty relate entirely to objects purely international or extraterritorial,” or “solely to objects intra-territorial, objects purely of municipal legislative jurisdiction.”⁴⁹⁵ Either way, supporters of the

493. *Id.* at 585; *see also id.* at 625 (Wilde); *id.* at 666 (Jackson). Jackson also denied that the House was obligated to implement treaties. *See id.* at 663-69.

494. *Id.* at 554. Arguing for the same conclusion about the necessity of legislation, Henry St. George Tucker declared “a treaty does not, cannot, execute itself.” Rather, it is a contract to do something, not “an act by which it is done.” He explained,

The stipulations of the instrument which the nation by its Executive undertakes to perform, are . . . of various characters, and separate and distinct natures. Some may be Executive merely, some Legislative; and indeed . . . it seems, that the engagements of the contracting Powers may on some occasions be referable to the Judiciary department of the Government. . . . If it be agreed that something shall be done, which falls within the province of the legislative power, then the legislative aid become necessary, because, though the President and Senate may make a treaty, the Constitution nowhere empowers them to make a law.

Id. at 557-58; *see also id.* at 638 (Sheffey, agreeing with Tucker).

495. *Id.* at 625. He also noted “treaties may be mixed or compounded of stipulations, relating to objects, some of which belong to one class and some to the other.” *Id.* at 626. He further explained that treaties dealing with international or extra-territorial issues “are either self-executory, and are in fact partly executed by the exchange of

bill tended to view the distinction between types of treaties entirely in constitutional terms, by reference to the enumerated powers of Congress—as opposed, or in addition, to the nature of the treaty or its provisions.

Opponents suggested a different emphasis. William Gaston declared,

It did not follow . . . from his doctrine in regard to the efficacy of treaties, that they necessarily changed or repealed legislative acts, with which they did not entirely accord. The stipulations of a treaty might amount, and often did amount, to no more than a pledge to alter or abrogate these acts, or to make legislative regulations conformable to such stipulations. Where the treaty was of this nature - that is to say, executory merely, legislative aid was necessary. But where it could execute itself, there it needed no aid.⁴⁹⁶

Benjamin Hardin agreed:

Treaties might be made, no doubt . . . for the execution of which it might be necessary to call upon the House to make laws; offensive and defensive treaties for instance, which could not otherwise be carried into effect; but when, as in the present case, the treaty was complete, and capable of executing itself, nothing of the kind was necessary.⁴⁹⁷

For these participants, the powers of Congress were of little or no importance compared to the nature of the treaty itself. Perhaps drawing on Chase in *Ware*,⁴⁹⁸ and also anticipating Marshall in *Foster*,⁴⁹⁹ they argued the distinction between treaties for constitutional purposes turned on the prior interpretive question whether the treaty itself required legislation or could go immediately into effect.⁵⁰⁰

ratifications, as in a treaty of peace, or they depend for their execution on the executive and judicial powers, which are sufficient for that purpose." *Id.* at 628.

496. *Id.* at 491. Gaston's conception of "executory" appears to have differed from Iredell's in *Ware* and to have been very close to Marshall's in *Foster*.

497. *Id.* at 545; see also *id.* at 608 (Hanson, arguing "the treaty is capable of executing itself"); *id.* at 609 (Richard Stanford, arguing the House has discretion and "an indirect control over" treaties that stipulate for legislation or require appropriations or further regulations, but "most of our treaties . . . were not of such description, but such as were sufficiently full in their details, and went plainly and obviously to their intended objects").

498. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796) (opinion of Chase, J.).

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

500. John Calhoun went further and suggested that if the treaty negotiators be-

Some opponents also went beyond the traditional federalist doctrine that treaties trump federal statutes to suggest a more comprehensive and moderate view of the relationship between the two. Thus, Gaston observed that treaties and statutes were equally laws of the nation.⁵⁰¹ He went on,

They both derive their efficacy from being Constitutional expressions of the will of the nation; and where there are two expressions of that will, which cannot stand together, the last necessarily abrogates the first. A law may repeal a treaty. . . . And a treaty for the same reason may also repeal a precedent act of Congress. . . .⁵⁰²

Gaston and other speakers—including Timothy Pickering, Secretary of State during the Robbins affair, hard-line federalist, and sometime disunionist—also made clear that they considered the last-in-time rule to be a structural principle that confirmed a broad treaty power without destroying legislative power, and which counseled rejection of broad claims of congressional power over treaty implementation.⁵⁰³ Embracing the last-in-time rule was a retreat for Federalists, but it was also an effective response to the Jay Treaty resolution. The resolution's emphasis on enumerated powers ensured tension with the President and Senate, because most treaties would overlap with those powers. To representatives worried about the power of the House but also concerned about political tension, the last-in-time rule affirmed congressional power without creating conflict.⁵⁰⁴

lieved legislation was necessary, "the proper form" was to say so in the treaty itself. 29 ANNALS OF CONG. 527 (1816).

501. *See id.* at 490.

502. *Id.* Asa Lyon declared: "Treaties, then, are laws, and as such, have operative force as other laws," which means "they have the power to repeal prior, contravening laws." *Id.* at 891. But treaties are not superior to laws; they "may be repealed, or set aside for good reasons, as well as other laws." *Id.* at 894.

503. *See id.* at 490 (Gaston); *id.* at 614-15 (Pickering). Pickering also would have required a clear statement; Congress may only annul a treaty "by a formal act" that "declare[s] a treaty no longer obligatory on the United States." *Id.* at 615. He referred to the statute, passed while he was Secretary of State, to terminate the convention with France. *See id.*; An Act to Declare the Treaties Heretofore Concluded with France, No Longer Obligatory on the United States, ch. 67, 1 Stat. 578 (1798). Pickering not only supported the Hartford Convention movement but also "preferred temporary dissolution of the union to continued Republican rule." PERKINS, *supra* note 467, at 139-40; *see also* BANNER, *supra* note 468, at 114-15, 330.

504. Arguing from the other side, Rufus Easton also saw the connection between self-execution and the last-in-time rule. "It is a correct principle," he admitted, that subsequent laws, inconsistent with former laws, repeal such former laws,

At the same time that the House was debating, the Senate passed its own bill, which provided, “Be it enacted . . . [t]hat so much of any act or acts as is contrary to the provisions of the Convention . . . shall be deemed and taken to be of no force or effect.”⁵⁰⁵ The House ignored the Senate’s bill in favor of its own. Some House members argued that the Senate’s decision to pass a bill of any kind indicated that the Senate also believed the treaty was not self-executing.⁵⁰⁶ Others opposed the Senate’s proposal because it was only declarative and did not actually repeal conflicting laws—and thus it did not admit the House’s role in implementing treaties and could be interpreted instead as confirmation that treaties override laws.⁵⁰⁷ On January 13th, the House passed Forsyth’s bill by a vote of 86-71.⁵⁰⁸

When the Senate began its debate on the House bill, James Barbour objected that existing federal statutes in conflict with the treaty were already “annulled upon the ratification of the treaty.”⁵⁰⁹ Echoing Gaston’s argument in the House, Barbour explained that the treaty power was complete, including in matters of commercial regulation; “[n]o legislative sanction is necessary, if the treaty be capable of self-execution.”⁵¹⁰ But the treaty

and is a rule which cannot be controverted. . . . But the question to be decided is, when does a treaty become a law, when has it efficacy as such, and when shall it be binding as the supreme authority of the nation?

