Text and Structure in Historical Context: A Theory About the Fate of the Exclusive Treaty Power

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I. Introduction

A. Congressional-Executive Agreements and the Paradox of International Agreement–Making in the 2020s

Scholars have long remarked, sometimes uneasily, on a constitutional paradox within United States international agreement practice. Article II of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[1] Unlike any other power conferred by the Constitution, the treaty power is vested in the President and two-thirds of the Senate only; this conjunction of institutions is sometimes collectively referred to as "the treaty-makers."[2] There ends the Constitution's only provision for international agreement–making; it apparently confers no other such power.[3]

Yet this apparent exclusivity bears no resemblance to the actual practice of the political branches. The proportion of American international agreements approved through the Article II Treaty Clause process dwindled to almost nothing over the last century[4] and continues to fall, as the Clinton, Bush, Obama, and Trump administrations each submitted fewer Article II treaties to the Senate than the last.[5]

In its place, a rising proportion of United States international

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1 U.S. CONST. art. II, § 2, cl. 2.

2 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 176 n. (2d. ed. 1996).

3 Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 632 (2020).

4 *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 903-04 (characterizing as a midcentury innovation the rule that "if the President persuades a majority in both Houses to ratify an executive agreement, it gains unquestioned acceptance as a binding international obligation"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1288 (acknowledging "the rise of the congressional-executive agreement in 1945"); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1240-41 (2008) (describing the irregular proliferation of congressional-executive agreements into various areas of international law-making since the mid-twentieth century).

5 Hathaway, Bradley & Goldsmith, *supra* note 3, at 632.

agreements has been approved through the ordinary bicameral legislative process: sometimes the executive enters into such agreements pursuant to *ex ante* congressional authorization, and sometimes it seeks *ex post* approval from both houses of Congress.[6] The most recent major United States trade agreement, the United States–Mexico–Canada Agreement, was approved *ex post*,[7] and beyond trade, many of the subject areas of United States international agreement–making have come to depend on it.[8]

Thus, there is a disconnect between the "Treaties" over which Article II assigns the treaty-makers apparently exclusive responsibility and the full corpus of United States international agreements, all of which are binding treaties for purposes of international law.[9] If the paradox of the Treaty Clause threatens to invalidate the United States' many congressional-executive agreements, the federal government's ability to give and keep its word on the world stage could be catastrophically disrupted.

B. Treaty Exclusivity Against Interchangeability: The Terms Defined and Illustrated

Such a risk resides, if anywhere, in the doctrine of treaty exclusivity, according to which the Article II Treaty Clause, in keeping with its textual singularity, forbids the ordinary political

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6 *See* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1209-10 (2018). Note that *ex ante* and *ex post* congressional-executive agreements together make up only part of the category of executive agreements whose proliferation Bradley and Goldsmith document, since some sole executive agreements are premised on the exclusive powers of the presidency under Article II. *See id.* at 1209; *see also, e.g.,* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 486-87 (1940) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936)). However, the executive branch intermingles agreements entered into pursuant to statutory authority and agreements entered into without such authority. *See* Hathaway, *supra* note 4, at 1259.

7 United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020).

8 *See* Hathaway, *supra* note 4, at 1264-69 (surveying agreements).

9 CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 76-77 (2001) (Article II treaties and congressional-executive agreements domestically distinct); *id*. at 43 (Article II treaties and congressional-executive agreements internationally identical). *Compare* Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (defining "treaty" in the international context); *with* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301(1) (AM. L. INST. 1987) (identical definition of "international agreement" in the United States context).

branches from intruding upon the international agreement–making power it grants the treaty-makers.[10] The alternative to exclusivity is interchangeability among United States international agreements, regardless of their form.[11] This Note uses the two terms broadly, such that exclusivity is any doctrine which reserves some exclusive function to an Article II treaty—not necessarily an exclusive set of subjects to act upon,[12] but, for example, a special binding force such as a restrictive withdrawal procedure.

Specifically, this Note considers the interchangeability of economic treaties with congressional-executive agreements enacted pursuant to the Foreign Commerce Clause.[13] Interchangeability in this context is a sort of some-assembly-required account wherein the President's ability to conduct foreign relations, in coordination with the foreign commerce power, permits the President and Congress to negotiate and enact, respectively, an international agreement that is thereafter the equivalent of an Article II treaty for all intents and purposes.[14] The alternative, an exclusive treaty power in this area, by contrast, would reject the congressional enactment, for much the same reason that a congressional act within the scope

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10 *See* John C. Yoo, *Laws as Treaties? The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 762 (2001).

11 *See* Hathaway, *supra* note 4, at 1243.

12 *But see, e.g.*, *id.* at 1246-47 (identifying only subject-matter distinctions between treaties and other forms of international agreement as scholarly alternatives to full interchangeability); *id.* at 1344-45 (tentatively embracing such a position).

13 U.S. CONST. art. I, § 8, cl.3.

14 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (sweep of presidential power when supported by a delegation of all applicable congressional power); Dames & Moore v. Regan, 453 U.S. 654, 668-69, 674 (1981) (applying Jackson's framework to a delegation of foreign affairs power); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 980 (2001) (acknowledging that *Dames & Moore* considered only sole executive agreements with congressional authorization, but expressing skepticism that the same rationale does not extend to presidentially negotiated agreements congressionally approved *ex post*). *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936) (endorsing looser standards for congressional delegations of foreign affairs power than domestic power). This Note does not address the question of whether the treaty-makers could regulate subjects otherwise beyond the ordinary Article I and II powers, even in combination. *See* Hathaway, *supra* note 4, at 1338-49 (discussing, in particular, Missouri v. Holland, 252 U.S. 416 (1920)); Tribe, *supra* note 4, at 1260-61, 1261 n.33 (arguing that, even accepting some form of interchangeability for the sake of argument, such *Missouri*-like exercises of the treaty power would not be interchangeable with congressional-executive agreements).

of an enumerated Article I power could nevertheless be found invalid if it did not use the appropriate bicameral procedure, say, or if it purported to commandeer state agencies to execute a congressional policy.[15]

The wide-ranging implications of any uncertainty as to which of these two doctrines is correct are apparent, and recent events illustrate the risk if treaty exclusivity is not laid to rest, given the extensive reliance on interchangeability in United States foreign policy today. In 2015, after long negotiation, the United States joined the other four permanent members of the U.N. Security Council, along with Germany and the E.U. in its own name, in an agreement with Iran.[16] This plan, the Joint Comprehensive Plan of Action (JCPOA), would limit Iran's enrichment of nuclear material; Iran would submit to an intense program of international inspections and physically shut down and dismantle facilities it could otherwise have used for uranium and plutonium enrichment.[17] Two years later, the United States unilaterally repudiated the agreement.[18] Iran resumed its nuclear development, and when American negotiators changed course, they were left to scramble to revive the agreement in time.[19]

At the time of the agreement, the executive branch had been cagey about whether the JCPOA was a congressional-executive agreement or a sole executive agreement.[20] As detailed below,[21] arguments about exclusivity and interchangeability have historically developed concerning the legitimacy only of the former. But regardless of the JCPOA's classification, the treaty-exclusivity arguments leveled against it illustrate with unique gravity the risk

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15 *See* Tribe, *supra* note 4, at 1259-1260 (discussing, respectively, INS v. Chadha, 462 U.S. 919 (1983), and New York v. United States, 505 U.S. 144 (1992)).

16 *The Nuclear Deal Fuelling Tensions Between Iran and America*, THE ECONOMIST, Jul. 22, 2019, https://www.economist.com/the-economist-explains/2019/07/22/the-nuclear-deal-fuelling-tensions-between-iran-and-america [https://perma.cc/M5EL-WP3B].

17 *Id.*

18 *Id.*

19 *Nuclear Talks with Iran Enter the Endgame*, THE ECONOMIST, Feb. 12, 2022, https://www.economist.com/middle-east-and-africa/nuclear-talks-with-iran-enter-the-endgame/21807592 [https://perma.cc/EJ5J-JB6C].

20 *See* Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. FORUM 338, 349 (2017).

21 See *infra* Part II.

the doctrine could pose to the ability of the United States to keep faith with international partners.

As the State Department worked to salvage some form of the agreement, a number of Senators raised a new demand: that any replacement agreement be submitted to the Senate for supermajority approval, according to the Treaty Clause.[22] In July 2021, twenty-four Senators co-sponsored a bill to effect such a requirement.[23]

The putative functional reasons why the JCPOA might have been better enacted as an Article II treaty, especially the claim that the executive branch might have been better restrained from withdrawing from an Article II treaty than it was from the sole executive agreement because legislators would have had power they otherwise lacked, have been addressed elsewhere; not only have past presidential administrations repeatedly succeeded in withdrawing unilaterally from Article II treaties, but the 114th Congress actually bicamerally, and almost unanimously, enacted a bill giving itself power to review the agreement, and then failed to pass a resolution exercising that power.[24] Still, treaty exclusivity's potential to raise opposition to United States compliance with and participation in the international legal order[25] suggests that it may

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22 Press Release, Jim Risch, Ranking Member, Senate Comm. on Foreign Rels., Risch, Johnson, Colleagues Introduce Iran Nuclear Treaty Act to Place Constitutional Check on Iran Deal (June 11, 2021), https://www.foreign.senate.gov/press/ranking/release/risch-johnson-colleagues-introduce-iran-nuclear-treaty-act-to-place-constitutional-check-on-iran-deal [https://perma.cc/XN73-QY6W] (pledging that the Article II process would "give the American people a proper constitutional check," without specifying how or on whom).

23 Iran Nuclear Treaty Act, S. 2030, 117th Cong. (2021) ("[A]ny agreement reached by the President with Iran relating to the nuclear program of Iran is deemed to be a treaty that is subject to the requirements of article II, section 2, clause 2 of the Constitution of the United States requiring that the treaty is subject to the advice and consent of the Senate, with two-thirds of Senators concurring."). One might rightly entertain doubts about the legislative seriousness of a proposal that a majority of the House of Representatives vote for its own disempowerment, as passage of the Iran Nuclear Treaty Act would apparently require. Still, the demand demonstrates the enduring normative force of this interpretation of the treaty power.

24 Josh Rubin, *No, Making the Iran Deal a Treaty Wouldn't Have Stopped Trump from Withdrawing From It*, JUST SEC. (May 25, 2018), https://www.justsecurity.org/56999/no-making-iran-deal-treaty-wouldnt-stopped-trump-withdrawing/ [https://perma.cc/2BV6-JZHY].

25 *See, e.g.*, HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 8-13 (2018) (arguing that lawful behavior is essential to the long-term success of United States foreign policy).

be worth examining on a formal as well as a functional level, to relieve the risk of a sudden formalist break with the international obligations of the United States.

Part II of this Note therefore examines the leading modern argument for forms of treaty exclusivity, and proposes that a structural argument, on the model outlined by constitutional scholar Charles Black, could reconcile formalist and functional interpretations of the treaty power as long as there is some demonstrable reason not to read exclusivity into the structure of the treaty power. Part III begins the search for such a reason by arguing that the treaty power is textually set aside from Article I's grants of legislative powers and Article II's other grants of executive powers as a consequence of the belief, current at the time of the drafting of the Constitution, that the "law of nations" governing international relations is derived from immutable principles of "natural law" superior to any government. Part IV, then, examines the history of naturalist international jurisprudence through its nineteenth-century fall from favor, and the rise, in its place, of a positivist methodology locating the sources of international law in the actions of states. Finally, Part V makes a circumstantial case that, although this theoretical shift was never expressly adopted into United States foreign relations law, the disappearance of naturalism from international jurisprudence permitted the twentieth-century collapse of treaty exclusivity, because the treaty power had been defined, and set apart from the other powers of the political branches, as the power to invoke natural law to create a binding obligation; it concludes that there is, therefore, a gap in the constitutional structure which natural law was meant to fill, but cannot and never did.[26] Thus, This Note concludes that present-day arguments for

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26 This is not the first argument that the shift from naturalism to positivism in international law gave rise to one or more idiosyncrasies of United States foreign relations law. *See, e.g.*, Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1110, 1112-13 (1985) (identifying the shift as one of several contributing factors, normative if not doctrinal, to the rise of the later-in-time rule); Detlev F. Vagts, *The United States and its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 326-27 (2001) (identifying naturalism as a theoretical basis for the binding force of treaties and pointing to its demise as a contributing factor in the declining reverence of American jurists for that binding force); *see also* Note, *Restructuring the Modern Treaty Power*, 114 HARV. L. REV. 2478 (2001) (arguing in general terms that the rise of positivism and the fall of the natural-law theories on which the binding force of treaties had rested, in combination with the subject-matter expansion of international lawmaking in the nineteenth century, eliminated the distinguishing

treaty exclusivity, insofar as they purport to maintain a historically grounded distinction, instead invoke the discursive ruins of a long-abandoned construct.

