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THE JEFFERSONIAN TREATY CLAUSE

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THE JEFFERSONIAN TREATY CLAUSE

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I. INTRODUCTION: THE “NECESSARY AND PROPER” EXERCISE OF THE FEDERAL TREATY POWER

The Treaty Clause of the United States Constitution declares that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹ A casual inspection of the stark text of the Treaty Clause seems to yield two seemingly obvious propositions: that the Treaty Clause is an affirmative grant of power to both the President and the Senate and that there are no internal textual limitations on the scope of the federal treaty power. Both of these seemingly obvious propositions are long-settled law. Both propositions are supported by a strong academic and historical consensus. And both propositions are wrong as a matter of the Constitution’s original meaning.

The Constitution’s Treaty Clause does in fact grant power to the Senate, but it grants no power to the President that he or she does not otherwise possess by virtue of “[t]he executive Power” vested by the first sentence of Article II.² The Treaty Clause confirms, clarifies, and qualifies the President’s power to make treaties, but it does not grant that power. Moreover, the federal treaty power is subject to very substantial, albeit subtle, constitutional limitations on its exercise. If properly viewed through the lens of

* Professor, Boston University School of Law. We are grateful to David Golove, Vasan Kesavan, and the participants at a workshop at Boston University School of Law for valuable comments. This article expands on material that appears in Chapter 2 of a book that we have published, *see Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History* 33-72 (2004), and we thank Yale University Press for permission to utilize and build upon that material.

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¹ **U.S. Const.** art II, § 2, cl 2.

² *Id.* art. II, § 1.

original meaning, the treaty power can only be used to implement or carry into effect other federal powers granted by the Constitution, and any such implementational use of the federal treaty power must be proportionate, measured, and respectful of background principles concerning rights and governmental structure. In other words, any exercise of the federal treaty power must be -- to borrow a phrase from another constitutional provision -- “necessary and proper for carrying into Execution”³ other federal powers. There is both much more and much less to the Treaty Clause than meets the eye.

The theory of the Treaty Clause that we present here, which views treaties solely as devices for reasonably implementing other constitutional powers, was inspired by Thomas Jefferson, who articulated a similar view of the clause more than 200 years ago. We hasten to add that Jefferson’s position was never historically ascendant, and Jefferson himself did not develop or defend the position in precisely the fashion that we do. We do not ground our position on the authority of Jefferson or on the weight of sympathy with Jefferson’s views expressed by other founding-era figures. Rather, we base our claims about the Constitution’s original meaning on the text and structure of the Constitution itself.⁴

A proper understanding of the treaty power is essential to an integrated understanding of American constitutionalism. The treaty power has always been one of the most important, and most controversial, federal powers. In the founding era, it was at the center of issues concerning the very character of the nation, such as territorial expansion and the eligibility of aliens to own real property. In recent years, the rise of

³ Id. art. I, § 8, cl. 18.

⁴ For those who wonder how a view that was not ascendant in Jefferson’s own time could possibly represent the Constitution’s original meaning, see infra XX.

globalization and the resulting proliferation of treaties addressing an ever-increasing range of subjects has put the treaty power equally at the center of modern constitutional debate. The Treaty Clause’s original meaning, of course, will not be regarded by everyone as decisive, or even relevant, to that debate. But for those who consider original meaning to be in any respect important or interesting, we hope to provoke some thought about a long-misunderstood constitutional clause.

The Treaty Clause is located in Article II, section 2 of the Constitution. Section 1 of Article II begins by vesting “[t]he executive Power” of the United States in the President. This clause is a grant of power – the “executive Power” – to the President.⁵ That “executive Power” includes the power to make treaties. The Treaty Clause, as is true of many of the provisions in sections 2 and 3 of Article II, *confirms* the existence of that particular presidential power and *qualifies* it by requiring Senate ratification of treaties, but the President’s treaty power *derives* from the Article II Vesting Clause rather than from the Treaty Clause.

The source of the power has important implications for its scope. Executive power of the kind granted by the Article II Vesting Clause is generally implementational by nature; it is the power to carry into effect law made by other actors.⁶ The treaty power, as an aspect of the executive power, shares this implementational nature; it is the power to carry law into effect in the international arena. Furthermore, executive power is generally subject to the *principle of reasonableness*, which is a venerable principle of British administrative law that requires exercises of delegated implementational power,

⁵ See *infra* XX.

⁶ See *infra* XX.

such as executive power, to be proportionate, measured, efficacious, and rights-regarding.⁷ The treaty power, as an implementational executive power, must conform to the principle of reasonableness. Thus, federal treaties must carry into effect some federal power other than the treaty power itself, and they must do so in a reasonable, proportionate, rights-regarding manner.

To be sure, this “Jeffersonian” or “implementational” (and we will henceforth use those terms interchangeably) conception of the treaty power is at least facially problematic along every dimension that might be thought relevant for constitutional meaning: textual, intratextual, structural, historical, and doctrinal. Textually, the Treaty Clause is phrased as an unlimited grant of power. Intratextually, the Article I Sweeping Clause *expressly* limits Congress’s implementational legislative powers to the enactment of “Laws which shall be necessary and proper for carrying into Execution”⁸ other federal powers, which shows that the founding generation knew how to draft a “necessary and proper for carrying into Execution” requirement when it wanted one. Structurally, the Treaty Clause requires consent to treaties by two-thirds of the Senate, which suggests that the Constitution’s chosen method for limiting treaties might be procedural rather than substantive. Historically, although our position was not utterly alien to the founding generation, it is distinctly anti-historical in most important respects. And doctrinally, it has been settled law at least since the Supreme Court’s landmark decision in 1920 in

⁷ See *infra* XX.

⁸ **U.S. Const.** art. I, § 8, cl. 18. Today, this clause is generally known as the “Necessary and Proper Clause.” The founding generation, however, consistently referred to it as the “Sweeping Clause,” and we employ the original label here.