29 ANNALS OF CONG. 548 (1816). He argued a treaty that overlapped with legislative powers could not be supreme law until Congress passed legislation to put it into effect, so that the last-in-time rule would best be satisfied—in his view—by requiring House participation. *See id.* at 548-51. Hentry St. George Tucker, by contrast, declared the idea of a last-in-time rule was “[i]mpossible! it is an inconsistency that cannot be admitted; it is a construction that would beget unutterable confusion.” *Id.* at 561; *see also id.* at 617-19 (Taylor, arguing a last-in-time rule would allow treaties to appropriate funds and alter the Constitution); *see also* Lobel, *supra* note 12, at 1101 n.151 (discussing this aspect of the debate).

505. 29 ANNALS OF CONG. 36-37, 40 (1816).

506. *Id.* at 551 (Easton); *id.* at 580, 582 (Randolph).

507. *See id.* at 594 (Forsyth); *id.* at 595 (Erastus Root). Pickering agreed—and therefore preferred the Senate bill, although he maintained no bill was necessary at all. *See id.* at 594.

508. *Id.* at 674.

509. *Id.* at 47; *see also id.* at 49 (if a treaty is supreme law under the Supremacy Clause, “then whatsoever municipal regulation comes within its provisions must *ipso facto* be annulled.”). James Barbour was the brother of Representative (and later Justice) Philip Barbour, who voted in favor of the House bill. *See id.* at 674; BARBOUR, Philip Pendleton—Biographical Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000131> (last visited Feb. 1, 2009).

510. 29 ANNALS OF CONG. 50 (1816). He went on to note that if “the treaty from its nature cannot be carried into effect but by the agency of the Legislature . . . then the

power was not superior to legislative power. Rather, the two powers were the same, so that “the last act, whether by the Legislature or the treaty-making power, abrogates a former one.”⁵¹¹ While the bill passed by the Senate had been merely “declaratory”—so that “all doubts and difficulties, should any exist, might be removed”—the House bill was “a supererogation.”⁵¹² Eligius Fromentin agreed, declaring that both the House and Senate bills “enact provisions evidently useless.”⁵¹³ He took it as “a settled principle . . . that the last law repeals the former law so far as the provisions of the former law are irreconcilable with the provisions of the latter,” which meant that the treaty “repeal[ed] every law anterior to that treaty, which is in opposition to the provisions of that treaty.”⁵¹⁴

Other Senators spoke in favor of the House bill. Jonathan Roberts declared it was “worse than absurdity” to say that a treaty can become law without legislative enactment.⁵¹⁵ Nathaniel Macon insisted House participation was necessary for treaties that overlapped with the enumerated powers of Congress.⁵¹⁶

George Washington Campbell also supported the House bill, but in a way similar to that of Randolph and Easton in the House. Campbell admitted “the conclusion would seem irresistible, that a treaty may be complete without the agency of the House of Representatives, and go into effect, as a law of the United States, without legislative enactment.”⁵¹⁷ But, he went on, the authority of the President and Senate to “to make a treaty complete . . . extends to such cases only wherein the subjects to which it relates are clearly within the treaty-making power,” which does not include “such subjects as lay more properly within the sphere of the general legislative powers previously

Legislature must act not as participating in the treaty-making power, but in its proper character as a legislative body.” *Id.* at 52.

511. *Id.* at 51.

512. *Id.* at 47, 57.

513. *Id.* at 58.

514. *Id.* at 59.

515. *Id.* at 66. Roberts seemed to go further than the republican position in the Jay Treaty debates, for his statements made no distinction between treaties that overlapped with enumerated legislative powers, and those that did not, except for treaties of peace. *See id.* at 70.

516. *See id.* at 75-76. As a Representative, Macon had voted for the Jay Treaty resolution. *See* 5 *ANNALS OF CONG.* 782 (1796).

517. 29 *ANNALS OF CONG.* 83 (1816).

vested in Congress.”⁵¹⁸ Thus, “some treaties become complete, and go into effect as laws of the United States, without legislative aid, while others are incomplete without such aid, and only pledge the faith of the nation that the requisite legislative acts will be passed for carrying their provisions into effect.”⁵¹⁹ Because the treaty affected revenue, he concluded, House participation was necessary.⁵²⁰

The Senate rejected the House bill the following day by a vote of 21-10.⁵²¹ No other issue appears in the reported debate, although many of the various speeches were noted and not reported. Thus, the Senate’s rejection appears largely to have turned on opposition to the House’s claims that treaties can neither override statutes nor go into immediate effect without House participation if they overlap with enumerated legislative powers. The Senate vote may also indicate its embrace of the moderate federalist position on the manner of distinguishing between self-executing and non-self-executing treaties.

The dispute between the House and Senate ultimately went to a conference committee.⁵²² The House conferees submitted a written statement to their Senate counterparts, in which they made several assertions that restated the principles of the Jay Treaty resolution, but in a more diluted fashion and with a conciliatory tone. They first protested that

the House of Representatives does not assert the pretension that no treaty can be made without their assent; nor do they

518. *Id.*

519. *Id.*

520. *See id.* at 86. Campbell had briefly succeeded Gallatin as Secretary of the Treasury under Madison. CAMPBELL, George Washington—Biographical Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000083> (last visited Feb. 1, 2009). He may have supported a last-in-time rule, but only for treaties that were “complete.” *See* 29 ANNALS OF CONG. 84-85 (1816).

521. *Id.* at 89.

522. When the House learned of the Senate’s action, it took up the bill that had passed the Senate. It voted to strike all of the Senate’s language and replace it with that of the House bill. *See id.* at 897 (81-70 vote in the Committee of the Whole); *see also id.* at 898 (passage in the House). Forsyth “condemned the Senate’s bill . . . as an attempt to deprive this House of its just powers in relation to the origination of propositions affecting the public revenue.” *Id.* at 884. The Senate then rejected the House amendments. *See id.* at 130-31 (19-15 vote not to strike the words “and declared” and vote to reject the rest of the House amendments). The House then stood firm. *See id.* at 134 (Senate receives message “that the House *insist* on their amendments to the bill” and “[t]hey ask a conference upon the subject.”); *see also id.* at 136 (Senate insists on its version of the bill and agrees to a conference).

contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty, or to carry it into execution. On the contrary, . . . to some, nay many treaties, no legislative sanction is required, no legislative aid is necessary.⁵²³

They also suggested the Senate would admit “the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory.”⁵²⁴ Thus, they maintained, the difference between the two bodies was not over principle but only over “application of the principle.”⁵²⁵ They pleaded that “it is safer in every doubtful case, to legislate”—in part because doing so would avoid tempting the President to execute treaties in such cases.⁵²⁶

At the conference, according to the House conferees, the Senate committee

admit[ted] the principle . . . that whilst some treaties might not require, others may require, legislative provision to carry them into effect. . . . [T]he Senate doubted whether any act of legislation was necessary [for this treaty], but since it was deemed important by the House that an act should be passed, they had no objection to give it their sanction; provided a precedent was not established, binding them thereafter to assist in passing laws, in cases on which such doubts might not exist.⁵²⁷

At the same time, however, the Senate conferees insisted on retaining the words “and declared,” so that the legislation would begin with the phrase, “Be it enacted and declared . . .”⁵²⁸ They explained that it was “expedient, with a view of giving to the bill a declaratory, as well as an enacting form.”⁵²⁹ The House conferees acquiesced, and they explained to their peers that “these words [we]re mere surplusage” that they had to accept if there was to be any agreement at all.⁵³⁰

523. *Id.* at 1019.

