

Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes

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*For nearly 150 years, courts have applied the “last-in-time” rule to resolve conflicts between treaties and federal statutes by giving effect to whichever was enacted later in time. Despite its acceptance by the courts, this rule has received unanimous criticism in the legal academy. In this article, I present the first comprehensive defense of the last-in-time rule on textual, structural, historical, and functional grounds. I argue that the last-in-time rule should be applied because the text of the Constitution grants treaties the status of enacted domestic law. As such, treaties are subject to the principle of statutory construction, *leges posteriors priores contrarias abrogant* (later laws abrogate prior laws that are contrary), unless otherwise indicated by the Constitution’s text or structure. This understanding is supported by Supreme Court precedent, historical evidence from the Founding era, including practice during the pre-Constitution era, discussions during the Constitutional Convention and ratifying debates, as well as actions during the early years of the constitutional era. In the course of defending the last-in-time rule, I also consider how the rule fits into the broader debate over the extent to which treaties, which increasingly seek to regulate traditionally domestic matters, have effect in the U.S. legal system. The last-in-time rule, I contend, provides an elegant compromise between internationalists seeking greater incorporation of treaties and revisionists seeking to limit or eliminate such incorporation. Under the last-in-time rule, treaties are given direct domestic effect, which facilitates greater U.S. participation in the international system. On the other hand, the last-in-time rule guarantees that a politically accountable Congress retains the flexibility to control a treaty’s domestic effects.*

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INTRODUCTION

Although the Constitution declares that treaties are the “supreme Law of the Land,”¹ the status of treaties in the American legal system is plagued by uncertainty. A court considering a private individual’s claim under a treaty must first consider a number of complex questions such as whether the treaty is “self-executing,”² whether the treaty’s effect is otherwise nullified by conditions placed on it during ratification,³ whether the treaty exceeds constitutional limitations on the exercise of the treaty power,⁴ and whether the treaty conflicts with inconsistent federal and state law.⁵

A court’s task in applying these doctrines is complicated by sharp disagreements among legal scholars about the proper way to resolve all of the aforementioned questions.⁶ These disagreements reflect a larger divide among scholars about the status

1. U.S. CONST. art. VI, § 1, cl. 2.

2. *Compare* *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (finding Seattle ordinance violated treaty with Japan), *with* *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), *overruled by* *United States v. Perchman*, 32 U.S. (7 Pet.) 51 (1833) (refusing to give treaty with Spain domestic effect).

3. *Compare* *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998) (rejecting challenge to Senate conditions on ratification of international human rights treaty), *with id.* at 1281 (Rose, J., dissenting) (arguing that court should remand to consider legal effect of Senate’s conditions), *and* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (1987) (suggesting that Senate’s conditions are invalid).

4. *Compare* *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding treaty’s domestic effect against Tenth Amendment federalism challenge), *with* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998) (arguing that “unlimited [treaty making] power . . . is inconsistent with a central principle of American federalism—that the national government’s powers are enumerated”), *and* *Reid v. Covert*, 354 U.S. 1 (1957) (holding that treaties and the laws enacted pursuant to them must comply with provisions of the Constitution), *and* Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2027–28 (2003) (suggesting that constitutional limitations on treaties may be unnecessary given protections provided by modern international human rights treaties).

5. *Compare* *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889) (holding that federal statute nullified domestic effect of treaty with China), *with* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 885–86 (1987) (arguing against rule permitting federal statutes to override treaties’ domestic effect).

6. Debates within the legal academy have raged in recent years over most of these doctrines. With respect to self-execution, compare John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2091 (1999) [hereinafter Yoo, *Globalism*] (arguing original understanding of Constitution made almost all treaties non-self-executing), and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2219 (1999) [hereinafter Yoo, *Treaties*] (arguing text and structure of Constitution support presumption of non-self-execution), with Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999) (questioning historical basis for non-self-execution), and Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (questioning textual and

of treaties, as well as all kinds of international law,⁷ within the American legal system. On one side, scholars adhering to an “internationalist” conception believe that treaties have domestic effect superseding inconsistent domestic law and that treaties should be unconstrained by most constitutional limitations.⁸ On the other side, revisionist scholars have argued that treaties should be subject to strict political and constitutional constraints, drastically limiting the effect that treaties have within the domestic legal system.⁹

These disagreements about the proper status of treaties in domestic law are not merely academic. Due to the evolution of modern international law, treaties have the potential to become a powerful form of domestic lawmaking within the United States. Not only has the number of international conventions and treaties to which the United States is a party increased,¹⁰ but the subjects of these treaties have increasingly turned toward areas of law that have been traditionally governed exclusively by domestic law.¹¹ This “new” type of international law is not just concerned with relations between

structural basis for non-self-execution). With respect to conditional consent, compare JOHN NORTON MOORE, *TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW* 71–72 (2001) (attacking Senate conditions on human rights treaties), with Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 457–60 (2000) (defending practice of attaching conditions to human rights treaties), and David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 135–36 (1999) (arguing that conditions do not preclude all domestic effect of human rights treaties). With respect to federalism and the treaty power, compare Bradley, *supra* note 4, with David M. Golove, *Treaty Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1313–15 (2000) (defending broad nationalist treaty power on historical grounds).

7. Treaties are only one source of international law. The status of customary international law, the other main source of international law in the U.S. system, has also been the subject of substantial academic debate. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997) (arguing that “in the absence of federal political branch authorization, [customary international law] is not a source of federal law”), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that the “practice of treating international law as federal law” should be left undisturbed by both the political and judicial branches). The Supreme Court recently entered into this debate by upholding federal court application of customary international law in the context of suits under the Alien Tort Statute. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). For a review and functional critique of the Court’s decision, see Julian Ku and John Yoo, *Foreign Competence: Formalism, Functionalism, and the Alien Tort Statute*, 2005 SUP. CT. REV. (forthcoming 2005). For the purposes of this article, however, the relationship of customary international law to other forms of domestic law raises a distinct question from the status of treaties.

8. For further explanation of the “internationalist conception,” see *infra* Part I.A.

9. For further explanation of “revisionism” and “sovereignism,” see *infra* Part I.B.

10. See, e.g., CONGRESSIONAL RESEARCH SERVICE, S. RPT. 106–71, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE*, 39 (2001) (reporting that the United States is now party to 600 treaties and nearly 11,000 separate executive agreements).

11. See Curtis A. Bradley, *The Treaty Power and American Federalism II*, 99 MICH. L. REV. 98, 105–06 (2000) (arguing that subject matter of treaties overlaps with traditional areas of state control in the U.S. system). For instance, modern treaties now seek to regulate matters as diverse as family law, probate law, commercial law, and criminal law. See *id.*

nation-states. Rather, it also seeks to regulate a nation's relationship with its own citizens.¹² Thus, in recent years, the United States has entered into (or considered entering into) treaties regulating commercial law,¹³ probate law,¹⁴ environmental law,¹⁵ family law,¹⁶ individual rights,¹⁷ and an assortment of other areas of law.

Not only does the new international law seek to regulate different areas of law, but the administration and interpretation of new international law treaties is often delegated to international institutions.¹⁸ This trend increases the likelihood of conflict between treaties and domestic law. For instance, in recent years the International Court of Justice ("ICJ") has twice found that U.S. domestic law limiting habeas corpus appeals violated U.S. treaty obligations to guarantee consular notification rights to foreign nationals charged with capital crimes.¹⁹ The ICJ found a conflict between the treaty and U.S. law even though the U.S. government offered a plausible alternative interpretation of the treaty that avoided conflict with domestic law.²⁰

12. Paul Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1556–62 (1999) (describing a new international law regulating relations between nation-states and their own citizens).

13. *See, e.g.*, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, *done* Dec. 11, 1995, 2169 U.N.T.S. 190, 35 I.L.M. 735; United Nations Convention on International Bills of Exchange and International Promissory Notes, *opened for signature* Dec. 9, 1988, 28 I.L.M. 170; United Nations Convention on Contracts for the International Sale of Goods, *signed* Apr. 11, 1980, 1489 U.N.T.S. 58, 19 I.L.M. 668.

14. *See, e.g.*, Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, *opened for signature* Aug. 1, 1989, 28 I.L.M. 146; Hague Convention on the Law Applicable to Trusts and on Their Recognition, *opened for signature* Oct. 20, 1984, 23 I.L.M. 1388; Hague Convention Providing a Uniform Law on the Form of an International Will, *opened for signature* Oct. 26, 1973, 12 I.L.M. 1298.

15. *See, e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Dec. 10, 1997, 37 I.L.M. 22; Montreal Protocol on Substances that Deplete the Ozone Layer, *signed* Sept. 16, 1987, 26 I.L.M. 1541.

16. *See, e.g.*, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, *opened for signature* May 29, 1993, 1870 U.N.T.S. 182, 32 I.L.M. 1134; Hague Convention on the Civil Aspects of International Child Abduction, *signed* July 1, 1988, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98.

17. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *signed* Nov. 20, 1994, 660 U.N.T.S. 212, 5 I.L.M. 352; International Covenant on Civil and Political Rights, *signed* Sept. 8, 1992, 999 U.N.T.S. 172, 6 I.L.M. 368; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14, 19 I.L.M. 33.

18. Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 83–87 (2000) (explaining the new international law as a form of "international legislation" administered and interpreted by international organizations).

19. *See* Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 128 (Final Judgment of Mar. 31); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 497–98 (June 27) (finding U.S. limitations on the right of foreign nationals to appeal capital convictions violated Vienna Convention on Consular Relations) [hereinafter LaGrand Judgment].

20. Avena, Counter-Memorial of the United States ¶¶ 6.67–6.100; LaGrand Judgment, *supra* note 19, at 496–98 (describing and rejecting U.S. interpretation of treaty obligation); *see*

The ICJ is not the only international institution that has found conflict between U.S. domestic law and treaties. The World Trade Organization has found a number of U.S. domestic laws to violate treaty obligations.²¹ United States courts have also considered conflicts between federal law and resolutions issued by the United Nations Security Council and its related committees.²²

Of course, conflicts between international treaties and domestic law can occur without the involvement of an international institution. For example, the United States has drawn international criticism for overriding bilateral tax treaty obligations through changes to its tax laws.²³ Thus, as treaties become more ubiquitous, and their interpretation is allocated to international institutions, the likelihood of direct conflict between treaties and domestic U.S. law increases.

To resolve conflicts with federal statutes, courts apply one of the most important doctrines governing the domestic effect of treaties: the "last-in-time" rule. This doctrine holds that when a treaty and federal statute conflict, whichever was enacted last in time controls.²⁴

Although they disagree on most other questions of treaty law, both internationalist and revisionist scholars have criticized the last-in-time rule. The critique of the last-in-time rule has three main components. First, scholars argue that the rule rests on "weakly reasoned" interpretations of the constitutional text²⁵ unsupported by structural inferences.²⁶ Second, scholars claim that the historical evidence from the Founding period does not support the application of the last-in-time rule to treaties and federal

also Counter-Memorial of the U.S. (F.R.G. v. U.S.), at <http://www.icj-cij.org>, ¶¶ 76–103 (March 27, 2000) [hereinafter LaGrand Counter-Memorial].

21. See, e.g., United States—Definitive Safeguard Measures on Imports of Certain Steel Products, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/259ABR.doc> (July 11, 2003) (finding that U.S. tariffs on steel imports violate World Trade Organization Agreement); United States—Tax Treatment for "Foreign Sales Corporations," available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABR.DOC> (Feb. 24, 2000) (finding U.S. tax laws violate WTO Agreement); United States—Import Prohibition of Certain Shrimp and Shrimp Products, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.DOC> (Oct. 12, 1998) (finding U.S. restrictions on import of shrimp to protect sea turtles violate WTO Agreement).

22. See, e.g., *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001) (refusing to give effect to interpretation of international human rights treaty issued by United Nations Human Rights Committee); *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972) (refusing to override federal statute that appeared to violate U.N. Security Council resolution); S. REP. NO. 92-359, at 131 (1971) (Byrd Amendment); S.C. Res. 232, U.N. SCOR, 21st Sess., 1340th mtg., U.N. Doc. S/RES/232 (1966).

23. See, e.g., Letter from Emmanuel de Margerie, France's Ambassador to the United States, to James A. Baker III, United States Treasury Secretary (July 16, 1987), reprinted in *EEC Group of Six Addresses 1986 Act's Treaty Override Provisions*, 36 TAX NOTES 437 (1987); New York State Bar Ass'n, Tax Sect. Comm. on U.S. Activities of Foreign Taxpayers and Comm. on Foreign Activities of U.S. Taxpayers, *Legislative Overrides of Tax Treaties*, reprinted in 37 TAX NOTES 931 (1987); OECD Committee on Fiscal Affairs, *Report on Tax Treaty Overrides* (1989), reprinted in 2 TAX NOTES INT'L 25 (1990).

24. See *Whitney v. Robertson*, 124 U.S. 190 (1888); *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1862).

25. See, e.g., Henkin, *supra* note 5, at 871–72.

26. See JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 100–01 (2d ed. 2003).

statutes.²⁷ Third, scholars have suggested that the rise of the new international law changes the functional case for adhering to the last-in-time rule. Some argue that treaties should then hold superior status to all federal statutes.²⁸ Others take the opposite view, arguing that federal statutes should have superior status over all treaties.²⁹

From both perspectives, however, the functional consequences of the last-in-time rule weigh against its continued application. Thus, despite its acceptance by courts, the last-in-time rule suffers from near unanimous criticism in the academy accompanied by periodic calls for its abandonment.³⁰

This article offers the first comprehensive scholarly defense of the last-in-time rule.³¹ It argues that, contrary to the prevailing academic consensus, there is a compelling textual and structural basis for the last-in-time rule. The crucial textual hook is the Supremacy Clause's designation of treaties as "Law."³² As Chief Justice Marshall recognized, this language made treaties "equivalent to an act of legislature" for purposes of U.S. domestic law. Therefore, treaties, as acts of the legislature, are subject to the traditional maxim *leges posteriores priores contrarias abrogant* (later laws abrogate prior laws that are contrary),³³ for resolving conflicts between different forms of enacted law. I argue that by giving treaties the status of domestic law, the drafters of the Constitution presumed that the *priores contrarias* doctrine would apply to conflicts between treaties and other forms of enacted law.³⁴

No previous discussion of the last-in-time rule has considered the significance of this traditional maxim of statutory construction. Indeed, the leading historical account of the last-in-time rule locates its origins in nineteenth century conceptions of "absolute

27. Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1091–100 (1987).

28. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 210–11 (1996); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 rep. n.1 (1987).

29. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. NO. 82-170, at 421–23 (Edward S. Corwin ed.) (1953) (arguing for giving statutes supreme status over treaties); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 790–99 (2001) (arguing that formalist structure requires giving statutes supremacy over subsequent treaties).

30. Scholars have been calling for the abandonment of the rule for many decades. See, e.g., Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 50 (1970) (arguing against last-in-time rule); *The Nuremberg Trials and Objection to Military Service in Viet-Nam*, 63 AM. SOC. INT'L L. PROC. 140, 180 (1969) (remarks of Louis B. Sohn).

31. No academic discussion of the last-in-time rule has ever defended application of the rule. See, e.g., HENKIN, *supra* note 28, at 209–11; PAUST, *supra* note 26, at 117–118, 120; Lobel, *supra* note 27, at 1091–100; Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 313–21 (2001). Even older discussions of the rule have argued for its rejection, albeit on the grounds that statutes should always trump treaties. See, e.g., 1 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES § 306 (1910).

32. U.S. CONST. art. VI, § 1, cl.2.

33. BLACK'S LAW DICTIONARY 899 (6th ed. 1990).

34. See discussion *infra* Part IV.

sovereignty” and does not mention *priores contrarias*.³⁵ Such an oversight demonstrates that academic critics of the rule have failed to grasp the importance of treaties’ status as domestic “Law” and thus the background assumptions that such status carries.

As I explain, the last-in-time rule, in the form of the *priores contrarias* maxim, was well known to members of the Founding generation.³⁶ In fact, the *priores contrarias* maxim was widely invoked during the Articles of Confederation period as grounds for ignoring earlier in time treaties. Some important Founders, including James Madison, recognized that the Articles themselves were a kind of treaty that a state legislature could modify and repeal through the passage of a later in time statute. The supremacy of later-in-time statutes over treaties helps to explain the Founders’ insistence on creating a new sort of “fundamental” constitutional law supreme over all others. The designation of constitutional law as “higher law” was, as many historians argue, an intellectual innovation of the Founding generation. Contrary to prior accounts of the Founders’ treatment of the last-in-time rule, there is no evidence that the Founders sought to give similar “higher law” status to treaties. Nor is there evidence that they sought to subordinate treaties to federal statutes. Rather, the bulk of the historical evidence confirms that *priores contrarias* continued to serve as the rule for resolving conflicts between different types of enacted laws, including treaties and federal statutes.³⁷

Because some might dismiss the historical foundations of the last-in-time rule as irrelevant to the modern era of globalization and the new international law, I also offer a functional defense of the rule. I believe the last-in-time rule’s assumption that treaties and federal statutes are equivalent for domestic law purposes provides a sensible model for the incorporation of modern treaties into the U.S. legal system.³⁸ An “equality” view of treaties and statutes rejects more radical revisionist claims about the limited domestic status of treaties and supports the internationalist conception of treaties as self-executing laws. At the same time, the equality view also rejects more radical internationalist claims seeking to give treaties “higher-law” status, free even from some constitutional limitations flowing from federalism or individual rights.³⁹

In this way, the last-in-time rule offers an elegant compromise between attempts to eliminate most domestic effects of treaties and attempts to enshrine treaties with a higher-law status. In an era of “new” international law, treaties and traditional domestic lawmaking will increasingly overlap and collide. The last-in-time rule mediates many of these conflicts by preserving a role for treaties in domestic lawmaking that allows the United States to participate (if it chooses) in the development of the new international law through treaties with immediate domestic effect.

On the other hand, the rule also shifts control over how and when to give treaties domestic effect to the more politically accountable branches, Congress and the President.⁴⁰ Unlike the more rigid “higher law” rule supported by internationalists, the last-in-time rule gives the U.S. Government the flexibility to suspend the last-in-time

35. See Lobel, *supra* note 27, at 1100.

36. See *infra* Part IV.B.3.

37. See *infra* Part IV.B.2.

38. See *infra* Part V.

39. See *infra* Part V.A.

40. *Id.*

rule by statute when they believe such a suspension is necessary on policy grounds. Giving Congress such political flexibility may actually foster, rather than hinder, U.S. participation in the development of the new international law.⁴¹

The Article proceeds as follows: Part I describes the effect of the last-in-time rule on the new international law. Part II reviews the broader conceptual divide among scholars over the proper status of treaties as domestic law. Part III outlines a textual and structural defense of the last-in-time rule. Part IV discusses the historical evidence supporting this understanding. Part V concludes by considering the doctrinal and functional consequences of accepting the last-in-time rule.

I. THE LAST-IN-TIME RULE AND THE NEW INTERNATIONAL LAW

Although the proper status of treaties as domestic law has troubled courts and commentators since the ratification of the Constitution in 1789, the rise of a new kind of international law at the end of the twentieth century has dramatically heightened the significance of treaties for the domestic legal system. In this Part, I discuss the rise of this new type of international law and its relationship with treaties. I then introduce the last-in-time rule and discuss its practical and doctrinal significance for the new international law.

A. *The Rising Importance of Treaties as Domestic Law*

Treaties played a central role in American history even before the establishment of the Constitution in 1789. During the Revolutionary War, American commissioners negotiated crucial treaties of alliance and friendship with major European powers⁴² and American independence was secured by the 1783 peace treaty with Great Britain ending the war and conferring British recognition of the new United States.⁴³

While treaties have always mattered, historically, treaties only indirectly regulated matters of domestic affairs. For instance, the 1783 peace treaty with Britain required, as a condition of peace, the recognition of debts to British creditors.⁴⁴ Such a treaty had effects on domestic affairs by limiting the effect of domestic law on British nationals,

41. See *infra* Part V.B.

42. See, e.g., Treaty of Alliance Between the United States of America and His Most Christian Majesty, Feb. 6, 1778, U.S.—Fr., 8 Stat. 6.

43. Provisional Articles Between the United States of America, and his Britannic Majesty, Nov. 30, 1782, U.S.—Gr. Brit., art. 1, 8 Stat. 54 [hereinafter Provisional Articles] (“His Britannic Majesty acknowledges the said United States . . . to be free, sovereign and independent States”). Indeed, foreign policy stood at the center of the concerns facing the drafters of the Constitution and the first presidential administrations. For general histories of early foreign policy, see, for example, FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF AMERICAN FOREIGN POLICY* (1961); FREDERICK W. MARKS, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (Scholarly Resources ed. 1986) (1973); PAUL A. VARG, *FOREIGN POLICIES OF THE FOUNDING FATHERS* (1963).

44. Provisional Articles, *supra* note 43, at art. IV, 8 Stat. 54. (“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.”).

but only as part of the larger (and far more important) foreign policy issue of achieving peace with Britain.

Similarly, treaties of friendship and commerce, a common form of treaty in the nineteenth and early twentieth centuries, generally conferred certain reciprocal rights for foreign nationals in the United States but did not seek to directly alter domestic laws except in application to foreign nationals. Thus, the Supreme Court famously struck down a Seattle regulation discriminating against Japanese nationals as violating a treaty with Japan.⁴⁵ The treaty with Japan did not purport to prescribe any particular kind of domestic regulation. Rather, it simply required non-discriminatory application of domestic law toward Japanese nationals.⁴⁶ The treaty had nothing to say, for instance, about the effect of the Seattle ordinance on U.S. nationals.

Both of these treaties reflect the traditional concerns of international law: the relationship between individual nation-states.⁴⁷ Individuals were relevant only to the extent their activities implicated state-to-state relations. As Professor Stephan has observed, the twentieth century has seen the rise of a “new” international law.⁴⁸ This new international law has two important characteristics that distinguish it from traditional international law.

First, rather than exclusively focusing on state-to-state relations, or even a state’s relations with foreign nationals, the new international law has expanded its subject matter to include relations between a nation-state and its own nationals.⁴⁹ Second, while traditional international law usually took the form of a bilateral treaty administered by the nation-states themselves, the “new” international law usually takes the form of a multilateral treaty administered by an international institution.⁵⁰

45. *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

46. Treaty of Commerce and Navigation, February 21, 1911, U.S.–Japan, art. I, 37 U.S.T. 1504:

The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . . The citizens or subjects of each . . . shall receive, in the territories of the other, the most constant protection and security of their persons and property

Id. at 1504.