*Missouri v. Holland*⁹ that the Treaty Clause serves as a head of federal jurisdiction independent of, and potentially broader than, the other enumerated powers of the federal government. Professor Gerald Neuman exemplifies the dominant doctrinal and academic consensus when he describes the Treaty Clause as “an independent grant of power to the federal government to enter into treaties that enact rules that Congress might not otherwise have been able to enact.”¹⁰

In the course of this article, we will address all of these concerns. Some of them dissolve fairly quickly under close scrutiny. Others are substantial but ultimately not fatal to our understanding of the Treaty Clause. In the end, there is no theory of the Treaty Clause that does not encounter very serious interpretative problems. We do not claim that our interpretation of the Treaty Clause can be established beyond a reasonable doubt, but only that our theory is a better account of the Constitution’s original meaning than any competing alternatives.¹¹

⁹ 252 U.S. 416 (1920) (holding that the President and Senate could by treaty regulate the hunting of migratory birds in a fashion that went beyond then-established limitations on Congress’s legislative powers).

¹⁰ Gerald L. Neuman, The Nationalization of Civil Liberties, 99 *Colum. L. Rev.* 1630, 1646-47 (1999). This classic conception of the Treaty Clause has been defended with extraordinary thoroughness and sophistication by David Golove. See David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 *Mich. L. Rev.* 1075 (2000).

¹¹ This raises the thorny problem of the appropriate *standard of proof* for claims about constitutional meaning – a problem that one of us has pondered at considerable length elsewhere. See Gary Lawson, Proving the Law, 86 *Nw. U.L. Rev.* 859 (1992); Gary Lawson, Legal Indeterminacy: Its Cause and Cure, 19 *Harv. J.L. & Pub. Pol’y* 411 (1996). If propositions about constitutional meaning should only be accepted if they are proved beyond a reasonable doubt, relatively few propositions deserve acceptance. We are not prepared to say that our claims about the Treaty Clause meet that lofty standard. But if propositions should be accepted under a lower threshold, such as a “preponderance of the evidence” or a “best available alternative” standard, then we think that we have a good case for acceptance. And one must keep in mind that the proper standard for acceptance may well vary with the context: the standard for acceptance in scholarship may not be the same as the standard for acceptance in adjudication. See Lawson, Proving the Law, *supra*, at 877-80; note XX, *infra*.

The argument that we construct proceeds in several discrete steps. In Part II, we define our interpretative approach, which we label “reasonable-observer originalism.” This approach looks for the meaning that would have been attributed to the Constitution by a reasonable founding-era observer in possession of all relevant information. The methodology is thus originalist but not strictly historical. Interpretation is a legal rather than historical enterprise, and we accordingly look primarily for hypothetical understandings that would have existed under ideal counterfactual conditions rather than for actual understandings.

In Part III, we define what we mean by an “implementational” theory of the treaty power and present its Jeffersonian roots. This discussion defines the limited scope of our inquiry. There are a great many important questions concerning the federal treaty power that we do not address in this article, such as whether treaties are the exclusive method by which the federal government can enter into binding international arrangements and whether treaties can ever take effect without need for implementing legislation. Our study is confined to the basic question whether the treaty power is, as current doctrine maintains, a unique kind of quasi-legislative power that defines its own sphere of jurisdiction or, as Jefferson maintained, purely an implementational power that can only act to implement other exercises of federal power. That is more than enough to keep us busy.

In Part IV, we establish some basic textual truths about the treaty power, the most jarring of which, at least to modern sensibilities, is that many express constitutional restrictions, most notably including the First Amendment, do not apply to the treaty power. These truths become important at a subsequent stage of our argument when we

examine the structural and consequentialist arguments for the implementational theory of the Treaty Clause.

In Part V, we present the bulk of our substantive argument by establishing that the Treaty Clause does not grant any power to the President but rather confirms and qualifies a presidential power derived from the Vesting Clause of Article II. This crucial step in the argument requires us to construct a comprehensive theory of Article II of the Constitution. In particular, in order to understand the Treaty Clause, one must first clear away the widespread misconception that the President draws power from sections 2 and 3 of Article II. The provisions in those sections confirm, clarify, and qualify presidential powers, and in some cases impose presidential duties, but they do not grant powers that are not otherwise derived from the Vesting Clause.

We further show how the treaty power's executive pedigree defines its scope and limits. Executive power is essentially implementational power, and to the extent that the treaty power is executive, it shares this character. Further, implementational executive power must be exercised in accordance with the principle of reasonableness, which in the eighteenth-century was a bedrock principle that required delegated executive power to be exercised in a measured, efficacious, and substantively reasonable fashion. Federal treaties must therefore implement federal powers in a proportionate and rights-regarding manner.

Part VI cements the case for the Jeffersonian, implementational theory of the treaty power by presenting consequentialist and epistemological reasons why the implementational view is the best originalist account of the federal treaty power. The implementational view avoids what are otherwise bizarre results, and although it limits

the federal treaty power more than has the law over the past 200 years, it does not reach results that the founding generation would have found absurd.

Part VII ends our discussion with some concluding remarks from Thomas Jefferson about his own theory. Jefferson did not claim that his theory of the treaty power was without flaws. Far from it. He claimed only that it was better than any other theory that had been put forward. That is our claim as well. To paraphrase Churchill, the implementational theory of the treaty power is the worst possible theory except for all of the others.

II. TAKING INTERPRETATION SERIOUSLY: DEFINING “REASONABLE-OBSERVER ORIGINALISM”

Before we pursue our task in earnest, we first need to define our interpretative approach. We conduct our inquiry using what we call “reasonable-observer originalism,” which holds that the Constitution means what a fully-informed original audience would have understood it to mean after considering all relevant evidence and arguments. Under this approach, original meaning represents *hypothetical* mental states that would have existed under (probably) counterfactual circumstances rather than *actual* mental states held by concrete historical persons. It would require a book to explore the rationale for and mechanics of this approach, and that is certainly not our project here.¹²

But a few brief comments are appropriate.

¹² For some introductory thoughts on this approach, see **Lawson & Seidman**, *supra* note *, at 7-13; Vasana Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting History, 91 **Geo. L.J.** 1113 (2003); Gary Lawson & Guy Seidman, The First “Establishment” Clause: Article VII and the Post-Constitutional Confederation, 78 **Notre Dame L. Rev.** 83, 87-93 (2002); Gary Lawson, On Reading Recipes . . . and Constitutions, 85 **Geo LJ** 1823 (1997).