524. *Id.*

525. *Id.*

526. *Id.* at 1020.

527. *Id.* at 1022.

528. *See id.*

529. *Id.*

530. *Id.*

After a short debate, in which members disputed whether or not the committee had given up too much, the House voted 100-35 to accept the amended bill.⁵³¹ On the Senate side, Rufus King—a relatively moderate Federalist who was soon to be the unsuccessful candidate for President against James Monroe—explained that the Senate conferees believed no legislation was required at all and “even a declaratory law . . . is [a] matter of mere expediency.”⁵³² Thus, they had insisted on retaining the word “declared” because it “imparts . . . the character of a declaratory law” that merely “recognises the existence and authority” of the treaty.⁵³³

The claim of extensive House authority over treaties that emerged from the Jay Treaty debates stumbled in 1816. The resulting statute did not “repeal” conflicting legislation; it merely “enacted and declared” that such legislation should be “deemed and taken to be of no force or effect,” and even that statement was controversial. The failure of the hard-line republican position may simply reflect the fact that this debate was far less partisan because the merits of the treaty were not at issue—although the debate and resulting compromise were still highly political. In addition, the Senate was also involved, and it had the opportunity to register its disagreement in a meaningful way.

Importantly, however, many of the victorious participants in the 1816 debate did not argue simply for the superiority of treaties over legislation. Nor did they embrace a “presumption” of self-execution or reject a role for the House. Nationalist republicans who opposed the House bill may have been uncomfortable with the full implications of the Jay Treaty resolution, even if

531. *See id.* at 1049-50, 1057.

532. *Id.* at 160. For King as moderate Federalist and presidential candidate, see BANNER, *supra* note 468, at 331; PERKINS, *supra* note 467, at 31-32, 96; WILENTZ, *supra* note 465, at 202.

533. 29 ANNALS OF CONG. 160-61 (1816). The Senate then accepted the conference version of the bill. *Id.* at 161. In relevant part, the statute reads,

Be it enacted and declared . . . [t]hat so much of any act as imposes a higher duty of tonnage, or of impost on vessels and articles imported in vessels of Great Britain, than on vessels and articles imported in vessels of the United States, contrary to the provisions of the convention . . . be, from and after the date of the ratification of the said convention, and during the continuance thereof, deemed and taken to be of no force or effect.

An Act Concerning the Convention to Regulate the Commerce Between the Territories of the United States and His Britannic Majesty, ch. 22, 3 Stat. 255 (1816) (emphasis added).

they accepted it in a more limited context—such as appropriations, where the need for legislation was fairly obvious. Participants who saw merit in aspects of the federalist approach to the treaty power (again, whether federalists or republicans in 1816) backed sharply away from the Hamiltonian view. Instead, they embraced a more moderate position that had two critical components: admitting that not all treaties operate as law by themselves, and advancing the last-in-time rule as a way to balance the legislative and treaty powers. These proponents of the last-in-time rule admitted that the treaty power was not superior to legislative power, that Congress was not bound by treaties, and that it could override them.

By the end of these debates, thoughtful Senators and Representatives had almost fully articulated the doctrine that some treaties were self-executing and could be put into effect by the President or courts, while others required implementing legislation. This view tended to claim a larger role for treaties than many republicans desired, and the last-in-time rule operated as a necessary corollary to the idea of self-execution. Far from being the reflexive adoption of a hoary maxim, the last-in-time rule as it emerged from these debates was the thoughtful resolution of a difficult theoretical and political issue. Its function was to ensure that the House would have an important albeit more limited constitutional role in overseeing the implementation and operation of treaties.⁵³⁴

534. Two future Supreme Court justices, Philip Barbour of Virginia and John McLean of Ohio, voted for the House bill. See 29 ANNALS OF CONG. 674 (1816). Neither was on the Court at the time of *Foster* or the last-in-time rule decisions, but McLean later authored a circuit court opinion that expressed the republican view of the treaty power, perhaps diluted a bit in response to the 1816 debate and *Foster*:

A treaty under the federal constitution . . . is not . . . and cannot be the supreme law of the land, where the concurrence of congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. . . . And in such a case, the representatives of the people and the states, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.

Turner v. Am. Baptist Missionary Union, 24 F.Cas. 344, 345-46 (6th Cir. 1852) (No. 14,251). MacLean applied these principles to a treaty providing for the sale of land and

E. *Aftermath and Conclusions*

In the years after the 1816 debate, the House and Senate continued to debate questions of treaty implementation, and the House continued to insist on its authority to review the merits of treaties in the course of considering laws—usually appropriations—that were necessary for implementation.⁵³⁵ Throughout this period, Congress also authorized the President to enter into numerous international agreements that were not submitted for Senate ratification—that is, they were congressional-executive agreements, not treaties. Although these agreements began to appear even before the congressional debates on the treaty power, it is difficult not to believe that the frequent debates over the role of the House—which stressed the ambiguity and tension in the relationship between the treaty and legislative powers—supported the constitutional legitimacy of such agreements and eventually their expansion into international trade.⁵³⁶

Treatise writers also addressed these issues in the years before *Foster*, and they tended to support federalist positions, so that federalist legal arguments persisted well after the party lost national influence or importance. In 1822, Thomas Sergeant declared, “[a]s a treaty is declared to be the Supreme law of the land, it is obligatory on Courts; and where it affects the rights of parties litigating in Court, it is as much to be regarded as an act of Congress.”⁵³⁷ He went on to note that “[i]n some instances

held that a statute was required to carry the treaty into effect, which meant that the statute—not the treaty—provided the rule of decision for the court. *Id.* at 346.

535. See BUTLER, *supra* note 227, at 437-43; GRANDALL, *supra* note 41, at 118-50; FISHER, *supra* note 329, at 40-42; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 812 n.45 (1995).

536. For histories of Congressional-executive agreements, see Ackerman & Golove, *supra* note 535, at 837-907; Hathaway, *supra* note 47, at 1286-1302. “[W]ith the exception of the general friendship and commerce agreements concluded with island nations,” Hathaway states, “there is little evidence [through the mid to late nineteenth century] of congressional-executive agreements regarding international trade.” Hathaway, *supra* note 47, at 1292. Ackerman and Golove note that House members rarely if ever claimed a role in making treaties—as opposed to implementing them—and so these debates are not directly analogous to contemporary reliance on Congressional-executive agreements. I am less sure, perhaps because I am not trying to fit this history into a theory of constitutional change being produced by concentrated moments of constitutional politics. In any event, Ackerman and Golove also concede that “the modernist reading of the text”—allowing Congressional-executive agreements—“was within eighteenth-century interpretive horizons.” Ackerman & Golove, *supra* note 535, at 813.