47. See Stephan, *supra* note 12, at 1556–62. See also MALCOLM N. SHAW, INTERNATIONAL LAW 126 (2d ed. 1986) (describing “orthodox positivist doctrine . . . that only states are subjects of international law”).

48. Stephan, *supra* note 12, at 1556–62.

49. *Id.*; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 rep. n.1 (1987) (unequivocally stating that international law concerns nations’ relations with its own nationals). *But cf.* *Barcelona Traction, Light, and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 44 (Feb. 5) (declaring that the State decides through municipal law what international law protections its citizens have against other nations).

50. For a discussion of this trend, see Ku, *supra* note 18, at 83–87.

1. Subject Matter

For example, the International Covenant on Civil and Political Rights ("ICCPR"), which the United States and nearly one hundred other nations have signed and ratified, obligates nations to guarantee certain individual rights and protections. Such protections extend to all citizens, including a state's own citizens, and do not depend on reciprocal recognition by other signatory nations.⁵¹ In contrast to traditional treaties, a nation can violate an ICCPR obligation by mistreating its own citizens in the application of its own domestic law.⁵²

Indeed, many of the ICCPR's obligations could be read to conflict with a variety of U.S. federal and state laws.⁵³ Most dramatically, Article 6 of the ICCPR prohibits parties from imposing death sentences for "crimes committed by persons below eighteen years of age."⁵⁴ Because the United States does in fact impose such sentences at the state and possibly the federal level, it has declared that it will not adhere to that provision of the ICCPR.⁵⁵ Even with this reservation, the United Nations Human Rights Committee, an international organization charged with overseeing compliance with the treaty, held that the United States is nonetheless bound by the ICCPR to end its practice of imposing the death penalty on juveniles.⁵⁶

In this way, the ICCPR illustrates the potential of modern treaties to enter into areas of law, such as criminal punishment of U.S. citizens, that had previously been the exclusive province of domestic state and federal law. Although the application of the non-self-execution doctrine has limited the domestic effect of the ICCPR, the treaty is only non-self-executing by virtue of controversial unilateral reservations imposed by the U.S. Senate as a condition of ratification. The legality of these reservations has been sharply challenged by legal academics,⁵⁷ although courts have so far given the reservations effect.⁵⁸ This means that absent a reservation, traditionally domestic

51. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, 21 U.N. GAOR, 21st Sess., Supp. No. 16, at art. 2, U.N. Doc. A/6316 (1966) [hereinafter *ICCPR*].

52. *Id.*

53. For example, the ICCPR bans "propaganda for war" and "advocacy of national . . . or religious hatred." *Id.* at art. 20. Both provisions arguably conflict with existing First Amendment protection of political and hate speech. See 138 CONG. REC. S4781-01 (1992).

54. *ICCPR*, *supra* note 51, at art. 6.

55. See 138 CONG. REC. S4781-01, § 1(2).

56. *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. GAOR Human Rights Comm., 52d Sess., 1382d mtg., at 5-6, 8, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter *General Comment*].

57. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (1987) (suggesting that Senate's conditions are invalid); see also MOORE, *supra* note 6, at 71-112; Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI-KENT L. REV. 571, 589-601, 632-43 (1991); Sloss, *supra* note 6, at 135-36. But see Bradley & Goldsmith, *supra* note 6, at 457-60.

58. *Domingues v. State*, 961 P.2d 1279 (Nev. 1998) (rejecting challenge to Senate conditions on ratification of international human rights treaty). But see *id.* at 1281 (Rose, J., dissenting) (arguing that the court should remand to consider legal effect of Senate's conditions).

matters concerning criminal law,⁵⁹ family law,⁶⁰ and probate law⁶¹ could be directly regulated by a treaty rather than by a state or federal statute.⁶²

2. International Institutions

The likelihood that treaties will conflict with domestic law is not simply a result of the new international law's expanded subject matter. The role of international institutions in the administration of the new international law also increases the likelihood of conflict because, unlike U.S. courts,⁶³ international institutions do not have an obligation to seek interpretations that avoid conflicts between treaties and domestic law. Instead, such institutions are typically charged with interpreting and applying international law and treaties to any matters within their jurisdiction, irrespective of conflicts with domestic law. The willingness of international institutions to find conflicts between domestic and treaty law can be seen most clearly in the United States' continuing dispute with the International Court of Justice ("ICJ") over the implementation of U.S. obligations under the Vienna Convention for Consular Relations.⁶⁴

In the past seven years, the ICJ has issued three opinions ordering the United States to suspend executions of foreign nationals convicted of capital crimes under various state laws.⁶⁵ The main question for the ICJ was whether the Vienna Convention's guarantee to each foreign national the right to consult with his or her consular official

59. See, e.g., ICCPR, *supra* note 51, at arts. 6–9, 11–14 (regulating rights of criminal defendants and prohibiting certain punishments).

60. See, e.g., ICCPR, *supra* note 51, at art. 23 (guaranteeing right of marriage and protection of spouses during marriage).

61. See, e.g., Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, *supra* note 14; Hague Convention on the Law Applicable to Trusts and on their Recognition, *supra* note 14; Hague Convention Providing a Uniform Law on the Form of An International Will, *supra* note 14.

62. For a review of the complex interaction between private international law treaties and domestic law, especially state law, see Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 459–60 (2004).

63. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."); see also *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *reaff'd and amended by Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001) (interpreting 8 U.S.C. § 1231(a)(6) to avoid conflict with article 9 of ICCPR).

64. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 262 [hereinafter Vienna Convention].

65. See *Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 128 (Final Judgment of Mar. 31); *LaGrand Judgment*, *supra* note 19; Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 99 (Provisional Measures Order of April 9) [hereinafter *Breard Provisional Measures Order*], *withdrawn*, 1998 I.C.J. 426 (Discontinuance Order of Nov. 10).

after being arrested⁶⁶ was violated by U.S. domestic laws limiting the ability of convicted defendants to raise Vienna Convention claims in habeas corpus proceedings.⁶⁷ In the two cases that reached a final judgment, the U.S. government offered treaty interpretations that avoided conflict with domestic U.S. law. It argued that Article 36 of the Vienna Convention does not require giving individual defendants the right to raise treaty violations in any subsequent criminal proceedings, including habeas corpus⁶⁸ and further argued that Article 36 obligations could be satisfied by state clemency proceedings.⁶⁹ Indeed, the language of Article 36 is somewhat ambiguous, requiring that any consular rights “shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations *must enable full effect* to be given to the purposes for which the rights accorded under this Article are intended.”⁷⁰ The United States argued that the “full effect” language referred only to the laws governing the initial arrest. It contended that nothing in the language of the provision required granting rights in subsequent post-conviction proceedings.⁷¹ After losing on this point, it then argued that nothing in this language required a judicial proceeding as opposed to an administrative review.⁷²

The point is not that the United States’ interpretation of the treaty is the correct one. Rather, the point is that its interpretation is a plausible one that gives effect to both the treaty (where rights of consular notification are required at the time of a foreign national’s arrest) and the federal statute (limiting post-conviction remedies). The ICJ, however, chose another equally plausible interpretation of “full effect” that required the United States to modify its domestic law to comply with the treaty.⁷³

In sum, the new international law’s broader subject-matter focus means that it is more likely to spill over into areas already regulated in the United States by domestic state and federal law. The role of international institutions in the interpretation of the new international law, especially in the form of treaties, is also likely to lead to more conflicts with domestic law. While such conflicts could and did occur in the past, there is good reason to presume that the sheer number of modern treaties, combined with their subject matter, will increase the chances of more frequent conflicts in the future.

66. Vienna Convention, *supra* note 64, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292, 294.

67. Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(a), (e)(2) (2000). *See* Breard v. Greene, 523 U.S. 371 (1998) (interpreting AEDPA so that a habeas petitioner alleging violation of “‘treaties of the United States’ will, as a general rule, not be afforded an evidentiary hearing if he ‘has failed to develop the factual basis of [the] claim in State court proceedings’” (quoting §§ 2254(a), (e)(2))).

68. LaGrand Counter-Memorial, *supra* note 20, at ¶¶ 78–81.

69. Avena, Counter-Memorial of the United States, *supra* note 20, at ¶¶ 6.67–6.100.

70. Vienna Convention, *supra* note 64, at art. 36(2) (emphasis added).

71. LaGrand Counter-Memorial, *supra* note 20, at ¶ 80.

72. Avena Counter Memorial, *supra* note 20, at ¶¶ 6.67–6.100.

73. LaGrand Judgment, *supra* note 19, at ¶¶ 87–91. Just how the United States must change its laws to comply with the Vienna Convention is now the subject of the current proceedings brought by Mexico. *See* Breard Provisional Order, *supra* note 65, at ¶¶ 7–8 (describing Mexico’s request for judgment ordering repeal or removal of doctrine of procedural default set forth by AEDPA habeas statute).

B. The Last-in-Time Rule

If, as the previous discussion suggests, conflicts between a treaty and domestic law are more likely to occur in the near future, federal and state courts must make two determinations. First, a court must determine whether the treaty in question is “self-executing”⁷⁴ as a matter of domestic law. As I will explain, beginning with Chief Justice Marshall, federal courts have granted treaties “self-executing” or direct domestic effect on the theory that treaties are equivalent to federal legislations.

Second, once a treaty is found to be self-executing, the court must determine the relationship between the treaty and the form of domestic law (e.g. constitutional, federal, or state) with which it comes into conflict. With respect to this question, although their rationale has not been entirely consistent, courts have uniformly applied the last-in-time rule to govern conflicts between treaties and federal statutes.

1. Self-Execution

Under British law, at the time of the Constitution, most treaties lacked domestic effect until an act of Parliament was passed to implement that treaty’s provisions.⁷⁵ But the Constitution, which declared treaties to be part of the “supreme Law of the Land,” appears to create a different rule.⁷⁶ The Supreme Court did not squarely consider the question of self-execution until 1829 when Chief Justice Marshall endorsed the principle of giving some treaties self-executing status as enforceable domestic law.⁷⁷ Although this decision held that the treaty in question was *not* self-executing, *Foster* established that in order for a treaty “to be the law of the land” and “consequently, to be regarded in courts of justice as equivalent to an act of the legislature, . . .” the treaty must “operate[] of itself without the aid of any legislative provision.”⁷⁸

Marshall’s opinion has been widely cited for establishing the self-execution of at least some treaties. Courts today have continued to find treaties self-executing.⁷⁹

74. What self-execution means is itself the subject of some debate. For my purposes, self-execution refers to the judicial enforceability of treaties. For an influential discussion of the different meanings of self-execution, see Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 697–700 (1995). The concept of self-execution is considered an American innovation, which has been adopted, to varying degrees, by other countries. See Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States*, 26 VA. J. INT’L L. 627 (1986); Albert Bleckmann, *Self-Executing Treaties*, 7 ENCYC. OF PUB. INT’L L. 414 (R. Bernhardt ed., 1984).

75. Although some scholars have questioned this understanding of British law, see, for example, Flaherty, *supra* note 6, at 2108–09, many influential American lawyers believed this to be the case. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 155 (Da Capo Press 1971) (1826).

76. U.S. CONST. art. VI.

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

78. *Id.* at 314.

79. See, e.g., *In re Comm’rs Subpoenas*, 325 F.3d 1287 (11th Cir. 2003) (holding extradition treaty with Canada self-executing); *Cheung v. United States*, 213 F.2d 82, 94 (2d Cir. 2000); *Spiess v. C. Itoh & Co. (America)*, 643 F.2d 353 (5th Cir. 1981); cf. *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 n. 22 (3d Cir. 2003) (avoiding question of whether treaty is self-executing).

Marshall did not, however, resolve all of the questions about the status of treaties in domestic law. Indeed, courts and scholars have continued to wrestle with questions such as how to determine whether a treaty is self-executing⁸⁰ and whether there are any constitutional limitations preventing treaties from being found self-executing.⁸¹ Additionally, because Marshall's opinion does stand for the proposition that, at least in some cases, treaties are enforceable as domestic law, it created the possibility that treaties will come into direct conflict with domestic law.

Although *Foster* did not directly address this latter question of the relative priority of treaties and domestic law, its formulation does provide some guidance. According to Marshall, treaties were (at least in some cases) "equivalent to an act of the legislature."⁸² He did not equate treaties with either the common law or the natural law. Rather, he emphasized that, for domestic law purposes, treaties are merely equivalent to a law enacted by a legislature. As I will explain, this understanding of the status of treaties is an important reason for applying the last-in-time rule to treaties and federal statutes.

2. Treaties and Conflict with Domestic Law

Although a treaty is "equivalent to an act of legislature," *Foster* did not address how treaties would interact with the three main forms of domestic law in the United States: state law, constitutional law, and federal law. Courts faced with a conflict between a treaty and a state law generally will give effect to the treaty (if it is self-executing),⁸³ whereas courts faced with a conflict between a treaty and the Constitution generally will give effect to the Constitution.⁸⁴

Both rules presume the superiority of one form of law over the other. But when conflict occurs between a treaty and a federal statute, the courts apply the last-in-time rule, which holds that "a treaty may supersede a prior act of Congress and an act of

80. Perhaps the most "confounding" question has to do with how to determine whether a treaty is self-executing. *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979). While many point to the intention of the United States, some argue that the intention of all of the parties to a treaty should determine this question. Compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. h (1987) ("intention of the United States determines whether an agreement is to be self-executing . . ."), with David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 45-55 (2002) (rejecting intent approach).

81. Professor John Yoo has single-handedly initiated a debate on whether treaties dealing with subject matters within the scope of Congress's Article I powers can ever be self-executing. See Yoo, *Globalism*, *supra* note 6, at 1955; Vazquez, *supra* note 6, at 2189-92.

82. *Foster*, 27 U.S. (2 Pet.) at 314.

83. This subordination of state law to treaties has never been seriously disputed. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) ("[E]very treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State.").

84. No court has seriously considered using a treaty to override a constitutional provision. *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("Of course . . . no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). But the historical origins for this rule are actually far from clear. See discussion *infra* Part IV.B.5.a (reviewing Patrick Henry's objections to treaty clause of the Constitution).

Congress may supersede a prior treaty.”⁸⁵ The simplicity of this rule, however, belies its somewhat complicated judicial origins and the courts’ differing justifications for its use.

a. Judicial Origins

The first judicial articulation of the last-in-time rule occurred in *Taylor v. Morton*,⁸⁶ a case decided by Justice Benjamin Curtis sitting in circuit. Plaintiffs challenged a congressional statute imposing duties on their importation of hemp on the grounds that the statute violated certain treaty obligations.⁸⁷

Justice Curtis assumed that this treaty was self-executing and squarely faced the question of a direct conflict between an act of Congress and a treaty. Although Justice Curtis agreed with Marshall that a “treaty is part of the municipal law,” he did not fully embrace Marshall’s view that a treaty is “equivalent to an act of the legislature.” Rather, Justice Curtis assumed that nothing in the Constitution resolves the relative priority of treaties and federal statutes. Instead, he reasoned that, as a functional matter, the Constitution must grant some part of the United States government the authority to repeal a treaty. To hold otherwise, he argued, would leave the country in a “helpless position.”⁸⁸ Because the power to repeal a treaty must exist, and the treaty-makers—the President and two-thirds of the Senate—would need consent from their treaty partners to withdraw from a treaty, Justice Curtis reasoned that Congress must have the sovereign power to repeal a treaty’s domestic effects. He did not reach the question of whether a treaty could likewise repeal a federal statute.

Thus, Justice Curtis’ “sovereignty” rationale for the last-in-time rule did not rely on the equality of treaties and federal statutes and left open the possibility that federal statutes could trump later in time treaties. Although it is widely cited as the origin of the last-in-time rule, it is worth emphasizing that the Supreme Court did not completely adopt the *Taylor* sovereignty rationale when it adopted the last-in-time rule. Instead, the Court followed Marshall’s formulation in *Foster* more closely and based its holding on the equality rationale:

By the Constitution a treaty is placed *on the same footing, and made of like obligation, with an act of legislation*. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other [I]f the two are inconsistent, the one last in date will control the other[.]⁸⁹

Because a treaty is equivalent to an act of legislation, “a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”⁹⁰

85. *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871).

86. 23 F. Cas. 784 (C.C.D. Mass. 1855).

87. *Id.*

88. *Id.* at 786.

89. *Whitney v. Robertson*, 124 U.S. 190 (1888) (emphasis added).

90. *Cherokee Tobacco*, 78 U.S. at 621; see also *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 597–600 (1884) (“A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or

This equality rationale differs from *Taylor's* sovereignty rationale in two important respects. First, the basis for the last-in-time rule rests solely on the equivalency of treaties and federal statutes and the understanding that treaties could repeal federal statutes. Second, the Supreme Court's approach did not rest on *Taylor's* theory that the power to break treaties must lie somewhere in the federal government. Rather, the Court simply limited its holding to treaties' status in domestic law as "equivalent to an act of legislature." As such, it was completely logical to apply the traditional rule for resolving conflicts between two acts of legislature: the last-in-time rule. This reasoning was further confirmed by *Chan Chae Ping v. United States*, where the Court explained that "[i]f the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act . . ."⁹¹

The Court in *Whitney* and *Chan Chae Ping* did explicitly endorse one aspect of *Taylor's* reasoning. Even if the statute overrides the treaty in violation of broad international law principles, such as in contravention of withdrawal provisions in the treaty itself, "those are not matters for judicial cognizance."⁹² Rather, a complaining country must direct its demands to the political branches of the federal government. This is not, however, a full endorsement of *Taylor's* reasoning for the existence of the rule in the first place that Congress must hold the sovereign authority to repeal treaties.

For this reason, it is the equality rationale, which extends the approach adopted by Marshall with respect to self-execution, that has served as the chief basis for the last-in-time rule. As I explain below, Justice Curtis' analysis has served as an attractive target for many critics of the last-in-time rule while the equality rationale has been largely untouched. Yet most court decisions applying the last-in-time rule for resolving conflicts between treaties and federal statutes have relied on the *Whitney* equality rationale.⁹³ As a matter of judicial precedent, therefore, the last-in-time rule rests more on the Marshall equality rationale than the Curtis sovereignty rationale.⁹⁴

b. Application of the Last-in-Time Rule

Whatever its rationale, the last-in-time rule has been applied in a wide variety of contexts. It has often been used to resolve conflicts between treaties and Congress' exercise of its powers over foreign immigration and commerce.⁹⁵ In the modern era, treaties and statutes have come into conflict in new ways. For instance, tax treaties

subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.").

91. *Chan Chan Ping v. United States*, 130 U.S. 581, 600-01 (1889).

92. *Whitney*, 124 U.S. at 194-95.

93. *See, e.g., Reid v. Covert*, 354 U.S. 1, 18 (1957) ("an Act of Congress . . . is on a full parity with a treaty."); *Cook v. United States*, 288 U.S. 102, 118-20 (1933) (citing *Whimiey* in holding that a treaty superseded prior statutes).

94. It rests on somewhat less solid footing among executive practice, but after some early concerns, no member of the executive branch has seriously challenged the applicability of the rule. *See, e.g., 5 Op. Att'y Gen.* 334, 345-46 (1851); *6 Op. Att'y Gen.* 658, 661-65 (1854).

95. *See, e.g., Chae Chan Ping*, 130 U.S. at 600-01 (conflict between treaty and immigration statute); *Taylor*, 23 F. Cas. at 784 (conflict between commercial treaty and tariff laws).

have caused numerous conflicts with the ever growing and complex Internal Revenue Code.⁹⁶ Although Congress had previously suspended the application of the last-in-time rule to much of the code,⁹⁷ in 1988 Congress made it clear that the last-in-time rule should be applied to all conflicts between tax treaties and the Internal Revenue Code.⁹⁸ This has sparked complaints from abroad. Several European countries have officially protested the application of the rule to override their nationals' tax treaty rights.⁹⁹

In recent years, the last-in-time rule has also been invoked by courts seeking to resolve conflicts between domestic law and U.S. treaty obligations to international institutions. International institutions, for instance, may be authorized to issue binding interpretations of U.S. treaty obligations. In such circumstances, courts will enforce federal law enacted later in time to the treaty's ratification.

For instance, in 1972, the D.C. Circuit cited the last-in-time rule as the basis for enforcing the "Byrd" Amendment, even though that statute apparently violated United Nations Security Council resolutions requiring member countries to boycott Rhodesia.¹⁰⁰

More recently, the Supreme Court cited the last-in-time rule in the aforementioned dispute with the International Court of Justice over the application of the Vienna Convention on Consular Relations. In the first of these cases, Paraguay had won a provisional order from the I.C.J. ordering the suspension of an execution of a Paraguayan national until the I.C.J. could rule on the merits. Both Paraguay and the individual facing execution petitioned the Supreme Court for relief arguing that the violations of the Vienna Convention should be given consideration in a habeas proceeding challenging the conviction or the death sentence.¹⁰¹

96. For a discussion of conflicts between the tax code and tax treaties, see Richard L. Doernberg, *Legislative Overrides of Income Tax Treaties: The Branch Profits Tax and Congressional Arrogation of Authority*, 42 TAX LAW. 173 (1989); David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?* 47 TAX LAW. 867 (1994).

97. I.R.C. § 894(a) (West 2002). See discussion *infra* Part V.B.1.

98. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, §1012(aa)(1), 102 Stat. 3342, 3531 (1988) (codified in I.R.C. § 7852(d)) [hereinafter TAMRA]; see also TAMRA § 6139, 102 Stat. at 3724; TAMRA § 1012(aa)(2-3), 102 Stat. at 3531-33.

99. See, e.g., OECD Committee on Fiscal Affairs, *Report on Tax Treaty Overrides* (1989), reprinted in 2 TAX NOTES INT'L 25 (1990); David Brockway, Commentary, 9 AM. J. TAX POL'Y 95, 96 (1991) (stating pro-override view); Kathleen Matthews, *Treaty Overrides: The View from Congress*, 39 TAX NOTES 422 (Apr. 25, 1988); Letter from Emmanuel de Margerie, France's Ambassador to the United States, to James A. Baker III, United States Treasury Secretary (July 16, 1987), reprinted in *EEC Group of Six Addresses 1986 Act's Treaty Override Provisions*, 36 TAX NOTES 437 (1987).