Law often tries to understand human affairs from the perspective of an ideal person rather than from the perspective of the actual actors in concrete cases. Tort lawyers are familiar with the concept of the “reasonable person” as the touchstone for legal liability, and hypothetical constructs such as the reasonable person play an important role in other legal inquiries as well.¹³ The interpretation of a constitution is a legal act. Evidence from other disciplines, such as history, psychology, political science, or economics, can be relevant to the interpretative enterprise, but at bottom a constitution is a legal instrument that can only be understood in legal terms.

The perspective of a reasonable, fully-informed observer has always been implicitly understood by lawyers to be the appropriate perspective for constitutional interpretation. Disputes about documentary meaning have never been thought to be fully resolvable by reference to nose counts, as would be true if actual mental states were the ultimate touchstone of reasoning. Today, as in the eighteenth century,

[p]eople give *reasons* for their views of meaning, and those reasons do not inevitably reduce to some calculation involving actual mental states. Those reasons can involve pointing out some feature of the document that one’s opponents have not yet seen, or have undervalued, or have refused to acknowledge for political or other reasons. In other words, they refer to mental states that *would* or *might* exist under counterfactual circumstances. Those reasons can also, of course, include reference to actual mental states; one can certainly invoke the numbers, the eminence, or both of the proponents of a particular viewpoint. But those actual mental states are *evidence* of meaning; they are not *constitutive* of meaning.¹⁴

¹³ We plan to explore this seemingly universal feature of legal systems in more depth in a subsequent work.

¹⁴ Lawson & Seidman, *supra* note XX, at 91.

One of us has elsewhere identified the basic differences (and similarities) between reasonable-observer originalism and various intentionalist or historicist methodologies that might be more familiar:

Operationally, the difference between reasonable-observer originalism and “intentionalist” approaches concerns the *weight* that is properly given to pieces of evidence rather than the *admissibility* of that evidence. Reasonable-observer originalism focuses on what a fully informed, unbiased observer would have concluded after weighing all relevant evidence. The expressed views of concrete historical individuals can provide modest evidence of what a reasonable observer would have concluded, but they are hardly the touchstone of an inquiry into meaning. Actual participants in actual debates were not always in possession of all relevant information, were not always unbiased observers, and were not always (given the real-world stakes involved) necessarily honest about their own thoughts or their perceptions of the thoughts of others. This is true of all forms of expressed views, including statements or actions of framers or ratifiers, statements or actions of legislators or executive officials, and statements or actions of judges. Precedents, whether testimonial, legislative, or judicial, are relatively weak evidence of original meaning. Such evidence generally pales before evidence drawn from text, structure, interpretative conventions, and general background understandings about language, the document in question, and the world in which the document is embedded.¹⁵

An approach such as ours that privileges an objective, hypothetical meaning does *not* consider materials such as “the records of the constitutional convention, the ratification debates, *The Federalist*, and early governmental practice” to be “the canonical originalist sources.”¹⁶ Instead, “one must always be prepared to ask whether an expressed understanding would have been different if the utterer had known or thought about X, Y, and Z.”¹⁷ A view that received only minimal expression during the founding era could

¹⁵ Gary Lawson, Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine, 73 *Geo. Wash. L. Rev.* 1701, 1707-08.

¹⁶ Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 *U. Chi. L. Rev.* 1721, 1733 (2002). See also Martin S. Flaherty, The Most Dangerous Branch, 105 *Yale L. J.* 1725, 1788 (1996) (taking for granted – mistakenly, our approach maintains -- that sound originalist arguments must focus on history, at least where texts are not clear on their face).

¹⁷ Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 *Const. Comm.* 191, 196 n.20 (2001).

nonetheless represent the original meaning of the Constitution *if* one concludes that a fully-informed audience, after considering all of the relevant arguments, including arguments that may not have occurred to anyone at the time, would have accepted that view as correct.

Put as simply as possible, our approach downplays, though it does not eliminate, the relevance of actual expressions of mental states and emphasizes the relevance of arguments from the text, organization, and context of the Constitution considered as a whole.¹⁸ To a reasonable-observer originalist, arguments from structure and first principles can easily outweigh even very impressive evidence about concrete historical understandings. “Original *understandings* were not necessarily original *meanings*.”¹⁹

¹⁸ Of course, the expressed mental states of government officials, such as judges, are important to know if one wants to avoid getting into trouble with armed agents of the state, but they do not have a privileged status for determining the actual meaning of the Constitution.

¹⁹ Lawson & Seidman, *supra* note *, at 12. The obvious objection to reasonable-observer originalism is: how can the authority of the Constitution possibly be grounded in hypothetical mental states that may never have existed? The obvious objection to the obvious objection is: this question confuses issues about the Constitution’s *meaning* with issues about the Constitution’s *authority*. We are making no claims about the Constitution’s political or moral authority; we simply seek to uncover facts about its meaning. One cannot know how much (if any) normative force the Constitution exerts without first knowing what the Constitution actually says. Put another way, understanding a constitution and deciding whether to follow it are two distinct operations. The nature of the document and the nature of communication tell you how to discern a document’s meaning, though not what to do with that meaning once you have it.

More precisely, the nature of the document tells you *part* of what you need to know in order to interpret it. Michael Dorf, in a characteristically thoughtful response to some of Professor Lawson’s prior work in this vein, see Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *Geo. L. J.* 1823 (1997), has forcefully denied that interpretation can be divorced from normative concerns because “[w]hether we equate meaning with original public meaning, or with speaker’s meaning, or with a dynamic conception of meaning, or with something else, depends on why we care about the meaning of whatever it is we are interpreting.” Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 *Geo LJ* 1857, 1858 (1997). Professor Lawson has elsewhere agreed that the answers to at least some interpretative questions are “inescapably normative, depending heavily on the end one seeks to serve through interpretation.” Gary Lawson, *Proving the Law*, *supra* note XX, at 860. It is crucial, however, to understand the particular respects in which interpretation, of a constitution or anything else, is and is not necessarily a normative enterprise.