II. Exclusivity Against Interchangeability Since the 1990s

The most recent scholarly controversy on exclusivity and interchangeability originated with the controversies over two trade agreements of the mid-1990s, when the congressional-executive agreement form had not faced a serious challenge in decades.[27] The North American Free Trade Agreement (NAFTA) was passed bicamerally in 1993;[28] the Uruguay Round agreements, which replaced the postwar General Agreement on Tariffs and Trade and created the World Trade Organization (WTO) in its modern form, were implemented by the bicameral Uruguay Round Agreements Act the following year.[29] They were thus congressional-executive agreements rather than Article II treaties. The significance of these new agreements prompted influential constitutional scholar Laurence Tribe to challenge their legitimacy and argue that full interchangeability of treaties and congressional-executive agreements flouted the text and structure of the Constitution.[30]

A. Tribe's Textual and Structural Challenge

The basic groundwork for Tribe's objection can be summarized in three steps.[31] First, the Article II Treaty Clause, by its very existence, indicates the existence of a treaty power whose properties

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characteristics of the Article II treaty power). This Note, in contrast to the first two pieces, addresses the question of treaty exclusivity directly, and seeks to offer a more detailed and precise causal account of the fall of treaty exclusivity and its consequences than the third piece.

27 *See* Ackerman & Golove, *supra* note 4, at 897, 919; Hathaway, *supra* note 4, at 1246-47. *But see* Ackerman & Golove, *supra* note 4, at 897-904 (chronicling contests over the scope of the Senate's treaty power in the latter half of the twentieth century).

28 North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

29 Pub. L. No. 103-465, 108 Stat. 4809 (1994).

30 *See* Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 Op. O.L.C. 232, 232-33 (1994).

31 This summary only covers that basic groundwork, not the whole of Tribe's argument against the Uruguay Round Agreements Act or any other particular agreement. But as the rest of Tribe's argument follows from this basic objection, and not vice versa; and as this portion of Tribe's argument is least particularized to the 1990s trade agreements; the bulk of this Note will respond to the basic objection.

differ from other lawmaking powers.[32] Second, when the Constitution prescribes requirements for the exercise of a power, anyone interpreting it ought to presume that the power is bound to those requirements; textual or historical evidence that there exist other avenues for the exercise of the power may be convincing, but the expediency of circumventing the limitations, even (perhaps especially) in combination with a history of such circumvention, is not.[33] Third, and most crucially, the existence of ambiguity in the constitutional text placing limitations on the exercise of a power releases no branch of government from those limitations.[34] One does not interpret the Constitution simply by identifying some threshold level of ambiguity in its provisions and then discarding the document itself in favor of other considerations, especially political expediency:

> The danger arises from a facile treatment of constitutional text and structure and a free-form approach to saying what they mean—an approach seemingly shaped by conclusions arrived at quite apart from an analytically careful dissection of the legal materials . . . substitut[ing] political process for the reasoned and rigorous textual and structural analysis that is elemental to constitutional interpretation . . . . [T]he loose forms of constitutional argument [deployed against an exclusive treaty power] might well leave political actors with the uneasy feeling that the text of the Constitution can be read to justify just about any decision—and

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32 *S. 2467, GATT Implementing Legislation: Hearings Before the Comm. on Com., Sci., and Transp., U.S. S.*, 103d Cong. 298 (1994) [hereinafter *Hearings*] (Prepared Statement of Prof. Laurence H. Tribe).

33 Tribe, *supra* note 4, at 1241-43, 1260; *see also Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. at 235 & n.15 (quoting unpublished memorandum by Tribe) ("[P]rior manifestations of a casual attitude toward the Constitution's structural requirements are insufficient in this context to justify abandoning the precise guarantees of the Treaty Clause.").

34 *See* Tribe, *supra* note 4, at 1266 ("[T]he difficulty of drawing such a line does not mean that the distinction can be discarded."); *id.* at 1278 ("[E]ven if the constitutional text were truly ambiguous, one should not view such ambiguity as license immediately to leap outside the discourse of text and structure . . . [because] [i]n a constitutional community devoted to government in accordance with a foundational legal text, adherence to text and structure provide immeasurably valuable safeguards . . . . If each textual ambiguity is viewed as an open invitation to leap outside the realm of text and structure altogether, there will be great temptation first to imagine ambiguity where little or none actually exists, and then to magnify whatever ambiguity one finds into something of far greater moment than is really there. It is, after all, relatively simple to find indeterminacy if one looks carefully enough.")

so can safely be ignored.[35]

B. The Scarcity of Textual or Structural Responses

Nevertheless, in the case of the WTO, Tribe's challenge did not receive any answer argued in a principally textual or structural mode. Ultimately, the Department of Justice's Office of Legal Counsel advised the "political actors" that they could disregard Tribe's argument on more or less the very grounds he had warned against, writing to the United States Trade Representative that textual ambiguity and longstanding congressional-executive agreement practice were sufficient to prevent the textual and structural reserve of the treaty power from raising any obstacle to bicameral implementation of the Uruguay Round agreements.[36] Instead, OLC argued, the political branches had made a "considered constitutional judgment[]" that they could act in reliance on the President's power to negotiate agreements with foreign states, and Congress's ability to implement the results of the negotiation by its Article I powers (in this case, the Foreign Commerce Clause).[37]

Indeed, most contemporary and later responses to Tribe's concerned themselves principally with practical considerations. The functional case is certainly strong. The proliferation of non-treaty agreements since the Second World War suggests that Tribe's exclusive reading of the Treaty Clause, if strictly implied, could undermine a staggering volume of the United States' current international agreements.[38] International legal scholar Oona Hathaway, writing in 2008, made a particularly strong case for the

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35 *Id*. at 1233-35.

36 *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. at 233-36 (historical practice); *id*. at 236-40 (justifying reliance on such practice with historical evidence of the ambiguous scope of any exclusive treaty power). This is not to say that OLC simply brushed aside Tribe's argument against reliance on historical practice and functional expediency; the OLC opinion was published in November, 1994, while *Taking Text and Structure Seriously*, Tribe's fullest broadside against the constitutional interpretive methodologies supporting treaty interchangeability, was not published until the following year.

37 *See id*. at 235.

38 *See Hearings*, *supra* note 32, at 315 (testimony of Bruce Ackerman, Professor of Law, Yale L. Sch.) ("If the Senate gives credence to Professor Tribe's last minute efforts to stop the World Trade Organization on constitutional grounds, it would immediately destabilize a host of America's solemn commitments as our allies wondered which of their congressional-Executive agreements, and there are many of them, fell on the wrong side of Professor Tribe's admittedly blurry constitutional boundary.")

modern-day superiority[39] and permissibility[40] of congressional-executive agreements in light of a long history of politically driven distribution of foreign affairs power, predating and including the 1787 Constitution.[41] Hathaway extensively analyzed that history and concluded that no legal principle, only practical political calculations, ever dictated the division of foreign affairs powers, and that therefore there is no reason why congressional-executive agreements should not be permissible wherever Article I grants Congress the powers necessary to implement an agreement negotiated by the President.[42]

However, the functional case, even when buttressed by at least some endorsement or acquiescence from all three branches of government,[43] does not directly disprove any step of Tribe's textual and structural reasoning.[44] It thereby leaves the other executive agreements exposed to the Article II attack described above, such that domestic legal objections (however politically motivated[45])

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39 Hathaway, *supra* note 4, at 1307.

40 *Id*. at 1338-39.

41 *Id*. at 1306.

42 *See id*. at 1275-76.

43 *See* Hathaway, *supra* note 4, at 1338 nn.298-99.

44 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7-8 (1982) (sketching a five-part taxonomy of constitutional arguments which may, but need not, draw conclusions from the same premises in the same way, and distinguishing prudential (practical) and doctrinal (precedential) arguments from textual and structural arguments); *id*. at 79 (pointing as an example to certain structural arguments which "do not 'answer'" a non-structural argument but rather "simply proceed from a different paradigm"). In a later work, Bobbitt referred to these categories as "modalities" of argument. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11 (1991). Bobbitt's definitions of his taxonyms shifted in emphasis, although not expressly in substance, between the earlier and the later work, *compare, e.g.*, BOBBITT, CONSTITUTIONAL FATE, *supra*, at 7 (treating attention to limitations of judicial power as the core of prudential argumentation), *with* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra*, at 13 (defining prudential argumentation as cost-benefit analyses of potential rulings); the latter usages seem more useful for some of my purposes, such as categorizing the literature on the treaty power in order to illustrate that it often does not quite meet Tribe directly. Specifically, Hathaway's argument functions as what Bobbitt termed a prudential argument, BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra*, at 16-17; similarly, Spiro, *supra* note 14, at 963-64 (2001) (arguing that the past practice of the branches should play a precedent-like role in developing a body of law on separation-of-powers issues which, like this one, seldom come before courts), works within the doctrinal mode, BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra*, at 17-18 ("[D]octrinal arguments are not confined to arguments originating in caselaw; there are also precedents of other institutions.")

45 *See* Hathaway, *supra* note 4, at 1352-53. Hathaway describes the obstacles to

threaten to add a dangerous element of unreliability to United States international agreement practice.

Furthermore, some of the functional arguments against an exclusive treaty power, as long as they remain unreconciled to the structural implications of the Treaty Clause, might appear to vindicate Tribe's caution against abandoning the inference of an exclusive treaty power. For instance, international legal scholar Harold Koh has proposed that, where constitutional prescriptions are ambiguous and no statute governs the interaction between the political branches, the division of foreign affairs power among them should be governed by rules of "quasi-constitutional custom" formed in about the same manner as customary international law between independent states.[46] Koh's framework has been criticized for obscuring the distribution of foreign affairs power in a way that tends to unilaterally empower the executive branch,[47] and in light of those criticisms, it may not be reassuring that OLC, writing from the perspective of the executive, relied on Koh's account as part of its justification for disposing of Tribe's objection in near-exclusive reliance on historical practice (albeit among other accounts).[48]

Even more controversial is the argument of constitutional scholar Bruce Ackerman, who served as Tribe's antagonist in the

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treaty interchangeability as "political, not legal" because any impediment to its enshrinement in statute, she predicts, will be more directly attributable to the self-interest of the two institutions empowered by the Treaty Clause (the presidency and the Senate) than to the muddy underlying doctrine. Still, one might argue that insofar as the presidency and the Senate are created by law, any defense of their prerogatives that they might raise is legal as well as political.

46 *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 68-72 (1990), cited in Koh, *supra* note 20, at 343 (arguing broadly against the entire three-part classification of sole executive agreements, congressional-executive agreements, and Article II treaties).

47 *See* Hathaway, Bradley & Goldsmith, *supra* note 3, at 643-44 (citing Koh, *supra* note 20, at 343) (criticizing Koh's contention, which he couches in his "quasi-constitutional custom" framework, "that Presidents can make binding international agreements based merely on a claim of consistency with domestic law," because Koh's claim "seems difficult to reconcile with the proposition, noted above, that all governmental actions must be authorized by the Constitution or by Congress"). Presumably, some of the same criticisms might be made of Spiro, *supra* note 14, although Spiro does succeed in resolving a number of the *reductiones ad absurdum* that Tribe levels at Ackerman and Golove. *See id.* at 975-77.

48 Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 Op. O.L.C. 232, 233-34 (1994).

1994-95 debate over NAFTA.[49] Ackerman argued in favor of treaty interchangeability as part of his broader, idiosyncratic theory of "constitutional moments," according to which the Constitution may be amended outside the process provided in Article V by a sort of extraordinary alignment of public opinion, expressed through the overwhelming electoral success of an institution challenging old constitutional rules in moments of crisis.[50] Ackerman argued that the exclusive treaty power was abolished by one such constitutional moment around 1945, in a repudiation of the isolationist Senate's use of that power to keep the United States out of the Treaty of Versailles.[51] This "higher lawmaking" process, in Ackerman's theory, is legitimized in substantial part by the absence of any language from Article V expressly disavowing other amendment procedures.[52] Ackerman's argument has been widely criticized,[53] and yet the only federal district court to have ruled on the issue of whether the bicameral approval of a particular international agreement was constitutional also rested part of its decision on the absence from the Treaty Clause of exclusive language.[54]

In sum, then, the scarcity[55] of direct and decisive answers to

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49 *See Hearings*, *supra* note 32, at 285 (introduction of Tribe and Ackerman by committee chairman); *id.* at 314-16 (Ackerman rejects Tribe's argument on mostly functional grounds); *id.* at 339 (concluding Tribe's and Ackerman's testimony, chairman jokes that "we have a staffer who will take you both to the airport, but do not put them on the same plane"); *see also* Ackerman & Golove, *supra* note 4, at 917-18 (1995).

50 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15, 20 (1998).

51 *See* Ackerman & Golove, *supra* note 4, at 873-74.

52 ACKERMAN, *supra* note 50, at 15 ("None of [Article V's] 143 words say anything like 'this Constitution may only be amended through the following procedures, and in no other way.").

53 *See, e.g.*, Tribe, *supra* note 4, at 1284 & n.210.

54 *See* Made in the USA Found. v. United States, 56 F. Supp. 2d 1226, 1317 n.344 (N.D. Ala. 1999) ("The Treaty Clause, by its terms, is not exclusive and does not, by its terms, limit other enumerated powers of Congress."), *rev'd on other grounds*, 242 F.3d 1300 (11th Cir. 2001) (holding the existence and scope of an exclusive treaty power a non-justiciable political question). To be clear, the court rejected Ackerman's "constitutional moments" theory. *Id*. at 1279 n.218.