537. SERGEANT, *supra* note 426, at 395; see also *id.* at 396 (“it is doubtful, whether a

the President . . . has exercised the power of declaring the State of the nation under existing treaties, and of enforcing and carrying into effect the obligations of neutrality.”⁵³⁸ Sergeant also provided brief discussions of the congressional debates without taking clear positions on the intersections among the treaty power, legislative powers, and the Supremacy Clause.⁵³⁹

William Rawle took a more forceful tone. His 1825 treatise began by describing treaties as “laws, in making which the house of representatives has no original share,” and he also argued the House is “bound” to perform the “duty” of appropriating funds “to support the exercise of the treaty making power.”⁵⁴⁰ His discussion of the Jay Treaty debates suggested the House “acquiesced” to some extent in Washington’s reply, while his discussion of the 1816 debates described the House bill as “a dangerous innovation” and the final statute as “a sort of compromise, which it is difficult to reconcile with a sound construction of the constitution.”⁵⁴¹ The tone of these comments clearly indicates sympathy with core federalist positions, but other parts of his discussion were more consistent with the moderate federalist position in the 1816 debates. First, he accepted the legitimacy of the last-in-time rule—although he also took care to assert that the rule necessarily “consider[s] the treaty as complete and effective,” as opposed to statutes passed to carry treaties into effect, “which suppose the treaty imperfect.”⁵⁴² Second, he admitted that a treaty can neither appropriate money nor raise revenue; only congressional legislation can accomplish those goals.⁵⁴³

New York Chancellor James Kent’s 1826 *Commentaries on American Law* was less compromising and generally espoused the

treaty is to be considered as of the same character as an act of Congress, in respect to criminal offences.”). The 1830 second edition adds a discussion that closely tracks the language of *Foster*. See *id.* at 405-06 (2d ed. 1830). For background on Sergeant, see ELIZABETH KELLEY BAUER, COMMENTARIES ON THE CONSTITUTION: 1790-1860, at 39 n.1 (1952). Sergeant’s older brother John participated in the 1816 debate as a member of the House, and he voted against the House bill. See 29 ANNALS OF CONG. 674 (1816).

538. SERGEANT, *supra* note 426, at 397.

539. See *id.* at 401-03.

540. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 56, 67-68 (1825). The chapter on the treaty power in the 1829 second edition is not materially different. For background on Rawle, including his Federalist views, see BAUER, *supra* note 537, at 58-65.

541. RAWLE, *supra* note 540, at 62-63.

542. *Id.* at 61.

543. See *id.* at 64-67.

federalist position in the Jay Treaty debate. Thus, he expressed “regret and astonishment” over the Jay Treaty resolution and dismissed it as “a naked abstract claim of right, never acted upon.”⁵⁴⁴ After endorsing Washington’s message to the House, Kent strenuously sought to minimize the House’s role in implementing treaties:

If a treaty be the law of the land, it is as much obligatory upon Congress as upon any other branch of the government, or upon the people at large, so long as it continues in force, and unrepealed. The House of Representatives are not above the law, and they have no dispensing power. . . . The argument in favor of the binding and conclusive efficacy of every treaty made by the President and Senate is so clear and palpable, that it has probably carried very general conviction throughout the community; and this may now be considered as the decided sense of public opinion.⁵⁴⁵

Kent went on to claim, erroneously, that his remarks reflected “the sense of the House of Representatives, in 1816,” and he proved a poor prophet when he asserted that “the resolution of 1796 would not now be repeated.”⁵⁴⁶ Yet Kent nonetheless can be read to accept, perhaps grudgingly and certainly obliquely, the last-in-time rule:

[The House has] a right to make and repeal laws, provided the Senate and President concur; but without such concurrence, a law in the shape of a treaty is as binding upon them as if it were in the shape of an act of Congress, or of an article of law of the constitution, or of a contract made by authority of law.⁵⁴⁷

The importance of these debates and the resulting commentaries has more than one dimension. First, of course, the continued concern about problems of treaty implementation—specifically with reference to the balance between legislative and executive power—demonstrated both that the text of the Consti-

544. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 286 (3d ed. 1836).

545. *Id.* at 286-87.

546. *Id.* at 287. Louis Henkin notes, “[t]he resolution was re-affirmed in 1871.” See HENKIN, *supra* note 408, at 482 n.115 (citing CONG. GLOBE, 42d Cong., 1st Sess. 835 (1871)).

547. KENT, *supra* note 544, at 287. Writing after *Foster*, Justice Joseph Story articulated similar views and forcefully defended self-execution, but he expressly admitted the legitimacy of the last-in-time rule. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 694-97 (1833).

tution was ambiguous and that there was little if any baseline understanding of how the political branches would or should exercise their overlapping powers. The debates were therefore crucial in creating a framework for managing or resolving constitutional ambiguity—more important, I would argue, than the treatises. Second, the differences between Federalist treatise writers and many members of Congress demonstrate pluralism on issues of constitutional interpretation. Further, the tone and content of Chief Justice Marshall's subsequent opinion in *Foster* is much closer to that of the congressional debates than to that of the treatise writers.

Finally, and perhaps most importantly, the topics that did not draw attention are also significant—because some issues were no longer matters of contention. Throughout the congressional debates, almost no one suggested that enforcement of treaties against the states was in any way problematic. Republicans certainly conceded at least that much when they continually insisted the Supremacy Clause was directed only at the states. Similarly, most participants assumed the judiciary had a role in treaty implementation. Although there was no clear agreement on anything like a “presumption” in favor of or against self-execution, few if any participants by 1816 denied that some treaty provisions could be enforced by courts without implementing legislation.

V. *THE SUPREME COURT RETURNS TO THE DEBATE*

A. *Foster v. Neilson and United States v. Percheman*

The Supreme Court returned to the debate over treaty implementation with its 1829 decision in *Foster v. Neilson*.⁵⁴⁸ The case presented a dispute over title to land in West Florida. The plaintiffs claimed title under a grant from Spain and further asserted that the 1819 treaty between the United States and Spain recognized their title. Speaking through Chief Justice Marshall, the Court rejected the plaintiffs' claim on two grounds.

First, the Court noted that from before the date of the alleged grants, the United States had asserted sovereignty over the disputed land and had denied Spanish claims.⁵⁴⁹ Federal stat-

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

549. *See id.* at 309.

utes enacted prior to the treaty reflected this view.⁵⁵⁰ The Court deferred to this exercise of sovereignty: "if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."⁵⁵¹ More generally, the issue of sovereignty over land was a question "respecting the boundaries of nations" and thus was "more a political than a legal question" to which courts must defer.⁵⁵²

Marshall next considered whether the eighth article of the 1819 treaty could have any impact on this understanding.⁵⁵³ The Court was divided over the meaning of the eighth article, and Marshall ultimately based his opinion on a more fundamental conclusion.⁵⁵⁴ Whatever the eighth article might mean, its impact depended on whether it "act[ed] directly on the grants, so as to give validity to those not otherwise valid," or whether it only "pledge[d] the faith of the United States to pass acts which shall ratify and confirm them."⁵⁵⁵ Marshall asked, in other words, whether the eighth article was self-executing as a rule of decision for the courts.