Propositions about meaning are propositions. Anything that is true of propositions in general is also true of propositions about meaning. One important truth about propositions is that the proof of any proposition requires three elements: *principles of admissibility* that tell you which considerations count for or against a proposition’s truth, *principles of significance* which tell you how much (relative) weight to give

III. TAKING JEFFERSON SERIOUSLY: DEFINING THE IMPLEMENTATIONAL TREATY POWER

A. *Avoiding False Starts*

The federal treaty power has been the subject of substantial debate from the nation's earliest days to the present. The framing generation worried about such questions as whether the President and a two-thirds majority of the Senate could cede some or all of a state's territory to a foreign power.²⁰ Early twentieth-century thinkers, echoing previous debates, wondered whether the treaty power could be used to create regulatory laws that are beyond the enumerated legislative powers of Congress.²¹ Modern scholars debate whether treaties can override otherwise applicable constitutional limitations, such as the prohibition on federal commandeering of state governmental

to different sets of admissible evidence, and *standards of proof* which tell you how much evidence is necessary in order to proclaim the truth value of a proposition.

Normative considerations enter at the last stage where one determines the standard of proof or level of evidence that is epistemologically required in order to make a declaration of truth. There is no way to separate that determination from the consequences of a truth declaration; the standard of proof appropriate to an ivory-tower scholar considering the meaning of the Engagements Clause is not necessarily the same as the standard of proof appropriate to the President of the United States deciding whether a certain state of affairs justifies the launch of thermonuclear missiles. But by the same token, the correct principles of admissibility and significance for documents are objective facts. It is possible to monkey around with the rules of admissibility and significance for a document such as the Constitution, just as it is possible to monkey around with the rules of admissibility and significance for proving ordinary facts about events in the world. The law does it all of the time through rules of evidence. But to do so is deliberately to sacrifice the search for truth in favor of other values. There may, of course, be many circumstances in which there is a good normative case for sacrificing the search for truth about constitutional meaning in favor of other values, but the scholarly enterprise is not one of them.

²⁰ See Vasan Kesavan, The Treaty-Making Power and American Federalism: An Originalist Proof for Missouri v Holland (unpublished manuscript, Dec. 9, 2001).

²¹ See *id.*, n.3.

processes,²² and whether treaties can extend only to a limited range of subjects that are properly a matter for international agreement.²³ Overlaying these debates is the perennial question whether and when treaties are self-executing--that is, take effect as domestic law without legislative implementation.²⁴ And the prevalence of executive agreements, with or without congressional approval, raises the additional question whether the treaty power is the exclusive mechanism by which the United States can make binding international commitments.²⁵

Historically, the most important of these debates has been whether the federal treaty power extends to matters beyond the legislative competence of Congress. Can the President and Senate, by treaty, regulate subjects that the President and Congress,

²² See, e.g., Martin H. Flaherty, Are We to Be a Nation? Federal Power vs. "States Rights" in Foreign Affairs, 70 *U. Colo. L. Rev.* 1277 (1999); Gerald L. Neuman, The Nationalization of Civil Liberties Revisited, 99 *Colum. L. Rev.* 1630, 1650-55 (1999).

²³ See Robert Anderson IV, "Ascertained in a Different Way": The Treaty Power at the Crossroads of Contract, Compact, and Constitution, 69 *Geo. Wash. L. Rev.* 189 (2001) (arguing that the treaty power is limited to provisions resulting from the good-faith negotiations of the parties); Caleb Nelson, The Treaty Power and Self-Execution: A Comment on Professor Woolhandler's Article, 42 *Va. J. Int'l L.* 801, 812-14 (2002) (suggesting that treaties that concern only the internal affairs of the treating nations may not constitute treaties within the meaning of the Constitution).

²⁴ In 1999, this question was the subject of a 303-page exchange in the pages of the Columbia Law Review between John Yoo, who defends the view that at least some treaties are not self-executing, and Martin Flaherty and Carlos Vazquez, who defend a stronger vision of self-execution. Compare John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 *Colum. L. Rev.* 1955 (1999); John C. Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, 99 *Colum. L. Rev.* 2218 (1999) with Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties As "Supreme Law of the Land," 99 *Colum. L. Rev.* 2095 (1999); Carlos Manuel Vazquez, Laughing At Treaties, 99 *Colum. L. Rev.* 2154 (1999). For an alternative view that would give self-executing effect only to treaties that do not conflict with existing statutory law, see Vasan Kesavan, The Three Tiers of Federal Law (unpublished manuscript, June 4, 2002).

²⁵ This question has prompted modern debates that approach in length, intensity, and variety the recent debates on self-execution. Compare Bruce A. Ackerman & David M. Golove, Is NAFTA Constitutional?, 108 *Harv. L. Rev.* 799 (1995) (treaties and executive agreements are interchangeable because of an unwritten constitutional amendment) with Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 *Harv. L. Rev.* 1221 (1995) (treaties and executive agreements are not interchangeable because the Constitution does not contain amendments written in invisible ink) with John C. Yoo, Laws As Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 *Mich. L. Rev.* 757 (2001) (treaties and executive agreements are sometimes interchangeable because of contemporary practice).

through legislation, cannot? This question whether there is a precise congruence between the jurisdictional scope of the treaty power and the scope of Congress's legislative power was the basis for founding-era objections to treaty provisions dealing with such matters as alien ownership of real property.²⁶ It was central to the Southern antebellum critique of federal treaties that interfered with Southern regulation of slavery.²⁷ It was the precise issue decided by the Supreme Court in *Missouri v Holland*, which held that Congress could implement treaties creating international commitments regarding migratory birds even though Congress and the President could not (under then-existing understandings) constitutionally regulate that subject under any of the enumerated Article I legislative powers.²⁸ In the wake of *Holland*, the relation between the treaty power and Congress's legislative powers was the subject of the attempt led by Senator John Bricker in the 1950s to amend the Constitution, most dramatically by a provision that would have stipulated (either as clarification or alteration of the Treaty Clause) that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."²⁹ This question about the relationship between the treaty power and the legislative power has been the subject of extensive legal commentary for a century. It is *not* the precise question that we seek to answer here.

²⁶ See Golove, *supra* note 10, at 1104-27.

²⁷ See *id.*, 1210-37.

²⁸ 252 U.S. 469 (1920). Today, under modern understandings of Congress's power to "regulate Commerce . . . among the several States," U.S. Const art I, § 8, cl 3, it is virtually certain that Congress would be allowed to pass a statute to protect migratory birds without recourse to a treaty.

²⁹ For a thorough (albeit decidedly unsympathetic) detailing of the progress, and near-passage, of the Bricker Amendment, see Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988).