55 It is not a total absence—for example, the district court in *Made in the USA Found.*, 56 F. Supp. 2d at 1279 n.318, found "a much more textually-based argument in favor of the interchangeability of the congressional-executive agreement with the 'treaty'" in David Golove's *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998). Still, Golove's argument is confined to the existence of ambiguity and thus does not wholly resolve Tribe's contention. Golove "claim[s] only that the text is subject to two conflicting plausible interpretations, *id.* at 1925, which does not address Tribe's concerns about the

Tribe's textual challenge has permitted the unsettled status of the Treaty Clause to continue and the number of interpretations within that status to proliferate. There is reason, then, to revisit Tribe's contention on its own terms in the hope of addressing the textual challenge on textual grounds.

C. The Need for a Structural Principle to Complete the Challenge to Interchangeability

It may yet be possible to reconcile Tribe's argument with the subsequent scholarship summarized above. Their use of different modalities of argumentation need not consign them to argue past one another, but may permit their conclusions to be harmonized. Charles Black, the constitutional scholar who effectively defined the concept of structural interpretation,[56] observed that, because structural reasoning by its nature must always turn on inferences about functional relations rather than grammatical or lexical arcana, it tends to dovetail with "practical rightness."[57] And, of course, as Ackerman's argument shows, neither treaty exclusivity nor interchangeability is provided for in the text itself.[58]

Structural arguments are typically reducible to four steps:[59] first, the identification of an unwritten but obvious fact about the relationship among constitutionally established bodies, what Tribe calls "the architecture of the institutions that the [constitutional] text

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misuse of ambiguity, quoted at length, *supra* note 34. Golove contends that Tribe's accusation that Ackerman and Golove abuse ambiguity and historical practice is refuted by the fact that "Ackerman's theory permits constitutional change outside of the formal amendment procedures of Article V . . . only when the strict requirements of a specially formulated set of criteria are met. The existence of textual ambiguities, past violations, or institutional acquiescence are either not among the relevant criteria or are in themselves clearly insufficient." Golove, *supra,* at 1926-27. It seems more than arguable that Tribe's accusation is not thereby refuted; insofar as Ackerman and Golove use a threshold level of textual ambiguity as a sufficient precondition to move to their less textually grounded criteria, they still use the ambiguity as a license to move beyond text, and the complexity of their non-textual criteria does not comprise a textual refutation to Tribe's textual critique.

56 *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 44, at 76-77; *see also* Akhil Reed Amar, America's Constitution *and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2001 (2006).

57 CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22-23 (1969).

58 Ackerman & Golove,, *supra* note 4, at 811.

59 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 44, at 16.

defines";[60] second, the inference of some institutional power or restraint that necessarily makes up part of that relationship; third, the identification of some practical political fact that could render that power or restraint a dead letter; fourth, the conclusion that, in order to preserve that inferred power or restraint, a particular rule must control.[61] The Supreme Court's reasoning in *National League of Cities v. Usery*[62] provides an example of this mode of argument. The reasoning there

> went essentially like this. (1) We have a federal system, composed of a supreme federal state and member states. (2) It follows that, to have such a system, there must be at least one thing that the national legislature cannot order the states to do; otherwise, we would not have a federal system but would instead have replaced it with the regions and departments of a unitary system. (3) Determining the wages and hours of state employees is a function crucial to the preservation of a state as a state; if Congress could manipulate the costs of such items, it could control state policies generally. (4) Therefore, Congress cannot be permitted to exercise such control.[63]

Tribe's argument can perhaps be put in the following form. (1) We have a system in which the powers granted to each branch of government are enumerated and limited, and not to be presumed; and we have a Constitution in which Article I confers certain legislative powers on Congress, including power over foreign commerce, and Article II confers certain powers to conduct foreign relations on the President, but Article II, section 2 confers "Power . . . to make Treaties" on the President and two-thirds of the Senate. (2) To have such a system, there must be some category of agreements, "Treaties," which the treaty-makers can conclude but the President and Congress cannot. (3) If any agreement within the power of the federal government could be enacted in the form of a congressional-executive agreement, the treaty-makers could be completely circumvented, and the Treaty Clause would not have the effect of enumerating some powers and limiting others. (4) Therefore, congressional-executive agreement practice must be

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60 Tribe, *supra* note 4, at 1233;

61 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 44, at 16.

62 426 U.S. 833 (1976).

63 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 44, at 16 n.14.

restricted.[64]

But, as Tribe acknowledges, the long history of sole executive agreements shows that the exclusive treaty power cannot encompass all international agreements.[65] In order to reach the final step, and determine the rule that would protect an exclusive treaty power, the preceding steps must be defined more clearly.[66] Tribe's argument, in other words, presents a structural imperative to identify a distinction between the Article II Treaty Clause and the ordinary Article I and II powers.

But identifying sufficiently practical principles to guide a structural inquiry is no trivial matter. Indeed, *National League of Cities* was eventually overruled when a later Court determined that the concept of "traditional governmental function[s]," which the earlier case had attempted to protect as a structural principle,[67] was in fact too vague, and insufficiently doctrinally sound, to be maintained.[68] First, not only must such a principle be unstated in the text, it is typically, as Black said of the dormant commerce power, "not so much implied logically or legally in the [Constitutional text] as it is evidenced" by it.[69] Thus, the right to travel between states, or the dormant Commerce Clause restrictions on states' ordinary regulatory power, can be said to follow not so much from any textual provision as from the inference that the federal structure incorporates a nationalized citizenry and economic life.[70] Second, as structural rules are unstated in the text, they must be more or less incontrovertible—*a priori* true, or close to it.[71] So it was when Chief Justice Marshall explained the Supreme Court's conclusion in *McCulloch v. Maryland*[72]—a prototypical structural ruling[73]—that

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64 *See* Tribe, *supra* note 4, at 1241-44.

65 *Id*. at 1265.

66 *See id.* at 1265-69. The distinction Tribe in fact draws is critiqued *infra*, Part II-D.

67 The holding of *National League of Cities*, not incidentally, is expressed in a rather more tortured fashion than Bobbitt's summary, quoted *supra* text accompanying note 63, reveals. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 851-52 (1976).

68 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

69 BLACK, *supra* note 57, at 21.

70 *Id*. at 15-22.

71 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 44, at 16 (structural analyses begin with "an uncontroversial statement about a constitutional structure"); *cf.* SCOTT J. SHAPIRO, LEGALITY 13 (2011) (defining legal truisms).

72 17 U.S. (4 Wheat.) 316 (1819).

73 *See* BLACK, *supra* note 57, at 15; *see also* BOBBITT, CONSTITUTIONAL FATE, *supra*

a state could not tax a federally chartered bank, he described the interpretation of federal supremacy on which the decision turned as "no express provision," i.e. not the triumph of some express federal legislation or judicial ruling over direct state opposition by the Supremacy Clause,[74] but "a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."[75]

Tribe analogizes the task of structural interpretation to the mathematical field of topology, "the study of those properties of geometric configurations in space that remain unchanged by certain continuous transformations, such as twisting or stretching."[76] Structurally impermissible practices include, for example, the legislative veto invalidated in *INS v. Chadha*,[77] in which Congress had effectively looped some of its power back into each house, altering its fundamental form.[78] Tribe proposes that congressional-executive agreement practice entails just such a fundamental transformation of the configuration of federal powers.[79] If Tribe's description of structural methodology is to be reconciled with this practice, it must be shown that the practice does not actually alter any relevant properties.

Consider the field of knot theory. Knot theory is a subfield of topology which concerns itself specifically with closed curves or sets of such curves in space (analogous to closed loops of string or interlocking closed loops).[80] A knot can be projected onto a two-dimensional plane as a line that intersects itself at certain over- and under-crossings.[81] The simplest knot, the "trivial knot" or "unknot,"

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note 44, at 78-79.

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

75 *McCulloch*, 17 U.S. at 426.

76 Tribe, *supra* note 4, at 1237.

77 462 U.S. 919 (1983).

78 Tribe, *supra* note 4, at 1238.

79 *Id*.

80 COLIN C. ADAMS, THE KNOT BOOK 2 (1994). Actually, the space in question need not be restrained to three dimensions, *id.* at 265, but I doubt there is anything to be gained by attempting to incorporate that detail into the metaphor.

81 *Id.* at 3.

may be projected with no crossings—a plain loop of string.[82] Two knots are identical if one can be formed from the other by deforming it without breaking it, reattaching it, or allowing it to pass through itself.[83] Those transformations of a projected knot that do not alter the knot's identity may be diagrammatically represented as steps called "Reidemeister moves."[84] Thus, certain apparently complicated projected knots can be shown to be unknots by a series of Reidemeister moves.[85] This Note attempts to find a proof, like a series of Reidemeister moves, that reduce the structure suggested by the Treaty Clause to the practice that actually exists—to show that there are no nontrivial knottings separating the USMCA, for example, from ordinary commercial regulation.

This Note will attempt this topological demonstration by showing that the principle "not so much implied . . . as it is evidenced" by the Treaty Clause—that the treaty power is separable and so separated from other executive and legislative powers with international implications—is, for specific historical reasons, a demonstrably unsuitable foundation for a structural rule.

D. The Indistinctness of "Sovereignty" as the Defining Characteristic of the Treaty-Making Structure

Before addressing the Treaty Clause's historical context, however, it is necessary to examine the defining characteristic for which Tribe and international relations scholar Anne-Marie Slaughter argued in the 1990s, and to argue that—perhaps due to the rapidity with which the argument had to be made and the depth of the methodological gulf between Tribe and Ackerman—it is not conclusive.

Slaughter proposed her distinction, which she derived from the notion of sovereignty, in a letter to the chairman of the Senate Committee on Commerce, Science, and Transportation.[86] Slaughter described "the highest expression of . . . sovereignty" as "law-making authority," although she did not purport to fully define the

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82 *Id.* at 3-4.

83 *Id.* at 2.

84 *Id*. at 13.

85 *Id.* at 15-16.

86 Letter from Professor Anne-Marie Slaughter, Harv. L. Sch., to Sen. Ernest F. Hollings, Chairman, S. Comm. on Com., Sci., and Transp. (Oct. 18, 1994), *reprinted in Hearings*, *supra* note 32, at 286-90.

term.[87] She described treaty-making as "an alternative legislative process to be carried out in conjunction with a foreign nation," a process which "involves both a delegation and a subsequent constraint on the sovereignty of the people of the United States under international law."[88] Since treaties, in binding later-elected federal and state governments, may "supersede or directly constrain ordinary state and federal law-making authority," Slaughter therefore concluded that treaty-making required "special safeguards," and that the Treaty Clause assigned the Senate particular responsibility to protect the interests of the states whose law-making power treaties may straiten.[89] Slaughter thus argued that the structural need for a distinguishing principle should be answered by reference to the lasting nature of treaties and to their federal implications. Slaughter's federalism concerns have been echoed in other proposed distinctions.[90]

In his own article, although Tribe placed significant reliance on Slaughter's letter,[91] he provided some additional arguments that the distinguishing feature of the treaty power should be considered its constraint of "sovereignty." Some historical evidence links it to the definition of the treaty power, such as Alexander Hamilton's assertion, in Federalist No. 75, that the treaty power was set apart from the ordinary executive and legislative powers by its ability to bind co-equal sovereigns on the world stage.[92] Tribe also suggests that the Treaty Clause should be juxtaposed[93] with the provisions that permit the states, with congressional approval, to enter into "Agreement[s] or Compact[s]," but categorically deny them the

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87 *See id*. at 287.

88 *Id*.

89 *Id*.

90 *See, e.g.*, Hathaway, *supra* note 4, at 1339-43 (surveying scholarly treatments). Hathaway herself, reluctant to define the exclusive treaty power as a mere escape hatch from federalism constraints, endorses a two-step definition for the reach of the exclusive treaty power: it must concern a subject beyond the reach of Congress's Article I powers, and it must concern a subject of bona fide international cooperation. *Id*. at 1343-44.

91 Tribe, *supra* note 4, at 1267. Some scholars looked askance at Tribe's reliance on Slaughter's letter, as opposed to some published source. *See, e.g.*, Spiro, *supra* note 14, at 977-78.