Marshall then explained why this distinction was important:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty ad-

550. See *id.* at 303-04, 308.

551. See *id.* at 309. The "construction" Marshall referred to was the government's interpretation of an 1800 treaty between France and Spain and its effect on the 1803 treaty between the United States and France for the purchase of the Louisiana Territory. See *id.* at 301.

552. See *id.* at 309. In his Robbins speech, Marshall identified national boundaries as political issues. See 10 ANNALS OF CONG. 607 (1800).

553. See *Foster*, 27 U.S. (2 Pet.) at 310-15.

554. For discussion of this aspect of the opinion, see David Sloss, *When Do treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT'L L. 20, 84-85 (2006).

555. *Foster*, 27 U.S. (2 Pet.) at 314 (1829).

dresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.⁵⁵⁶

Turning to the language of the treaty, Marshall declared that it did not “act[] directly on the subject” and instead used “the language of contract.”⁵⁵⁷ As a result, the treaty did not “repeal[] those acts of congress which were repugnant to it,” and implementing legislation was necessary.⁵⁵⁸

As I mentioned in the Introduction, commentators debate whether this language creates a general presumption in favor of self-execution under the Supremacy Clause. The arguments on either side are unconvincing because the structure of Marshall’s argument suggests a middle course. He first states that the presumption elsewhere is against self-execution, but that the United States follows “a different principle.” So far, this language only rejects a presumption against self-execution. Critically, the rest of the passage did not take the further step of creating a new presumption going the other way. Instead, Marshall simply asserted there are two types of treaties—those that are “equivalent to an act of the legislature” and create rules of decision for courts, and those that require the legislature to “execute the contract before it can become a rule for the court.”⁵⁵⁹

Marshall’s opinion has an initial similarity to Iredell’s in *Ware*. Both begin with the observation that, in general, treaties are not self-executing, but that the Supremacy Clause established a different rule. From there, however, their opinions diverge. Iredell can be read to declare that treaties are almost always self-executing under the Supremacy Clause, except that they cannot disturb vested rights without precise language stat-

556. *Id.*

557. *See id.* at 314-15.

558. *See id.*

559. I thus agree with John Yoo that Marshall presents the self-execution issue as “a simple either/or question,” *see* Yoo, *Globalism and the Constitution*, *supra* note 7, at 2090, although I disagree with his subsequent attempt to draw a presumption against self-execution from *Foster*. *See id.* at 2090-91. I also disagree with Henkin, Paust, Sloss, and Vázquez, who see a presumption in favor of self-execution. *See* HENKIN, *supra* note 408, at 199-200; PAUST, *supra* note 3, at 70-71; Sloss, *supra* note 7, at 19-21; Vázquez, *supra* note 6, at 700-03; Vázquez, *Laughing at Treaties*, *supra* note 7, at 2193-94. Admittedly, Marshall uses slightly different language to describe the two categories. He states that “whenever” a treaty operates of itself, it is self-executing, and “when” it does not, it is non-self-executing. I am not aware of any rule of construction that gives distinct and doctrinally dispositive meanings to “when” and “whenever” in this context.

ing an intention to do just that. Marshall, on the other hand, established no presumption and instead looked to the language of the treaty to decide whether or not it was self-executing.⁵⁶⁰

Notably, moreover, Marshall's tone is less insistent than Iredell's. His conception of treaty implementation, for example, more clearly anticipates a role for Congress—a stance that is particularly salient given the facts of the case. He was also less emphatic in *Foster* than he had been in the Robbins affair, when he had argued for self-execution in the context of executive power rather than judicial power.⁵⁶¹ His language in *Foster*—including the focus on the language of the treaty—is also less strident than that of the federalist treatise writers. In fact, it is strikingly similar to the statements of moderate Federalists and republicans in the 1816 debate (as well as to Jefferson's and Chase's views of years before).⁵⁶²

Three years later, in *United States v. Percheman*, the Court reconsidered the language of the eighth article of the 1819 treaty and determined that it was self-executing after all. Worth noting is no one disputed that the land at issue had been within Spanish territory prior to the treaty, and the federal statutes that had been important in *Foster* were not relevant. Marshall consulted the Spanish version of the treaty and observed that it appeared to “stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred.”⁵⁶³ He then asserted that “[i]f the English and the Spanish parts can, without violence, be made to agree,

560. Not surprisingly in light of his statements in the Virginia legislature, Marshall also did not repeat Iredell's claim that a treaty was always “obligatory, in point of moral obligation . . . on the Legislative, Executive, and Judicial Departments.” *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796) (opinion of Iredell, J.).

561. See Wedgwood, *supra* note 420, at 365 (arguing Marshall was more willing to defer to Congress than during the Robbins affair). Similarly, his opinion in *Foster* can be read as backing away from—or at least clarifying—the implications of his opinion in *The Schooner Peggy*.

562. I cannot prove that Marshall was aware of the 1816 debates or that the views expressed in those debates simply permeated U.S. legal culture in the 1820s. But Marshall tended to keep abreast of political issues and at least sometimes followed Congressional debates on important issues. See HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835*, at 54 (1997) (arguing Marshall was aware of the ebbs and flows of the political process and its impact on the potential power of the Court); RO-BARGE, *supra* note 277, at 272, 300 (asserting Marshall had a “keen interest in party matters” and noting he followed the debate on President Jackson's Indian removal policy).

563. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833).

that construction which establishes this conformity ought to prevail."⁵⁶⁴ Marshall concluded that the English text was more flexible, and he reinterpreted it to have the same meaning as the Spanish text.⁵⁶⁵

David Sloss argues *Percheman* "overruled" *Foster*, with the result that "courts should be cautious in applying [the idea of non-self-execution] to the presumption in favor of judicial remedies for violations of individual treaty rights."⁵⁶⁶ Carlos Vázquez contends that *Percheman* "recognize[s] that the Supremacy Clause establishes a strong presumption that treaties are enforceable in court in the same circumstances as provisions of statutes and the Constitution of like content."⁵⁶⁷ Neither claim has much to do with the Court's analysis. As in *Foster*, the Court focused on the text of the treaty to determine whether or not legislation was necessary to its implementation. The only difference—and it is certainly an important one—is that the Court adopted rules of construction (not presumptions) to guide its interpretation. First, Marshall can be read as suggesting, perhaps even holding, that treaty language should be interpreted consistently with international law unless there is a reason to read it differently.⁵⁶⁸ Second, he stated that treaties drawn up in more than one language should be interpreted to "conform[] . . . to each

564. *Id.*

565. *See id.* at 89.