We consider this question to be a non-starter, as there is no plausible reason to suppose that the treaty power can extend only to subjects within Congress's enumerated powers. Vasani Kesavan has endeavored to demonstrate that at least one universally accepted function of treaties -- the cession of territory to another country, generally as part of a treaty of peace -- is beyond the enumerated powers of Congress.³⁰ A much simpler example, however, is readily available: Congress does not have the power to end a war, but the President and the Senate can formalize the end of a war by treaty. Congress, of course, can *effectively* end a war by refusing to fund the war effort, but it has no formal power, either internationally or domestically, to terminate a war.³¹ Thus, if the debate really focuses on whether the Constitution's presidential/senatorial treaty-making power is precisely coextensive with the congressional/presidential lawmaking power, it is much ado about nothing.

This long-standing focus on whether the treaty power and the legislative power are congruent is a distraction. We focus on a broader and more fundamental question: is the treaty power *jurisdictional*, in the sense that it describes a distinctive area of federal competence independent of other grants of enumerated power, or *implementational*, in the sense that treaties are only permitted to carry into effect other exercises of enumerated national power? Thomas Jefferson said the latter, and Thomas Jefferson was right.

B. *The Ties That Bind*

³⁰ See Kesavan, *supra* note XX.

³¹ See Christopher Rebel J. Pace, *The Art of War under the Constitution*, 95 *Dickinson L. Rev.* 557, 562-65 (1991); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Cal. L. Rev.* 167, 265 (1996). Congress could enact a statute declaring peace, and perhaps that statute would have domestic consequences if other statutes are contingently triggered by such a legislative declaration, but the declaration does not end the war in any meaningful legal sense.

Before we present Jefferson's theory, however, we must first identify the distinctive nature of treaties. What can one do through treaties that cannot be done by some other legal act? The answer is that domestic legislation cannot legally bind either foreign sovereigns or future American governmental actors. Congress can, within its constitutional authority, bind citizens, states, and the national government. It can even create legal rights in foreign governments and give those foreign governments enforcement power in American courts. But Congress cannot regulate foreign sovereigns or prevent itself or future Congresses from altering statutory rights granted to foreign governments. For those tasks, the nation needs treaties: legally binding consensual arrangements between or among sovereigns.

Suppose that the United States and France want to enter into an agreement providing for reciprocal duty-free entry of perfumes. Congress can pass a law exempting French perfumes from all American duties. But if Congress later changes that law, the French government would have no legal recourse. The French government could change its own domestic law, make diplomatic hay, begin a trade war, or even throw legality to the wind and begin a shooting war, but the American action would not violate any legal norm. If, however, the arrangement is embodied in a treaty, then subsequent legislation contrary to the terms of the treaty would violate international law. Congress could still pass legislation in violation of the treaty that would be fully effective as a matter of domestic law; the treaty does not constitutionally disable Congress. But a treaty that "locks in" an international agreement raises the cost of such legislation by whatever amount a violation of international law is considered or expected to entail. Similarly, a

treaty, and only a treaty, can secure an internationally-binding agreement from a foreign sovereign.

Treaties are thus an essential means for implementing national powers in the international arena. The Sweeping Clause permits Congress to execute national powers domestically (provided that such executory laws are “necessary and proper”). The Treaty Clause similarly permits the United States, through the President and the Senate, to implement national powers internationally by locking in intergovernmental agreements.

C. *Jefferson Speaks*

At least, locking in intergovernmental agreements is the most *minimal* function of the Treaty Clause. It is another matter altogether to say that it is the *maximal* or *only* function. Thomas Jefferson took that next step.³² Jefferson succinctly expressed his constitutional view of treaties in a manual on parliamentary practice that he wrote for the Senate while he was Vice President:

By the Constitution of the United States, this department of legislation is confined to two branches only, of the ordinary Legislature; the President originating, and Senate having a negative. To what subject this power extends, has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves.

³² Jefferson was, at least much of the time, deeply suspicious of the federal treaty power’s scope and exercise. Although some scholars allege that various aspects of his views on the treaty power reflected a dominant founding-era consensus, others powerfully (and persuasively) disagree. Compare Curtis A. Bradley, The Treaty Power and American Federalism, 97 *Mich. L. Rev.* 390, 415-16 (1998) (claiming that Jefferson’s views were widely held); George A. Finch, The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits, 48 *Am. J. Int’l L.* 57, 61 (1954) (same) with Golove, supra note XX, at 1188 (arguing that Jefferson’s views were idiosyncratic). One need not be an historian to sense that Professor Golove has much the better of this argument; even a casual reading of founding-era materials shows that Jefferson’s view commanded something very far from a consensus. For our purposes, however, it does not matter which view of Jefferson and his contemporaries is correct. Our goal is to determine whether Jefferson’s view is, all things considered, the reading of the Treaty Clauses that would have been adopted by a reasonable observer in possession of all relevant knowledge, not whether it actually commanded a clear majority of his contemporaries.

1. It is admitted that it must Concern the foreign nation, party to the contract, or it would be a mere nullity *res inter alias acta*. 2. By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated. 3. It must have meant to except out of these the rights reserved to the States; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way. 4. And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.³³

This passage obviously reflects Jefferson's hostility to treaties,³⁴ and it would be rash to read it as a general expression of the sentiments of the Senate -- or indeed as a general expression of anything other than Jefferson's hostility to treaties. Nonetheless, it contains some important suggestions for restrictions on the treaty power that merit examination.

Jefferson's first proposed restriction on the treaty power -- that treaties must genuinely concern foreign nations -- is not as obviously sound as it may seem. Jefferson was no doubt imagining a putative "treaty" that is in fact simply an attempt to perform an end-run around the Article I legislative process by having a foreign collaborator help construct domestic legislation through the formalities of a treaty. Even many modern advocates of a broad treaty power share some of these concerns about phony treaties.³⁵ The Constitution only prohibits such arrangements, however, if the collaborative agreement falls outside the boundaries of the term "treaty" as it appears in the Constitution. That is, if an entirely one-sided affair, in which one party simply uses the

³³ Thomas Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States, in Jefferson's Parliamentary Writings 353, 420-21 (Wilbur Samuel Howell ed., 1988).