92 Tribe, *supra* note 4, at 1262; *see also id.* at 1244 n.74 (evidence from Constitutional Convention).

93 A method which, he points out, can yield insights that should not be overlooked. *Id*. at 1235-36.

power to "enter into any Treaty, Alliance, or Confederation."[94] These provisions, he points out, distinguish treaties on some basis from some other forms of agreement between polities[95]—though they do not in themselves suggest what the distinction is, and Tribe acknowledges that these clauses have long frustrated judicial exposition.[96]

To implement this responsibility, however, Slaughter suggested only a loose set of criteria, to be applied by the political branches, for determining whether a particular international agreement so impacts federal or state sovereignty as to fall within an exclusive treaty power.[97] This solution arguably does little to resolve the lingering tension and confusion engendered by the overlap between congressional-executive agreements and Article II treaties. First of all, the two are already distinguished by a list of criteria applied by one of the political branches, namely the executive branch by way of the State Department.[98] Indeed, this system has been in place in one form or another since long before the WTO controversy.[99] Secondly, the concept Slaughter attempted to identify and protect was "sovereignty," which she defined as "the sovereignty of the people expressed in the federal legislative authority and in the state legislative authorities."[100] Insofar as "sovereignty" may be equated with ultimate lawmaking authority,[101] it makes sense to consider it a property compromised by treaty-making. But "sovereignty" is a slippery and even auto-antonymous concept, which can mean both the capacity to enter into international agreements[102] and the

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94 U.S. CONST. art. I, § 10, cls. 1, 3.

95 Tribe, *supra* note 4, at 1266.

96 *Id.* at 1266 n.152 (citing U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460-54 (1978)).

97 Letter from Slaughter to Hollings, *supra* note 86, at 288.

98 11 U.S. DEP'T OF STATE, FOREIGN AFFS. MANUAL § 723.3.

99 U.S. DEP'T OF STATE, CIRCULAR NO. 175 (1955), *reprinted in Official Documents*, 50 AM. J. INT'L L. 724, 784-89 (1956).

100 Letter from Slaughter to Hollings, *supra* note 86, at 288.

101 *See, e.g.*, Morgan Guar. Trust Co. of N.Y. v. Republic of Palau, 924 F.2d 1237, 1243-45 (2d Cir. 1991) (finding that Palau was not possessed of "the attributes of sovereign statehood" because, *inter alia*, it was subjected to United States law).

102 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (AM. L. INST. 1987) (identifying sovereignty as a component of statehood, along with the capacity to make international agreements). The Restatement is not clear, and other sources are inconsistent, as to whether sovereignty is a precondition or a consequence of legal personality. Knox v. Palestine Liberation Org., 306 F. Supp. 2d 424,

prerogative to break them.[103]

Perhaps there remains, then, a missing piece to the textual account of the Treaty Clause. Admitting the necessity of structural analysis of the Treaty Clause, such an analysis need neither throw the sand of ambiguity in the gears of United States international lawmaking nor harshly abrogate eighty years of international agreement practice. As the next Part shows, there was a theoretical distinction between treaties and other international agreements in the eighteenth century. But that theoretical distinction is no longer maintainable. It resided in the other characteristic of treaties Slaughter identified: not their greater ability to constrain the states than domestic federal lawmaking, but their function as a binding and lasting agreement between nations.

III. The Role of "Natural Law" in the Eighteenth-Century Law of Nations

Invocation of international agreement–making power gives rise to rules of law. The power assigned by the Treaty Clause, then, is what the legal theorist H.L.A. Hart would have called a "secondary" or "power-conferring" rule, as opposed to a "primary" rule that directly imposes obligations.[104] But the power it confers derives from another secondary rule: *pacta sunt servanda*, the international legal rule that permits states to enter into binding obligations.[105] So

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435 n.21 (S.D.N.Y. 2004) (citing *id*. cmt. b) ("The term 'sovereignty' is 'much abused' . . . as it can refer to an *indicator*, or criterion, of statehood, or an *incident* of statehood."). *See also* Spiro, *supra* note 14, at 977 n.18 (pointing out counterintuitive results of Tribe's and Slaughter's use of the concept).

103 *See* Whitney v. Robertson, 124 U.S. 190, 195 (1888) (allowing a federal statute to govern in preference to an earlier inconsistent treaty because "[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will"); *see also, e.g.*, Kucinich v. Bush, 236 F. Supp. 2d 1, 2-3 (D.D.C. 2002) (quoting Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, ¶ 2, May 26, 1972, 944 U.N.T.S. 13) (describing provision in Anti-Ballistic Missile Treaty reserving the right of each party "in exercising its national sovereignty . . . to withdraw from this Treaty" as the basis for the United States' 2001 withdrawal from the agreement).

104 H.L.A. HART, THE CONCEPT OF LAW 78-79, 27 (1961).

105 *See* Vienna Convention on the Law of Treaties, *supra* note 9, at 334, 339. The 1980 Vienna Convention, of course, long postdates the framing of the Treaty Clause, but codifies rules about the basic function of treaty-making that had existed for centuries. *See* Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 AM. J. INT'L L. 1, 19 (1995); *id*. at 1 (summarizing, though rejecting, alternative theories which place the origins of treaty-making as late as the mid-eighteenth century). Admittedly, it hardly seems necessary to observe that treaty-making power existed by the time the Treaty Clause

if a structural argument is to be found that the Treaty Clause confers a distinct power which it denies the other branches, that distinct characteristic belongs to a power which in turn is a creature of international law.

From the seventeenth to the nineteenth century, jurists—especially scholars of what was then called the "law of nations"—lent credence to the notion of "natural law," higher law on which the power of temporal nations ultimately depended. This naturalism shifted and changed over time before draining out of international jurisprudence towards the end of the nineteenth century. Because the Constitution was drafted at a particular moment in the latter part of the naturalist epoch, the treaty power, unlike the other powers the Constitution confers on the federal government, was defined by naturalist international jurisprudence. This section therefore first sketches out the nature of treaties as described by the Framers of the Constitution, so as to demonstrate that they left unstated a crucial part of their account of what a treaty *was*; and then argues that natural law was meant to fill that gap.

A. Treaties as Sui Generis Legal Instruments in the Early United States

The treaty power was of the utmost importance to the rise of the constitutional order. The early United States, geographically bracketed by bellicose transoceanic empires at a time when even such legal norms as those empires purported to observe were breaking down, needed to safeguard its independence by legitimizing itself within the framework of the European state system, i.e. by demonstrating its fealty to the law of nations.[106] It was natural in such a context that the treaty power should end up

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was written.

106 *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934-35, 936-37, 955-57 (2010) (fragility of and threats to the early republic); OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 10-11, 23-24, 27-28 (2017) (broad sweep of legal theory of "just war" and permissibility of pillage in seventeenth and eighteenth centuries); PAUL W. SCHROEDER, THE TRANSFORMATION OF EUROPEAN POLITICS 1763-1848, at 6-8 (1994) (ruthless, transactional *Realpolitik* in eighteenth-century European diplomacy); *see also, e.g.,* CHRISTOPHER CLARK, IRON KINGDOM: THE RISE AND DOWNFALL OF PRUSSIA, 1600-1947, at 192, 196 (2006) (1740 Prussian invasion of Silesia as exemplar of wars of aggression within the eighteenth-century European state system).

with some unique attributes. For example, the Supremacy Clause, although it conditions supremacy of federal statutes upon their promulgation under the auspices of the 1787 Constitution, does not place such a limit on treaties, which need only have been made "under the Authority of the United States" to carry supreme power; this distinction ensured that the constitutional change did not imperil treaties made under the Articles of Confederation.[107]

The treaty-making power was also, as noted above, placed in the hands of an unusual conjunction of institutions: not the executive and legislature combined, nor either alone, but the executive and two-thirds of the Senate, acting together as "the treaty-makers."[108] It is as if the power had been conferred on a fourth branch of government.[109] As the treaty-making power cannot possibly have been coterminous with foreign policy-making, since at least some agreements were made outside the Treaty Clause as early as the first

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107 Reid v. Covert, 354 U.S. 1, 16 (1957) (quoting U.S. CONST. art. VI, cl. 2).

108 U.S. CONST. art. II, § 2, cl. 2; *see supra* note 2.

109 WALTER BAGEHOT, THE ENGLISH CONSTITUTION 266 (London, Chapman & Hall 1867) ("The President can only make treaties, 'provided two-thirds of Senators present' concur. The sovereignty therefore for the greatest international questions is in a different part of the State altogether from any common administrative or legislative question. It is put in a place by itself."). Bagehot, incidentally, believed that the unwieldiness of the amendment process lent American constitutional discourse a crabbed, contorted quality: "Every alteration of [the Constitution], however urgent or however trifling, must be sanctioned by a complicated proportion of States or legislatures. The consequence is that the most obvious evils cannot be quickly remedied; that the most absurd fictions must be framed to evade the plain sense of mischievous clauses . . . . The practical arguments and the legal disquisitions in America are often like those of trustees carrying out a misdrawn will—the sense of what they mean is good, but it can never be worked out fully or defended simply, so hampered is it by the old words of an old testament." *Id.* at 268. *But cf.* Tribe, *supra* note 4, at 1247 (reproaching Bruce Ackerman and Akhil Amar for advocating means of amending the Constitution outside Article V, and implying that a formalized amendment process is necessary to identify the limitations of constitutional amendments). Bagehot, a snobbish English Victorian praising the unwritten constitutionalism of the Westminster system, is not an influential authority on the subject of American constitutionalism; still, his criticism provides an interesting (if roundabout) way of illuminating the virtues of structural argumentation as a remedy for certain otherwise-obvious *textual* evils without resort to absurd fictions, which is to observe that American structural constitutional arguments bear a certain resemblance to UK constitutional jurisprudence. *Compare, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819) (asserting that an implied federal supremacy, beyond the text of Article VI but nevertheless essential to the function of the federal system, insulates federal agencies from state taxation), *with* R (Miller) v. Prime Minister [2019] AC 41 (UKSC) [39]-[51] (appeal taken from Eng. and Scot.) (deriving, from the principles of Parliamentary sovereignty and Parliamentary accountability, limits on the royal prerogative to prorogue Parliament).

Washington administration, only a distinction among powers with international implications can provide the structural principle that would support an exclusive treaty power.[110]

Contemporary sources do not directly address this question, or at least do not address it clearly, leaving the nature of Article II treaty-making to be inferred from their accounts. The drafters of the Constitution were at least clear that the allocation of the treaty power was no accident: something set it apart from the powers conferred on each of the three branches in itself. Thus John Jay, in Federalist No. 64, answered the objection that "as the treaties when made are to have the force of laws, they should be made only by men invested with legislative authority" by pointing to the power of courts and executive officers to wield lawmaking power.[111] The treaty power was to be *sui generis*, then, and the treaty-makers truly a fourth branch.

Alexander Hamilton described that *sui generis* nature in Federalist No. 75, when he argued that it was precisely "the particular nature of the power of making treaties" that necessitated its unique allocation.[112] That nature, he wrote, was neither executive nor legislative; though it bore the greatest kinship to a legislature's power "to prescribe rules for the regulation of the society," treaty-making was not lawmaking because,"[i]ts objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."[113] Incidentally, Hamilton carved out no exception for commercial treaties, though they had the effect of regulating individual participants in commerce.[114] Thus, Hamilton concluded, "[t]he power in question . . . form[s] a distinct department."[115] The essential point, here, is that the binding and international nature of treaties set them apart from the other powers of the federal

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110 *See* CONG. RSCH. SERV., *supra* note 9, at 78.

111 THE FEDERALIST NO. 64, at 393-94 (John Jay) (Clinton Rossiter ed., 1961).

112 THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

113 *Id.* at 450-51. I caution that Hamilton's definition of law as "rules prescribed by the sovereign to the subject" should not be taken to prefigure John Austin's definition. *See infra* notes 166-168 and accompanying text.

114 Contrast THE FEDERALIST NO. 64, *supra* note 111, at 390 (John Jay) (listing commerce among the principal subjects of treaty practice).

115 THE FEDERALIST NO. 75, *supra* note 112, at 451 (Alexander Hamilton).

government. The power assigned to the treaty-makers was that of pledging the nation's good faith so as to lend a contract with a foreign nation the force of law, and this power, in Hamilton's account, could not be found in the mere conjunction of the political branches.

B. The Invocation of Natural Law as the Distinguishing Characteristic of the Treaty Power: A Case Study from 1793

Once a treaty had been entered into, however, the responsibility for upholding its binding power fell on all three branches;[116] the implementation of that responsibility further illustrates the source and function of that binding power. For example, following the execution of Louis XVI and the proclamation of the First French Republic in 1792, President Washington solicited the advice of his cabinet regarding the ongoing binding force of United States treaties with France,[117] which required them to examine the nature of that binding force. Washington ultimately accepted the argument of Secretary of State Thomas Jefferson.[118]

Jefferson began his examination of the binding force of the treaties by enumerating the sources of law in light of which he would examine the question, which he listed as follows: "1. the

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116 *See* Alexander Hamilton, Pacificus No. 1 (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 36-38 (Harold C. Syrett et al. eds., 1969) (arguing that the power to interpret treaties and determine the circumstances under which they are binding resides with the executive except when within the jurisdiction of the courts, because the executive is the branch most competent to act on the world stage); James Madison, Helvidius No. 1 (Aug. 24, 1793), *reprinted in* 15 THE PAPERS OF JAMES MADISON 66, 67-68 (Thomas E. Mason et al. eds., 1985) (rejecting Hamilton's argument that most treaty-related powers should default to the executive, because commentators on the law of nations "speak of the powers to declare war, to conclude peace, and to form alliances, as among the highest acts of the sovereignty; of which the legislative power must at least be an integral and preeminent part"); *id*. at 71 (reserving a role for the courts in the application of treaties); *see also generally* DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 61 (2016) (describing "two-step approach" to treaty implementation in pre-WWI United States, according to which all treaties were binding upon the United States and, where applicable, were implemented by whatever branch possessed the powers necessary for their implementation); David L. Sloss, *Executing* Foster v. Neilson*: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 143-64 (2012) (providing eighteenth- and nineteenth-century examples of legislative and judicial applications of the "two-step approach").