100. *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972) (refusing to override statute that violated U.N. Security Council resolution ordering boycott of Rhodesia); see also S. REP. NO. 92-359, at 121 (1971) (Byrd Amendment); S.C. Res. 232, U.N. SCOR, 2nd Sess., 1340th mtg., U.N. Doc. S/RES/32 (1966).

101. *Breard v. Greene*, 523 U.S. 371 (1998).

The Supreme Court rejected both petitions. Primarily, it adopted an interpretation of the Vienna Convention that did not conflict with federal laws governing habeas corpus proceedings and that was later rejected by the I.C.J. in *LaGrand* and *Avena*.¹⁰²

Alternatively, the opinion noted that even if the treaty did, as petitioners insisted, conflict with federal habeas law, the last-in-time rule would prevent the Court from giving effect to the treaty. The Anti-Terrorism and Effective Death Penalty Act was enacted in 1996 while the Vienna Convention was ratified in 1969. Hence, “Breard’s ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule”¹⁰³

This case illustrates how the last-in-time rule could affect the interaction between the United States and an international institution issuing binding interpretations of U.S. treaty obligations. In this situation, an international institution adopted a binding interpretation of a treaty obligation that conflicted with domestic laws governing criminal punishment and post-conviction review. The Supreme Court adopted a narrow interpretation of the treaty but also pointed out that the treaty was subject to a later-in-time statute.¹⁰⁴

The last-in-time rule thus operated as a final bar preventing the international institution’s interpretation of U.S. treaty obligations from taking effect within the domestic legal system. As international institutions become more prominent and important in the interpretation of U.S. treaty obligations, it is likely that this last in time bar will be more commonly applied.

Of course, the last-in-time rule does not affect treaties that supersede state laws nor does it protect treaties from constitutional challenges. But it remains a decisive rule for treaties for at least two reasons. First, the broad scope of the federal lawmaking power means that there are very few areas of state law that federal law cannot regulate. Hence, most conflicts with state law will also conflict with federal statutory law.

Second, the possibility of enacting a federal statute repealing or modifying a treaty’s effect in the domestic system is significant because it lessens the necessity for applying constitutional scrutiny to treaties. For instance, questions about the constitutionality of delegations to international institutions such as the United Nations Security Council or the International Court of Justice can be assuaged by the realization that the ultimate control over the treaty’s domestic effect lies with Congress.¹⁰⁵ Perhaps for this reason, U.S. policymakers have taken some comfort in the rule. Senator Jesse Helms, the former chairman of the Senate Foreign Relations Committee, observed in a speech to

102. Thus, the Court reasoned that “[b]y not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.” *Id.* at 375–76; see also *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)* (Final Judgment of 31 March 2004).

103. *Id.* at 376. The Supreme Court may revisit this holding this Term in light of *LaGrand* and *Avena*. See *Medellin v. Dretke*, 125 S.Ct. 686 (2004).

104. *Breard*, 523 U.S. 371.

105. See *Ku*, *supra* note 18, at 93–104. Of course, this does not mean that I am abandoning my claim that courts should impose a judicially enforceable non-delegation doctrine on international delegations. See *id.* at 121–45. Rather, I am simply observing that without the last-in-time rule, the delegation concern would be even greater.

the U.N. Security Council that (to his apparent satisfaction) U.S. treaty obligations can be superseded by a simple act of Congress.¹⁰⁶

C. Summary

The development of a new international law, regulating a nation's relations to its own nationals and administered by international institutions, raises the likelihood of conflict between treaties and domestic law. With respect to state law and constitutional law, such conflicts will be resolved by choosing constitutional law over treaties but treaties over state laws. When a conflict occurs with federal law, however, courts will apply the last-in-time rule on the theory that treaties and federal statutes are equivalent forms of law. The importance of this equality rationale, which has formed the basis for judicial application of the last-in-time rule, has been obscured by a separate sovereignty rationale endorsed by an influential circuit court opinion.

Whatever its rationale, because of the broad scope of modern federal law, the interaction of treaties and federal law is likely to constitute the main front in a growing number of collisions between treaties and domestic law. Indeed, the last-in-time rule has already been invoked to limit the effect of an international institution's interpretation of a treaty that would have affected domestic laws governing criminal punishment. Moreover, even the possibility that Congress can overrule the domestic effect of a treaty or an international institution's interpretation of a treaty obligation can have an important effect on treaty makers and the interpretation of treaties. For these reasons, it is fair to say that as treaties become more important for the domestic law system, so will the last-in-time rule.

II. TREATIES AS LAWS—A CONCEPTUAL DIVIDE

In this Part, I consider the two main conceptions of the status of treaties within the domestic legal system. The "internationalist conception" generally holds that treaties should have presumptive enforceability as a matter of domestic law and that treaties should supersede inconsistent federal and state law irrespective of many traditional constitutional limitations. In contrast, the "revisionist" approach sees a more limited role for treaties with respect to federal and state law, one that is also subject to strict constitutional limitations. The last-in-time rule does not fit comfortably within either the internationalist or revisionist conception. For this reason, proponents of both sides have argued for discarding the last-in-time rule as a mechanism for resolving conflicts between treaties and federal statutes.

A. The Internationalist Conception

A number of prominent and influential legal scholars take the position that treaties, and international law more generally, should have as much domestic legal effect within

106. Senator Jesse Helms, Address before the United Nations Security Council (Jan. 20, 2000), *discussed in* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 350–54 (2000).

the United States as possible. Dubbed the "internationalist conception,"¹⁰⁷ it is comprised of two substantive components.

First, internationalists believe that treaties and other kinds of international law should be presumptively incorporated as domestic law. This means, in the context of treaties, that treaties should be presumed self-executing and that attempts by the treaty makers or courts to declare treaties non-self-executing should be strictly limited or prohibited.¹⁰⁸

Second, internationalists believe that treaties should be supreme to all domestic law, including federal law,¹⁰⁹ and perhaps even constitutional law.¹¹⁰ Moreover, internationalists have generally rejected most federalism limitations on the treaty power.¹¹¹ As a result, the internationalist conception generally considers treaties supreme to federal as well as state law irrespective of whether the federal statute was passed later in time to the treaty's ratification or whether the state law would otherwise fall within the protection of the Tenth Amendment.¹¹² For this reason, as I will explain in Part II.C, many internationalists have called for the abandonment of the last-in-time rule.

To be sure, labeling scholars as internationalists fails to capture the nuances in their specific views on many of these questions. This term, however, usefully captures a general orientation to the incorporation of treaties and international law shared by many, if not most, American scholars of international law.¹¹³

107. See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539–57 (1999) (outlining elements of "internationalist conception"); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of Customary International Law*, 111 HARV. L. REV. 2260, 2274–75 (1998) (describing an "internationalist assumption" that international law must be part of domestic law).

108. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111, n.5 (1987) (stating there is a "strong presumption that a treaty has been considered self-executing" if no presidential or congressional action taken); HENKIN, *supra* note 28, at 201–04; Jordan J. Paust, *Self Executing Treaties*, 82 AM. J. INT'L L. 760, 775 (1988).

109. See Henkin, *supra* note 5, at 871–72; Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last-in-time rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 398–414 (1988).

110. See Spiro, *supra* note 4, at 2017–27.

111. See, e.g., HENKIN, *supra* note 28, at 189–93; Lori F. Damrosch, *The Role of the United States Senate Concerning Self Executing Treaties*, 67 CHI.-KENT L. REV. 515, 530–31 (1991); Gerald L. Neuman, *The Global Dimensions of RFRA*, 14 CONST. COMM. 33, 34 (1997).

112. For instance, the Supreme Court has ruled that the federal government cannot regulate certain subjects through its Article I commerce clause power. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1997). Some internationalist lawyers and scholars have nonetheless argued that these same subjects could be regulated under the treaty power. See, e.g., Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-0029).

113. The views of Louis Henkin, the author of the leading treatise on foreign relations law and the Chief Reporter of the Restatement (Third) of the Foreign Relations Law of the United States, encapsulate most of the internationalist conception. The abiding influence of Henkin and the Restatement (Third) on both his disciples and his critics is hard to overstate. See Paul Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual*

B. A Revisionist View – The New Sovereignism?

In recent years, the internationalist conception has come under criticism within the academy from a group of scholars often referred to as revisionists. Defined broadly, revisionism has been described as “challenges—sometimes novel ones—to conventional thinking.”¹¹⁴ In the context of foreign relations law, the term “revisionist” was probably initiated by a 1997 Harvard Law Review article challenging internationalist conceptions of the status of customary international law within the domestic system.¹¹⁵ Subsequent articles critiquing other components of the internationalist conception have established a revisionist framework for analyzing the status of international law within the domestic system. This framework has two main components.

First, revisionists have argued that international law, whether it takes the form of customary or treaty law, should be subject to the same constitutional limitations and requirements that are imposed on other forms of domestic law. For example, in the context of treaty law, revisionists have argued that treaties should be limited by the Tenth Amendment to the same degree as federal law.¹¹⁶

Second, revisionists have argued that international law, especially treaties, should have very limited domestic effect. For example, revisionists have argued that the Senate may impose unilateral conditions limiting or nullifying the domestic effect of treaties.¹¹⁷ Others have gone further, claiming that most treaties have no self-executing effect if their subject matter falls within Congress’s Article I legislative powers.¹¹⁸

The revisionist conception extends beyond the issue of incorporation of treaties and international law into the domestic system.¹¹⁹ Professor Spiro has attributed to these

Origins of the Restatement (Third) of the Foreign Relations Law of the United States, 44 VA. J. INT’L L 33 (2003).

114. Michael D. Ramsey, *Textbook Revisionism*, 43 VA. J. INT’L L. 1111, 1113 (2003) (reviewing CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (2002)).

115. See Bradley & Goldsmith, *supra* note 7, at 849–70. The term was first used by their critics. See, e.g., Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 666–67 (1998) (stating that the Bradley and Goldsmith “revisionist arguments have been almost universally criticized”). The term has also been used to describe Professor John Yoo’s criticism of internationalist conceptions of self-execution. See Flaherty, *supra* note 6, at 2096–97 (referring to Professor Yoo’s position in the “revisionist” vanguard); Vazquez, *supra* note 6, at 2203 (describing Yoo as part of “a small group of scholars who have embarked on the project of unsettling what had previously been thought to be settled in the area of foreign affairs law”).

116. See, e.g., Bradley, *supra* note 4, at 433–50 (arguing for limited conception of treaty power’s scope of authority over state law).

117. See, e.g., Bradley and Goldsmith, *supra* note 6, at 456–68.

118. See, e.g., Yoo, *Treaties*, *supra* note 6, at 2091–94 (arguing that original understanding prohibited self-executing treaties within scope of Congress’s Article I powers).

119. For instance, scholars have challenged existing conceptions of the President’s power over foreign affairs and war powers and the role of states in foreign relations. See, e.g., Saikrishna Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L. J. 231, 233–65 (2001) (arguing that all U.S. foreign affairs powers are held by the President if not otherwise assigned to Congress); Ku, *supra* note 62, at 527–30 (arguing states have substantial role in foreign relations and compliance with international law); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 369–90 (1999) (arguing that there are no implied limitations on state activity in foreign affairs); John C. Yoo, *Clio at War: The Misuse of*

scholars a normative view about the nature of international law, referring to them as the “New Sovereignists.”¹²⁰ Indeed, as I have argued previously, the term “revisionist” is a fairer characterization of this group of scholars because much of their work is focused on revising or critiquing the prevailing internationalist conception of international law rather than advancing a particular pro-sovereignty ideology.¹²¹

C. *Internationalists, Revisionists, and the Last-in-Time Rule*

Although the last-in-time rule lies at the heart of potential conflicts between treaties and domestic law, it does not fit comfortably into either of the two conceptions.

1. Internationalists and the Last-in-Time rule

The last-in-time rule assumes that treaties are, at least in some circumstances, domestic law on par with federal law. In this way, the existence of the last-in-time rule supports the incorporation of treaties into domestic law and at least the first component of the internationalist conception.

However, the last-in-time rule also authorizes Congress to nullify the domestic effect of an otherwise valid treaty. This troubles internationalists for at least two reasons. First, it challenges internationalist claims for the supremacy of international law, including treaties, over all forms of domestic law. Second, the existence of the last-in-time rule also suggests that Congress has the power to unilaterally declare a treaty non-self-executing for purposes of domestic law.¹²² This means that even though the last-in-time rule supports finding most treaties self-executing, it also suggests that self-execution can be cancelled by an unilateral act of Congress.

For these reasons, it is hardly surprising that internationalist scholars have long called for the last-in-time rule to be reconsidered or discarded.¹²³ Their case against the last-in-time rule rests on both textual and historical considerations, but also contains a functional component. A globalizing world characterized by international cooperation requires the United States to avoid doctrines that encourage or even invite violations of its international obligations. As Professor Henkin declares:

Other free countries increasingly have subordinated domestic institutions and parochial ways to help achieve greater effect for agreed international norms. Now is hardly the time for the United States, aspiring to lead the struggle for the rule of

History in the War Powers Debate, 70 U. COLO. L. REV. 1169 (1999) (criticizing use of historical sources to support congressional control over war powers).

120. See Peter J. Spiro, *The New Sovereignists*, FOREIGN AFF., Nov.–Dec. 2000, at 9; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L. J. 649, 653–55 n.16 (2002).

121. See Ku, *supra* note 62, at 470 n.63. Indeed, so-called “New Sovereignists” have rejected the characterization, or at least the connotations the term creates, about their substantive policy views. See Curtis A. Bradley & Jack L. Goldsmith, *Letter to the Editor*, FOREIGN AFF., Mar.–Apr. 2001, at 188–89 (arguing that it “is not a rejection of international law . . . to examine whether treaties or customary international rules are consistent with U.S. interests and constitutional standards, or to consider how these international norms should best be implemented within the U.S. system.”).

122. See Vazquez, *supra* note 6, at 2174–75.

123. See, e.g., Henkin, *supra* note 5, at 869–72; Paust, *supra* note 109, at 398–416.

law in a disorderly world, to retreat further into unilateralism by distorting our jurisprudence and encouraging our institutions to pay less, rather than more, respect to the law of nations.¹²⁴

2. Revisionists and the Last-in-Time Rule

The internationalist criticisms of the last-in-time rule do not, oddly enough, mean that revisionists will necessarily embrace the rule. While the last-in-time rule guarantees Congress the power to override the domestic effect of a treaty, it also holds that a treaty can repeal an otherwise valid federal statute. This result has led at least one leading revisionist scholar, Professor John Yoo, to reject the last-in-time rule as well.¹²⁵

For Professor Yoo, the problem with the last-in-time rule is not so much with the rule itself, but with its implications for his broader conception of treaties. Not only has he argued against the internationalist presumption of self-execution for treaties, but he has further argued that the original understanding of the Constitution prohibited any self-executing treaties from coming into conflict with legislation enacted by Congress pursuant to its Article I powers.¹²⁶

Although he concedes that judicial precedent has not conformed to this understanding, he nevertheless maintains that, at the very least, courts should adopt a “clear statement” rule “that treaties are non-self-executing unless the treaty makers openly declare otherwise.”¹²⁷ The rationale for adopting a clear statement rule would be to avoid constitutional difficulties created by regulating matters within the scope of Article I and thus, conflicting directly with federal statutes.¹²⁸

This conception of treaties nearly eliminates the domestic legal effect of treaties reflecting the new international law, which is concerned with the relations between a state and its own citizens in the context of human rights, commercial law, family law, and other issues.¹²⁹ Under existing Supreme Court precedent, these matters almost certainly fall within Congress’s existing Article I powers.¹³⁰ Therefore, treaties implementing obligations under the “new” international law, could not become an independent mechanism for domestic lawmaking. In most cases, treaties would not be “law” at all for domestic purposes.¹³¹

Because Professor Yoo’s analysis divides self-executing treaties and federal statutes into essentially independent spheres, he cannot accept the existence of a last-in-time rule that presumes an overlap between treaties and statutes. In his view, when a self-

124. Henkin, *supra* note 5, at 886.

125. Yoo, *supra* note 29, at 815–16.

126. *See, e.g.*, Yoo, *Globalism*, *supra* note 6, at 1955; Yoo, *Treaties*, *supra* note 6, at 2233–57.

127. Yoo, *Globalism*, *supra* note 6, at 1955.

128. Yoo, *Treaties*, *supra* note 6, at 2256–57.

129. *See, e.g.*, Bradley, *supra* note 11, at 105–06.

130. This can be reasonably inferred by the fact that the Supreme Court has only limited federal legislative power twice in the past seventy years. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1997); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

131. *See Vazquez*, *supra* note 6, at 2189–92.

executing treaty and statute conflict, a court should consider whether the treaty or the statute has strayed beyond its field of delegated authority under either Article I or Article II. Whether or not that treaty or statute is "last in time" cannot be relevant to his analysis.

Therefore, the last-in-time rule would never be needed because, by definition, treaties and Article I legislation should never come into conflict. If a treaty did attempt to encroach on an Article I subject, Professor Yoo would support giving priority to the Article I legislation. Indeed, he has explicitly argued that the last-in-time rule should be rejected because no federal statute can be repealed by a treaty.¹³²

In this way, at least one revisionist conception of treaties also rejects the last-in-time rule. From this perspective, however, the last-in-time rule gives too much domestic effect to treaties rather than too little.¹³³

D. Summary

This part has identified two approaches to analyzing treaties as domestic law. On one side, internationalists generally support giving treaties domestic effect that supersedes inconsistent federal and state law without any serious constitutional limitations stemming from federalism or individual rights. On the other side, revisionist scholars have sought to limit the domestic effect of treaties by allocating the power to declare treaties non-self-executing to the treaty-making branches and by imposing federalism and other constitutional constraints on the treaty power. In its most radical form, the revisionist approach would prohibit treaties from having any domestic effect within the scope of Congress's Article I powers, thereby making it nearly impossible for treaties to implement most types of the "new international law."

In this way, the existence of the last-in-time rule poses difficulties for both internationalists and revisionists. For internationalists like Professor Henkin, the last-in-time rule reduces treaties to equal status with federal statutory law and subjects treaties to the legislative whims of Congress. For revisionists like Professor Yoo, the last-in-time rule suggests an impermissible confluence of treaties and federal statutory law that undermines his broader conception of treaties as non-self-executing in almost all circumstances. Because the existence of the last-in-time rule challenges both

132. Yoo, *supra* note 29, at 815–16.

133. Professor Akhil Amar has offered another view that reads treaties as superior to all state law but subordinate to federal law. In his reading, federal law could repeal an earlier-in-time treaty, but no treaty could repeal an earlier-in-time statute. See AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (forthcoming November 2005) (draft on file with the Indiana Law Journal). This reading draws heavily on comments made during the Virginia Ratification debates by Francis Corbin and in a post-ratification speech by James Wilson. See *id.* While powerfully presented, I am nonetheless unconvinced that this understanding of the status of treaties was widely shared during the Founding period given statements by Madison, Hamilton, and Wolcott in opposition to this view. See discussion *infra* at text accompanying note 287 (Madison), note 345 (Hamilton), and note 331 (Wolcott). Still, Amar's discussion does reinforce my conclusion that the historical evidence in favor of the internationalist view is weak, and that the main disagreement centered on whether treaties would have equal or *lesser* status than federal law.

conceptions of the role of treaties in the domestic legal system, it is not surprising that the rule has been rejected by both sides of this conceptual divide.

III. A TEXTUAL AND STRUCTURAL DEFENSE

Although the last-in-time rule has important implications for the domestic effect of treaty law, it rests on shaky foundations, at least within the legal academy. Both internationalist and revisionist scholars have argued that the last-in-time rule is inconsistent with the text and structure of the Constitution, especially as understood at the time the Constitution was drafted and ratified. Given the strength of these criticisms, it is somewhat surprising that courts generally do not even bother to offer textual or structural justifications for their application of the rule.¹³⁴

This Part provides the missing textual and structural basis for the rule. With respect to text, the Constitution's designation of treaties as "Law" for domestic purposes should be understood to subject treaties to the background rule for resolving conflicts between different forms of law: the last-in-time rule. With respect to structure, the Constitution's structure assumes overlap and conflict between the forms of law created by different lawmaking institutions. The courts, and not the original lawmaking mechanisms themselves, are responsible under the constitutional structure for resolving such conflicts.

A. Text

The main source for analyzing the textual propriety of the last-in-time rule is the Supremacy Clause, which reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹³⁵

At the very least, this section establishes that three forms of law—constitutional law, the "Laws of the United States," and treaties—are the "supreme Law of the Land." This "supreme Law" binds "the Judges in every State" regardless of state law (including state constitutional law). The inferiority of state law is likely established by the phrase "supreme Law" rather than by the "Judges in every State" clause.¹³⁶ The last clause is probably best understood as a rule of construction for state courts when interpreting state and federal law.¹³⁷

134. See, e.g., *Chac Pan Ping v. United States*, 130 U.S. 581, 600–01 (1889); *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855).

135. U.S. CONST. art. VI, cl.2.

136. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 245 n.60 (2000). Otherwise, as Professor Nelson argues, the Supremacy Clause appears to bind state judges only.

137. *Id.*

1. The Textual Critique

Critics of the last-in-time rule have argued, however, that the mere fact that constitutional law, federal law, and treaties are all designated "supreme Law" does not establish any hierarchy between these three kinds of law within the U.S. system.¹³⁸ After all, an assumption of equality between the various forms of law recognized by the Supremacy Clause would subject *constitutional* law to the last-in-time rule as well.¹³⁹ But this cannot be the right result because, "in our jurisprudence, the Constitution prevails over other federal law."¹⁴⁰

This criticism echoes the analysis of the last-in-time rule provided in *Taylor v. Morton*. In that case, Justice Curtis rejected a textual justification for the last-in-time rule on similar grounds, suggesting that the constitutional text offers no guidance for resolving a conflict between a treaty and a federal statute.¹⁴¹ Instead, he advanced a "sovereignty" rationale which depends on the assumption that Congress must hold the sovereign authority to violate a treaty.