566. Sloss, *supra* note 554, at 88.

567. Vázquez, *Treaties as Law of the Land*, *supra* note 7, at 607.

568. *See Percheman*, 32 U.S. (7 Pet.) at 88; *see also* *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125 (1814) (stating the effect under the Constitution of a declaration of war should be consistent with prevailing notions of international law). Vázquez suggests the Court created a presumption in favor of self-execution in part by asking "whether the United States had 'insisted on the interposition of government.'" Vázquez, *Treaties as Law of the Land*, *supra* note 7, at 645 (quoting *Percheman*, 32 U.S. (7 Pet.) at 88). But this language appears as part of the Court's discussion of international law and the inferences that can be drawn from it about the intentions of the parties to a treaty. It has nothing to do with a general constitutional attitude toward self-execution. Nor is it likely, in light of his insistence on a general rule of non-self-execution outside the United States, that Marshall meant to imply international law ordinarily made treaties self-executing. Of course, one easily could argue, as Sloss does, that the relevant interpretive rules include a "presumption in favor of judicial remedies for violations of individual treaty rights," or that the general idea of interpreting treaties to be consistent with international law should govern today over more specific and historically contingent rules. *See* Sloss, *supra* note 554, at 32. The first seems entirely consistent with *Foster* and *Percheman*, while the second requires a more relaxed approach to the cases but would also allow greater doctrinal flexibility.

other.”⁵⁶⁹

Percheman tweaks but does not substantially alter the structure that *Foster* created for determining whether a treaty was self-executing. And that structure follows the moderate tone adopted by leading participants in the 1816 debates: some treaties are self-executing, and some are not, depending on the nature and language of the provision in question. There is no general presumption but, as I discuss in the Conclusion, this position can support a series of specific presumptions about certain kinds of treaty provisions.

B. *The Last-in-Time Rule*

In *Foster*, Marshall declared that self-executing treaties are “equivalent to an act of the legislature” and that such a treaty “repeal[s] those acts of congress which [are] repugnant to it.”⁵⁷⁰ He did not discuss the impact of a federal statute on an existing treaty, but his assertion that self-executing treaties and statutes have “equivalent” status under the Constitution and his embrace of the moderate congressional position on treaty implementation—a view which itself was a retreat from the Hamiltonian insistence that treaties are superior to statutes—are consistent with the last-in-time rule.⁵⁷¹

Justice Curtis took the next step. His circuit opinion in *Taylor v. Morton* considered the impact of a federal statute on an existing treaty. Looking to the Supremacy Clause, he concluded that although it makes treaties “part of our municipal law . . . it has not assigned to them any particular degree of authority.”⁵⁷² To resolve the issue, he first asserted judges could not ask whether a statute that conflicts with a treaty “proceeds upon a just interpretation of the treaty” because that was a matter for the legislative branch.⁵⁷³ If Congress had power to pass the statute, which includes the power “to modify and repeal existing laws,” it must be applied unless there was something special about treaties and the treaty power that compelled a different

569. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

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

571. See *Kesavan*, *supra* note 7, at 1611; *Ku*, *supra* note 15, at 334-36.

572. *Taylor v. Morton*, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,799).

573. *Id.* Curtis also declared that whether a party to a treaty had violated or withdrawn from it was not a judicial question. See *id.* at 787.

result.⁵⁷⁴ The power “[t]o refuse to execute a treaty . . . is prerogative, of which no nation can be deprived,” and “it must reside somewhere.”⁵⁷⁵ Yet the potential consequences of limiting this power to the treaty-makers and thereby placing the treaty power above legislative power, he declared, were so serious that such a position was “impossible to maintain.”⁵⁷⁶ Thus, Curtis expressed “no doubt that it belongs to congress,” which meant that “legislative power is applicable to [treaties] whenever they relate to subjects, which the constitution has placed under that legislative power.”⁵⁷⁷ Here the republican claim in the congressional debates—that treaties were not automatically superior to federal statutes—operated as a premise. Further, the republican position that congressional consent was necessary for any treaty that overlapped with legislative powers—an argument that had been battered by the 1816 debates—emerged in a new form as an explicit justification for the last-in-time rule.

The Supreme Court adopted the last-in-time rule in a series of cases in the 1870s and 1880s. In *The Cherokee Tobacco*, a plurality stated flatly, “[t]he effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution.”⁵⁷⁸ Citing *Foster*, Justice Swayne declared “[a] treaty may supersede a prior act of Congress.”⁵⁷⁹ Citing *Taylor*, he continued by affirming that “an act of Congress may supersede a prior treaty.”⁵⁸⁰ Any larger questions involving the relationship of treaties and statutes “must be met by the political department of the government.”⁵⁸¹ Justice Bradley’s dissent objected to the ease with which the majority equated “a solemn treaty” with “mere municipal law,” but he admitted a last-in-time rule.⁵⁸² Like Timothy

574. *Id.* at 785.

575. *Id.* at 786.

576. *Id.*

577. *Id.* In an alternate holding, Curtis stated the treaty was not self-executing in any event under *Foster*. See *id.* at 787-88.

578. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870). Three justices did not participate, and two justices dissented, so that the opinion for the Court did not have the votes of a majority of all the justices even though it commanded a majority of those who heard the case. See also *The Head Money Cases*, 112 U.S. 580, 597 (1884) (discussing this issue).

579. *The Cherokee Tobacco*, 78 U.S. at 621.

580. *Id.*

581. *Id.*

582. *Id.* at 623 (Bradley, J., dissenting).

Pickering in the 1816 debate, however, he would have imposed a clear statement rule, so that “laws of a general character” would not override treaties “unless expressly mentioned.”⁵⁸³

Fourteen years later, in *Edye v. Robertson* (*The Head Money Cases*), the Court again declared, “so far as the provisions in [a statute] may be found in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country.”⁵⁸⁴ The Court relied on *Foster*, which it paraphrased at length. According to the Court, “[a] treaty is primarily a compact between independent nations” and depends on the political branches for its enforcement.⁵⁸⁵ “But a treaty may also contain provisions which confer certain rights upon” individuals.⁵⁸⁶ The Constitution “places such provisions as these in the same category as other laws of congress,” such that they may be “a rule of decision” for courts.⁵⁸⁷ The Court went on to paraphrase *Taylor*, stating the Constitution gives a treaty “no superiority over an act of Congress” in the sense of making it “irrepealable or unchangeable.”⁵⁸⁸ Channeling Republican doctrine, the Court even suggested the participation of the House, Senate, and President in making statutes weighs in favor of making them superior to treaties.

Whitney v. Robertson followed the same structure as *The Head Money Cases*. Some treaty provisions are “not self-executing” and require “legislation to carry them into effect.”⁵⁸⁹ If some provisions of a treaty are self-executing, then they “require no legislation to make them operative [and] have the force and effect of a legislative enactment.”⁵⁹⁰ In cases of conflict between a federal statute and a treaty provision, “the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.”⁵⁹¹ *Whitney* differs in one important respect, however. Stepping back from *The Head Money Cases*’s sug-

583. *Id.* at 622.

584. *The Head Money Cases*, 112 U.S. 580, 597 (1884).

585. *Id.* at 598.

586. *Id.*

587. *Id.* at 598-99; see also *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (quoting and applying this portion of the *Head Money Cases*).

588. *The Head Money Cases*, 112 U.S. at 599.

589. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

590. *Id.*

591. *Id.* The Court also stated that it was preferable “to construe them so as to give effect to both, if that can be done without violating the language of either.” *Id.*

gestion that legislation was superior, the Court explained the Constitution places treaties and federal statutes “on the same footing,” and “no superior efficacy is given to either over the other.”⁵⁹² Relying on *Taylor*, the Court recognized that this approach could create problems, but insisted they were political issues, not judicial issues. All the courts could do was “construe and give effect to the latest expression of the sovereign will.”⁵⁹³

In *The Head Money Cases* and *Whitney*, the last-in-time rule is not a rule of construction. Instead, the Court treats it as the necessary counterpart to the *Foster* doctrine that recognizes the self-executing nature of some treaty provisions.⁵⁹⁴ Further, as in *Foster*, neither case articulates a presumption for or against self-execution. The Court appears to assume that most treaty provisions are not self-executing in the sense of creating rules of decision for courts, but it does not impose any burdens of proof for distinguishing among provisions. Last Term, however, in *Medellin*, the Court cited both cases as support for the suggestion of a presumption against self-execution.⁵⁹⁵ Whether or not a presumption is desirable, *Medellin*'s use of these cases betrays the current Court's failure to understand their context as reflections of a debate over treaty implementation that took place largely in the halls of Congress. At least to the end of the nineteenth century, the moderate position on self-execution and the last-in-time rule that emerged in the 1816 debates remained coherent and continued to prevail.

VI. CONCLUSION

A primary goal of this Article has been to portray the ambiguity, disagreement, and debate surrounding the implementation of treaties in the early years of government under the Constitution. Original understandings on many issues either did not exist or were tenuous and even conflicting. Beyond recognition

592. *Id.*

593. *Id.* at 195. The Court reaffirmed the analysis of *Whitney* and *The Head Money Cases* in *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 600-03 (1889).

594. It also reflects, as Jules Lobel argues, late nineteenth century “notions of absolute sovereignty, nationalism, congressional supremacy, and positivism.” Lobel, *supra* note 15, at 1110. Yet the rule's origin in the 1816 debates suggests a longer and more complex pedigree.

595. See *Medellin v. Texas*, 128 S. Ct. 1346, 1357 (2008). For another example of *Medellin*'s loose approach to sources, see *supra* note 221.

that the Supremacy Clause ensured the superiority of treaties over state law and confirmed that some treaty provisions would be enforceable in court, the Framers and ratifiers left the details of treaty implementation to be worked out over time.

As this Article has shown, most of that working out took place in Congress, where a series of debates—culminating in the 1816 dispute over treaty implementation—produced a compromise position. First, some treaties are self-executing, which means they vest power directly in the President or are enforceable in court without legislation. Second, other treaties are not self-executing because they require implementing legislation to have domestic legal effect. Third, conflicts between treaties and federal statutes will be resolved by the last-in-time rule, which recognizes that treaties do not need legislative implementation merely because they conflict with federal statutes, but also acknowledges congressional authority over matters regulated by treaties and rejects the idea that treaties are superior to statutes. The Supreme Court's decisions in *Foster* and the last-in-time rule cases adopted the compromise position almost in its entirety.

Still, the compromise view left many participants dissatisfied, and some of the more doctrinaire republican and federalist contentions did not disappear. Further, these competing ideas appeared, flourished, or foundered in a context broader than legal or constitutional argument.⁵⁹⁶ Since the early twentieth century, that broader context has included the rise of the United States to “great power” or “superpower” status, massive growth in the federal government, increase in the kinds of tasks undertaken by government generally, expansion of executive power, a shift toward using congressional-executive agreements instead of treaties, and changes in the kinds of individual rights that treaties address.⁵⁹⁷ Against these developments, one easily could conclude that the pedigree of the 1816 compromise is insufficient by itself as a basis for constitutional doctrines of treaty implementation—that is, unless one maintains that early U.S. constitutional history alone should determine constitutional doctrine.

596. See, e.g., Lobel, *supra* note 15, at 1110.

597. See HENKIN, *supra* note 408, at 198 (noting increase in “human rights [as] a focus of international concern . . . in numerous international covenants and conventions” since World War II).

On the issue of self-execution, for example, Anne Woolhandler has observed that to the extent treaty provisions were self-executing in the founding period and through most of the nineteenth century, they usually addressed issues of private rights. Today, by contrast, numerous treaties and multilateral conventions create or recognize individual liberal rights against governments and state actors. She questions whether earlier assumptions about self-executing treaty provisions should automatically apply to this changed context.⁵⁹⁸

Woolhandler's question is apt for anyone who thinks that history is relevant but not controlling on constitutional issues. Under such a view—which I share—the search for a timeless and immutable doctrinal rule is misguided. The better course is to bring the historical conversation and current problems together with the goal of arguing, interpreting, and making decisions that are neither entirely bound by history nor entirely unconstrained by it.⁵⁹⁹ For example, the historical narrative in this Article makes clear not only that treaties creating or affecting private rights were believed self-executing, but also that the House was jealous of its powers and concerned about Presidential power, that self-execution doctrine and the last-in-time rule have accommodated that jealousy to some extent, and that the President and Senate are aware of and sometimes respect the powers of the House. The question then is whether or how these various factors apply to contemporary circumstances. I think these concerns remain valid and that within the U.S. constitutional tradition—as many writers have argued in many contexts—individual enforcement of legal rights is an important counterweight to certain forms of governmental power,⁶⁰⁰ while congressional authority is a significant check on free-ranging executive power. In

598. See generally Woolhandler, *supra* note 7.

599. This approach is loosely related to the idea of “fidelity in translation.” See generally Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993). Notably, this approach allows substantial space for normative and policy claims such as the ones Carlos Vázquez advances in *Treaties as Law of the Land*, *supra* note 7, to support a presumption in favor of self-execution. What it denies is the argument from historical certainty and authority that often supports such claims.

600. I mean this as a doctrinal statement, not an affirmation of a specific political philosophy. For efforts to recognize the value of rights while also understanding them as existing within governmental and other power structures, see PHENG CHEAH, *INHUMAN CONDITIONS: ON COSMOPOLITANISM AND HUMAN RIGHTS* 145-77 (2006); John T. Parry, *Rights and Discretion in Criminal Procedure's “War on Terror”*, 6 *OH. ST. J. CRIM. L.* 323 (2008).

short, the concerns that drove the early debates do not merely continue to be important; they may be heightened in current circumstances.

In keeping with this argument, I suggest the following brief conclusions. First, for treaties that create individual rights—whether private legal rights or liberal rights against government actors—the general post-ratification understanding and the 1816 compromise still hold. In general, the provisions of such treaties should be self-executing as rules of decision. Indeed, they should be presumed to be so unless the treaty-makers (including the Senate) or Congress determine otherwise, in which case legislation is necessary.⁶⁰¹

When treaties grant power to the executive branch, however, the compromise—to the extent the version ratified by the Court even includes executive self-execution—should give way to a more cautious approach. The President does not simply exercise an Article II caretaker power when implementing a treaty.⁶⁰² Rather, as the dominant force in U.S. foreign policy, the President wields vast power domestically and internationally and has enormous influence on congressional action in the area. While the President was also the central figure in early U.S. foreign policy, the relative positions of the executive and legislative branches have changed markedly. Presidential implementation of a treaty takes place within a much broader array of presidential power and policy-making authority. For these reasons, courts should not presume that a treaty provision vests the President with power to act free of congressional cooperation in the ways Marshall suggested in the Robbins debate. To the contrary, separation of powers concerns counsel a careful and narrow approach to such provisions.