117 MARK W. JANIS, AMERICA AND THE LAW OF NATIONS 1776-1939, at 38 (2010).

118 *Id*. at 38-39.

Moral law of our nature. 2. the Usages of nations. 3. their special Conventions."[119] These sources seem to correspond to natural law, customary international law, and treaties.[120] Jefferson went on to answer the question of when a treaty loses its binding force with reference to moral reasoning alone. He identified impossibility and self-preservation as valid grounds on which to abrogate a treaty obligation, and by way of a citation to authority, added: "For the reality of these principles I appeal to the true fountains of evidence, the head and heart of every rational and honest man. It is there Nature has written her Moral laws, and where every man may read them for himself."[121]

Later, to refute Alexander Hamilton's opposing argument—which relied on the writings of the Swiss legal scholar Emmerich de Vattel[122]—Jefferson also argued from the authority of learned commentators, which he strictly subordinated to moral rules. "Questions of natural right are triable by their conformity with the moral sense and reason of man," he wrote, and commentators, therefore, "can only declare what their own moral sense and reason dictate" and only possess authority insofar as they "happen to have feelings and a reason coincident with those of the wise and honest part of mankind."[123] Thus, Jefferson's methodology for applying the authority of learned commentators was to place the relevant passages from four influential eighteenth-century jurists side by side

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119 Thomas Jefferson, Opinion on the Treaties with France, *in* 25 THE PAPERS OF THOMAS JEFFERSON 608, 609 (John Catanzariti et al. eds., 1992).

120 *Cf.* Francesca Iurlaro, *Vattel's Doctrine of the Customary Law of Nations Between Sovereign Interests and the Principles of Natural Law*, in THE LAW OF NATIONS AND NATURAL LAW 1625-1800 278, 283-84, 287 (Simone Zurbuchen ed., 2019) (summarizing Emmerich de Vattel's classification of international law into natural and positive categories, with custom and treaties grouped under the latter); *see also* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 161-62 (revised ed. 1954) (describing Vattel's particular prominence in the early United States). In any case, note the contrast between the eighteenth-century sources of the law of nations and the modern sources of international law. Statute of the International Court of Justice, art. 38, ¶ 1.

121 Jefferson, *supra* note 119, at 609-10.

122 *See* JANIS, *supra* note 117, at 38-39; Letter from Thomas Jefferson to John Adams (Apr. 28, 1793), *in* 25 THE PAPERS OF THOMAS JEFFERSON, *supra* note 119, at 619.

123 Jefferson, *supra* note 119, at 613. Here, again, Jefferson's methodology foreshadows international law as we know it today—compare Statute of the International Court of Justice, art. 38, ¶ 1(d) (accepting "the teachings of the most highly qualified publicists of the various nations" as legal authority)—but illustrates a paradigm so different as to be almost alien.

and follow only those principles on which they agreed.[124] From the commentators, he derived an exhaustive list of the potential grounds for treaty abrogation, based on the moral obligation of good faith and the moral principles that outlined circumstances under which such an obligation might be breached nonetheless.[125]

These eighteenth-century sources thus suggest that the power reserved to the treaty-makers by Article II, section 2, was the power to submit the United States to international obligations lent force not by positive, written sources of law, but by the abstract moral principles that made up natural law—so whatever power may have been exclusively reserved to the treaty-makers would have been the power to conclude whatever agreements fell under the jurisdiction of those naturalist principles. Indeed, the unwritten moral principles of natural law supplied essential components of the law of nations upon which the Constitution was meant to empower the federal government to act.[126]

IV. The Rise and Fall of the Natural Law of Nations

To identify the natural-law principles that would have governed the products of the Article II treaty power, and to lay the groundwork for an analysis of the implications of naturalism's nineteenth-century demise for our ability to distinguish an exclusive treaty power, this Part surveys the historical trajectory of natural-law jurisprudence, and the theoretical function it served at the time of the drafting of the United States Constitution. Such an expansive chronological narrative serves to avoid the historiographical pitfall of flattening complex historical events into patchworks of static objects interrupted only by compartmentalized episodes of change.[127] This Part argues that natural law provided a basis for

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124 *Id*. at 613-15. Jefferson actually seems to have determined that the commentators did not fundamentally disagree. Although Hamilton's quotation from Vattel appeared to provide additional grounds for treaty abrogation, Jefferson looked to other portions of Vattel's treatise to suggest readings of the passage that so narrowed those additional grounds as to collapse them entirely into those already covered. *Id*. at 615-16.

125 *Id*. at 609-10.

126 *See*, *e.g.*, Hamilton, *supra* note 116, at 41 (arguing that the President's power to issue a declaration of neutrality when a treaty partner went to war depended not only on existing treaties with the belligerent powers but also upon "what rights the law of Nature and Nations gives and our treaties permit, in respect to those Nations with whom we have no treaties"); Seizure in Neutral Waters, 1 Op. Att'y Gen. 32, 34 (1793) (determining extent of United States territorial waters with reference to natural law).

127 DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF

binding international obligations in the fractured landscape of early modern Europe after the Renaissance and the religious wars discredited the theology that had ordered medieval potentates, but that the abstrusity and ambiguity of naturalist jurisprudence rendered it wholly inadequate for the increasing complexity and interconnection of international relations in the nineteenth century, leading jurists to abandon as unworkable the concept the Constitution had been meant to implement.

A. Sovereigns and Subjects from the Medieval Period to the Westphalian Order

The perennial problem of how to govern independent states in the absence of a higher authority capable of compelling their obedience has long distinguished international law from domestic law.[128] The "law of nations" with which the federal government was meant to engage under the 1787 Constitution was the product of European states' newly acute confrontation with this problem in the seventeenth century. The medieval European order had been knit together, not by a system of rules governing relations between co-equal sovereigns as in the modern system, but by a dense tapestry of feudal, familial, and ecclesiastical relations, most of which took overtly hierarchical forms.[129] Indeed, the Scholastic theologians who led the universities of the "renaissance of the twelfth century"[130] adapted from late antique Neoplatonists the notion of a

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HISTORICAL THOUGHT 160-62 (1970).

128 *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 51 (1977) ("Because international society [i.e. international order, as opposed to international anarchy] is no more than one of the basic elements at work in modern international politics . . . it is always erroneous to interpret international events as if international society were the sole or the dominant element. This is the error committed by those who speak or write as if the Concert of Europe, the League of Nations or the United Nations were the principal factors in international politics in their respective times; as if international law were to be assessed only in relation to the function it has of binding states together, and not also in relation to its function as an instrument of state interest."); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 255-56, 261-63 (2011) (summarizing the problem of enforcement in international law and John Austin's argument, further described *infra* notes 166-168 and accompanying text, that this distinction deprives international law of truly legal force).

129 *See* NUSSBAUM, *supra* note 120, at 17, 21, 22 (revised ed. 1954).

130 *See* ALISTAIR E. MCGRATH, CHRISTIAN THEOLOGY: AN INTRODUCTION 36-37 (3d ed. 2001).

"Great Chain of Being," an all-encompassing hierarchical order linking the divine to the inanimate by way of intermediate layers of created beings, each subject to the one above.[131] This worldview leaves no room for sovereignty as understood in modern international law, i.e. in the sense of ultimate lawmaking authority.[132] Treaties were not compacts of good faith between sovereign and sovereign—they were secured by sacramental oaths administered by the Church,[133] whose power pervaded and superseded temporal realms.[134] Adjudicating the binding force of a treaty was not the prerogative of any temporal power guided by "the moral sense and reason of man," as it would be for Jefferson in 1793, but strictly the province of the Church, which dictated the conditions on which the validity of treaties depended and claimed for the Pope a "supreme and unlimited power" to release parties from treaty promises by dispensation.[135]

The medieval structure was swept away, however, by the Reformation and the religious wars of the early modern period, which philosophically and power-politically tore up the medieval

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131 *See* ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA 58-59 (1961) (all-encompassing hierarchy in Platonist and Aristotelian thought); *id*. at 61-62 (refinement of the worldview by Neoplatonists); *id*. at 67-68 (adoption of the worldview from Neoplatonism into Scholasticism); CHRISTOPHER R. ROSSI, BROKEN CHAIN OF BEING: JAMES BROWN SCOTT AND THE ORIGINS OF MODERN INTERNATIONAL LAW 17-18 (1998) (summarizing Thomas Aquinas's location of divine, natural, and positive law in this cosmic hierarchy).

132 *See, e.g.*, Letter from Slaughter to Hollings, *supra* note 86, at 287; Knox v. Palestine Liberation Org., 306 F. Supp. 2d 424, 435 n.21 (2004). Whether the sovereignty in question is a precondition or a consequence of statehood (the ambiguity discussed in the cited note from *Knox*) is a moot point; neither had any place in the medieval worldview.

133 NUSSBAUM, *supra* note 120, at 18-19.

134 For example, the Church contributed motive and legitimacy to the Anglo-Norman incursions into Ireland beginning in the twelfth century. *See* ROBERT BARTLETT, THE MAKING OF EUROPE: CONQUEST, COLONIZATION AND CULTURAL CHANGE 950-1350, at 22-23 (1993). A more dramatic example would be the surrender of the Holy Roman Emperor Henry IV to Pope Gregory VII during the contest over the power to invest bishops within the empire; Henry walked barefoot to the where the pope was ensconced in the fortress of Canossa in Tuscany and lay face down on the ground outside the gates to plead for absolution. Admittedly, Henry's move was a calculated gambit to strengthen his political hand; but the Canossa incident graphically underscores the point that there was no place for even the concept of a supreme temporal sovereign in the legal framework of medieval Europe. *See* HORST FUHRMANN, GERMANY IN THE HIGH MIDDLE AGES C. 1050-1200, at 64-66 (Timothy Reuter trans., 1986).

135 NUSSBAUM, *supra* note 120, at 18-19.

order by the roots.[136] In 1648, the Peace of Westphalia, in putting an end to the epochal violence of the Thirty Years' War,[137] terminated all pretenses of the Holy Roman Emperor or the Pope to enforce religious uniformity within the Empire or within Europe, and multilaterally altered the internal structure of the imperial polity in such a way as to cement the settlement.[138] The hierarchical medieval system thus gave way to a modern one, in which the rules of international law were prescribed between sovereigns, not by imperial or papal sovereigns to feudal or ecumenical subjects.[139] Indeed, it was in this era that the notion of the sovereign state—possessed of "absolute and perpetual power" against outside interference—was articulated by the French political theorist Jean Bodin and incorporated into the foundations of international law.[140]

But an international law meant to prevent sanguinary paroxysms of interconfessional warfare could not ground itself in theology, and it was in this context that the notion of natural law, as the foundation for rules governing sovereigns, gradually shed much of its religious character. This shift did not happen all at once. Some of the earliest contributors to the modern theory of international law, the Spanish Scholastics Francisco de Vitoria (1486-1546) and Francisco Suárez (1548-1617), who located the binding force of international law in natural law, still saw natural law as a component of a divinely ordained world order.[141] Around the same time, the Oxford jurist

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136 Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 28 (1948).

137 *See, e.g.*, CLARK, *supra* note 106, at 35-36 (depopulation of Brandenburg).

138 *See* Gross, *supra* note 136, at 21-22 (treaties ratified the principle of religious self-determination for imperial vassals and altered the functioning of the Imperial Diet to require cross-confessional support for religious legislation).

139 *See id.* at 28-29 ("The old [pre-Westphalian] world, we are told, lived in the idea of a Christian commonwealth, of a world harmoniously ordered and governed in the spiritual and temporal realms by the Pope and Emperor . . . . [The peace] marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority. The idea of an authority or organization above the sovereign states is no longer."); *id*. at 32 (medieval "claim of the Emperor to exercise temporal jurisdiction over princes").

140 NUSSBAUM, *supra* note 120, at 77; WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 167, 169 (Michael Byers trans., 2000). Grewe acknowledges that the idea that any king was, as a practical matter, co-equal with the Emperor (*rex est imperator in regno suo*, attested the writings of the medieval Italian jurist Baldus, *see* Gross, *supra* note 136, at 30-31) originated before the early modern period, but argues that the notion was not put into widespread practice until codified by Bodin.

141 GREWE, *supra* note 140, at 188-90. In the twentieth century, Vitoria and Suárez

Alberico Gentili (1552-1608), who as a Protestant naturally excised any hint of papal power from the law of nations as he described it, relied far less on religious texts, and more on historians and classical writers as the authority for that law.[142] The Dutch theorist Hugo Grotius (1583-1645), sometimes known as the "father of international law," departed from the Scholastic tradition[143] by arguing, finally, that one could conceive of a naturalist law of nations in the absence of divine authority.[144] By the time of the Peace of Westphalia, then, there existed an influential theory of a law of nations that obviated any need for the medieval hierarchies, was theologically neutral, and was compatible with equality between unitary sovereigns.