Buttressed by such admissions that the constitutional text does not require the last-in-time rule, critics of the rule like Professor Henkin have been able to assume that the text of the Supremacy Clause does not support the last-in-time rule.¹⁴² Instead of looking at the text, internationalist scholars have suggested that determining the relative priority of the different forms of law recognized in the Supremacy Clause flows from the nature and importance of those different forms of law.¹⁴³ Indeed, if the necessity of a sovereign power to repeal treaties lies at the heart of the last-in-time rule, internationalist scholars can directly challenge this rationale on the theory that modern international law, especially the kind of international law devised by multilateral treaty, should no longer be subject to the whims of a sovereign legislature given that other countries have rejected the U.S. approach. As the Restatement (Third) of Foreign Relations Law notes:

[I]t has been urged that the . . . [last-in-time rule] should not apply to inconsistency between a statute and general international law established by general multilateral treaty. For that case at least there have been suggestions that the United States might better adopt the jurisprudence of some European countries, which gives effect to an international agreement even in the face of subsequent legislation.¹⁴⁴

In other words, as in many European countries, the new importance of international law ought to confer on it greater status in domestic U.S. law than the last-in-time rule currently provides.

138. *E.g.*, Henkin, *supra* note 5, at 871-72.

139. *See id.*

140. *Id.*

141. 23 F. Cas. 784 (C.C.D. Mass. 1855), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1862); *see supra* text accompanying notes 86-94.

142. Henkin, *supra* note 5, at 871-72.

143. *See, e.g., id.*; Paust, *supra* note 111, at 398-414.

144. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 n.1 (1987).

2. A Textual Defense

a. Why Have a Supremacy Clause?

Before conceding to Professor Henkin and Justice Curtis that the Supremacy Clause provides no guidance to resolving the relative priority of statutory and treaty law, however, it is worth thinking about why the Supremacy Clause is needed in the first place. If the relative priority of the various forms of law, say state law versus federal law, could be determined by the *nature* of those forms of law rather than by textual instructions in the Constitution, there would be no need for the Supremacy Clause.

For instance, if, as internationalist critics have argued, it is the nature of treaties as international law that gives them superior status to federal law, then it seems equally plausible that the nature of treaties gives them superior status to state law. But if the Constitution had intended to leave the question of determining the relative hierarchy of different types of law to the inherent nature of those laws, the Supremacy Clause would appear to be completely superfluous. Indeed, as I will argue in Part IV, internationalist critics have offered no serious historical explanation for why the Constitution's drafters felt it necessary to declare that treaties were supreme to state law but felt no such need with respect to treaties over federal statutes.

In fact, the drafters of the Constitution obviously felt that some textual declaration was needed to subordinate state law to the Constitution, treaties, and federal statutes. The text of the Supremacy Clause plainly serves this purpose. But the inclusion of the Supremacy Clause strongly suggests that in the absence of this clause all forms of law designated by the Constitution, including state law, have no obvious priority to each other. Were it not for state law's exclusion from the status of "supreme Law," state law would stand on the same footing as the other forms of law.¹⁴⁵

The fact that state law, prior to its demotion in the Supremacy Clause, stands on equal footing to the other forms of law indicates that the text of the Constitution contained a background assumption about the relationship between various forms of law. Imbued in modern conceptions of hierarchy between state and federal law, it is sometimes hard to conceive of state and federal law holding equal status. But as Professor Nelson has explained, state courts under the Articles of Confederation treated all enacted law, including federal law and treaties, as equal rather than superior to state law.¹⁴⁶ Courts sought to interpret state and federal laws to avoid conflict. But when no such reconciliation could be made, courts would apply the standard rule of statutory construction, the last-in-time rule, to resolve conflicts between enacted federal and state laws.¹⁴⁷

The best understanding of the purpose of the Supremacy Clause, therefore, is to exempt state law from the last-in-time rule. Its silence, however, about the relative relationship of federal statutes and treaties suggests that the last in time assumption remains in effect.

145. I draw this insight from Professor Nelson's important work. See Nelson, *supra* note 136, at 245–46.

146. *Id.* at 247–48.

147. *Id.*

b. The Constitutional Law Exception

The main objection to this reading, of course, is that an assumption of equality between the various forms of law recognized by the Supremacy Clause would subject *constitutional* law to the last-in-time rule as well.¹⁴⁸ But constitutional law, at least since *Marbury v. Madison*,¹⁴⁹ is clearly not subject to the last-in-time rule. The lack of textual support for the superiority of constitutional law suggests, say critics, that it is the *nature* of constitutional law, rather than any instructions from the text, that makes it superior to federal and state law. This means that the *nature* of treaty law, rather than the text, makes it superior to federal statutory law.

This is a serious but not insurmountable objection. The most important textual response relies on the use of the word "Constitution." As I will discuss below in Part IV, the use of the word "Constitution" as opposed to "Articles of Confederation" represents a fundamental shift in thinking about the law binding the various states together, as Justice Marshall recognized in *Marbury*.¹⁵⁰ While the Articles of Confederation served as a kind of treaty between the states,¹⁵¹ the use of the term "Constitution" represents something quite different: an action by the "people" of the different states to establish a fundamental law.¹⁵² Indeed, as James Madison himself argued, while a law violating a treaty might be enforced, a law "violating a constitution established by the people themselves was null and void."¹⁵³

But if the status of constitutional law as superior to all other forms of law, including state law, was apparent from the very use of the term "Constitution," why include the term in the Supremacy Clause at all? The likely explanation is that the Supremacy Clause was still needed to establish the superiority of constitutional law to the only other kind of law with a similar claim to popular sovereignty: *state* constitutional law. With both types of law claiming a certain fundamental law status, the inclusion of the Supremacy Clause within the Constitution serves to dispel any doubts about the ultimate status of federal constitutional law.

In sum, critics have dismissed the text of the Supremacy Clause as a possible basis for the last-in-time rule. But none of the critics have squarely faced the hard question: if the nature of treaty law is understood to be supreme to all domestic law, why is the Supremacy Clause needed at all? The answer is that the last-in-time rule operates to resolve conflicts between different forms of law (except for constitutional law). The purpose of the Supremacy Clause is to abolish the last-in-time rule with respect to state law. By failing to add further textual instructions on the relative priority of federal and treaty law, the text of the Constitution leaves in place the last-in-time rule for conflicts between the remaining two forms of (non-constitutional) law.

148. See Henkin, *supra* note 5, at 867–70.

149. 5 U.S. (1 Cranch) 137 (1803).

150. *Id.* at 176–80.

151. David Golove, *The New Federalism: Treaty Delegations of Legislative, Executive, and Judicial Autonomy*, 55 STAN. L. REV. 1697, 1706–10 (2003) (reviewing the historical conception of the Articles of Confederation as a treaty rather than a constitution).

152. For a discussion of the Founders' conception of higher law, see *infra* text accompanying notes 177–81.

153. 2 RECORDS OF THE FEDERAL CONVENTION 93 (Max Farrand ed., 1937).

B. Structure

On a separate front, critics have also argued that the last-in-time rule is inconsistent with the Constitution's structure. Specifically, the leading revisionist critic of the rule has suggested that treaties cannot, under any circumstances, nullify the effect of a federal statute.¹⁵⁴ This structural criticism of the last-in-time rule is less widely shared, but it amounts to a powerful objection to applying the rule.

1. The Structural Critique

The structural objection to the last-in-time rule rests heavily on a formalist approach to analyzing the Constitution's structure, in particular its lawmaking structure. The Constitution sets up three formal lawmaking mechanisms: legislation under Article I, treaty-making under Article II, and constitution-amending under Article V. The product of the formal lawmaking processes is recognized as "Law" (in the Supremacy Clause) that is superior to state law. These same forms of law are recognized in Article III as falling within the scope of the federal judicial power.

Each of these lawmaking processes, in theory, is limited by procedural and substantive constraints. Substantive constraints impose subject matter limitations on each lawmaking mechanism. Thus, Congress's Article I powers are limited to delegated powers, such as its power to regulate interstate commerce.¹⁵⁵ Similarly, some courts and commentators have suggested that the treaty power is limited to proper matters of international negotiation.¹⁵⁶ Even the constitution-amending power is restrained, albeit in minor ways.¹⁵⁷

In addition to these substantive subject matter constraints, courts have recognized procedural constraints on the lawmaking mechanisms. Thus, the Article I legislative process requires bicameral presentment to both houses of Congress and approval by the President to take effect.¹⁵⁸ Similarly, the President must seek the advice and consent of the Senate prior to making any treaties.¹⁵⁹ Finally, a constitutional amendment must run the gauntlet of congressional and state legislative approval (or approval by constitutional convention).¹⁶⁰

The Supreme Court has imposed a formalist approach to these procedural requirements, at least with respect to Article I legislation. In *INS v. Chadha*¹⁶¹ and its progeny, the Court rejected congressional attempts to create mechanisms such as the

154. Yoo, *supra* note 29, at 790–99.

155. U.S. CONST. art. I, § 8, cl. 3.

156. See, e.g., Thomas Jefferson, *Manual of Parliamentary Practice: for the Use of the Senate of the United States*, in JEFFERSON'S PARLIAMENTARY WRITINGS 353, 420 (Wilber S. Howell ed., 1988) (describing limitations on the treaty power to those "subjects usually regulated by treaty"). For a detailed discussion of the history of the subject matter constraint on the treaty power, see Bradley, *supra* note 4, at 419–22.

157. U.S. CONST. art. V (prohibiting any constitutional amendment banning slave trade prior to 1808).

158. *Id.* at art. I, § 7, cl. 2.

159. *Id.* at art. II, § 2, cl. 2.

160. *Id.* at art. V.

161. 462 U.S. 919 (1983).

legislative or line-item veto because such mechanisms had the effect of repealing legislation without full bicameral presentment as required by the Article I processes.¹⁶² In other words, the Court has held that the full Article I procedure for legislation is the *exclusive* mechanism for exercising Article I legislative powers.¹⁶³ It has also held that repealing a law enacted pursuant to Article I is indistinguishable from Article I legislation and must comply with the same procedures.¹⁶⁴

The Court has not considered (nor has it had the opportunity to do so) whether similar formalist strictures must be placed on the treaty power and the constitutional-amending power. This has left room for some scholars, most notably Professors Ackerman and Golove, to argue that neither of these procedures is *exclusive* and that both treaties and constitutional amendments can be created through other procedural mechanisms.¹⁶⁵ Hence, in the context of treaties, they have claimed that treaties can be replaced by a combination of executive agreements and congressional legislation¹⁶⁶ and that constitutional amendments may be replaced by a combination of influential and authoritative judicial interpretations ratified by presidential elections.¹⁶⁷ Although enormously influential, this approach also has been vigorously criticized¹⁶⁸ and has not been explicitly recognized or adopted by any court.¹⁶⁹ If one does not accept the Ackerman-Golove conception, then, as Professor Yoo argues, the formalist approach articulated by the Court in *Chadha* and its progeny remains the dominant understanding of the Constitution's lawmaking structure.¹⁷⁰

A formalist approach to the procedural constraints governing the treaty power, however, cuts against the last-in-time rule. If the Article I legislative process is the exclusive mechanism for making and repealing Article I legislation, then, from a formalist perspective, treaties cannot repeal Article I legislation, whether or not that treaty was ratified later in time. To take the formalist analysis of procedural constraints to its logical conclusion, Article II treaty-making should also be an exclusive mechanism. This would prohibit later in time statutes enacted via Article I from repealing Article II treaties.

In this way, the last-in-time rule appears inconsistent with a formalist approach to constitutional structure.¹⁷¹ Rather than focus on which form of law was created later in time, a formalist approach would permit the repeal of a treaty or statute only using the

162. *Id.* at 951; *Clinton v. City of New York*, 524 U.S. 417, 438–41 (1998).

163. *Chadha*, 462 U.S. at 951.

164. *Id.* at 952.

165. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 811 (1995) (pointing out that the text does permit the inference that treaties are not the exclusive means of creating international agreements).

166. *Id.*

167. *Id.* at 907–08.

168. E.g., Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

169. See *Made in the U.S.A. Found. v. United States*, 56 F. Supp. 2d 1226, 1312–13 (N.D. Ala. 1999).

170. Yoo, *supra* note 29, at 789.

171. *Id.* at 815.

same procedural mechanisms by which they were created. Thus, instead of choosing which treaty was “last in time,” a formalist approach to structure would look at the mechanism creating each form of law and then consider whether that law or treaty fell within the proper substantive borders. Alternatively, the formalist structure might simply require, as in *Chadha*, the full use of the original lawmaking mechanism in order to repeal either the treaty or the statute. Any attempt to modify a form of law by use of an alternative mechanism—say using a treaty to repeal a statute—would not be enforced by a court.

2. The Structural Defense

This line of attack on the last-in-time rule is not based solely on the *Chadha* approach. The Court in *Taylor v. Morton*¹⁷² also recognized this argument and found it so powerful that the Court resorted to an extra-constitutional theory to justify the rule. But this resolution of the challenge posed by the *Chadha* formalist structure is hardly satisfying. In fact, there are at least two arguments against imposing a formalist separation of the various lawmaking functions.

First, the Constitution’s creation of separate *procedural* mechanisms for making treaties and statutes does not mean that the product of those mechanisms, mainly treaties and statutes, will never overlap and collide. Rather, the absence of strict *substantive* constraints on the various lawmaking powers makes such collision almost inevitable. For instance, the Supremacy Clause itself is designed to resolve expected conflicts between state law and the other three forms of law. But since all the powers held by the federal government were delegated away from the states (except where reserved), one might plausibly argue that these substantive constraints would preclude any conflicts between federal and state law. Presumably, a formalist would argue that Congress could not exercise powers it did not have (such as over intrastate commerce) and the states could not exercise powers they did not have (such as over interstate commerce).

The mere allocation of various powers between the states and the federal government, however, does not guarantee that conflicts between laws will not exist. Substantive constraints, such as the line between interstate and intrastate commerce, for instance, have been notoriously difficult to draw. Courts have been hesitant to exercise a “dormant” federal power to police state intrusions into interstate commerce.¹⁷³ This means that states can act, generally speaking, until the federal government acts otherwise. This also means that federal and state law will (and often do) overlap and conflict.

The expected conflict between federal and state law explains the necessity of creating a Supremacy Clause to resolve such conflicts in favor of federal law and treaties. Indeed, it is worth asking why a Supremacy Clause would even be necessary if each lawmaking mechanism recognized by the Constitution—the amending power, the statute power, the treaty power, and the state law power—existed within its own

172 67 U.S. 481, 484 (1863).

173. See, *Quill Corp. v. North Dakota*, 504 U.S. 298, 309–10 (1992); *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256–58 (1938); *Sanford v. Poe*, 69 F. 546 (6th Cir. 1895), *aff’d sub nom. Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897).

subject matter universe free from any possibility of conflict with the other forms of law.

If the conflict between federal statutory law and state law is inevitable and expected, it is difficult to believe that conflicts between treaty law and federal law would be any more common. Unlike federal statutes, which are subjected to a battery of specific subject matter limitations in Article I, section 8, the treaty power is not subject to any explicit textual constraints. At best, courts have suggested the treaty power is limited by a vague and open-ended “proper matters of international negotiation” limitation.¹⁷⁴ This makes conflict almost certain. The lack of meaningful subject matter limitations on the treaty power, and the expansive scope of Congress’s delegated powers under Article I make conflict between treaties and federal statutory law unavoidable.

Second, there is a crucial difference between the legislative veto rejected by the Court in *Chadha* and repeals of federal statutes pursuant to the treaty power. Unlike the legislative veto, which was a creation of Congress pursuant to Article I, the treaty process is a creation of the Constitution itself. While it might make sense to regard legislative vetoes as a threat to the strict constitutionally-created procedural constraints on Article I, it is difficult to believe that the treaty power is a similar kind of threat since it is subject to its own constitutionally-mandated procedural constraints in Article II. For this reason, *Chadha* and its progeny are best understood as limiting the ability of each lawmaking branch to create new mechanisms for modifying or repealing their creations. There is no reason to read those cases as limiting the ability of other constitutionally created lawmaking mechanisms to modify or repeal each other.

Finally, accepting a *Chadha*-like limitation on the treaty power requires a more limited role for the federal courts in resolving conflicts between different forms of law than is contemplated by Article III. Under a strict formalist conception, a conflict between state and federal law could only be resolved by either the federal or state entity repealing its own laws. But the federal judicial power is plainly authorized to resolve conflicts between all forms of state and “supreme Law.” Indeed, it reaches “all Cases . . . arising under” the Constitution, federal statutes, and treaties.¹⁷⁵ If the federal courts hold the power to resolve conflicts between state and federal law, there is no reason to exclude them from resolving conflicts between the Constitution, federal statutes, and treaties. As Professor Yoo himself has argued, the text and structure of the Constitution plainly support judicial review of constitutional issues.¹⁷⁶ From the outset, it has been understood that federal courts have the power to engage in aggressive judicial review of conflicts between state, federal, and constitutional law.¹⁷⁷ It would be

174. The contours of this limitation was most prominently articulated by Chief Justice Charles Evan Hughes in *Limitations of the Treaty-Making Power of the United States in Matters Coming within the Jurisdiction of the States*, 23 AM. SOC’Y INT’L L. PROC. 176, 194, 196 (1929). See also *Power Auth. of N.Y. v. Fed. Power Comm’n*, 247 F.2d 538, 543–44 (D.C. Cir. 1957) (discussing proposed subject matter limitation), *vacated by* 355 U.S. 64 (1957). For a detailed discussion of the rise and fall of the subject matter limitation, see Bradley, *Treaty Power*, *supra* note 4, at 419–22.

175. U.S. CONST. art. III, § 2.

176. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 890–906 (2003).

177. *Id.* at 912–81.

odd to exclude treaties from the ambit of a federal court's jurisdiction to resolve conflicts between treaties and federal statutes.

C. Text and Structure Combined

Despite internationalist claims to the contrary, there is a textual basis for the last-in-time rule: the designation of treaties as "Law." As domestic "Law," treaties, like federal statutes, are subject to the Constitution's background assumption for resolving conflicts between different forms of law: the last-in-time rule. If, as internationalist critics have argued, the inherent nature of treaty law as international law should alter this rule with respect to other forms of law, it is unclear why the Supremacy Clause is needed at all. The best way to reconcile this problem is to recognize that, with the exception of constitutional law, the drafters of the Constitution understood that the last-in-time rule would apply to different forms of enacted law, even with respect to law enacted by different lawmaking institutions.

Moreover, the constitutional structure does not, as the leading revisionist critic would have it, contemplate independent substantive spheres of lawmaking for each type of law. In fact, the absence of strict substantive constraints on the treaty power strongly suggests that conflicts with the other forms of law recognized by the Constitution are almost inevitable. The inclusion of a Supremacy Clause reflects this assumption with respect to state law and the other forms of law. Federal courts, granted jurisdiction over all of these forms of law, serve as the forums for resolving such conflicts.

This textual and structural explanation rests to some degree, as I have noted, on claims regarding assumptions and intentions shared by the Constitution's drafters and ratifiers. The burden of the next section is to provide the historical support for the understanding of text and structure articulated here.

IV. THE HISTORICAL ORIGINS OF THE LAST-IN-TIME RULE

This Part reviews the leading historical account of the last-in-time rule, which rejects the historical basis for the rule. I offer an alternative account that supports the understanding of the text and structure articulated in Part III.

I begin by examining the origins of the last-in-time rule in the traditional English rule for resolving conflicts among statutes and the rise of a concept of higher law in the pre-revolutionary period. Next, I discuss conflicts among forms of law, particularly state law and treaty law, under the Articles of Confederation. This period, which has been largely ignored by existing scholarship on the last-in-time rule, provides strong evidence of the Founding generation's assumption that the last-in-time rule applied to conflicts between treaties and domestic statutes.

I then review the consideration of this problem at the constitutional and ratifying conventions as well as during the seminal Jay Treaty debates in the first post-ratification administrations.

A. Previous Historical Explanations of the Last-in-Time Rule

Critics of the last-in-time rule argue that, in addition to the rule's absence of textual support, the rule also lacks support from historical evidence about the original intent of the drafters of the Constitution.¹⁷⁸ In particular, Professor Lobel's leading and influential account of the original understanding of treaties¹⁷⁹ soundly rejects the last-in-time rule in favor of an internationalist view of the relationship between international and domestic law.¹⁸⁰ This internationalist history of the last-in-time rule has gone completely unchallenged until now. The account has two components.

First, the internationalist account emphasizes the Founding generation's broad embrace of natural law. This is important because it reflects their understanding that the law of nations, or international law, constitutes a fundamental component of natural law. Moreover, the Founders believed that natural law, including international law, should operate as a constraint on positive man-made law.¹⁸¹

Second, the internationalist history relies on specific statements (made by key members of the Founding generation before, during, and after the ratification of the Constitution) that support the higher or superior status of international law, particularly treaties, over domestic law. Such statements, the story goes, reflect a specific understanding that treaties cannot be superseded by domestic federal law unless the superseding act itself conformed with international law.¹⁸²

While there is much to admire in Professor Lobel's careful treatment of the historical evidence surrounding the last-in-time rule, his account is nonetheless incomplete. As I will explain, Professor Lobel's conclusions, as well as the internationalist commentators who have relied on them, overstate the extent of the Founders' commitment to treaties over domestic law.

Most importantly, Professor Lobel's discussion fails to adequately consider the origins of the last-in-time rule in both the British legal tradition and in the pre-Constitution Articles period. The last-in-time rule did not, as Professor Lobel argues, emerge only in the nineteenth century as part of an ideological conversion of the federal judiciary to doctrines of absolute sovereignty.¹⁸³ Rather, under the legal tradition that the Founders received from England, the last-in-time rule was commonly applied to resolve conflicts between various forms of enacted law, even if those laws were enacted by different lawmaking institutions.

Within this received legal tradition, the concept of a "higher law," that was also *positive* law and judicially enforceable, was hardly a well-settled proposition. Instead, much of the English legal tradition, best represented by Blackstone, drew a sharp distinction between natural law, which included the law of nations, and positive man-made law that could be interpreted and enforced by man-made institutions such as courts. As I will show, the Americans generally accepted this English distinction and

178. *E.g.*, Lobel, *supra* note 27, at 1076–96.

179. Professor Lobel's work has been tremendously influential on other scholars' consideration of the historical basis for the last-in-time rule. *E.g.*, Paust, *supra* note 108, at 763 n.28; Vasquez, *supra* note 6, at 2204 n.206; *see also* HENKIN, *supra* note 28, at 201.

180. Lobel, *supra* note 27, at 1100.

181. *Id.* at 1078–90.

182. *Id.* at 1090–100.

183. *Id.* at 1100–10.

applied the last-in-time rule, the traditional rule for resolving conflicts among enacted positive law.