Treaty provisions that neither create individual rights nor vest power in the executive branch are less likely to be self-executing if the 1816 compromise remains relevant. Put somewhat differently, under the compromise, there is no general presumption for or against self-execution, but presumptions will arise

601. For the legitimacy and validity of non-self-execution declarations, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); Vázquez, *Treaties as Law of the Land*, *supra* note 7, at 667-94; see generally Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

602. For discussion of presidential power and treaties, see generally Swaine, *supra* note 462.

with respect to different kinds of treaties.⁶⁰³ This last category of treaty provisions includes those for which implementing legislation is necessary, as well as provisions that for one reason or another are less amenable to direct enforcement by the President or judiciary.

In addition, the compromise also supports the ongoing legitimacy and desirability of the last-in-time rule as a democratic check on the treaty power and executive foreign affairs power.⁶⁰⁴ Finally, it bolsters not only the historical legitimacy of congressional-executive agreements but also their political legitimacy in the face of challenges to their constitutionality.⁶⁰⁵

How then does *Medellin* fit into this scheme? In general, the majority opinion works within the historical parameters of the debate over treaty implementation, and the ultimate result is defensible under the terms of the 1816 compromise.⁶⁰⁶ Even the Court's conclusion that the President lacks power in some circumstances to implement a non-self-executing treaty⁶⁰⁷—an analysis that is remarkably free of nuance⁶⁰⁸—has the virtue of reviving concerns about presidential authority in foreign affairs that had less weight in earlier cases.⁶⁰⁹

That said, the Court's analysis strains at the edges of the compromise and at times comes close to republican positions that the compromise seemed to discard. For example, the doctrinal version of the compromise, as stated in *Foster*, supports the *Medellin* majority's general focus on treaty language. But to the extent the Court put a thumb in the scale on the side of non-self-execution, it departed from that analysis.⁶¹⁰ Instead, it came closer to contemporary lower court decisions that have effec-

603. See *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 435, 442-45 (2008) (arguing for specific “default presumptions” for or against self-execution rather than a general presumption either way).

604. See *Ku*, *supra* note 15, at 386-89.

605. For justification of congressional-executive agreements, see Hathaway, *supra* note 47, at 1307-38. For the constitutional debate, compare Ackerman & Golove, *supra* note 535, with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

606. The careful analysis in Justice Stevens' concurring opinion bears out this view. See *Medellin v. Texas*, 128 S. Ct. 1346, 1372 (2008) (Stevens, J., concurring).

607. See *id.* at 1368-69 (majority opinion).

608. For useful discussions, see Stephan, *supra* note 6; Ingrid B. Wuerth, *Medellin: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1 (2009).

609. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

610. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102

tively enforced a presumption against self-execution⁶¹¹—which in turn reflects positions roughly similar to those taken by Gallatin at his more partisan moments in the Jay Treaty debates.

Neither a thumb in the scale nor a presumption against self-execution is warranted, and *Medellin* does not provide any explicit argument to the contrary. *Foster* already reflects a balance of interests that include skepticism about but acceptance of treaties as law-making documents, federalism values, and separation of powers concerns about the relationship between the executive and legislative branches. Further, to the extent the expansion of treaty practice, particularly in the area of human rights, threatens to upset that balance, the existence and legitimacy of non-self-execution declarations underscores the ability of the treaty-makers to be aware of and address the array of issues surrounding domestic implementation of treaty obligations.

But just as the majority opinion appears to reach back to positions outside the compromise as articulated in *Foster*, Justice Breyer's dissent also departs from that framework—and indeed from any of the arguments that drove the early debates.⁶¹² His multifactor approach to the question of self-execution arguably seeks only to provide context for the interpretive decision, but he imports so much context that the text of the treaty risks disappearing in a rush of policy judgments.

To some extent, of course, “policy” is inevitably part of a contemporary judge's interpretive methodology. In addition to the changes in the broader context of treaty implementation that I already mentioned, any historical approach to self-execution must also recognize the changes that have taken place in conceptions, and self-conceptions of the federal judicial role. Marshall sought to portray the self-execution inquiry as a simple textual analysis. He almost certainly had policy reasons for adopting that approach—after all, I have suggested that he was consciously ratifying the compromise view hammered out in Congress—but his doctrinal approach made little room on its face for policy judgments in specific cases. Today, however, there is wide, if often grudging, acceptance of the idea that no

AM. J. INT'L L. 540, 546-47 (2008) (arguing the Court did not create a general presumption against self-execution).

611. See *id.* at 551; see also Vázquez, *Treaties as Law of the Land*, *supra* note 7, at 629.

612. See *Medellin*, 128 S. Ct. at 1380-83 (Breyer, J., dissenting) (suggesting a case-by-case multifactor analysis of self-execution).

judge can approach the text of a statute or treaty without a variety of commitments that will affect and in some cases determine the resulting interpretation. Certainly, the multi-factor analysis that Breyer proposed not only reflects but embraces that idea of the judicial process.

The difference, then (and perhaps as always), is one of degree. For *Foster* and the political debates that stand behind it, recognition of a distinction between self-execution and non-self-execution, and of the last-in-time rule, is the result of a policy debate. Of course the further step of classifying treaties into one category or another also includes policy choices. But the focus in *Foster* is on the plausible readings of the text. Breyer's approach, by contrast, forwards the policy decisions so much that text becomes just one of many factors.

I am not arguing Breyer's approach is illegitimate. Such a claim would not only be naïve but would also conflict with my argument that self-execution doctrine has ambiguous foundations and took time to emerge from the crucible of early political debates. As the progeny of such debates, the doctrine reflects a balance of policies that demand rebalancing over time. I prefer continued adherence to the 1816 compromise, essentially for policy reasons and jurisprudential inclination, and I distrust the easy acceptance of broad case-by-case policy-making power that seems to characterize Breyer's jurisprudence. But his approach has the virtue of transparency; he makes clear that he is balancing multiple factors with strong attention to policy. Although I prefer Justice Stevens' concurrence, I ultimately find Breyer's approach preferable to that of the majority, which puts forward a chain of reasoning that depends more on assertion about the relevant text than actual analysis of it and more on claims of historical continuity than actual engagement with the relevant history.

In the end, this Article has attempted to provide a better picture of debates about treaty implementation in early U.S. constitutional history. I have tried not only to reveal the ambiguities of the founding arrangement but also to provide the context for understanding the development of and justifications for contemporary doctrines of self-execution and the last-in-time rule. More pointedly, this history also provides a perspective for assessing and possibly assimilating new approaches to the issues surrounding implementation of treaties. To the extent one seeks a

general original understanding on these issues, one might dare conclude that the generation that experienced ratification and the early debates over treaty implementation would appreciate such efforts and would even give them its blessing.