Thus, in the international legal system to which the United States sought admission in the late eighteenth century, natural law still posited a metaphysical binding force for the rules of international law. To show that the distinctness of the treaty power was premised on that early modern paradigm, there remains to be examined the natural-law basis of the binding nature of treaties. The rule that treaties are to be observed, *pacta sunt servanda*, "is perhaps the most important principle of international law."[145] The theorists of this period founded the principle of *pacta sunt servanda* on natural law.[146] Eighteenth-century writers held to this hypothesis

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partially displaced Hugo Grotius as the founders of modern international law. *See id.* at 187-88; NUSSBAUM, *supra* note 120, at 74. Grotius still takes a pivotal position in this Note's narrative because of the relatively less religious character he assigned to the natural law of nations.

142 NUSSBAUM, *supra* note 120, at 96-97. Incidentally, Gentili's theory of the law of nations still bore some resemblance to Neoplatonism. *See* Gross, *supra* note 136, at 32-33 (quoting Gentili, relying on classical scholars—including Plato, though not Neoplatonists specifically—to argue for the applicability of natural law to sovereign nations, and to argue that the law of nations should be guided by the precept that "[a]ll this universe which you see, in which things divine and human are included, is one, and we are members of a great body").

143 Although he relied on it. GREWE, *supra* note 140, at 194.

144 NUSSBAUM, *supra* note 120, at 108-09. Grotius still believed that the law of nations had a divine foundation; still, his rules functioned without reference to that foundation. GREWE, *supra* note 140, at 194-95.

145 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. a (AM. L. INST. 1987); *see also* GREWE, *supra* note 140, at 190 (describing "the source of the binding force of those obligations into which States had entered" as "a problem . . . which heavily engaged the theory of law of nations until modern times, without a generally accepted solution ever being found").

146 *See* GREWE, *supra* note 140, at 190 (Suárez); Hersch Lauterpacht, *The Grotian*

even as the perceived source of natural law shifted from theology to Enlightenment philosophy[147] and naturalist jurisprudence began to wane in favor of other methodologies. In particular, Emmerich de Vattel, the jurist upon whom early American scholars, politicians, lawyers, and judges most often relied,[148] also found the basis for the binding force of promises in natural law.[149]

B. The Failings of the Naturalist Law of Nations

At the turn of the nineteenth century, then, the structural role of the Article II Treaty Clause was to reserve for the treaty-makers the power to undertake binding obligations on the international stage by invoking the higher moral principles of natural law, which since 1648 had come to stand in for the now-fallen medieval hierarchies that had once claimed jurisdiction over those obligations. By the end of the nineteenth century, however, naturalist jurisprudence would practically disappear from the landscape of international legal theory, and the rise of the congressional-executive agreement would arguably have begun. Part V, *infra*, describes the origins of the congressional-executive agreement in that period and suggest that it was enabled by the ascendance of positivism.

Positive methodology in international law—i.e., the reliance on identifiable, written sources, whether treaties, commentaries, or documentary evidence of state practice accompanied by *opinio juris*—is not a nineteenth-century invention; it played some role in

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Tradition in International Law, 23 BRIT. Y.B. INT'L L. 1, 42-43 (1946) (Grotius).

147 NUSSBAUM, *supra* note 120, at 135.

148 *See id.* at 161-62 (evidence of frequent citations of Vattel in early American courts); Vincent Chetail, *Vattel and the American Dream: An Inquiry into the Reception of the* Law of Nations *in the United States*, *in* THE ROOTS OF INTERNATIONAL LAW: LIBER AMICORUM PETER HAGGENMACHER 251, 264 (Pierre-Marie Dupuy & Vincent Chetail eds., 2014) (evidence of frequent citations of Vattel in early American diplomatic correspondence). *But see* Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 570 (2012) (arguing that the significance of Vattel to the early American law of nations has been overstated relative to that of other theorists, such as Grotius and Pufendorf).

149 2 EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS § 163 (Joseph Chitty ed., Philadelphia, T & J.W. Johnson & Co., 1872) ("It is a settled point in natural law, that he who has made a promise to any one has conferred upon him a real right to require the thing promised . . . . This obligation is, then, as necessary as it is natural and indubitable, between nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society. Nations, therefore, and their conductors, ought inviolably to observe their promises and their treaties.").

international jurisprudence as long as there were sources of positive international law to consult. Even for Suárez, Scholastic Jesuit though he was, much of the law of nations was positive in character.[150] But from the seventeenth towards the end of the eighteenth century, some scholars of the law of nations, without necessarily denying the existence or even the salience of the law of nature, began to spend more time compiling evidence of the written law of nations than attempting to derive its rules from any abstract moral reasoning, whether or not expressed in classical or theological sources.[151] It was, in large part, naturalism's inability to provide an account of the law of nations as complete or as convincing as it seemed to promise that led to its abandonment.

Thus, for example, Johann Jakob Moser (1701-1785) (influenced by the Pietist movement, which though religious in nature espoused an anti-dogmatic practicality which in some ways foreshadowed the Enlightenment[152]) chose to approach the law of nations from a positivist, rather than a naturalist, perspective, because natural law was so obscure and contradictory that it could be cited to support either side of any issue.[153] Moser's positivist project made limited progress, however, since there then existed no systematic positivist methodology, and he failed to devise one; his twelve-volume treatise consists of a patchy agglomeration of evidence of international practice, only sometimes on point.[154]

Still, the underdeveloped condition of the positive law of nations could not conceal the inadequacies of naturalist jurisprudence, and other writers made the same observations as did Moser. Jeremy

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150 GREWE, *supra* note 140, at 190 ("Suárez grounded the law of nations on a consensus of State wills. The law of nations was positive, human law based either on treaty or custom.").

151 *See* NUSSBAUM, *supra* note 120, at 167 (Richard Zouche), 168 (Cornelius van Bynkershoek), 173-74 (Samuel Rachel), 176-77 (Johann Jakob Moser), 181-82 (Georg Friedrich von Martens).

152 *See id.* at 175; CLARK, *supra* note 106, at 126-27, 137 (describing the characteristics of the Pietist movement that made it a useful ally for a Calvinist dynasty attempting to govern a mostly Lutheran population). I should caution that Moser was from South Germany and Clark's account of the significance of Pietism is particular to the lands governed by Brandenburg-Prussia, *see* CLARK, *supra* note 106, at 135, but I note the connection anyway because it suggests a link between eighteenth-century intellectual trends and naturalism's incipient retreat in the same period.

153 NUSSBAUM, *supra* note 120, at 176-77.

154 *Id.* at 177-78.

Bentham, the caustic founder of utilitarianism[155] and coiner of the term "international law" to replace "the law of nations,"[156] made perhaps the most influential eighteenth-century case against the law of nature.[157] As the objective of all politics and governance, Bentham prized the principle of utility—the greatest good for the greatest number—for its simplicity and clarity, and railed against "nonsense," by which he meant argumentation which he did not believe could be reduced to a simple and clear meaning.[158] Thus, in an unpublished work early in his career, he excoriated the English commentator William Blackstone for what Bentham perceived as a sloppy and nonsensical definition of the law of nations as consisting in part of the law of nature and in part of treaties voluntarily entered into by the sovereign; Blackstone, said Bentham, had defined the law of nations as "consist[ing] partly of another Law, and partly of a thing that isn't Law at all."[159] As for natural law, derived from universal higher principles, it was also nonsense. Of Blackstone's treatment of the subject, Bentham wrote sarcastically:

> The Law of Nature is the Law that men are under when in a state of Nature. The State of Nature is the State men are in when there are no Laws . . . . The Law of Nations is the Law that governs the proceedings of Nations towards each other. Nations, States are made such by means of the Laws . . . that there are in each. We see now how it can [not] be otherwise that there should be these two things: and that these two things should be the same.
>
> As to the effect and success [the law of nations] has, I mean of so much as is Law of Nature, we need be in no pain about it: as such it must be 'inevitably conformed to': must in consequence have been inevitably known: must bid us to be happy, and must make us so.[160]

This, then, was the critique to which Bentham subjected the natural law of nations as received by the drafters of the Constitution: it was

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155 JEREMY WALDRON, NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 29 (1987).

156 GREWE, *supra* note 140, at 463.

157 *See* NUSSBAUM, *supra* note 120, at 185; JANIS, *supra* note 117, at 10-11 (2010).

158 WALDRON, *supra* note 155, at 34.

159 JANIS, *supra* note 117, at 11 (quoting JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 37 (James H. Burns & H.L.A. Hart eds., Clarendon Press 1977)).

160 BENTHAM, *supra* note 159, at 37 (first alteration in original).

an intellectual dead end.[161] Bentham also tore into Emmerich de Vattel in particular for his equivocation, writing with all his usual grace, tact, and restraint:

> Vattel's propositions are most old-womanish and tautological. They come to this: Law is nature—Nature is law. He builds upon a cloud. When he means anything, it is from a vague perception of the principle of utility; but more frequently no meaning can be found. Many of his dicta amount to this: it is not just to do that which is unjust.[162]

His acrid tirades and titanic arrogance notwithstanding, Bentham was an influential writer, including on cross-national lawmaking.[163] And his criticisms of Vattel, in particular, are widely echoed; many jurists have argued that Vattel's popularity among diplomats and politicians derived in large part from his

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161 Bentham also excoriated the Declaration of Independence. JANIS, *supra* note 117, at 29-30. To be more precise, during this period, as naturalist jurisprudence was incorporated into Enlightenment philosophy, it was adopted as the basis for the various rights proclaimed by American and French revolutionaries. NUSSBAUM, *supra* note 120, at 135. But Bentham disdained the notion of inalienable rights as a mere distraction from the principle of utility, writing of the Declaration of the Rights of Man: "*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of these pretended natural rights is given, and those are so expressed as to present to view legal rights. And of these rights, whatever they are, there is not, it seems, any one of which any government *can*, upon any occasion whatever, abrogate the smallest particle . . . . What is the language of reason and plain sense upon this same subject? That in proportion as it is *right* or *proper*, *i.e.* advantageous to the society in question, that this or that right – a right to this or that effect – should be established and maintained, in that same proportion it is *wrong* that it should be abrogated . . . . To know whether it would be more for the advantage of society that this or that right should be maintained or abolished, the time at which the question about maintaining or abolishing is proposed, must be given, and the circumstances under which it is proposed to maintain or abolish it; the right itself must be specifically described, not jumbled with an undistinguisable [*sic*] heap of others, under any such vague general terms as property, liberty, and the like." Jeremy Bentham, *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution*, *reprinted in* WALDRON, *supra* note 155, at 53-54.

162 10 JOHN BOWRING, THE WORKS OF JEREMY BENTHAM 584 (Edinburgh, William Tait 1843).

163 *See, e.g.*, MARK MAZOWER, THE GREEK REVOLUTION: 1821 AND THE MAKING OF MODERN EUROPE 247-49 (2021) (discussing Benthamite influence on early nineteenth-century revolutions such as that of Greece, derived both from Bentham's intellectual force and from his followers' connections with London-based finance and their resulting leverage over fragile new governments; also admitting that "it is easy to be diverted by the paternalistic arrogance and absurd self-importance of Bentham and his followers").

susceptibility to totally contradictory interpretations.[164] The shortcomings of eighteenth-century naturalism, of which Vattel was the latest and most influential exponent, came under attack from all sides in the nineteenth century, and enabled the positive, codified international law to which Bentham aspired[165] to displace the fuzzy, naturalistic law of nations.

C. Positivism, Dualism, Empire, and the Deepening Problem of Binding Force

In the early nineteenth century, the English utilitarian John Austin—in part following Bentham[166] and in part following the German writer Carl Friedrich de Savigny[167]—notoriously declared that, due to the lack of a higher sovereign charged with its enforcement, international law was not law, but rather "positive morality," unless, until, and only insofar as it was adopted into and applied within the domestic legal system of one or another state.[168] The legal significance of this semantic classification, if any,[169] is beyond the scope of this Note. But in the absence of natural law,

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164 *See, e.g.*, NUSSBAUM, *supra* note 120, at 158-59 ("In Vattel, [the earlier scholar Christian] Wolff's propensity for empty syllogistics degenerates into shallow oratory . . . . The weakness of Vattel's reasoning was aggravated by his lack of legal training . . . . It is probable that the defects of Vattel's training are primarily responsible for the striking ambiguity of his formulas and the inconsistency of many of his conclusions."); GREWE, *supra* note 140, at 375 ("[Vattel's] principles were . . . burdened with obscurities, inconsistencies, and contradictions."); Chetail, *supra* note 148, at 270-71 (Vattel as usefully manipulable authority).

165 BOWRING, *supra* note 162, at 584 ("Few things are more wanting than a code of international law.").

166 JANIS, *supra* note 117, at 15.

167 NUSSBAUM, *supra* note 120, at 234; *see* GREWE, *supra* note 140, at 504 (Savigny's characterization of international law as unfinished law).