The American application of the last-in-time rule to resolve conflicts among different forms of enacted positive law, however, created difficulties during the Articles of Confederation era because it permitted states to violate laws and treaties concluded by the central government by passing statutes *later in time*. This problem was addressed in the Constitution by altering the last-in-time rule with respect to state law. At the same time, the Constitution's drafters emphasized the importance of giving the Constitution itself higher law status. The resulting framework created a three-tier system of law: constitutional law, federal and treaty law, and state law. Within each tier, the last-in-time rule was understood to resolve conflicts.

As Professor Lobel points out, there is some evidence that the Founding generation intended to give treaties a "higher" status as positive, judicially enforceable law.¹⁸⁴ But much of the evidence he cites does not support his main contention, and, as I will argue, the evidence supporting the last-in-time rule is far stronger and more persuasive than Professor Lobel and other internationalists have recognized.

Of course, my historical account is hardly neat and conclusive.¹⁸⁵ My purpose in embarking upon this lengthy historical investigation is not to find conclusive evidence of original intent. Rather, even if one does not subscribe to "originalism," the insights and thoughts of the Founding generation on this question cannot be ignored in attempting to resolve difficult constitutional interpretations.¹⁸⁶ Moreover, in this case, historical evidence is particularly important because of the way critics have relied on the original understanding of the Constitution to justify their rejection of the last-in-time rule.¹⁸⁷ Finally, a comprehensive historical discussion is necessary because judicial applications of the last-in-time rule have failed to offer a detailed and persuasive justification either on textual or historical grounds.

My modest goal here is to knit together, for the first time, a coherent historical account that explains and justifies the application of the last-in-time rule to treaties and federal statutes.

B. *The English Legal Tradition*

The English legal tradition remains a fixed starting point for any attempt to discuss the development of American law in the eighteenth century. Many members of the Founding generation were trained in English law and believed themselves to be part of the English legal tradition.¹⁸⁸ For this reason, the English treatment of the last-in-time

184. *Id.* at 1100.

185. Indeed, as Professor Flaherty has famously argued, historical analysis as practiced by constitutional law theorists often sacrifices historical credibility for "reductive simplicity." Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 529 (1995).

186. For a more detailed explanation of this view, see H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 26–30 (2003) (arguing that views of Founders are indispensable, though not exclusive, tools of constitutional interpretation).

187. *E.g.*, HENKIN, *supra* note 28, at 201–04; PAUST, *supra* note 26, at 100.

188. FORREST McDONALD, *THE AMERICAN PRESIDENCY* 12–13 (1994) (describing American lawyers' knowledge of English law during the framing of the Constitution).

rule is a necessary foundation for any meaningful discussion. Moreover, the key to unraveling the basis for the last-in-time rule is to understand its origin as an English rule of statutory interpretation.

1. Blackstone and English Law

A crucial source for understanding the nature of English law, at least English law as understood by eighteenth century American colonists, is the work of William Blackstone. Blackstone's work was widely distributed and utilized during the pre-revolutionary period.¹⁸⁹ For this reason, his framework for classifying different types of law provides a crucial insight into the Founding generation's understanding of the relationship and relative hierarchy of different forms of law.¹⁹⁰

In his famous treatise, *Commentaries on the Laws of England*,¹⁹¹ Blackstone identified four kinds of law. The first, and most supreme law, is the law of nature.¹⁹² This law reflects the will of the Supreme Being and, while man has free will, this free will is "in some degree regulated and restrained" by the law of nature.¹⁹³ Reason plays an important role in the discovery of the law of nature, but its imperfection requires that, in some cases, law can only be found through divine revelation. This law of revelation has "infinitely more authority than" the law of nature because the latter "is only what . . . we imagine" through reason to be that law.¹⁹⁴

In addition to the two foundational forms of law, a third kind of law is needed to regulate intercourse between the different states to which man has organized himself. This "law of nations . . . depends entirely upon the rules of natural law, or upon" treaties or other agreements between those communities.¹⁹⁵

These three forms of law form the backdrop for Blackstone's principal interest: municipal law. This type of law is defined as "a rule of civil conduct prescribed by the supreme power in 'a state, commanding what is right and prohibiting what is

189. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193 (1984). Sales of Blackstone's *Commentaries on the Law of England* sold well in the American colonies. About 2500 copies had been sold by the start of the Revolution in 1775, with 1400 advance orders received before the first American edition became available between 1771 and 1772. See EDWIN S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 85 n.126 (Cornell Univ. Press 1974) (1928).

190. Although Blackstone had an unquestioned influence on the Founders' thinking, his work has received relatively less scrutiny in the American legal academy. The leading American discussion of Blackstone's work remains Daniel Boorstin's famous book, *The Mysterious Science of Law*, which salutes Blackstone's synthesis of politics and law. DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES (1958). For other discussions of Blackstone's importance, see PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM 109-13 (2003); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

191. The University of Chicago Press (1979) edition of Blackstone's work is used throughout this paper.

192. 1 *id.* *38.

193. 1 *id.* *39-40.

194. 1 *id.* *42.

195. 1 *id.* *43.

wrong.”¹⁹⁶ Municipal law, like all human laws, rests on the foundations of the law of nature and the law of revelation. In fact, no human laws should contradict these laws. But a great many more mundane issues are left unresolved by the law of nature and the law of revelation, and human laws can have wide latitude to specify rules for those issues.¹⁹⁷

The power to prescribe municipal law is lodged in the supreme power of a state. There are, Blackstone observes, various forms of government that allocate this power differently. In England, the power is uniquely shared between the two houses of Parliament with the executive power controlled by the King.¹⁹⁸

For my purposes, it is crucial to understand Blackstone’s conception of the relation between the law of nature and municipal law. For certain “natural rights,” duties, and crimes, a human lawgiver only declares what is already accepted to be true. Murder, theft, and perjury, for instance, are no more wrong simply because the human lawgiver has declared them to be wrong.¹⁹⁹ On the other hand, for the many “indifferent” matters, the sovereign holds the last word on right or wrong depending on its judgment about the overall welfare of the society.²⁰⁰

2. Blackstone and the Last-in-Time Rule

For Blackstone, municipal law is “divided into two kinds; the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.”²⁰¹ The unwritten law is derived from custom, while written statutory law is “either declaratory of the common law, or *remedial* of defects” within it.²⁰² Remedial statutory law fixes imperfections in the common law attributable to mistakes by judges or to the general imperfections of all laws.²⁰³ In light of this remedial function, “[w]here the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one.”²⁰⁴

This framework helps to explain why unwritten law (common law) and written law (statutory law) are subject to different rules for resolving conflicts. When there is a conflict between the common law and a statute, the statute *always prevails*, no matter whether the statute was passed earlier in time to the judicial decision finding a conflict. Because the unwritten law is understood to have pre-dated all statutes and enacted law, no statute could, under this framework, ever exist prior in time to a common law rule.

In contrast, the power to repeal an old statute is a natural and necessary rule given statutory law’s function as a system of supplemental rules devised to revise or perfect the common law. The Latin formulation of this concept, *leges posteriores priores contrarias abrogant* (later laws abrogate prior laws that are contrary), was recognized

196. 1 *id.* *44.

197. 1 *id.* *46–67.

198. 1 *id.* *47–50.

199. 1 *id.* *54.

200. 1 *id.* *55; See also Carrese, *supra* note 190, at 129 (describing Blackstone’s positivist approach).

201. 1 BLACKSTONE, *supra* note 191, *63.

202. 1 *id.* *86 (emphasis in original).

203. 1 *id.*

204. 1 *id.* *89.

both by Coke in his famous *Institutes of the Laws of England*, and by Matthew Bacon.²⁰⁵ Blackstone went so far as to call the *priores contraria* doctrine a “maxim of universal law . . . laid down by a law of the twelve tales at Rome.”²⁰⁶

The power is so important, in fact, that Blackstone makes clear that “[a]cts of parliament derogatory from the power of subsequent parliaments bind not.”²⁰⁷ In Blackstone’s conception, the legislature’s sovereign power “acknowledges no superior upon earth, which the prior legislature must have been, if it’s [sic] ordinances could bind the present parliament.”²⁰⁸

The importance Blackstone places on statutory law, as well as the sovereign authority of the legislature, naturally calls into question the ability of courts to modify or repeal such law. While conceding that some have argued “acts of parliament contrary to reason are void,” Blackstone doubts that this principle has ever been adopted in English law.²⁰⁹ “[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.”²¹⁰ Further, “there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words.”²¹¹

3. Summary

Blackstone’s framework for understanding different types of law is significant to the origins of the last-in-time rule for at least two reasons. First, it shows that English law accepted the notion of higher law in the form of the law of nature and the law of revelation. But it also establishes that English law gave sovereigns wide latitude to enact municipal law. Through common law development and “remedial” statutes, courts and legislatures prescribed rules of conduct for their subjects.

Second, Blackstone’s approach, while recognizing the existence of higher law, did not recognize the power of courts to enforce these forms of higher law as *positive* law that would supersede enactments of Parliament. In this elaborate hierarchy, municipal laws were only repealed by subsequent *municipal* laws. Such repeals could only occur when conflicts were absolutely clear and no other possible construction could be found.

To be sure, Professor Lobel has argued that Blackstone is not a fair representative of the whole English tradition because other influential English law authorities recognized the ability of courts to apply natural law principles to constrain or even overturn municipal law.²¹² In support of this view, he cites Lord Coke’s famous dictum in *Dr. Bonham’s Case* that “when an act of Parliament is against common right and

205. See, e.g., 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 638 (London, W. Strahan 4th ed. 1778); 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 43 (London, M. Flesher 1644).

206. 1 BLACKSTONE, *supra* note 191, *40.

207. 1 *id.* *90.

208. 1 *id.*

209. 1 *id.* *91.

210. 1 *id.*

211. 1 *id.*

212. See Lobel, *supra* note 27, at 1082–83.

reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."²¹³

But declaring the conformity of statutes to natural law does not mean that courts could therefore ignore improper statutes. Rather, Coke's principle may only have required courts to *construe* and *interpret* statutes to conform with recognized legal principles.²¹⁴ As I will discuss in the next section, Americans influenced by Coke, such as James Otis, probably understood the principle in this more limited way.²¹⁵

Thus, within the English tradition, the legislature's sovereign power, though limited by the law of nature and revelation, remains broad within the realm of municipal man-made laws. Indeed, as one influential historian argues, Blackstone's conception was so broad that it made Parliament the

sovereign lawmaker of the realm, whose power, however arbitrary and unreasonable, was uncontrollable. Parliament could now actually create new law whose binding force came not from its intrinsic justice and conformity to the principles of the common law, but from its embodiment of the will of the social constituents of the nation or simply its sovereign authority.²¹⁶

Therefore, any "natural law limitations on the power of Parliament were strictly theoretical."²¹⁷ In this light, it is hardly surprising that English law adopted the "universal maxim" of the last-in-time rule, as opposed to appeals to broader conceptions of natural law and justice, to resolve conflicts among municipal man-made laws.²¹⁸

C. Law in Pre-Revolutionary America

Blackstone's conception of law and of the importance of a legislature in shaping law through statutes was well known in pre-revolutionary America.²¹⁹ But it would be a mistake to believe colonial thinkers uncritically accepted Blackstone's approach on all aspects of law, or even on fundamental questions such as the supremacy of the legislature over municipal law. In fact, historians have argued that colonial Americans underwent subtle but significant changes in their conception of law that eventually departed from Blackstone and other English traditions. Thus, as Bernard Bailyn puts it, law for Americans was reconceived from "a command 'prescribed by source superior and which the inferior is bound to obey'" into "the view 'that the only reason why a

213. *Id.* at 1081 (quoting 77 Eng. Rep. 638, 652 (1610)).

214. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 177 (1967); Samuel E. Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 545 (1938).

215. BAILYN, *supra* note 214, at 188; see *infra* text accompanying notes 218–27.

216. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* at 265 (1998).

217. *Id.* at 260.

218. 1 BLACKSTONE, *supra* note 191, at 49.

219. See David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 484 (1993) (noting that sixteen of the signatories to the Declaration of Independence were known to have purchased the Commentaries).

free and independent man was bound by human laws was this—that he bound himself.”²²⁰

Colonial Americans’ emphasis on reason as the basis for law’s force and authority naturally led them to consider limitations on the scope of a lawmaker’s power. Thus, the important pre-Revolutionary thinker James Otis could state “not only [that] an act of Parliament ‘against the constitution is void,’ but that it was the duty of the courts to ‘pass such acts into disuse,’ for the ‘reason of the common law [could] control an act of Parliament.”²²¹ In other words, Otis suggested that natural law in the form of a constitution could somehow justify a court’s rejection of an act of Parliament. Certain rights exist that “no man or body of men, not excepting Parliament, justly, equitably, and consistently with their own rights and the constitution can take away.”²²²

Professor Lobel has cited this and other statements by the influential Otis as evidence that American colonists and legal thinkers rejected Blackstone’s commitment to parliamentary supremacy.²²³ But Otis’s views on the role of courts in controlling parliamentary acts are deeply ambiguous. Otis’s robust conception of natural rights appeared to co-exist with his faith in Parliament as the ultimate institution empowered to protect the natural rights he valued.²²⁴ As Professor Wood explains, Otis “never conceived [of natural rights] being so fundamental that they had to be differentiated and separated from the institutions of government and the ordinary statutes of Parliament.”²²⁵ In this way, Otis’s ambivalent opinions on the acceptability of judicial control over statutes coincided with most English thinkers.²²⁶

It is here that Professor Lobel’s otherwise convincing analysis runs into difficulties. Much of his argument depends on discussions of a variety of natural and international law authorities and statements by members of the Founding generation endorsing the supremacy of those authorities.²²⁷ But he does not appreciate the significance of the intermediate position sketched out by Otis and others, which paid respect to the supremacy of natural law while at the same time denying any institution other than the sovereign legislature the authority to alter municipal law to enforce this supremacy.

Otis matters because he has been credited by historians for serving as a crucial bridge between the traditional English law framework outlined by Blackstone and the

220. BAILYN, *supra* note 214, at 174 (quoting James Wilson).

221. *Id.* at 176 (alteration in original).

222. WOOD, *supra* note 216, at 262–63 (quoting James Otis).

223. See Lobel, *supra* note 27, at 1081 n.48.

224. See BAILYN, *supra* note 214, at 177.

225. WOOD, *supra* note 216, at 262–63.

226. See Thorne, *supra* note 214, at 545; see also 1 KENT, *supra* note 75, at 419–20:

When it is said in the [English law] books that a statute contrary to natural equity and reason or repugnant or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as to the binding efficacy of the statute. The will of the legislature is the supreme law of the land, and demands perfect obedience.

227. See, e.g., Lobel, *supra* note 27, at 1078–84.

reason-based, constitution-centered focus of Revolutionary America.²²⁸ He appears to have laid the intellectual groundwork for later American intellectual innovations—in particular, the distinctive American commitment to higher written constitutional law. For our purposes, it is important to recognize the prevailing baseline assumption during the colonial period: municipal law, or human law, remained subordinate to natural law. The hard question that Americans began to face, however, revolved around who had the power to shape or revise municipal man-made law to conform to increasingly robust conceptions of natural law popular in colonial America. The first examples of this struggle can be found in the years after the approval of the Articles of Confederation in 1778.

D. The Articles Period

The Revolutionary War and its aftermath have often been overlooked by constitutional law scholars in favor of the Philadelphia Convention and subsequent state ratifying conventions.²²⁹ But historians have long considered the importance of the establishment of the Articles of Confederation at the outset of the war, and its operation throughout the 1780s, as an important period for the formation of American constitutionalism and of American law in general.²³⁰ Indeed, as I will explain, the Articles Congress, both in war and peace, faced difficult legal questions about the legal force of the Articles themselves and of treaties concluded under the authority of the Articles Congress.²³¹ Their resolutions of these questions reveal the continued importance of the last-in-time rule as a mechanism for resolving conflicts among laws. Most importantly, the evidence from the Articles period establishes that major figures in the Founding period recognized that the last-in-time rule governed conflicts between treaties and municipal law.

1. Constitutions and Higher Law

Although his approach has been criticized by historians in recent years,²³² Gordon Wood's argument about the development of American constitutionalism remains enormously influential, especially in the legal academy. Wood famously argued that American constitutionalism represented a serious and meaningful break with its English political and legal heritage as well as a reaction to the excesses of the state governments during the Articles period.²³³

The idea of a constitution revealed and clarified by 1776 was not only explored and expanded in the subsequent years but the metaphors and analogies that

228. See BAILY, *supra* note 214, at 186–87.

229. See Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 784 (1993).

230. See, e.g., WOOD, *supra* note 216, at 421–29.

231. See *infra* Part IV.D.2.

232. See, e.g., MARC W. KRUMAN, *BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 109–30 (1997).

233. WOOD, *supra* note 216, at 421–29.

underlay the Americans' constitutional conceptions were radically altered as well—all contributing by the late 1780's to an often unsurely grasped but decisively new interpretation of the character of constitutional restraints on political power.²³⁴

This evolving conception of constitutional law meant that although the American colonies had embraced constitutions, and even written constitutions, the prevailing practice of state assemblies during the Articles period was to amend such constitutions or state charters through ordinary legislation.²³⁵ How could ordinary legislation alter written constitutions? Because of the very doctrine identified by Blackstone as the "universal" maxim, the last-in-time rule. This rule forbade a prior legislature from binding its successors. Thus, as Jefferson observed with respect to Virginia's own constitution, "[b]ecause no legislature could pass an act transcendent of the power of other legislatures, the [Virginia] Constitution was merely an ordinance" with "no higher authority than the other ordinances of the same session."²³⁶

Not all Americans agreed, however, with the prevailing practice of amending constitutions via ordinary legislation. As early as 1784, Thomas Tudor Tucker argued in a South Carolina pamphlet that a constitution should be a fundamental law "declared paramount to all acts of the Legislature, and irrevocable and unalterable . . ."²³⁷ The last-in-time rule, though widely recognized and accepted, appeared to be an obstacle to the growing American commitment to fundamental constitutional law.

Even as Americans disagreed on the status of fundamental law, they also worried about the role of courts in enforcing a fundamental law. Because colonial and early state courts held so much discretion in the application of a hodgepodge of English common law and local statutory law, courts were the natural forums for enforcing this constitution against the legislature. But the idea of giving courts the power to overturn legislative acts troubled Americans during this period. Giving courts such a power, James Madison observed in comments on Jefferson's draft constitution for Virginia, "makes the Judiciary Department Paramount in fact to the Legislature, which was never intended and can never be proper."²³⁸

Americans thus struggled with at least two difficult problems related to the last-in-time rule during this period. First, the American commitment to a robust form of natural law, first promulgated by thinkers like Otis in the pre-war period, clashed with the notion of legislative supremacy embodied in the last-in-time rule. Second, even as some Americans, like Jefferson, moved to enshrine constitutional law with superior legal force, they recognized that this would give courts the authority to essentially overrule legislative acts.

2. The Articles and Higher Law

The problem of the lack of "higher law" status for state constitutional law also existed with respect to the Articles of Confederation. The legal status of the Articles

234. *Id.* at 259–60.

235. *Id.* at 274–75.

236. *Id.* at 276.

237. *Id.* at 281.

238. 6 THE PAPERS OF THOMAS JEFFERSON 315 (Julian P. Boyd ed., 1952).

with respect to state law was highly ambiguous and contested. Indeed, the Articles were considered by many Americans to be a mere treaty between the state governments rather than a constitution.²³⁹

The language of the Articles reflects its treaty-like status. It established a “firm league of friendship” to better “secure and perpetuate mutual friendship and intercourse among the people of the different states in this union.”²⁴⁰ Further, the Articles make clear that “[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated. . . .”²⁴¹

Although the Articles do not contain any provision similar to the Supremacy Clause, they do grant the Articles Congress the “sole and exclusive right and power of . . . entering into treaties”²⁴² Even this power was limited to exclude “treaties of commerce” that restrained the legislative power of the respective states from imposing duties and imposts on foreigners.²⁴³ Still, this limitation does suggest that, with that single exception, treaties made by the Articles Congress could restrain the legislative power of the states.

On the other hand, the practice of the states during the Articles period suggested that the treaty bound states only in the same way that natural law or the law of nations bound Parliament under Blackstone’s framework. State legislatures should respect treaty obligations, but if they breach those obligations, there is no positive law mechanism for remedying the breach. As Jefferson himself argued, the power to make a treaty under the Articles gives a power to treaty, but it does not “include *ex vi termini* a power to pass away every thing by treaty which might be the subject of the treaty.”²⁴⁴

Indeed, as I will discuss below, a number of states seemed willing to pass legislation in clear breach of the Treaty of Paris, the treaty ending the Revolutionary War and recognizing American independence. These violations suggest that treaties did not, under the Articles, hold a superior legal force as either “federal” law or higher “international” law.

3. *Rutgers v. Waddington*

One of the most famous disputes between a state law and the Treaty of Paris during the Articles period was litigated in New York by none other than Alexander Hamilton. *Rutgers v. Waddington*²⁴⁵ involved a suit by an American property owner against a British merchant for back rent due to that merchant’s occupation of the American’s property during the British wartime occupation of New York.²⁴⁶

The plaintiff’s claim relied on the Trespass Act, a New York statute enacted at about the same time that the Treaty of Paris was finalized. The Trespass Act authorized

239. See Golove, *supra* note 151, at 1702.

240. THE ARTICLES OF CONFEDERATION, art. 3–4.

241. *Id.* art. 2.

242. *Id.* art. 9.

243. *Id.*

244. 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 238, at 120.

245. *Rutgers v. Waddington* (N.Y. City Mayor’s Ct. 1784), reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 393 (Julius Goebel, Jr. et al. eds. 1964).

246. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 245, at 320–28.

claims by property owners for use of their land during the war and prohibited the pleading of military orders and military authorization as justification for the land use.²⁴⁷ The British defendant argued, however, that notwithstanding the Trespass Act, both the law of nations and the Treaty of Paris justified his occupation of the disputed property. In this case, the British defendant had paid rent to the British military authorities who had seized plaintiff's abandoned property upon occupying New York.²⁴⁸

Judge Duane's opinion in *Rutgers* is widely remembered for refusing to enforce the New York statute in the face of the law of nations, thus presaging both the rise of judicial review in the United States and a role for customary international law in domestic American law.²⁴⁹ The court's opinion dodged the question of whether the Treaty of Paris superseded the New York statute, suggesting that the treaty's status with respect to state law was difficult to resolve.²⁵⁰

To modern eyes, the conflict between the Treaty and the New York statute is a classic federalism question. But in 1784, the conflict between these two forms of law was much more complicated. Within the Blackstonian framework, the New York state legislature was the supreme sovereign legislative power. Thus, even if the treaty did impose some obligation on the New York court, the New York legislature's passage of the later-in-time Trespass Act could repeal the Treaty's effect within New York.