³⁴ See supra note XX. It also identifies the President as a branch of the legislature, which does not speak well of Jefferson's acumen as a constitutional interpreter. Fortunately, we do not invoke Jefferson as an authority but instead independently examine whether his views of the treaty power are correct.

³⁵ See Flaherty, supra note XX, at 1306 ("Few would dispute that requirement, early on articulated by Thomas Jefferson, that treaties not be pretextual"); Golove, supra note XX, at 1090 n.41; Louis Henkin, The Constitution, Treaties, and International Human Rights, 116 U. Pa. L. Rev. 1012, 1024-25 (1968).

form of a treaty to alter its domestic law, would not even count as a “treaty” for constitutional purposes, then Jefferson was right to doubt the validity of such agreements. Otherwise, it is hard to see why a treaty, if it really is a treaty, is unenforceable simply because it is a bad deal -- or even a subterfuge. The Constitution lays down certain formal rules for accomplishing certain ends, and if those formal rules are followed, the procedure is legal unless there is some substantive limitation on the scope of the granted power.³⁶ A properly executed treaty is legally binding unless it either is not a treaty or it exceeds some limitation on the scope of the treaty power that is implicit in the constitutional structure -- which brings us to the rest of Jefferson’s analysis.

Jefferson’s second and fourth limitations -- that treaties cannot concern matters that could “otherwise be regulated” or matters in which the Constitution “gave a participation to the House of Representatives” -- are closely related; both suggest that treaties cannot serve as substitutes for legislation. According to Jefferson, where the Constitution authorizes regulation by (bicameral) legislation, regulation by treaty is implicitly forbidden. The *only* sphere of application for treaties, on this understanding, is subjects that cannot be regulated by legislation, which would obviously include the intergovernmental “lock in” function that cannot be accomplished by legislation.

But what if certain subjects -- for instance, regulation of marriage or local land use -- are beyond the enumerated legislative powers of Congress? Obviously, it would not trench upon the prerogatives of Congress or the House to permit treaties to regulate such subjects, because there would be no prerogatives upon which to trench. Just as obviously, it would essentially constitute the federal government as a general

³⁶ On the importance of constitutional form, even at the expense of substance, see Vasan Kesavan & Michael Stokes Paulsen, Is West Virginia Unconstitutional?, 90 *Cal. L. Rev.* 291 (2002).

government; anything outside the legislative powers of Congress would be within the treaty powers of the President and Senate. That is why Jefferson added his final limitation on the treaty power: the Constitution “must have meant to except out of these [treaty powers] the rights reserved to the States; surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way.” That is, according to Jefferson, treaties cannot reach subjects that are not within some other enumerated federal power.

Together, Jefferson’s limitations describe a treaty power that is purely *implementational*: it can carry into effect enumerated federal powers by extending them into the international arena in legally binding fashion, but it cannot regulate on its own initiative.

In an 1803 letter to Wilson Cary Nicholas, Jefferson repeated and elaborated this thesis:

If [the Treaty Clause] has bounds they can be no others than the definitions of the powers which that instrument gives. It specifies & delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President & Senate may enter into the treaty; whatever is to be done by a judicial sentence, the judges may pass the sentence.³⁷

That which is “proper to be executed by way of a treaty” is to make domestic law internationally binding or to secure binding commitments from foreign sovereigns.

Under a Jeffersonian understanding of treaties, that “lock-in” function is *all* that treaties may properly accomplish. A treaty could, for instance, execute a legislated trade agreement by entering into legally binding relations with a foreign government (or by

³⁷ Letter from Thomas Jefferson to Wilson Cary Nicholas, Sept. 7, 1803, in 8 **The Writings of Thomas Jefferson** 247 n.1 (Paul L. Ford, ed., 1897).

setting up a framework that is triggered by subsequent legislation), but a treaty could not itself establish the terms of trade apart from legislation.

The treaty power, as described by Jefferson more than 200 years ago, is a vehicle for implementing otherwise-granted national powers in the international arena. It may be used to carry into effect national powers found in the Constitution,³⁸ but it cannot function as a free-standing power, divorced from connection to the exercise of some other enumerated power. In this respect, the Treaty Clause is analogous to the Sweeping Clause of Article I: the Sweeping Clause permits Congress to implement otherwise-granted national powers domestically, while the treaty power permits the President and Senate to implement otherwise-granted national powers internationally by entering into agreements with foreign sovereigns.

A close look at the Constitution's text and structure points, even if somewhat crookedly, to such an implementational reading of the Treaty Clause. We must, however, ask for patience during that close look; the argument will take some time to construct.

IV. TAKING TEXT SERIOUSLY: UNCOMFORTABLE TRUTHS ABOUT THE TREATY CLAUSE

Start with some genuinely incontrovertible facts about the constitutional text. First, the power to make treaties is jointly vested in the President and the Senate: the

³⁸ Importantly, the powers implemented by the Treaty Clause need not be Article I powers of Congress. The implementational view permits the treaty power to effectuate *all* powers of *all* federal institutions. Just as the Sweeping Clause permits Congress to pass legislation to implement its own granted powers “and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” the treaty power, on this Jeffersonian understanding, permits treaty-makers to carry into execution presidential and judicial powers, as well as powers vested in individual officers (such as the Vice President's power to preside over the Senate or the Chief Justice's power to preside over presidential impeachments).

President can “make Treaties, provided two thirds of the Senators present concur”³⁹

Thus, as with the Article I lawmaking power that is shared among the President, the Senate, and the House,⁴⁰ the Constitution commits the treaty power to a combination of actors.

Second, the Constitution specifically denies to the states any treaty-making power: “No State shall enter into any Treaty, Alliance, or Confederation.”⁴¹ States may, with the consent of Congress, “enter into an[] agreement or Compact . . . with a foreign Power,”⁴² but not even the consent of Congress can authorize a state treaty.