168 Hathaway & Shapiro, *supra* note 128, at 261-62; NUSSBAUM, *supra* note 120, at 233-34.

169 Hathaway and Shapiro argue that the legal character of international law is indispensable for its moral evaluation, as whether it is law has implications for the identification and implementation of its proper use. Hathaway & Shapiro, *supra* note 128, at 255. On the other hand, they acknowledge that other scholars see the question as trivial, or indeed as a tired rhetorical ploy for lawless cynics. *See, e.g.*, *id.* (citing José E. Alvarez, *But is it Law?*, 103 AM. SOC'Y INT'L L. PROC. 163, 163 (2009) ("I am frankly appalled that we are still discussing this 1960's chestnut of a question.")). Still others dismiss the question altogether. *See, e.g.*, RICHARD POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 3 (1996) ("[*S*]*omething* ought turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it.").

and the medieval hierarchy it had replaced, the problem of locating a source for the binding force of international law bedeviled the legal theorists of the nineteenth century, however positive their methods.

Nevertheless, naturalism sustained further blows in this period as the increasing industrialization and economic interconnection of the world, which expanded the volume of treaties addressing commercial and technological matters, along with imperialism, which gradually forced such polities as it did not extinguish into the framework of the European state system, drove a dramatic proliferation of international lawmaking.[170] The space for naturalist methods in international legal scholarship consequently diminished.[171] Indeed, insofar as English-speaking jurists continued to invoke naturalism, they arguably did so specifically because naturalist methods were inadequate to the task of providing legal rules for the governance of international relations, which suited the ascendant British Empire by permitting it to maintain a certain politically useful flexibility in its international relations.[172]

In the late nineteenth century, positivism having come into its own, its exponents turned their attention to the problem of theoretically accounting for the existence and binding force of international law, in light of the now-total departure from the conceptual stage of any power or principle supreme over the sovereign state.[173] The Austrian jurist Georg Jellinek attempted to solve the problem by locating the binding force of international law in the concept of sovereignty itself, by identifying as an aspect of such sovereignty the concept of "auto-limitation," or the sole

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170 *See* NUSSBAUM, *supra* note 120, at 196-97 ("[N]onpolitical treaties multiplied immensely. Among the more important nineteenth century patterns one may mention treaties of commerce, consular treaties, treaties on extradition, on monetary matters, on postal, telegraphic, and railway communications, on fishing at sea, on copyrights and patents."); GREWE, *supra* note 140, at 462.

171 *Cf.* GREWE, *supra* note 140, at 512 (arguing that positivism caused the growth of international lawmaking, rather than the reverse).

172 *Id*. *But see* Stephen C. Neff, *Jurisprudential Polyphony: The Three Variations on the Positivist Theme in the 19th Century*, *in* THE ROOTS OF INTERNATIONAL LAW: LIBER AMICORUM PETER HAGGENMACHER 301, 309 (Pierre-Marie Dupuy & Vincent Chetail eds., 2014) (arguing that common-law jurists, less inclined than civil-law jurists to reason from abstract principle, laid much of the groundwork for positivist methodology in international jurisprudence).

173 NUSSBAUM, *supra* note 120, at 234 (identifying Jellinek as the first comprehensive theorist of international law since Austin).

prerogative to prescribe rules for the governance of oneself.[174] In Jellinek's account, the sovereign's power to enter into an international agreement was now identical with the sovereign's power to prescribe rules of law for the governance of its subjects,[175] and its binding force derived from the self-destructive nature of arbitrariness and lawlessness: A state without rules was no state at all, internationally as well as domestically.[176] Such a theory, if substituted for Grotian or Vattelian naturalism as the framework defining the treaty power conferred by Article II, section 2, might no longer present an obstacle to the interchangeability of that power with any other conjunction of the powers of the political branches.

More influential, however,[177] was the framework proposed by Heinrich Triepel, who, accepting Austin's sundering of international from domestic jurisprudence, articulated the theory of "dualism," i.e. international and domestic law as separate legal systems, which did not need to be accounted for by quite the same principles, but also could not directly act upon one another.[178] Additionally, Triepel reinvented the sovereign empowered to prescribe international law to its subjects by hypothesizing that, whenever one or more sovereign states expressly concluded a treaty or gave their implied consent to a customary rule, they together formed a common will, which, in the role of a higher power, prescribed the rule to the participant states as its subjects.[179] This particular postulate, however, odd and metaphysical,[180] departed from the realm of positivist jurisprudence and did not prove influential in the long run.[181] What remained was Triepel's

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174 Neff, *supra* note 172, at 322-23.

175 *See id*.

176 *Id.* at 322-23; *cf.* Hathaway & Shapiro, *supra* note 128, at 255 n.5, 349 (describing international law, like legality in general, as the substance of the sovereign and thus its safeguard against dissolution rather than an encumbrance upon it).

177 *See* NUSSBAUM, *supra* note 120, at 235; GREWE, *supra* note 140, at 505.

178 NUSSBAUM, *supra* note 120, at 235.

179 GREWE, *supra* note 140, at 505-06; *see also* Neff, *supra* note 172, at 314 (custom as "tacit treaty-making").

180 GREWE, *supra* note 140, at 506 ("The formation of a 'common will' which bound the merging individual State wills in a manner which was not unilaterally revocable remained a process which, in the final analysis, could not be explained on the basis of positivist conceptions."); *see also* Neff, *supra* note 172, at 315 ("[T]o that extent, it is arguable that Triepel's theory had at least some flavour of natural-law to it.").

181 Neff, *supra* note 172, at 333 (common-will positivism faded into obscurity in the early twentieth century). I find it remarkable that this least lasting component of Triepel's

legitimation of dualism,[182] and this, too, accords with the modern foreign affairs powers.[183]

At any rate, the old naturalism had drained out of international law by the early twentieth century. Although American and British jurists had continued to evoke it longer than their continental European counterparts, they either had paid it lip service while engaging in principally positivist analysis, as in the case of the American diplomat Henry Wheaton,[184] or else lacked lasting influence, as in the case of the ardent British naturalist Robert Phillimore.[185] Thus, when Dionisio Anzilotti, whose dualist theory closely followed Triepel's save for the fact that he took *pacta sunt servanda* as an unprovable axiom rather than as an effect of Triepel's common-will sovereign,[186] took part in deciding the epochal *Lotus* case as part of the Permanent Court of International Justice, he exhaustively catalogued the only sources of international law capable of binding sovereigns:[187]

> The rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be

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theory bore some resemblance to the notion advocated in the Federalist Papers that a party to a treaty could only be released from its obligation with the consent of the other party. *See* THE FEDERALIST NO. 64, *supra* note 111, at 394 (John Jay) ("[I]t will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.").

182 *See* NUSSBAUM, *supra* note 120, at 235.

183 *See, e.g.*, John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 319-20 (1992) (dualistic characteristics of American system); *see also infra* Part V.

184 Neff, *supra* note 172, at 306-07; *see also* GREWE, *supra* note 140, at 506 (linking Wheaton to Bentham and Austin).

185 *See* GREWE, *supra* note 140, at 511-12.

186 *See* Neff, *supra* note 172, at 313 (close theoretical alignment between Triepel and Anzilotti as leading supporters of dualist positivism); GREWE, *supra* note 140, at 506 & n.19 (Anzilotti's modification of Triepel's theory).

187 *See* Ole Spiermann, *Judge Max Huber at the Permanent Court of International Justice*, 18 EUR. J. INT'L L. 115, 129 (2007) (arguing that Anzilotti was responsible for writing dualism into the *Lotus* decision).

presumed.[188]

V. The Departure of Naturalism from the American Foreign Affairs Constitution and Its Consequences

No American court, President, or Congress ever adopted Triepel's dualism into American law. But as international law developed, neither did the United States stake out a position for itself as the last champion of the old law of nations.[189] Indeed, where once a number of fields of American law had purported to rest on a law of nature, by the end of this very period, the only areas of law in which natural law had not been renounced were those in which it had never existed in the first place.[190] It follows that within the American system, international law must have undergone some evolution concomitant with the nineteenth-century rise of positivism, and that that evolution must not have been so idiosyncratic as to leave the United States as an outlier at its end. As this section argues, there is reason to believe that, just as the need to justify *pacta sunt servanda* and the binding nature of international law troubled international legal theorists, American doctrines ceased to presume any answer to the questions those principles posed, and invented a new dualism that paralleled Austin's doubts and Triepel's bifurcation.

Already, in the early nineteenth century, American jurists

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188 The S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7, 1927).

189 As noted above, nineteenth-century American and British writers, such as Henry Wheaton, continued to refer to and even defend natural law during that period. But the naturalist international jurisprudence still subsided in common-law countries by the early twentieth century. *See* GREWE, *supra* note 140, at 511 (lack of lasting influence of British naturalists). Instead, the most influential international legal treatise in the English-speaking world in the early twentieth century was that of the arch-positivist Lassa Oppenheim. Neff, *supra* note 172, at 308-09. Even the indecisive attempts to find a naturalist basis for international law during the interwar period were characterized by their contemporaries as a new departure from the positivist consensus rather than a continuation of uninterrupted tradition. *See* GREWE, *supra* note 140, at 603-05.

190 *See* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 178-80 (2021) (rejection of natural law by American courts). Regarding the spread of fields which never had any connection to natural law in the first place, see, e.g., Paul v. Nat'l Life, 352 S.E.2d 550, 551 (W. Va. 1986) ("[N]o conflicts of law doctrine has ever had any credible pretense to being 'natural law' emergent from the murky mists of medieval mysticism. Indeed, the mention of conflicts of law and the *jus naturale* in the same breath would evoke a power guffaw in even the sternest scholastic.").

evinced dissatisfaction with the definitions of the foreign affairs powers the drafters of the Constitution had purported to distribute. For instance, Joseph Story, discussing the different agreements mentioned in the Compacts Clause and neighboring provisions[191] in his *Commentaries on the Constitution*, tried to rely on the exposition of St. George Tucker, a prominent jurist of the late eighteenth century who played some role in shaping the constitutional order.[192] Tucker had adopted Vattel's distinction, which distinguished between the "treaties, alliances, and confederations" wholly forbidden to the states, on the one hand, and the "agreements and compacts" permissible with Congressional approval, on the other, on the basis of their subject matter and duration.[193] Story, in response, identified all the weaknesses for which Vattel has so long been criticized:

> What precise distinction is [in Article I, section 10] intended to be taken between *treaties*, and *agreements*, and *compacts*, is nowhere explained, and has never as yet been subjected to any exact judicial, or other examination. A learned commentator [Tucker], however, supposes, that the former ordinarily relate to subjects of great national magnitude and importance, and are often perpetual, or for a great length of time; but that the latter relate to transitory or local concerns, or such as cannot possibly affect any other interests, but those of the parties. But this is at best a very loose, and unsatisfactory exposition, leaving the whole matter open to the most latitudinarian construction. What are subjects of great national magnitude and importance? Why may not a compact or agreement between states be perpetual? If it may not, what shall be its duration? Are not treaties often made for short periods, and upon questions of local interest, and for temporary objects?[194]

It appears, then, that Story's generation had either rejected some

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191 U.S. CONST. art. I, § 10, cls. 1, 3 ("No State shall enter into any Treaty, Alliance, or Confederation . . . . No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.")

192 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462-63, 463 nn.13-14 (1978) (background on Story and Tucker).

193 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA 310 (1803) (citing Vattel).

194 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1396 (Boston, Hilliard, Gray, & Co.; Cambridge, Brown, Shattuck, & Co. 1833).

concrete idea espoused by Tucker's, or perhaps found that a workable principle whose existence was presupposed by the naturalist, Vattelian strand of thinking did not, in fact, exist.[195]

This vacuum of authority left room for a notion not unlike Triepel's dualism. The rise of the later-in-time rule over the course of the nineteenth century[196] suggests that just such a notion had begun to take shape. In American law today, courts will give effect to a later statute inconsistent with an earlier treaty even if it violates the treaty.[197] John Jay, in Federalist No. 64, seemed to suggest that treaties should prevail over inconsistent statutes.[198] Alexander Hamilton, arguing against the necessity of Congressional legislation to implement the unpopular Jay Treaty, invoked the later-in-time principle, but in favor of the treaty against the existing statutory

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195 This is not to say that Story entirely rejected natural law. *See, e.g.*, United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (Story, Circuit Justice, C.C.D. Mass. 1822) (No. 15,551) (upholding the seizure by a naval vessel of a slave ship on the grounds that positive law "does not advance one jot to the support of the proposition, that a traffic . . . that is unnecessary, unjust, and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations" and that "every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations"). I suggest only that Story's rejection of Tucker's Vattelian law of treaties represents a stage in the wholesale evolution away from natural law which would ultimately render treaty exclusivity unworkable, or represents a complete rejection of only that part of natural law on which treaty exclusivity was premised.