This is exactly the argument wielded by the plaintiffs. Even if the treaty was a valid exercise of the federal government's power under the Articles, the Articles had received only legislative ratification in New York. Therefore, any later-in-time rule could amend or repeal the previous legislative act, for example, granting Congress the power to make a treaty.²⁵¹

Hamilton's response to this argument reveals that the last-in-time rule for treaties was a serious and plausible position at the time. Most notably, Hamilton did not reject the plaintiffs' claim that a later-in-time legislative act could repeal a previously concluded treaty due to the international obligations imposed by the treaty. In fact, his brief to the court appears to concede that "the sovereign authority may for reasons of state violate its treaties and the laws in violation bind its own subjects."²⁵²

Instead of arguing against the last-in-time rule as a whole, he simply argues that the rule does not apply to individual state statutes. "[I]n our Constitution it is not true that the sovereignty of any one state has legally this power. Each state has delegated all power of this kind to Congress. They are equally to judge of the necessity of breaking as the propriety of making treaties."²⁵³ Importantly for my purposes, Hamilton

247. 1 *id.* at 319–20.

248. 1 *id.* at 326–27.

249. See, e.g., William N. Eskridge, *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1025 (2001); Prakash & Yoo, *supra* note 176, at 936.

250. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 245, at 377.

251. 1 *id.* at 380. To be sure, the plaintiffs also made two alternative arguments: an interpretive argument, contending that the treaty did not expressly contradict the Trespass Act; and a federalism argument, that the Treaty exceeded the federal government's authority under the Articles. 1 *id.* at 336–37.

252. 1 *id.* at 377–78.

253. 1 *id.* at 378.

concedes the power of a legislature to violate treaties, despite those treaties' international character.

Eventually, Hamilton focused his argument on interpreting the Trespass Act to avoid conflict with the law of nations and the treaty. This strategy proved a success. Even though Judge Duane's opinion seemed to declare that the treaty, made and ratified according to the Articles, "rendered its obligation perpetual," his focus remained on the problem of an individual state attempting to "alter or abridge" the articles of the treaty.²⁵⁴ On the other hand, "the operation and effects of the treaty, within our own state, are fit subjects of enquiry and decision."²⁵⁵ In these circumstances, echoing Blackstone, the judge conceded plaintiffs' argument that if the New York legislature "think fit positively to enact a law, there is no power which can controul [sic] them."²⁵⁶

Nonetheless, Judge Duane avoided the problem of whether the treaty repealed the statute by accepting Hamilton's claim that the statute could be read consistent with the law of nations and the treaty. Even here, his analysis reflects an assumption that the last-in-time rule could apply. Calling the last-in-time rule a "true rule," he invokes another canon of statutory construction to find for the defendants, explaining that "repeals by implication are disfavoured by law."²⁵⁷

Thus, although *Rutgers v. Waddington* stands today as a precursor of the American practice of judicial review, it also reveals the difficulties of reconciling American conceptions of law with the new Articles system. While Professor Lobel has cited the case to bolster the argument for judicially enforceable international law,²⁵⁸ neither he nor any other internationalist scholars have recognized that all of the players in the case the plaintiffs' counsel, Hamilton, and Judge Duane believed that a sovereign legislature could violate a treaty obligation by passing a later-in-time statute and that a court would be bound to enforce that law.

4. The Jay Report

Rutgers v. Waddington reveals, in great detail, the difficulties that leading attorneys such as Hamilton faced in reconciling treaties and laws during the Articles period. Of course, the disputes over the Treaty of Paris were not limited to New York, nor did the disputes over the treaty remain limited to the consequences of military occupation. In the end, Article 4 of the treaty, guaranteeing "Creditors on either side" that there will be "no lawful Impediment to the Recovery of the full value" of debts contracted prior to the war, became the greater source of conflict.²⁵⁹ Additionally, Article 5 added that

254. 1 *id.* at 413.

255. 1 *id.*

256. 1 *id.* at 415.

257. 1 *id.* at 417; see also WOOD, *supra* note 216, at 457 (discussing *Rutgers*).

258. See Lobel, *supra* note 27, at 1085.

259. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. 4 [hereinafter Treaty of Peace]. For background on the negotiation and final agreement, see SAMUEL F. BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* 51-121 (1962); RICHARD B. MORRIS, *THE PEACEMAKERS, THE GREAT POWERS AND AMERICAN INDEPENDENCE* (1965); Richard B. Morris, *The Durable Significance of the Treaty of 1783*, in *PEACE AND THE PEACEMAKERS, THE TREATY OF 1783* 230-50 (Ronald Hoffman & Peter J. Albert eds., 1986).

"it is agreed that all Persons who have any interest in confiscated Lands, either by Debts, Marriage Settlements, or otherwise, shall meet with no lawful Impediment in the Prosecution of their just Rights."²⁶⁰

Given that many postwar Americans were deeply in debt to British creditors, these two provisions empowering British litigants to seek recovery of their debts proved highly unpopular. A number of states began passing laws prohibiting courts from granting British creditors any recoveries.²⁶¹

These state laws prompted the Secretary for Foreign Affairs, John Jay, to circulate a letter to the states urging compliance with the offending treaty provisions. Jay's famous letter sketched a position on the legal status of treaties more radical than was recognized by the court in *Rutgers*. Treaties were the law of the land even without intervention of the state legislatures.²⁶² Additionally, the application of treaties should be a matter for courts following laws of nations and "that no individual State has a right by legislative Acts to decide and point out the sense in which their particular Citizens and Courts shall understand this or that Article of a treaty."²⁶³

Read more closely, however, it is far from clear that Jay is claiming that state *positive* law inconsistent with a treaty would have no effect. He elides the issue by stating that "[h]ow far such legislative Acts would be valid and obligatory even within the limits of the State passing them, is a question which we hope never to have occasion to discuss."²⁶⁴ He adds only that it is "[c]ertain . . . that such Acts cannot bind either of the contracting Sovereigns, and consequently cannot be obligatory on their respective Nations."²⁶⁵

Understood in the context of the Articles system, all this statement really means is that the "contracting sovereign," that is, the federal government, remains obligated to its treaty partner under international law despite state laws repealing a treaty's domestic law effects. It does not mean that courts should void any laws that are inconsistent with treaty obligations. Jay's main point is that the offending state laws are causing negative foreign policy consequences. Indeed, he concedes that "contracting Nations cannot like individuals avail themselves of Courts of Justice to compel performance of contracts. . . ." ²⁶⁶ Rather, the real threat is "an appeal to Heaven and to

260. Treaty of Peace, *supra* note 259, at art. 5.

261. See Jack N. Rakove, *Making Foreign Policy—The View from 1787*, in FOREIGN POLICY AND THE CONSTITUTION 1–3 (Robert A. Goldwin & Robert A. Licht eds., 1990)

262. 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS, FROM THE FIRST MEETING THEREOF TO THE DISSOLUTION OF THE CONFEDERATION, BY THE ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 204 (1821):

When therefore a treaty is constitutionally made, ratified and published by us, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention, consent or fiat of state legislatures . . . Hence it is clear, that treaties must be implicitly received and observed by every Member of the Nation

263. 32 JOURNALS OF CONTINENTAL CONGRESS, 1774–1789, 179 (U.S. GPO 1936).

264. 32 *id.*

265. 32 *id.*

266. 32 *id.* at 180.

Arms.”²⁶⁷ In other words, state violations of the treaty do not remove the international legal consequences of the treaty on the United States. This does not mean such state laws are void. Of course, it does mean that treaty partners could appeal to “Arms” to enforce their treaty obligations.

This understanding of Jay’s thinking is consistent with the congressional resolutions that were passed in response to his report urging states to repeal laws violating the treaty. Although the resolutions declare that “the Legislatures of the several States cannot of right pass any Act or Acts for interpreting . . . nor for restraining, . . . retarding, or counteracting the operation and execution of the same [because] they become the . . . Law of the Land . . . ,” the resolutions do not declare inconsistent state laws void.²⁶⁸ Rather, the resolutions explain that as a treaty of peace, the Treaty of Paris is a law of the United States, and therefore

all State Acts establishing provisions relative to the same objects, which are incompatible with it, must in every point of view be *improper*. Such Acts do nevertheless exist, but we do not think it necessary either to enumerate them particularly or to make them severally the subjects of discussion. It appears to us *sufficient to observe and insist*, that the treaty ought to have free course in its operation and execution, and that all obstacles interposed by State Acts be *removed*.²⁶⁹

Therefore, the Articles Congress requested “[t]hat all such Acts or parts of Acts, as may be now existing in any of the States repugnant to the treaty of peace *ought be forthwith repealed*, as well to prevent their continuing to be regarded as violations of that treaty. . . .”²⁷⁰

The phrasing of these resolutions does not make sense if Congress was simply declaring such laws inconsistent with treaty obligations. Having declared state laws in plain violation of international treaties, and having even been told by Jay that such laws could serve as a justification for war by a treaty partner, such laws were merely called “improper.” Then, after declaring that treaties are the “Law of the Land,” the resolutions are forced to concede that state laws in violation of the treaty “nevertheless exist.” Moreover, Congress is then reduced to “observ[ing] and insist[ing] that the treaty ought to have free course. . . .”²⁷¹

During debates over the Jay Report and its proposed resolutions, some members of Congress did in fact suggest that the resolutions need only declare that state laws violating the treaty were void. Madison responded that state court judges are more likely to rely on state law than national resolutions.²⁷² Importantly, he also argues that asking states to repeal the offending laws would be the best approach because

[A] distinction too . . . might be started possibly between *laws prior & laws subsequent to the Treaty*; a Repealing effect of the Treaty on the former, not

267. 32 *id.*

268. 32 *id.* at 181 (quoting unanimous resolution).

269. 32 *id.* (emphasis added)

270. 32 *id.* at 181–82 (emphasis added).

271. 32 *id.*

272. 33 *id.* at 728.

necessarily implying the nullity of the latter. Supposing the Treaty to have the validity of a law only, it would repeal all antecedent laws. To render succeeding laws void it must have *more than the mere authority of a law*.²⁷³

Madison's support for the plan to seek state-by-state repeal was broadly consistent with the Blackstonian framework concerning the relationship between different forms of enacted law. In Madison's conception, a treaty "would only repeal all *antecedent*

273. 32 *id.* (emphasis added and emphasis removed). Lobel concedes the existence of this statement but understates its importance by describing it, in a footnote, as "tentative." See Lobel, *supra* note 27, at 1097 n.134. Madison did not like the last-in-time rule, but his recognition of its existence was not tentative. See 33 JOURNALS OF CONTINENTAL CONGRESS, *supra* note 263, at 729:

In case these succeeding laws contrary to the Treaty should come into discussion before the Courts, it would be necessary to examine the foundation of the federal authority, and to determine whether it had the validity of a Constitution, paramount [sic] to the legislative authority in each State. This was a delicate question, and studiously to be avoided as it was notorious that although in some of the States the Confederation was incorporated with & had the sanction of their respective Constitutions, yet in others it rec'd a legislative ratification only and rested on no other basis. He admitted however that the word operate might be changed for the better & proposed in its place, the words 'be regarded' as violations of the Treaty which was agreed to without objection.

Jefferson's analysis of this issue was more ambiguous, but he appeared to take the same view. Responding to a complaint by the French Ambassador over an alleged violation of a treaty with France, he notes that his opinions have little weight with judges. "Their Guide is the Law of the Land, of which Law its Treaties make a Part." Thomas Jefferson, *Jefferson's Amplification of Subjects Discussed with Vergennes* (circa Dec. 20, 1785), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 238, at 107, 110. After explaining that Georgia law does not violate treaty obligations because it places French claim on same level as native, he explained:

The Treaty has placed the Subjects of France on a footing with Natives as to Conveiances [sic] and Descent of Property. There was no Occasion for the Assemblies to pass Laws on this Subject, the Treaty being a Law, as I conceive, superior to those of particular Assemblies, and repealing them where they stand in the Way of its Operation. The Supposition that the Treaty was disregarded on our Part in the Instance of the Acts of Assembly of Massachusetts and New Hampshire which made a Distinction between Natives and Foreigners as to the Duties to be paid on Commerce, was taken Notice of in the Letter of Nov. 20 And while I express my Hopes that, on a Revision of these Subjects, nothing will be found in them derogatory from either the Letter or Spirit of our Treaty, I will add Assurances that the U.S. will not be behind-hand in going beyond both, whenever Occasions shall offer of manifesting their sincere Attachment to this country.

Id. at 110.

laws.”²⁷⁴ In order for treaties to render “*succeeding*” laws void, thereby ending the last in time presumption, treaties would have to have “*more*” than the mere authority of law.²⁷⁵

In sum, the significance of the Articles period has often been overlooked by legal scholars, and critics of the last-in-time rule have been no exception. Contrary to the prevailing historical account of this period, the concept of treaties as “higher” law restraining positive lawmaking was not widely accepted during this period. Instead, the last-in-time rule was a well-settled doctrine for resolving disputes among different forms of enacted municipal law. States passed laws purporting to “repeal” treaties and Congress responded by asking the states to “repeal” the offending statutes. Key members of the Founding generation, especially Alexander Hamilton and James Madison, recognized that the last-in-time rule could operate to allow state legislatures to override the domestic effect of treaties by enacting later in time statutes.

E. The Constitutional Convention

It is well known that the state violations of the Treaty of Paris were one of the primary motivations for convening what became the Constitutional Convention in Philadelphia.²⁷⁶ But the eventual creation of a constitution giving treaties status as “supreme law” over the states did not by itself resolve the thorny question of how treaty law would interact with laws emanating from the new federal government. Members of the Convention did not focus a great deal of their attention on the treaty power,²⁷⁷ and to the extent they did, most of their energy was devoted to exploring the relationship between treaty law and state law.²⁷⁸ Still, there is little evidence that the members believed treaty law, once it became self-executing law, would have a higher status than other federal law due to its international character.

I. Treaties and the Supremacy Clause

Recent scholarly attention has focused on the difficult question of whether the framers intended treaties to have the status of “self-executing” law and on the scope of the treaty power over the states. The question of whether treaties would have a higher or lower status than federal law was never directly addressed in the context of the treaty power or the supremacy clause.

Thus, the delegates’ debates over the supremacy of federal law and treaties focused on the central government’s mechanism for ensuring federal supremacy rather than on the status of federal versus treaty law. For instance, the original Virginia Plan provided for a federal power “to negative” state laws in contravention with the Constitution or

274. See 33 JOURNALS OF CONTINENTAL CONGRESS, *supra* note 263, at 728 (emphasis added).

275. 33 *id.* (emphasis added).

276. See Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 *Persp. Am. Hist.* 233, 267–68 (1984).

277. *Id.* at 236.

278. See, e.g., Yoo, *Globalism*, *supra* note 6, at 2000–12.

with treaties.²⁷⁹ The “national veto” mechanism actually remained consistent with much of the last in time concept because it would have transferred to the new federal legislature the power to block inconsistent state law through a subsequent act of legislation.

For various reasons, the national veto plan was abandoned, with the delegates eventually settling on a supremacy clause granting the Constitution, federal statutes, and treaties supreme law status over state law.²⁸⁰ The discussions about including treaties in the Supremacy Clause, however, do not appear to directly contemplate the relation of treaties to other federal law or the Constitution.

The Convention records do support the view, however, that treaties were to have operation as law under the Supremacy Clause. For this reason, delegates such as James Wilson proposed amendments to give the House a role in treaty-making,²⁸¹ and Madison sought to distinguish between certain treaties that would operate as law on their own and others that would require action by the House.²⁸² Both of these proposals, however, were rejected. The final version of the Treaty and Supremacy Clause resulted in treaties that had the operation as supreme law and without any explicit subject matter limitations. The question of whether treaties had “higher” status was simply not raised in this context.

2. The Method of Ratification of the Constitution

This is not to say that the delegates did not share some understanding of the status of treaties vis-à-vis other laws. Although the question of how to ratify the new Constitution does not seem directly related to the status of treaty law, the decision to use popular conventions rather than state legislatures to ratify the Constitution reflected the delegates’ understanding that treaties and all other forms of enacted law could be repealed by an ordinary act of legislation.

As discussed previously, the pre-war and Articles period were characterized by a surfeit of intellectual discussion about the higher law status of constitutions.²⁸³ Americans were troubled by English insistence on parliamentary supremacy over municipal law and looked for a positive “higher law.” This contrasted with the Blackstonian and English conception of higher law as a moral, but not a positive, limitation on legislative power. The experience of divergent state governments during the Articles period, as many historians have argued, further confirmed the belief among key Americans that the new country needed a positive fundamental law.²⁸⁴

In particular, the concept of higher law collided directly with the last-in-time rule. As Jefferson and Madison discovered in their work on the Virginia Constitution, and as Hamilton discovered during his litigation in *Rutgers v. Waddington*, the last-in-time rule had been repeatedly invoked to limit the effect of state constitutional law, treaties, and the Articles of Confederation itself.

279. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911).

280. 1 *id.* at 164.

281. 2 *id.* at 400; Rakove, *supra* note 282, at 241 & n.14.

282. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 279, at 394.

283. See *supra* Part IV.D.

284. See, e.g., WOOD, *supra* note 216, at 260.

The decision by convention delegates to send their new proposed federal constitution to popular conventions, rather than to the state legislatures (in contrast to the way that the Articles had been approved), reflected an attempt to avoid the last-in-time rule. As Madison declared, the Articles were defective because, having been approved by the state legislature, “in conflicts between acts of the States, and of Congs., especially where the *former are of posterior date*, and the decision is to be made by State Tribunals, an uncertainty must necessarily prevail”²⁸⁵

Yates’s account of this declaration clarifies that Madison saw the last-in-time rule as the main obstacle to be overcome for enforcement of a fundamental higher law.²⁸⁶ While Madison’s view on the operation of the last-in-time rule was contested by opponents of the ratifying conventions, other delegates, like George Mason, appeared to believe the states would retain power to overrule even a constitution ratified by popular convention.²⁸⁷

Madison reiterated his argument for ratification by convention by again arguing that the last-in-time rule would allow states to overrule even the new Constitution. A description of his reasoning is worth quoting at length:

[Madison] considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a Constitution. The former in point of moral obligation might be as inviolable as the latter. In point of political operation, there were . . . important distinctions in favor of the latter. 1. *A law violating a treaty ratified by preexisting law, might be respected by the Judges as law*, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void.²⁸⁸

Madison was speaking of the difference between the Articles, a self-described “league” which plausibly had only the status of a treaty, and a constitution ratified by popular convention. Although states had a “moral” obligation to obey the Articles, this does not mean “a law violating a treaty” would not be respected by judges as law.²⁸⁹

Madison’s conception of the relationship of treaties to law reflects a synthesis of various competing conceptions of law percolating in the pre-war and post-war period. As Blackstone stated, all human law was subject to the higher laws of nature and revelation. However, only the sovereign had the authority to “make” positive human law and adjust it to conform with such higher law. In Blackstone’s conception, this supreme sovereign was Parliament, and no power could “controul” this sovereign.²⁹⁰

Americans like Otis had wanted to give greater positive content to the higher natural law,²⁹¹ and others began advocating for a written constitution to vindicate these higher law values.²⁹² But in practical terms, the courts and many state legislatures continued to

285. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 279, at 122–23 (emphasis added).

286. 1 *id.*

287. 2 *id.* at 91.

288. 2 *id.* at 93 (emphasis added).

289. 2 *id.*

290. 1 BLACKSTONE, *supra* note 191, at 49.

291. See *supra* text accompanying notes 221–27.

292. See *supra* text accompany note 237–38.

follow a Blackstonian approach claiming ultimate control over all positive law through, at the very least, the power to pass subsequent legislation. Madison, drawing from his experience in Virginia and in the Articles Congress, was attempting to find a solution to this problem by shifting Blackstone's notion of sovereignty away from the legislature and to the "people," who would act through ratifying conventions. This would give constitutional law, unlike the Articles and other treaties, a fundamental law status superior to ordinary legislation.

F. *The Ratification Debates*

The Philadelphia Convention is hardly the last word for those seeking to understand the original intent of the Constitutional text. As a matter of political theory, the acts of popular sovereignty embodied in the state ratifying conventions, and not the mere framing of the Constitution in Philadelphia, transformed the proposed Constitution into law. Hence, the meaning of the Constitution as understood by the ratifiers may hold greater weight than the intent of the convention delegates.²⁹³ Whether or not the ratifying convention materials are more important, the materials are at least as important as any other to understanding the last-in-time rule.

A review of debates from two of the major state ratifying conventions where the treaty power was discussed, Virginia and New York, reveals further evidence that a treaty's interaction with federal law was different from how that treaty would interact with state law. This stems, at least in part, from the debaters' focus on the relationship between the treaties and state law, which had now changed by virtue of the Supremacy Clause. Overall, the discussion in the ratifying debates, mainly (though not unanimously) supports my claim that the basic background assumption for resolving conflicts between treaties and federal statutes is the last-in-time rule.