Third, federal treaties, including treaties validly made by the Confederation government, are “the supreme Law of the Land”⁴³ and accordingly, by the plain terms of the Supremacy Clause, take precedence over state statutes or state constitutions. Under standard conflict-of-laws doctrine, they are also held to take precedence over prior inconsistent federal statutes, though that conclusion is subject to serious question as a matter of original meaning.⁴⁴

Fourth, the First Amendment does not apply to the Treaty Power. This statement, unlike the prior three statements, is likely to seem jarring to modern eyes, but it is as

³⁹ The treaty-making power is not the only power vested in that particular combination of institutions. The President and Senate also share the power of appointment of principal officers of the United States (and of inferior officers if Congress does not vest their appointment elsewhere). *See U.S. Const* art II, § 2, cl 2. In the case of treaties, however, two thirds of the Senate must approve, while a majority of the Senate is enough to consent to a presidential appointment.

⁴⁰ *See id.* art. I, § 7, cls 2-3.

⁴¹ *Id.* art I, § 10, cl 1.

⁴² *Id.* art I, § 10, cl 3.

⁴³ *Id.* art VI, cl 2.

⁴⁴ On standard doctrine, see Caleb Nelson, *Preemption*, 88 *Va. L. Rev.* 225 (2002). On original meaning, see Kesavan, *The Three Tiers of Federal Law*, *supra* note XX.

textually certain as is anything in the Constitution. The First Amendment says that “*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government, for a redress of grievances.”⁴⁵ The President and Senate are not Congress, and the First Amendment by its unmistakable terms applies only to Congress. If a treaty requires congressional implementation for its full effect, then of course Congress could not enact implementing legislation in violation of the First Amendment, but the treaty itself is simply beyond the terms of the amendment.⁴⁶

Modern law, of course, applies the First Amendment to the President, the courts, and the states,⁴⁷ and a fortiori to the federal treaty-making authority, but that is a textually indefensible maneuver. To read the First Amendment to apply to entities other than Congress is simply to abandon the enterprise of constitutional interpretation.

Of course, there may be constitutional provisions that apply to non-congressional actors that have much the same *effect* as the First Amendment, so that little damage is done by acting *as though* the First Amendment applies to other entities, but that is a matter to be explored case by case. For instance, it is likely that the Privileges or Immunities Clause of the Fourteenth Amendment prevents states from (at least discriminatorily) abridging rights of speech, religion, and assembly.⁴⁸ One can

⁴⁵ **U.S. Const** amend 1 (emphasis added).

⁴⁶ Cf. Nelson, *supra* note XX, at 811-12 (noting that the First Amendment, by its terms, seems not to apply to treaties).

⁴⁷ See **Daniel A. Farber, The First Amendment** 1 (1998).

⁴⁸ “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” **U.S. Const** amend XIV, § 1. For the proposition that the Privileges or Immunities

metaphorically describe this as “applying the First Amendment to the states,” but the First Amendment itself does not apply to the states as a matter of original meaning.

Similarly, the First Amendment by its terms does not apply to executive and judicial action. That conclusion is not as significant as it might seem at first glance, for the simple reason that presidents and courts are not in a position to threaten rights of speech, religion, or assembly in the same manner as is Congress. Congress, of course, is not granted any enumerated power to regulate speech, religion, or assembly, and the First Amendment was accordingly simply repeating limits on the lawmaking power that were already contained in the original constitutional structure.⁴⁹ Nonetheless, one can readily imagine that Congress might try to misuse its authority under the Sweeping Clause to implement federal powers through methods that implicate rights of speech or religion, such as by banning criticism of import laws in order to maximize their effectiveness. These laws, if enacted, would not be “necessary and proper” for effectuating federal powers, and Congress accordingly never had any enumerated constitutional authority to enact them, but it is easy to understand why people in 1791 might have worried about the prospect. (Those people had good cause to worry, of course, as seven years later congressional Federalists invoked the Sweeping Clause as authorization for the Sedition

Clause protects some First Amendment rights against discriminatory state action, see John Harrison, Reconstructing the Privileges or Immunities Clause, 101 *Yale L.J.* 1385 (1992). For the proposition that the Privileges or Immunities Clause may also protect some First Amendment rights against even nondiscriminatory state action, see Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 *Yale L.J.* 1193 (1992).

⁴⁹ As one Federalist pamphleteer put it in 1788: “examine the plan [of the Constitution], and you will find that the liberty of the press and the laws of Mahomet are equally affected by it.” Hugh Williamson, Remarks on the New Plan of Government (1788), reprinted in **Bernard Schwartz**, 1 **The Bill of Rights: A Documentary History** 550, 551 (Chelsea House Publishers, 1971). For other expressions of this view by prominent founding-era figures, see Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 *Duke L.J.* 267, 318-19 (1993).

Act of 1798.⁵⁰) The First Amendment was designed to quell concerns about such exercises of congressional power by confirming that Congress has no enumerated power, express or implied, to abridge freedom of speech or religion, regulate the establishment of religion, etc., in the course of implementing federal powers. There is no presidential power that poses an equivalent threat to free speech or religion. The President has various executive and war-making powers, but none of those powers remotely would justify presidential action, in the absence of statute, restricting speech or religion in domestic territory. There is accordingly nothing for the First Amendment to clarify with respect to presidential power, because there is no perceptible danger.⁵¹ Courts, of course, can take actions that implicate speech, such as entering libel judgments or issuing protective orders, but no one in 1791 would have imagined that those actions, in the ordinary course of carrying out “[t]he judicial Power,” raise any constitutional issues.

One can imagine out-of-control judges issuing bizarre orders, but such action would so

⁵⁰ See David Jenkins, The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence, 45 **Am. J. Legal Hist.** 154, 178-83 (2001) (discussing the role of the Sweeping Clause in debates over the constitutionality of the Sedition Act); Lawson & Granger, supra note XX, at 275-76 (describing how the Federalists misconstrued the Sweeping Clause in these debates).