196 To anticipate an objection, the Marshall Court ruling in Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), is often cited as the wellspring of treaty non-self-execution in American law, *see, e.g.*, Medellín v. Texas, 552 U.S. 491, 504-05 (2008), and thus may appear to undercut the contention that that American dualism was a mid-nineteenth-century development. However, Sloss, *supra* note 116, at 159-62 argues that the *Foster* Court declared no generally applicable principle concerning the relationship between domestic and international law, but merely held that when the Adams-Onís treaty, by which the United States acquired Florida from Spain, transferred the land at issue in Florida directly to the United States subject to an obligation to perfect title in the plaintiff claimants, only Congress could fulfill that duty for separation-of-powers reasons, specifically the Property Clause, U.S. CONST. art. IV, § 3, cl. 2.

197 CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 53-54 (2013). The later-in-time rule is still subject to some restraints in the name of international law, in the form of the *Charming Betsy* canon of statutory interpretation according to which a statute will not be interpreted in such a way as to conflict with an international legal obligation if possible. *Id.* at 54-55.

198 THE FEDERALIST NO. 64, *supra* note 111, at 394 (John Jay) (arguing that treaties under the Constitution are not, and should not be, "like acts of assembly . . . repealable at pleasure").

code rather than the reverse.[199]

But beginning in the mid–nineteenth century, jurists began to adopt an approach according to which the Supremacy Clause neither prescribed nor adopted any hierarchy placing treaties above domestic statutes. Supreme Court Justice Benjamin Curtis, riding circuit in 1855, was the first to apply this rule,[200] in *Taylor v. Morton*.[201] There, hemp importers sued to recover duties collected on Russian hemp after Congress had by statute lowered tariffs on hemp from other sources, in contravention of a treaty with Russia promising to place no higher duty on hemp from Russia than from anywhere else.[202] Curtis adopted the dualist perspective that no treaty was applicable in a United States court until incorporated into domestic law, by some domestic authority.[203] Conceding that the Supremacy Clause of the Constitution provided such an authority, he still insisted that the authority's presence or absence was exclusively a domestic question, and so, "[i]f the people of the United States were to repeal so much of their constitution as makes treaties part of their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern."[204] As it was, Curtis ruled that in the absence of an express hierarchy in the Supremacy Clause, no source of domestic law had conferred on treaties any higher authority than statutes.[205] Since *Marbury* had found that the Constitution's supremacy over statutes followed from the purpose of a constitution, rather than any aspect of the Supremacy Clause, Curtis would not afford a treaty any special status unless he found such status implicit in the concept or indispensable to the function of a treaty.[206] Since he found that the asymmetry between the power to pass statutes and the power to conclude treaties did not require the treaty to prevail, and that the judiciary was not well suited to the interpretation of treaty language or the identification of grounds for breach on the plane of international law, Curtis held that a treaty and

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199 SLOSS, *supra* note 116, at 55.

200 Lobel, *supra* note 26, at 1104.

201 23 F. Cas. 784 (Curtis, Circuit Justice, C.C.D. Mass, 1855) (No. 13,799).

202 *Taylor*, 23 F. Cas. at 784-85.

203 *See id.* at 785.

204 *Id.*

205 *See id.*

206 *Id.*

a statute were no different in their effect, including on each other.[207]

Nowhere did Curtis refer to the law of nature as a potential authority on the nature of treaties, as had, for example, Jefferson. His dualist doctrine paralleled Austin's distinction between international rules of merely moral force and international rules adopted into true law in the domestic system;[208] it paralleled Triepel's treatment of international and domestic law as separate systems;[209] and it even paralleled Jellinek's theory of auto-limitation.[210] Curtis thus responded to the vacuum of authority left by natural law in much the same way as did the theorists of modern positivism. Over the remainder of the century, Curtis's reasoning was adopted by the Supreme Court.[211] In the infamous *Chinese Exclusion Case*,[212] in which the Court considered effect of an earlier treaty contrary to the Chinese Exclusion Act,[213] the Court not only relied on *Taylor* in allowing the statute to override the treaty but adopted the Austinian reasoning that treaty obligations belonged to the realm of morality and were for that reason beyond the concern of a court of law.[214]

In stark contrast to the vigorous internationalism of the early United States, the increasingly dualist judiciary withdrew ever further from the realm of foreign affairs as the international-facing powers allocated by the Constitution became "not so much 'separated' as fissured, along jagged lines indifferent to classical categories of governmental power."[215] The Court's retreat from

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207 *Id*. at 785-87.

208 *See supra* note 168 and accompanying text.

209 *See supra* note 178 and accompanying text.

210 *Compare Taylor*, 23 F. Cas. at 785 ("Ordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which they agree to regulate their own conduct."), *with* Neff, *supra* note 172, at 321-23.

211 Lobel, *supra* note 26, at 1107-08.

212 Chae Chan Ping v. United States, 130 U.S. 581 (1889).

213 *Id*. at 589.

214 *Id*. at 602-03 ("This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct.").

215 HENKIN, *supra* note 2, at 27. On the decline in the American judiciary's willingness to address itself to international law, see Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) ("Concerns about separation of powers and judicial competence often make courts reluctant to second-guess other branches of government in areas involving international affairs. Modern jurists also are notably lacking in the diplomatic experience of early Justices such as John Jay and John

interference in foreign policy culminated with its sweeping surrender of authority to review executive action in the international arena in *United States v. Curtiss-Wright Export Corp.*,[216] in which the Court adopted a lower standard of review for Congressional delegations of foreign policy power than of domestic power to the executive, and a high degree of deference for an ill-defined conception of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[217] By the late twentieth century, the judiciary had arguably ceded much of the field of foreign relations law to the political branches.[218] American courts have been

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Marshall, who were familiar with the law of nations and comfortable navigating by it."). For an example of the internationalism of the early courts, see United States v. Smith, 18 U.S. (5 Wheat.) 153, 156–57, 163 n. (1820) (Story, J.), in which Daniel Webster had argued that piracy, as a crime adopted by statute from the law of nations into United States law, was too ill-defined to be constitutionally punishable. *See also* JANIS, *supra* note 117, at 45. Justice Story rejected the argument in a footnote, which began "To show that piracy is defined by the law of nations, the following citations are believed to be sufficient" and ran for fourteen pages of block quotes of learned commentators in four languages.

216 299 U.S. 304 (1936).

217 *Id*. at 315, 319-20. Perhaps not incidentally, the Court arguably misread the speech by John Marshall to Congress in which Marshall referred to the President as "the sole organ of the nation in its external relations." *Id*. at 319. Marshall, then Secretary of State to John Adams, was simply answering the Republican charge that the President had intruded upon the province of the judiciary by applying the extradition provision of the Jay Treaty to a man accused of mutiny and murder by British authorities. *See* H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS 79-83 (2002). Marshall's point in identifying the President as "the sole organ of the nation in its external relations" was to argue that, because the power to interact with foreign sovereigns and their agents was executive in nature, the President's constitutional function included the interpretation and application of international law. *See id*. at 83-89.

218 *See, e.g.*, Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. (forthcoming 2023) (manuscript at 37), http://dx.doi.org/10.2139/ssrn.4172365 [https://perma.cc/SF73-SABY] (discussing use of the political question doctrine for this purpose by lower courts); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1917-19 (2015) (surveying Supreme Court rulings to this effect). *But see* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism"*, 128 HARV. L. REV. FORUM 294, 301-02 (2015) (criticizing the previous article's indistinct historical account of the shift to and from extraordinary deference in the twentieth century). Bradley does not seem to contest Sitaraman and Wuerth's account of a shift *to* extraordinary deference in the early twentieth century, at least insofar as he criticizes it, *id.* at 302 n.66, by relying on Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 277 (2002) (arguing that *Curtiss-Wright* was underpinned by a "high positivist vision of American sovereignty" that had reached its apogee in the late

especially reluctant, in the last half century, to pass on any Treaty Clause issues.[219]

During and after this very period in the late nineteenth and early twentieth centuries, when the adamantly international naturalist Constitution had collapsed and American dualism came to shield the political branches' actions regarding international law from judicial review, the modern congressional-executive agreement appeared. Beginning with the election of 1888, Congress passed a number of statutes delegating to the President *ex ante* authorization to enter into tariff negotiations and implement any resulting agreements.[220] Then, in the 1940s, international agreement practice shifted rapidly in the direction of congressional-executive agreements subject to *ex post* bicameral approval and unconstrained by subject matter.[221]

VI. Conclusion

One can infer from these circumstances that the abandonment of whatever naturalist notions may once have distinguished treaties from mere international coordination, and the rise of dualist-positivist deference to the executive in American foreign relations law, enabled the appearance of the congressional-executive agreement. When that inference is made, one need not simply suppose, based on an absence of satisfying evidence, that there exists no structural principle adequate to carve out an exclusive treaty power covering actions otherwise permissible under Articles I and II. Instead, there is an affirmative reason why no such principle should be expected: The Framers of the Constitution believed such a structural principle resided in a natural law of nations, a set of

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nineteenth century).

219 *See generally* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 12-14 (2018) (summarizing cases in which the Supreme Court and lower courts have refused to review treaty terminations by the executive); *see also* Made in the USA Found. v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001) ("We . . . decline to reach the merits of this particular case, finding that with respect to international commercial agreements such as NAFTA, the question of just what constitutes a 'treaty' requiring Senate ratification presents a nonjusticiable political question.").

220 Hathaway, *supra* note 4, at 1293-95.

221 Ackerman & Golove, *supra* note 4, at 875-83 (summarizing piecemeal moves in the direction of *ex post* congressional-executive agreements over the course of the Roosevelt presidency); *id.* at 891-92 (describing the outpouring of such agreements after 1945).

unwritten, universal moral principles perforce annexed to the textual Constitution, but the coherence and utility of that law went the way of the transmutation of metals, the humoral theory of medicine, and other such ideas embraced in the same era.

Today, the political branches may be undecided about which of them has what responsibility to fulfill the United States' international obligations. The full scope of such issues sprawls far beyond the scope of this Note. Rather, the purpose of this Note is to argue that the relationship of the United States to its international obligations—such as the JCPOA—should be laid bare and not obscured beneath the residue of the eighteenth-century distinction between the treaty power conferred by Article II and the other powers of the political branches, combined and coordinated with international partners. Today, commentators argue that the rules-based international order is under threat from states whose leaders believe that they can best achieve their goals by gaming the system.[222] In such circumstances, the United States ought at least to

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222 *See* Oona Hathaway & Scott Shapiro, *Putin Can't Destroy the International Order by Himself*, LAWFARE (Feb. 24, 2022, 5:46 PM) https://www.lawfareblog.com/putin-cant-destroy-international-order-himself (arguing for a robust international response to the illegality of the Russian invasion of Ukraine); *see also, e.g.*, David J. Scheffer, *Legal Principles Matter in Defense of Democracies*, OPINIO JURIS (Jan. 17, 2022) http://opiniojuris.org/2022/01/17/legal-principles-matter-in-defense-of-democracies/ [https://perma.cc/HB33-PMF3] (describing legal principles aligned with Ukrainian and Taiwanese security); Caroline de Gruyter, *Boris Johnson's "Sausage War" Was Deadly Serious*, FOREIGN POL'Y (June 23, 2021, 4:16 PM), https://foreignpolicy.com/2021/06/23/boris-johnsons-sausage-war-was-deadly-serious/ [https://perma.cc/WY9A-ZQES] (arguing that UK intransigence regarding supposedly settled Brexit agreements is the product of bad-faith negotiation); Justin Key Canfil, *The U.S. Will Exit the Open Skies Treaty and It's Unclear Why*, LAWFARE (June 3, 2020, 8:40 AM), https://www.lawfareblog.com/us-will-exit-open-skies-treaty-and-its-unclear-why [https://perma.cc/CHW6-4ECP] (surveying obscure rationale for and adverse consequences of withdrawal from arms control treaty). Whether these trends are indeed new is surely debatable, but no less worthy of attention for that, especially insofar as the United States, as a leading world power, is capable of exerting normative influence. *Compare* Communiqué, Ministry of Foreign Affairs of the People's Republic of China, Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (Jul. 12, 2016), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201607/t20160712_679470.html [https://perma.cc/92F7-CTBG] (superpower rejecting international arbitral proceedings after adverse ruling); *with* U.S. DEP'T OF STATE, U.S. WITHDRAWAL FROM THE PROCEEDINGS INITIATED BY NICARAGUA IN THE INTERNATIONAL COURT OF JUSTICE (1985), *reprinted in* 24 I.L.M. 246, 246-49 (1985) (superpower rejecting ICJ proceedings after adverse ruling).

strive for transparency and honesty regarding its international legal obligations, and set aside obfuscatory language severed from any clear and comprehensible doctrine.[223]

The difference between an Article II treaty and an executive or congressional-executive agreement is minimal or nothing. The whole subject should be laid to rest and the true issue stated clearly. Because no benevolent higher power, constitutional or international, will see to it that the United States keeps its word on the world stage, if that word is to be kept, the responsibility for keeping it falls squarely on the political branches.

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223 *Cf.* SLOSS, *supra* note 116, at 59 ("[W]e can define 'legal gibberish' as a legal term of art that is used to obfuscate legal issues. When lawyers and judges utilize legal gibberish, they create confusion because the gibberish term functions as a substitute for rational legal analysis.").