1. Virginia

As the largest southern state, Virginia's ratification played a crucial role in the overall success of the Federalist campaign. For contemporary scholars of the treaty power, Virginia's convention is also important because the quality and depth of the discussion on the treaty power exceeds the recorded debates from any other state convention.²⁹⁴ Previous historical investigations of the last-in-time rule, however, have largely ignored the discussion in Virginia.²⁹⁵

The Anti-Federalists, led by George Mason and Patrick Henry, saw the treaty power created by the Constitution as a strange and dangerous innovation.²⁹⁶ Not only did Anti-Federalist critics attack the allocation of the treaty power to the President and the Senate without the inclusion of the House, but they also challenged the decision to give treaties status as domestic law and then to make them superior to state law. As Patrick Henry argued, "to say that [treaties] are municipal is to me a doctrine totally novel. — To make them paramount to the Constitutions and laws of the States is

293. Yoo, *Treaties*, *supra* note 6, at 2222 n.17.

294. See Flaherty, *supra* note 6, at 2147–49.

295. See, e.g., Lobel, *supra* note 27, at 1090–100.

296. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1380 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DOCUMENTARY HISTORY].

unprecedented.”²⁹⁷ He went on to argue, even more dramatically, that the treaties made will be paramount “to the Constitution, and everything.” Referring to the power to make treaties (which he imprecisely attributes to Congress rather than to the Senate), he charged, “[w]ill not the laws of Congress [treaties] be binding on Congress . . . ?”²⁹⁸

Henry’s attacks on the self-execution of treaties and the Federalist response have been the subject of exhaustive analysis and I do not mean to revisit that discussion here.²⁹⁹ Rather, I focus on the Federalist response to Henry’s claims because they reveal, albeit somewhat indirectly, certain Federalist assumptions about the relationship of treaty law to federal statutes. Three different Virginia Federalists attempted to rebut Henry’s attacks. In doing so, they supported the understanding of the Constitution’s text and structure outlined in Part III: treaties are subordinate to the Constitution but supreme over state laws. By implication, I contend, the Virginia Federalists also endorsed the equality of treaties and federal laws and the last-in-time rule.

a. Nicholas

Responding to Henry’s claims that the federal government could, by treaty, invade individual rights and subvert federal law and the Constitution, George Nicholas argued that the Supremacy Clause made clear that treaties are subordinate to the Constitution. Because treaties are made “under the authority of the United States,” treaties are limited to matters pursuant to the powers given to the treaty makers by the Constitution. Through this reasoning, Nicholas concluded that no treaty “repugnant to the spirit of the Constitution or inconsistent with the delegated powers” could be valid.³⁰⁰

Nicholas’s reasoning is somewhat convoluted because he essentially argues that the phrase “under the authority of the United States” limits treaties to whatever powers were delegated by the Constitution to the treaty makers in the same way that the phrase “in pursuance” limits federal statutes. Although he does not define the limits of the delegation “under the authority of the United States,” his response does provide evidence that supporters of the ratification understood that the last-in-time rule did not control conflicts between the Constitution and a treaty.

b. Corbin

Further attempts to respond to Henry’s charges about the “unlimited” treaty power, however, confused matters. Responding to complaints that treaties would be “paramount to the Constitution itself, and the laws of Congress,” Corbin declared that “[i]t is as clear, as that two and two make four, that the treaties made are to be binding on the States only.”³⁰¹

297. 10 *id.* at 1382.

298. 10 *id.* at 1395.

299. Compare Yoo, *Treaties*, *supra* note 6, at 2221–33, with Flaherty, *supra* note 6, at 2009–105.

300. 10 DOCUMENTARY HISTORY, *supra* note 296, at 1389.

301. 10 *id.* at 1392.

As Professor Flaherty has observed, whatever else might be said about it, this statement is far from clear.³⁰² It seems to suggest that treaties are supreme to state law but not supreme to any other kind of law. Because no other Federalist endorsed this view, Corbin himself may have had a different meaning. If the last-in-time rule serves as a background assumption, then Corbin's statement that "treaties made are to be binding on the States only" can be understood as drawing a distinction between treaties "binding" states irreversibly as opposed to treaties that could be subject to later congressional revision by statute. In this way, "binding" in Corbin's phraseology refers to giving treaties "supreme" status over the states. This understanding of Corbin's use of the phrase "binding" is confirmed by his warning that "treaties would never be complied with, if their observance depended on the will of the States . . . [f]or, if any one State could counteract any treaty, how could the United States avoid hostility with foreign nations."³⁰³

c. Madison

Corbin's statement confused Henry, who demanded clarification on whether treaties' domestic effects were as limited as Corbin argued. "Can any thing be paramount to what is paramount?-Will not the laws of Congress be binding on Congress, as well as on any particular State?-Will they not be bound by their own acts?"³⁰⁴

Madison's response to Henry's wild speculations about the new treaty power is illuminating. The treaty "power is precisely in the new Constitution, as it is in the Confederation."³⁰⁵ Under the existing system, "Congress are authorized indefinitely to make treaties."³⁰⁶ Referring to the state laws passed to comply with the Jay Report, Madison said that many of the states recognized the power of Congress to make treaties under the Confederation.³⁰⁷

Madison then goes on to argue that the treaty power, like any other delegation under the Constitution, is limited by the object of the delegation. He thus suggests a subject matter limitation on the treaty clause but rejects offering a specific definition of these limits for fear of endorsing, by implication, all other uses of the power. In any event, he states his belief that fear of abuse of the treaty power is mitigated by the fact that treaties deal with external matters. In such external matters, a national representative would naturally prefer the best interests of his own nation to that of the foreign parties.

Madison's faith in the new nationalist government and his distrust of the states, especially in foreign affairs, is well known. Thus, it is not surprising that Madison endorsed Corbin's argument, which Madison said "restrained the supremacy of these [treaties] to the laws of the particular States, and not to Congress . . ."³⁰⁸ Again, he emphasizes the importance of national control over treaties, noting that if treaties do

302. See Flaherty, *supra* note 6, at 2147-48.

303. 10 DOCUMENTARY HISTORY, *supra* note 296, at 1392 (emphasis added).

304. 10 *id.* at 1395.

305. 10 *id.*

306. 10 *id.*

307. 10 *id.* at 1411 n.11.

308. 10 *id.* at 1396.

not “supercede [state] existing laws . . . [they] cannot be of any effect.”³⁰⁹ But Madison appears to have few problems with the possibility of Congress’s laws coming into conflict with treaties because he agrees with Corbin’s statement that treaties do not restrain Congress.

Again, the background assumptions about the interaction of law are crucial for unpacking these complex and somewhat ambiguous statements. By endorsing “restrain[t]” of “the *supremacy*” of treaties, Madison almost certainly referred to the way “supremacy” is used in the Constitution to indicate a departure from the last-in-time rule. Moreover, given Madison’s prior statements about treaties and the last-in-time rule and his intention to use these statements to reject Henry’s claims about the dangers of treaties, his endorsement of Corbin’s statement is best understood as an endorsement of what is today the prevailing understanding: treaties are *supreme* to state law so that state law cannot override treaties, but treaties are *not supreme* to federal statutes. If they are not *supreme*, then they are, as Madison previously acknowledged, subject to the last-in-time rule.

2. New York

The most extensive explications of the treaty power and related issues in New York took place in the medium of the Federalist Papers. Although seen today as sources of overall original intent due to the reputation of their authors (Hamilton, Madison, and Jay), the Federalist Papers should also be understood as crucial contributions to the New York ratification debates. As such, it is important to consider them carefully because scholars have found support in them for rejecting the last-in-time rule.³¹⁰ A more careful reading, however, shows that the Federalist Papers also do not conclusively resolve this question.

a. Jay

John Jay offered one of the most detailed explications of the treaty power in Federalist No. 64. His choice of this topic was not surprising given his role as Secretary for Foreign Affairs in the Articles Congress. After explaining why the combination of the President and Senate would be an ideal way of handling the complex issues raised by foreign policy and treaty making, he responds to objections about the treaties being “supreme laws of the land.”³¹¹

He begins by acknowledging that the supremacy of treaties over domestic law is controversial. His opponents “insist and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure.”³¹² This “new and peculiar” doctrine leads Jay to point out that foreign countries will be unlikely to make a bargain that would bind them, but “on us only so long and so far as we may think proper to be bound by it.” He concedes that, like laws, “they who make treaties may alter or cancel them,” but

309. 10 *id.*

310. See, e.g., Lobel, *supra* note 27, at 1094–98.

311. THE FEDERALIST No. 64, at 436–37 (John Jay) (Jacob E. Cooke ed., 1961).

312. *Id.* at 436.

because treaties are created between two parties, the consent of both parties must “ever afterwards be [needed] to alter or cancel them.”³¹³

Jay appears here to be plainly rejecting the last-in-time rule for treaties, arguing that treaties can never be altered or canceled without the consent of the other party. His remarkable statement has been cited by critics of the last-in-time rule as evidence that the rule has weak originalist foundations.³¹⁴

Jay’s analysis is indeed remarkable, but it need not be fatal to the last-in-time rule. First, Jay was almost certainly focused, as was everyone at the time, on the relationship between treaties and *state* law. Hence, his discussion began as a defense of treaties being “the *supreme* laws of the land,” which is an obvious reference to the Supremacy Clause and its subordination of *state* legislation to treaties.³¹⁵

Second, Jay’s view that treaties cannot be altered or cancelled without consent from the other party correctly states the rule for ending treaties as a matter of international law. But it does not confront the difficult question of when a treaty may be violated by municipal legislation, which, as he well knows from his duties during the Articles period, frequently occurs as a matter of municipal law even when such treaties remain binding under international law.

Finally, the force of Jay’s argument should also be considered in light of his final claim, which echoes Madison’s statements in Virginia: “The proposed Constitution therefore has not in the least extended the obligations of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.”³¹⁶

Internationalists have focused on Jay’s claim that treaties are “beyond the lawful reach of legislative acts . . .”³¹⁷ But Jay is almost certainly arguing that treaties have binding force under international law whether or not municipal legislatures choose to violate them. This is the best way to make sense of his claim that the obligations of treaties are the same under the Constitution as under the Articles because he conceded that the Articles system allowed sovereigns to violate treaties by passing later in time legislation.³¹⁸ As a matter of international law, Jay is no doubt correct, which is why he feels able to extend his claim beyond even the Articles and the Constitution to “any form of government.”³¹⁹ But as a matter of domestic municipal law, Jay’s analysis does not make any sense. Jay knew as well as anyone else that the municipal law status of treaties, and indeed of the Articles themselves, was highly contested during the Articles period and that the last-in-time rule was understood to apply to conflicts between state law and treaties.

For these reasons, Jay’s statements should not be understood as a clear rejection of the last-in-time rule for treaties and federal statutes. Instead, Jay seems to be stating, as the Articles Congress recognized in their request that states repeal offending statutes, that treaties bind as a matter of international law despite being violated as a matter of municipal law. Nothing in Jay’s lengthy and influential discussion in the Federalist No.

313. *Id.* at 436–37.

314. See Lobel, *supra* note 27, at 1090–100.

315. THE FEDERALIST, *supra* note 311, at 436 (emphasis in original).

316. *Id.* at 437.

317. See, e.g., Lobel, *supra* note 27, at 1097 (quoting Jay, *supra* note 306, at 437).

318. See discussion, *infra* part IV.D.4.

319. THE FEDERALIST, *supra* note 311, at 437.

64 suggests he is claiming anything more. It certainly cannot serve as conclusive or even persuasive evidence for internationalist attacks on the last-in-time rule.

b. Hamilton

Jay's fellow New Yorker, Hamilton, offers a less ambiguous analysis of the treaty power and its status as law. Hamilton is writing to respond to critics seeking the inclusion of the House in the treaty process in order to avoid "intermixture" of legislative and executive powers.³²⁰ Hamilton observes that treaties "will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them." The power of making treaties relates "neither to the execution of the subsisting laws, nor to the enactment of new ones. . . . Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith."³²¹

Thus far, Hamilton's discussion of the necessity of having a single judicial tribunal for enforcing treaties as laws reflects a more pragmatic view of the problems of treaties operating as laws than the broad international concerns addressed by Jay. In discussing the necessity of a judicial power, he declares that if treaties are "to have any force at all, [they] 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."³²²

Under the Articles, Hamilton points out, treaties "are liable to the infractions of thirteen different Legislatures, and as many different courts of final jurisdiction, acting under the authority of those Legislatures."³²³ Thus, Hamilton grounded himself, unlike Jay, in the problems of treaties as positive law and openly conceded that treaties were overruled as a matter of domestic positive law during the Articles period.

c. Conclusions

To the extent that treaties were discussed during the ratification debates, both Federalist and Anti-Federalists focused on what we would recognize today as the federalism question. Treaties were supreme law of the land, and the debates appear to confirm that the new Constitution was intended to prevent the state violations of treaties that had occurred during the Articles period.

In this context, the question of the relationship between treaties and federal law was largely overlooked. Surprisingly, the Anti-Federalists' main fear outside the federalism context was that treaties could somehow trump the new Constitution. This argument was rejected by all Federalists. But the very idea that a treaty (or any other federal law) could override the Constitution reflects the pervasiveness of the concept of the last-in-time rule during this period.

The Founding generation poster-child for internationalists, John Jay, did not necessarily seek a complete rejection of the last-in-time rule. Like all participants in the

320. THE FEDERALIST NO. 75, AT 504–05 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

321. *Id.*

322. THE FEDERALIST NO. 22, AT 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

323. *Id.* at 144.

ratification debates, Jay focused on the supremacy of treaties over state law. Jay's claim that treaties could never be cancelled without agreement by the other treaty party reveals that he was probably analyzing treaties in their international character without taking into account the complications of how to carry out treaties under municipal law.

Hence, Jay's analysis should not be taken as conclusive evidence that the Founders rejected the last-in-time rule for treaties. In particular, Jay's ambiguous statements need to be read against the arguably less ambiguous statements made by Corbin and Madison during the Virginia convention. Corbin limited treaties' "supremacy" to state laws, and Madison backed up his fellow Virginian Federalist's interpretation. If treaties are supreme only to state laws, then the natural implication is that treaties are not "supreme" over federal statutes. If so, then the background assumption of last in time, of which Madison was well aware, applies.

G. Post-Founding Practice

To be sure, the ratification of the Constitution did not end disagreements about the nature of the treaty law as domestic law. Indeed, only a few years after the new federal government was established, it faced a national controversy over the legal effect of a crucial treaty with Great Britain negotiated by then Chief Justice John Jay. In the course of that debate, which focused on the role of the House in carrying out treaty obligations, more evidence emerged that the last-in-time rule applied to treaties and federal statutes.

1. The Jay Treaty

In 1795, John Jay negotiated a treaty to settle a number of continuing disputes between the United States and Great Britain. The Jay Treaty, as it came to be known, attempted to resolve the lingering dispute over the rights of British creditors to collect pre-war American debts. It was this dispute over rights of British creditors and legislation by states to nullify the rights of such creditors that had sparked Jay's original report to Congress during the Articles period. Jay now proposed to settle this problem once and for all by transferring all claims to an international commission.³²⁴

The Jay Treaty has historical importance in its own right, but it also serves as the first post-Founding battle over the status of treaties as domestic law. In particular, the Jay Treaty revealed a sharp split between the pro-British Federalists and their pro-French Republican opposition, who had greater numbers in the House than the Senate.³²⁵ The Republicans in the House, led by James Monroe, organized opposition to the Jay Treaty. Their first tactic was to demand that President Washington turn over documents relating to the negotiations before the House would consider federal legislation to carry out the treaty's obligations. Amid this debate, both sides confronted an issue—the relationship of treaties to federal statutory law—that they had rarely focused on before.

Washington appeared to realize that his response to the House's request would set a precedent, so he consulted his legal advisers, including Secretary of Treasury Oliver

324. See generally BEMIS, *supra* note 259.

325. See *id.* at 88.

Wolcott and Hamilton.³²⁶ He also received advice from then-Chief Justice Oliver Ellsworth although it less clear that this advice was solicited. All three advised him to reject the House's request although it is Wolcott's analysis that is the most relevant because he self-consciously cites Congress' power to repeal a treaty as evidence that a treaty is otherwise controlled by the President and Senate exclusively. Moreover, his memorandum has been largely ignored by prior historical accounts of the status of treaties as domestic law.³²⁷

a. Wolcott

Wolcott began by reviewing the history of treaties under the Articles. He points out that many of the Republican members of the House, including Monroe, had apparently endorsed the power of Congress to enforce treaties directly against the states during the Articles period. Wolcott goes on to describe the treaty power as an obligation of public faith on behalf of the whole nation. These obligations are "justly and properly declared to be *laws*; the legislative power is bound to regard and give them effect."³²⁸

He then rejects the Republican claims that treaties only have an effect on state, as opposed to federal, law. On a first reading, this appears to reject the approach Corbin and Madison advanced in the Virginia convention. But Wolcott goes on to criticize the Republican position as "nearly tantamount to a declaration that no treaty was binding until confirmed by an act of Congress."³²⁹ This is not a rejection of last in time. Rather, it is a rejection of non-self-execution for all treaties.

Excluding treaties from any matter controlled by Congress would not be a "reasonable limitation upon the power of making treaties" because treaties must necessarily change existing laws to be effective.³³⁰ Finally, he points out that if treaties could not repeal federal legislation, treaties of peace could not end war because they could not, in theory, repeal a congressional declaration of war.

Having sketched out a robust view of treaties as domestic law, Wolcott then tries to explain why an "unlimited" treaty power is reasonable. Simply because treaties could be abused does not mean limitations must exist, he contends, because many of Congress' powers are similarly unlimited. "The greatest abuses may happen under the most restricted forms of government which have been yet devised." Furthermore, abuse is less likely to go unchecked because

though treaties . . . have the force and obligations of laws in the United States, it is conceived that they are entitled to no precedence over acts of Congress. The House of Representatives has at any time a power to originate a bill for declaring

326. See Samuel B. Crandall, *Treaties, Their Making and Enforcement*, in 21 *STUD. IN HIST. ECON. AND PUB. LAW*, 115–21 (The Faculty of Political Science of Columbia University eds., 1904).

327. In fact, the only discussion of this memo I have uncovered is in Crandall's reference to it in 1904. See *id.*

328. *MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS*, EDITED FROM THE PAPERS OF OLIVER WOLCOTT, SECRETARY OF THE TREASURY 314 (George Gibbs ed., 1846).

329. *Id.*

330. *Id.*

war, or for doing any other act consistent with a treaty, and an *act declaring a treaty to be void would repeal its legal obligations* and afford evidence that the contract was at an end.³³¹

Wolcott's analysis thus takes a somewhat unexpected shift. Instead of defending treaties' preeminence over all municipal law, as internationalists might expect, he defends the President-Senate monopoly by devaluing treaties' longevity. Legislatures are always presumed to regard their obligations of "justice, morality, and good faith" and "the legislature are under no peculiar restrictions" when considering laws that conflict with treaties. Therefore,

[i]t is not . . . true, as has been said, that treaties cannot repeal laws, and that laws cannot repeal treaties. The reverse is true. Statutes and treaties of the United States are alike supreme laws of the land, and the *last act of whichever description, will control the former*.³³²

What is surprising about Wolcott's analysis is that he could simply have argued that treaties are supreme over federal law and thus Congress has no right to demand documents related to treaty making. By conceding that treaties and statutes are "alike supreme laws of the land," he actually opens the door to a Republican counter argument that if Congress has the right to repeal a treaty, it certainly has the discretion as to whether to implement one. Instead, he defends withholding the treaty documents on the narrower grounds that "[i]n the exercise of the duties committed to the President, secrecy and personal confidence are sometimes essential . . . and will not always permit a full disclosure of all documents. . . ."³³³

Thus, Wolcott made perhaps the first official recognition of the last-in-time rule for treaties and statutes in a concession to the Republicans that did not obviously support his overall legal position. Of course, the application of the rule to treaties did not originate from this memorandum. Rather, his application of the last-in-time rule to treaties and federal statutes flowed naturally from applying the basic *prioris contrarias* doctrine to the new framework created by the Constitution.

b. Ellsworth

Washington may have also solicited advice from the new Chief Justice of the Supreme Court Oliver Ellsworth. In a letter dated March 13, 1796, five days after being sworn in, Chief Justice Ellsworth wrote a letter to his fellow Connecticut resident, Senator John Trumbull, concluding that the House's demand should be rejected.³³⁴ This letter may also have been delivered to the President.³³⁵ Although he reaches the same conclusion as Wolcott on the House's request, he goes further than Wolcott in emphasizing the status of treaties.

331. *Id.* at 1796.

332. *Id.* (emphasis added).

333. *Id.* at 317.

334. See William R. Casto, *Two Advisory Opinions by Chief Justice Oliver Ellsworth*, 6 GREEN BAG 413 (2003).

335. Crandall, *supra* note 326, at 124–26.

Like Wolcott, Ellsworth begins his letter with the Constitution's description of treaties as supreme law of the land. As law, a treaty "instantly ipso facto repeals all existing laws so far they interfere with it. This is an inseparable attribute of a Statute or what has the effects of one . . ." He goes on to argue that "a Treaty can not be repealed or annulled by Statute because it is a compact with a foreign power, and one party to a compact can not dissolve it without the consent of the other."³³⁶ This appears to be a plain rejection of the last-in-time rule for treaties and statutes. Ellsworth's statement echoes Jay's approach in *Federalist No. 64*, except that, unlike Jay, he is clearly analyzing a conflict between a treaty and federal (as opposed to state) law.

This placed treaties beyond the reach of either state or federal legislative acts and allowed a foreign power to determine the applicability of a domestic law. But his elaboration of this statement reveals that he believed statutes and treaties would rarely conflict with each other. Statutes regulated commerce generally but treaties were necessary to secure privileges for American commerce and simultaneously secure privileges for the foreign party's commerce. Understood in this way, treaties and statutes are "reconcilable [sic] and respectively competent to the ends for which they were granted."³³⁷

Ellsworth's views are not quite as internationalist as they first appear. For instance, he concedes that in other contexts, the House might legitimately seek treaty documents for the purpose of rescinding a treaty. If, for instance, the House sought the papers to "impeach or to originate a declaration of war," it might have a claim to the treaty papers.³³⁸ At least with respect to a declaration of war, Ellsworth recognizes that Congress can, by law, repeal a treaty even without the other party's consent. Indeed, a few years later, Congress abrogated a treaty with France—not by declaring war, but by legislation passed in the midst of the Quasi-War with France during the late 1790s.³³⁹

c. Hamilton

Hamilton also advised Washington to reject the House's demands, although his proposed message for Washington came too late for Washington's consideration.³⁴⁰ Still, his reasoning is interesting because even though Hamilton is known for his stout defense of executive powers, like the presidential power to make treaties, he agreed with Wolcott that the last-in-time rule applied to treaties.

Hamilton identified the requirement of an agreement by a foreign sovereign as the unique characteristic of treaties. Hence, treaties could not include a subsequent role for the House because foreign sovereigns would have no guarantee of binding performance. Additionally, Hamilton agreed that treaties could not be constrained to those areas not governed by the federal legislative power. But then he draws an important distinction between the House's current efforts to constrain treaty making

336. Casto, *supra* note 334, at 414.

337. *Id.* at 415.

338. *Id.*

339. Act of July 7, 1798, ch. 67, 1 Stat. 578, 578 (providing for the removal of all obligations of the United States arising from treaties with France).

340. Alexander Hamilton, Message for Washington to Congress, in Reply to a Call for Papers Relating to the Treaty with Great Britain (Mar. 20, 1796), reprinted in 7 WORKS OF HAMILTON 118, 131 (Henry C. Lodge ed., 1886).

and the power of the Congress as a whole. If the legislative power was competent to repeal this law by a subsequent law, "it must be by the whole legislative power, not by the mere refusal of one branch to give effect to it. . . . A legal discretion to refuse the execution of a pre-existing law is virtually a power to repeal it."³⁴¹ In other words, Hamilton advised Washington that while Congress might repeal a treaty, the House alone could not.

Hamilton's involvement in this matter did not end after Washington rejected the House's demands because the House then began a month-long debate on whether to carry out the treaty. Hamilton launched a series of publications decrying the Republican House in what he called the "Defence." In these articles, he expanded and clarified his thinking on the nature of treaties with respect to federal law.

In *Defence No. XXXVII*, Hamilton reviewed the various constitutional objections to the Jay Treaty and found them wanting, not least because they appear to require rejecting the majority of the twenty-eight articles of the treaty.³⁴² In fact, many of the objections appear to complain of the treaty's intrusion on Congressional powers. Hamilton attacks these objections by pointing out how the same arguments about the treaty's intrusions on Congress' powers could be made on behalf of the states, were it not for the Supremacy Clause. Hamilton then claims, somewhat counter-intuitively, that no such clause is needed *because* the scope of treaty power is understood to be co-extensive with federal legislative power.

As such, the question naturally arises: "whether a Treaty can repeal *preexisting* laws?"³⁴³ It is interesting that Hamilton phrased the issue in this way. He could have followed Ellsworth and Jay and emphasized treaties' contractual and international character. Instead, he focused on treaties' relationship to *preexisting* laws as opposed to all laws. This focus only makes sense if one assumes, as he almost certainly did given his prior statements and experience in *Rutgers v. Waddington*,³⁴⁴ that the last-in-time rule could apply to treaties and statutes.

Echoing Wolcott, Hamilton concludes that because the Constitution gives "ipso facto force of law to Treaties, making them equally with the Acts of Congress, the supreme law of the land," a treaty must necessarily repeal an inconsistent, previously enacted law.³⁴⁵ As authority for this doctrine, he cites "*leges posteriores priores contrarias abrogant*." Thus, the last-in-time rule is applied to treaties because treaties under the constitution are laws. The necessary implication of Hamilton's reliance on this doctrine, however, is that statutes could override previously enacted treaties as well. If treaties were understood to be "supreme" to federal statutes, then no recourse to the last in time principles was necessary. Hamilton's analysis plainly accepts the equality of treaties and federal statutes and the operation of "*priores contraries*," or the last-in-time rule, to resolve conflicts between them. Given that the leading defender of executive power could have supported the more aggressive internationalist conception

341. *Id.*

342. See Alexander Hamilton, *Defence No. XXXVII*, in 3 THE AMERICAN REMEMBRANCER; OR AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, & RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN, NO. XII 259, 260 (Philadelphia, Henry Tuckniss 1796).

343. See Hamilton, *supra* note 340, at 118–37.

344. See *supra* text accompanying notes 244–57.

345. Hamilton, *supra* note 340, at 118–37.

articulated by Ellsworth, it is striking that he instead relied on the much weaker last in time defense.

Overall, the experience of the post-Founding administration is illuminating because characters central to the process of creating the Constitution were faced with difficult decisions about the operation of the Constitution. While Hamilton is the most prominent of the three discussed in this section, he, Ellsworth, and Wolcott could all fairly be described as important contributors to the creation and establishment of the Constitution. It is thus revealing that they do not fully agree on the relationship between treaties and federal statutes. The more pragmatic-minded Hamilton and Wolcott saw treaties and statutes as, for purposes of domestic law, completely equivalent and subject to the last-in-time rule. Ellsworth's short advisory opinion reflects a more idealistic view of domestic and foreign politics, which would require a nation to bind itself and its domestic law under international treaties until the other party cancels the treaty.

H. Summary

The leading internationalist account of the origins of the last-in-time rule offers an incomplete picture of the Founding generation's approach to resolving conflicts between treaties and domestic laws. It is true, as internationalist critics have emphasized, that the Founding generation accepted the force of natural law and that natural law was understood to include international law. It is also true, however, that such law was not understood by most Americans to hold the status of positive municipal law enforceable against a valid act of the legislature.

The Founding generation, steeped in the English legal tradition, followed much of the Blackstonian conception of law, including the last-in-time rule. This rule, understood in the Blackstonian framework, authorized a sovereign legislature to repeal its own prior-enacted municipal law.

The Founders did not, however, import British conceptions of law wholesale. This set the stage for one of the most important developments of the pre-Constitutional period. The Founders sought to explicitly state the basic fundamental law of the state in written form, and to shield that law from subsequent legislative acts. No such energy was devoted to ensuring that treaties would also have a higher law status.

In fact, state legislatures during the Articles period felt free to repeal the offending provisions in the Treaty of Paris, and the Articles Congress was reduced to requesting states to again repeal those acts. Even the Articles themselves created only a league of friendship, which was therefore subject to the last-in-time rule. Recognizing that even a treaty between the states was subject to the last-in-time rule, key figures like Madison sought to shield the new federal Constitution from the last-in-time rule by seeking ratification by popular convention and to use that new Constitution to subordinate state law.

To be sure, as internationalist scholars have argued, there is some evidence that influential Founders like Jay and Ellsworth believed treaties were exempt from the last-in-time rule. Historical analysis is seldom neat and its very messiness makes the use of history in legal scholarship both tempting and dangerous. In this case, the overall historical picture is not definitive. But the object of this section has not been to provide ironclad historical proof for the propriety of the last-in-time rule. Instead, this rather lengthy review of the historical evidence supplies what has heretofore been missing from scholarship on the last-in-time rule: a coherent account of how and why Founding

generation figures like Madison and Hamilton would have applied the last-in-time rule to treaties and federal statutes.

Given the inadequacies of existing internationalist accounts of the same period, I believe this account establishes that the last-in-time rule has a more substantial and persuasive historical foundation than existing scholarship has admitted.

V. THE CONSEQUENCES OF ACCEPTING THE LAST-IN-TIME RULE

In this Part, I explore the doctrinal and functional consequences of the last-in-time rule. I conclude that accepting the last-in-time rule requires considering treaties and federal statutes as “equivalent to an act of legislature” for all domestic law purposes. This “equality” conception³⁴⁶ of treaties and federal statutes, first developed by Marshall and supported by the text, structure, and history of the Constitution, gives treaties the status of self executing law that can repeal prior federal statutes, but it allocates final control over the domestic effect of treaties to Congress and subjects treaties to constitutional limitations.

In this way, the equality conception strikes a compromise between internationalist and revisionist views on the domestic effect of treaties. It requires greater political accountability and legislative flexibility than internationalists would seek but it also may encourage more U.S. participation in the development of “new” international law than some revisionists would prefer.

A. *The Equality Conception*

At the heart of the last-in-time rule is a basic conception: treaties and statutes have equal domestic legal status. Both are equally “Law.” Thus, although statutes are made by Congress via the processes set forth in Article I of the Constitution and treaties are made by the President with the advice and consent of the Senate as mandated by Article II, both result in “Law” of equal status within the domestic legal system. If conflict occurs, the traditional maxim *leges posteriores priores contrarias abrogant* applies. The equality conception challenges crucial elements of both the internationalist and revisionist conceptions of treaties.

1. Challenging the Internationalist Conception

Needless to say, the equality of treaties and statutes undermines important components of the internationalist conception. First, giving treaties and statutes equal status means that treaties do not always trump federal statutes in the way that internationalists have sought.³⁴⁷ The equality view concedes that treaties are laws, but rejects internationalist attempts to make treaties more than laws, at least with respect to federal statutes.

Second, while the equality principle accepts that treaties can repeal prior federal statutes, it does not endorse internationalist claims that Congress or the Senate is

346. I borrow this term from Louis Henkin. See Henkin, *supra* note 5, at 872.

347. See *supra* text accompanying notes 107–113.

powerless to subsequently limit or nullify the domestic effect of a treaty.³⁴⁸ Accepting that Congress has the power to repeal the domestic effect of a treaty means that Congress should have the power to render any treaty non-self executing through subsequent legislation.³⁴⁹ In this way, the last-in-time rule supports the Senate's widely criticized practice of conditioning consent to certain treaties through unilateral declarations of non-self-execution. If Congress can extinguish the domestic effect of treaties, than surely the Senate can, as part of its advice and consent process, accomplish the same result.³⁵⁰

Third, the equality of treaties and federal statutes strongly suggests that treaties are subject to the same limitations imposed on statutes by the Constitution. This includes, most controversially for internationalists, the same federalism limitations imposed on Congress' Article I powers. The equality view requires this result because if treaties could exceed the limitations imposed by federalism, such a treaty would also be immune from congressional repeal.

2. Rejecting "Sovereignist" Revisionism

On the other hand, the equality principle undermines "sovereignist" revisionist claims about the superiority of federal statutes over treaties.³⁵¹ Under Professor Yoo's conception, treaties and federal statutes could never come into conflict.³⁵² Any treaty or statute intruding on the authority of the other would be nullified, whether or not it was made last in time. At the very least, he argues, federal statutes should remain immune to repeal by treaties.

The equality of treaties and statutes simply cannot co-exist with this framework. The existence of the last-in-time rule and its recognition at the outset of the Constitution's establishment, presupposes conflicts between federal legislation and treaties. Historical practice confirms that treaties and statutes have overlapped in a variety of contexts from the beginning of the Republic.³⁵³ Equality requires giving treaties full status as domestic law, and this equality includes the power to repeal inconsistent prior-in-time federal statutes.

In sum, the equality view does not accept important components of both the internationalist and revisionist conceptions of treaties as laws. While the equality conception agrees with the internationalists that treaties are "Law," it requires giving treaties equal, not greater status than federal statutes. Treaties are "Law," no more and no less.

348. See, e.g., MOORE, *supra* note 6, at 71–88; Sloss, *supra* note 6, at 135–36.

349. See Vazquez, *supra* note 6, at 174–75.

350. *Id.*

351. See discussion *infra* Part II.C.2.

352. See discussion *infra* Part II.C.2.

353. See *supra* text accompanying notes 31–40.

B. The Advantages of Equality

1. Legislative Flexibility

By authorizing Congress to repeal the domestic effect of a treaty, the last-in-time rule leaves ultimate control over a treaty's domestic effect with Congress. But this does not mean that Congress will always act to weaken U.S. treaty compliance. Indeed, critics of the last-in-time rule rarely consider the possibility that Congress may impose a statutory exception to the last-in-time rule. For instance, Section 7852(d) of the Internal Revenue Code specified that

[n]o provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.³⁵⁴

Prior to its repeal in 1988, this provision guaranteed that when a tax treaty and the Internal Revenue Code came into conflict the tax treaty would prevail. The old provision was first included in the Internal Revenue Code of 1954 to ensure that the Code did not conflict with existing tax treaty obligations.³⁵⁵ Subsequent tax acts sometimes specified that the last-in-time rule did apply, while others held the opposite.³⁵⁶ Indeed, the amendment to Section 7852(d) maintained the superiority of treaties with respect to a number of provisions.³⁵⁷ For instance, section 894(a) maintained in 1988 that “[i]ncome of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income . . .” and exempt from taxation.³⁵⁸ Courts have thus enforced treaty obligations in the face of later in time statutes.³⁵⁹

Congress provided a similar suspension of the last-in-time rule when it enacted the Foreign Sovereign Immunities Act (“FSIA”) in 1976. Although the statute purported to remove sovereign immunity from foreign countries in a variety of circumstances, the act’s effect was, “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.”³⁶⁰ Congress thus suspended the operation of the last-in-time rule with respect to the FSIA and earlier in time treaties. Interestingly, the last-in-time rule means that subsequent treaties can override the

354. I.R.C. § 7852(d) (1986) (repealed 1988).

355. See Sachs, *supra* note 96, at 870.

356. See *id.* at 870–74. Many recent tax acts, by contrast, have specifically addressed interaction with treaties. For instance, the Revenue Act of 1962 expressly provided that “section 7852(d) [giving preference to treaties] . . . shall not apply in respect of any amendment made by this Act”. Revenue Act of 1962, Pub. L. No. 87-835, 76 Stat. 960, 1069–70 (1962). The Foreign Investors Tax Act of 1966, however, took the opposite approach. Although that Act reduced the burdens on foreign investors and thus no treaty violations were found, the Act (sec. 110) specifically provided that it did not apply in any case where its application would be contrary to any U.S. treaty obligation. Foreign Investors Tax Act of 1966, H.R. 13103, 89th Cong. § 110 (1966).

357. See *id.* at 318–20.

358. I.R.C. § 894(a) (1988).

359. See, e.g., Aiken Indus., Inc. v. Comm’r of Internal Revenue, 56 T.C. 925 (1971).

360. 28 U.S.C. § 1604 (2000).

FSIA, thus guaranteeing that treaties will always trump the FSIA provisions whether earlier or later in time.

Understood in this light, the last-in-time rule is not a license for Congress to ignore treaty obligations, as some internationalists have suggested. Instead, the last-in-time rule gives Congress the flexibility to reconcile domestic and treaty law in the manner it sees fit. In some cases, as with much of the Internal Revenue Code and the FSIA, Congress specified that treaties would trump even later in time statutes. In other cases, Congress decided otherwise.³⁶¹ But in all cases, Congress remained responsible for controlling the interaction of treaties and domestic law. Of course, it could also choose, as it has done on many occasions in the past, to leave control to the states.³⁶² The point is that the last-in-time rule leaves Congress a menu of options for carrying out these treaty obligations.

In contrast, if the last-in-time rule did not exist, Congress's menu of options would be reduced to one. Discarding the last-in-time rule would eliminate any role for Congress and require the adherence to treaties at all times. Treaties would always trump statutes, and no federal institution would have the authority to change that rule as a matter of domestic law. In this way, the critics of the last-in-time rule are seeking to enshrine international obligations into an inflexible law that cannot be adjusted or modified through the political process. Such an approach denigrates the importance of preserving a role for Congress in the supervision of international law.³⁶³

But it is far from obvious that all treaties should be shielded from the normal domestic political process. Some treaties deal with individual human rights, others relate to tax treatment, while still others concern themselves with contract interpretation. It is simply implausible that all treaties have an equal policy claim on "higher" status, as the *Restatement* seems to recognize.³⁶⁴ Some treaties might need to be shielded from normal congressional repeal, but others do not. Without the last-in-time rule, no domestic institution would have the ability to make such a judgment.

2. Greater Political Accountability

As discussed in Part I, the rise of a new kind of international law poses new challenges for U.S. foreign relations law.³⁶⁵ Internationalist scholars have generally supported greater authority for international organizations and international law within the U.S. system. For this reason, they have argued in favor of a treaty power

361. See, e.g., Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(a), (e)(2) (1994 & Supp. IV). See generally *Breard v. Greene*, 523 U.S. 371, 376 (1998) (interpreting AEDPA so that a habeas petitioner alleging violations of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings").

362. See *Ku*, *supra* note 62, at 501–06.

363. For a creative and important proposal for resolving the status of customary international law by seeking Congressional statutory incorporation, see T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004).

364. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 n. 1 (1987).

365. *Ku*, *supra* note 18, at 83–88.

unrestrained by federalism,³⁶⁶ the self-execution of treaties,³⁶⁷ and greater authority for international organizations.³⁶⁸

Each strain of the internationalist conception seeks to shield international law from various mechanisms of political control. For instance, an unrestrained treaty power is free from control by state government and a self-executing treaty "supreme" over federal statutes is free from control by the House of Representatives. When combined with internationalist enthusiasm for international institutions to interpret these treaties unconstrained by a non-delegation doctrine, treaties are also free from the control of the President and the Senate after their initial approval. This results in less participation by the political branches of the American system, both state and federal, in the creation and implementation of international treaties. I have argued elsewhere that the lack of domestic political participation in the creation and administration of international law undercuts that law's political legitimacy.³⁶⁹ International law, which already suffers from a "democracy deficit" and questions about its legitimacy needs more, rather than less endorsement, by the domestic political process.

The last-in-time rule serves as a sort of last line of defense in favor of political control over treaties. Even a self-executing treaty, unconstrained by federalism and controlled by an international organization, is still subject to repeal by congressional enactment under the last-in-time rule. In this way, the last-in-time rule serves as an insurance policy against excessive internationalization of U.S. law by treaties. Most importantly, it continues to place the ultimate decision over the domestic effect of an international treaty in the political branches of the federal government.

3. More Treaties

Somewhat ironically, the last-in-time rule's role as a last line of sovereigntist defense could end up encouraging greater U.S. participation in the development of the new international law. The internationalist conception of treaties poses a difficult dilemma for U.S. treaty makers. Once they approve a treaty, they essentially cede control over the treaty to the judiciary, foreign governments, and/or international institutions.³⁷⁰ Many modern international treaties transfer interpretive authority over a treaty to international tribunals such as the World Trade Organization panels or the International Court of Justice. Indeed, at least one member of the Supreme Court has argued that the international tribunal controls the final authoritative interpretation of the treaty for domestic law purposes.³⁷¹ Such an authoritative interpretation by an

366. See, e.g., Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHL.-KENT L. REV. 515 (1991).

367. See, e.g., Paust, *supra* note 108, at 775-78.

368. See Ku, *supra* note 18, at 75.

369. See *id.* at 121-31.

370. I have elsewhere described this process as a type of delegation. See *id.* at 80.

371. There are indications that at least some members of the current Supreme Court are willing to accept this type of delegation of treaty interpretation. Justice Breyer, dissenting from a denial of certiorari, has argued that the Court should at least consider whether its own treaty interpretation should be revised in light of an authoritative interpretation of that same treaty by the International Court of Justice. See *Torres v. Mullin*, 540 U.S. 1035 (2003).

international tribunal would override Supreme Court interpretations of the same treaty.³⁷²

Private litigants in both international and domestic settings will have incentives to use international treaties to advance a variety of public law concerns,³⁷³ as they have already done in the context of customary international law and human rights litigation.³⁷⁴ Given these possibilities, it is not surprising that the Senate has been hesitant to approve many major international agreements and that when they have done so, they have increasingly sought to declare such treaties non-self-executing.³⁷⁵

Without the last-in-time rule, the treaty makers would probably become even more hesitant to enter into treaties. The ability to impose limitations on the domestic effect of treaties has been a crucial factor in smoothing Senate passage of the major postwar international human rights agreements.³⁷⁶ If treaty makers lose the backstop of the last-in-time rule as well, their incentive to avoid making treaties would grow even stronger.

CONCLUSION

Treaties matter. This is hardly an original insight, yet it is nonetheless true that treaties hold the potential to become a central source of domestic lawmaking for the United States system. The explosion of international law in an era of globalization means that more and more treaties will seek to regulate new and different areas of law.

The potential of treaties to reshape domestic law troubled Americans even before the Constitution was adopted. In recent years, scholars have reopened questions about the status of treaties in domestic law and divided into two main groups. Internationalists believe international law, in particular treaty law, should become a more important and powerful force within domestic U.S. law. Revisionists have argued that the internationalization of U.S. law cannot occur at the expense of traditional constitutional limitations and concerns for democratic accountability.

The last-in-time rule, one of the least controversial – and least understood – doctrines of U.S. treaty law, does not fit comfortably into either conception. This may explain, at least partially, why it has drawn criticism from both sides. Most importantly, existing scholarship has failed to provide a meaningful defense of the rule. Indeed, as currently understood, the rule has no academic defenders nor have courts offered any serious textual, structural, or historical defense of the rule.

This article has provided just such a defense based on the text and structure of the Constitution and the historical evidence of the Founders' understanding of the relationship between treaties and statutes. Following Chief Justice Marshall, who explained that treaties are "equivalent to an act of legislation" under the Constitution, treaties are "Law" under the Constitution and serve as a basis for federal court

372. *Id.*

373. The most influential advocate of using international law in this regard is Dean Harold Koh. His conception of using public law litigation to develop and strengthen international law norms has been enormously influential. *See, e.g.,* Harold H. Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997).

374. *See, e.g.,* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

375. *See* Bradley & Goldsmith, *supra* note 6, at 457–59.

376. *Id.*

jurisdiction. The text and structure of the Constitution can (and should) be read to give treaties equal, as opposed to superior or subordinate status, with respect to federal statutory law.

A review of the historical materials related to the Founding of the Constitution confirms this textual and structural understanding. The concept of "Law" during the Founding era slowly evolved from a Blackstonian framework of municipal law controlled exclusively by the sovereign to a uniquely American concept of a higher law declared and controlled by the "people" as sovereign. This evolution in American thinking, however, also confirms the baseline assumption that all forms of law were subject to the last-in-time rule, or modification at the will of the legislative sovereign.

The historical record on how treaties were supposed to fit into this system is far from clear or conclusive. While the historical record remains somewhat murky, the bulk of evidence, largely overlooked by previous scholarship, supports the application of the last-in-time rule. Some Founders, like John Jay and Oliver Ellsworth, appeared to elevate treaties beyond even federal law, while others, like James Madison, Alexander Hamilton and Oliver Wolcott, sought to defend the treaty power by emphasizing its subjugation to the last-in-time rule. Ultimately, the last-in-time rule prevailed. Its eventual adoption should not be completely surprising because it flowed from the basic conception of law that underlay most of the Founders' thinking.

The acceptance of the last-in-time rule requires adopting an equality conception of treaties and federal statutes. This equality principle both supports and rejects elements of the internationalist and revisionist approaches to the domestic effect of treaties.

In addition to the textual and structural arguments outlined above, there are sound functional reasons to support the equality conception, even in a world dominated by the new international law. The equality conception strikes an elegant compromise between the need to participate in the development of the new international law and basic American commitments to political accountability and democratic control over domestic lawmaking. Indeed, the last-in-time rule may serve as an insurance policy encouraging treaty makers to participate in the development of international law. Without the last-in-time rule, U.S. treaty makers will lose the flexibility they currently hold to decide how best to balance international policy concerns with domestic obligations. In this way, the last-in-time rule may actually serve to encourage, rather than discourage, U.S. participation in the development of the new international law.