⁵¹ The other provisions of the Bill of Rights present a more complicated story. Amendments 2-8 do not make specific reference to Congress. Indeed, they do not even make specific reference to the federal government, though Chief Justice John Marshall was surely correct to conclude in Barron v Baltimore, 32 U.S. (7 Pet.) 242, 250 (1833), that the context of the Bill of Rights demonstrates that it does not limit state governments. It makes sense that those other amendments are not limited to Congress, because they deal with subjects that implicate potential abuses of the executive or judicial power. The Second Amendment, which protects the right to keep and bear arms, limits Congress but also prevents the President from disarming the militia through his power as military commander-in-chief. Similarly, the Third Amendment, which limits the quartering of soldiers, also obviously addresses the President’s power over the military. The Fourth Amendment’s requirement of reasonable searches and seizures constricts the President’s power to execute the laws, and the requirement of probable cause for warrants limits the judicial power to immunize executive agents from civil suits. The Fifth Amendment’s criminal process provisions clearly constrain the executive’s prosecutorial power and the judicial power to compel testimony through contempt orders. The Due Process Clause is paradigmatically a restriction on arbitrary executive or judicial action. The Sixth, Seventh, and Eighth Amendments all target potential abuses of the judicial process. The only exceptional provision may be the Takings Clause of the Fifth Amendment, which is perhaps the most difficult provision in the Bill of Rights to explicate. For our trepidatious expedition into the Takings Clause swamp, see Gary Lawson & Guy Seidman, Taking Notes: Subpoenas and Just Compensation, 66 **U. Chi. L. Rev.** 1081 (1999).

blatantly exceed “[t]he judicial Power” that no clarifying or confirming amendment was necessary.⁵²

The simple fact is that the First Amendment by its terms does not apply to executive or judicial actions, though of course it does limit congressional action that seeks to “carry into Execution” executive or judicial action. That fact may be out of step with modern sensibilities, but it is a fact nonetheless. The same is true of treaties: the First Amendment by its express terms simply does not apply to treaties, though it applies to congressional legislation implementing treaties. If a treaty that commits the United States to restrictions on speech or religion is unconstitutional, it must be unconstitutional for reasons other than the First Amendment.

For identical reasons, at least some of the prohibitions on federal action in Article I, section 9 of the Constitution do not apply to the treaty power. The first, and to an eighteenth-century observer the most important, of those prohibitions states that “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited *by the Congress* prior to the Year one thousand eight hundred and eight”⁵³ This provision was specifically exempted from the Article V amendment process until its own internal time limit ran its course.⁵⁴ In other words, Congress could not--and unamendably could not--forbid the importation of slaves for twenty years after ratification of the Constitution. The prohibition, however, by its terms applies only to *Congress*. This provision stands in stark contrast to another

⁵² Judges are also subject to review on appeal and through impeachment. See Lawson, supra note XX, at 227-28.

⁵³ **U.S. Const** art I, § 9, cl 1 (emphasis added).

⁵⁴ See id. art V (“no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article.”).

provision of Article I, section 9, which states that “[n]o Title of Nobility shall be granted by the United States”⁵⁵ This provision by its terms applies to any action taken on behalf of the United States, which presumably would include treaties.⁵⁶ In any event, it is clear that the Slave Trade Clause only restricts Congress.

To pose a question that will loom large later in our story: Does that mean that in 1789, the President and Senate could have entered into a treaty that mutually forbade the importation of slaves into the signatory countries and thus immediately ended the slave trade, despite the fact that the combined forces of Congress, the President, and the Article V amending authorities could not do so? If the answer is “yes,” the Treaty Clause is a more extraordinary provision than anyone, including the founding-era opponents of slavery, has thus far noticed. If the answer is “no,” it must be by virtue of something in the Constitution other than Article I, section 9.

Fifth, and finally, the Treaty Clause is located in Article II of the Constitution--the Article that primarily describes and empowers the federal government’s executive institutions. The location of provisions in the Constitution, of course, is not an infallible guide to their characterization. Article I, section 4, clause 3 gives the Vice President power to preside over the Senate and to cast tie-breaking votes in that body, but although the grant appears in Article I, it is not, strictly speaking, a grant of legislative power, for the simple reason that the Constitution itself specifies that “[a]ll legislative Powers herein

⁵⁵ *Id.* art I, § 9, cl 8 (emphasis added).

⁵⁶ As for the other Article I, section 9 prohibitions that do not make specific reference to congressional actions, one could plausibly say either that the absence of such reference makes them generally applicable to all federal action or that the specific reference to “the United States” in the Nobility Clause demands the opposite inference. The placement of these provisions in Article I does not create a presumption that they apply only to Congress because some of them, such as the prohibition on withdrawal of funds without an appropriation, *id.* art I, § 9, cl 7, are clearly aimed at executive and judicial actors.

granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”⁵⁷ The Senate, in turn, “shall be composed of two Senators from each State,” which means that the Vice President is not technically a member of the Senate and therefore cannot share in the Senate’s legislative powers.⁵⁸ Similarly, even though Article I, section 7 gives the President a vital role in the lawmaking process, the President’s presentment power cannot be considered “legislative” for purposes of the Constitution, because the President is not Congress and only Congress can exercise “legislative” power within the meaning of the Constitution. Whether one wants to call these non-congressional Article I powers of the President and Vice President “quasi-legislative” or some new term invented just for the occasion, such as “legisecutive,” is a matter of taste, so long as one does not call them “legislative.” For the same reasons, the Senate’s roles in the treaty-making and appointment processes do not make senators executive actors for purposes of the Constitution, because the “executive Power” is vested in the President alone. The Constitution’s division of power reflects a real-world political compromise rather than a theoretically pure conception of separated powers; one must take the Constitution’s definitions and allocations of power as one finds them without attempting to force them into a prefabricated mold.⁵⁹

Nonetheless, the basic Article I-Article II-Article III/legislative-executive-judicial structure of the Constitution is hard to miss. Indeed, it is perhaps the Constitution’s most obvious structural feature. The “legisecutive” lawmaking powers of the President and

⁵⁷ *Id.* art I, § 1, cl 1.

⁵⁸ *Id.* art I, § 3, cl 1. It also means, *inter alia*, that two-thirds of the Senate cannot expel the Vice President. See *id.* art I, § 5, cl 2 (“[e]ach House may . . . , with the Concurrence of two thirds, expel a Member”).

⁵⁹ Theoretical conceptions, of course, are important because they help define otherwise ambiguous terms and provide the background conventions against which the Constitution’s compromise was constructed.

Vice President no doubt appear in Article I because, although they are not technically legislative powers within the meaning of the Constitution, they more closely resemble legislative powers than they do any of the other three basic categories of governmental power. The Treaty Clause, by contrast, is in Article II. What, if anything, are we to make of this placement?

Of course, once we begin to consider the implications of the Treaty Clause's location in Article II, we quickly leave the realm of incontrovertible textual facts and enter the world of highly controvertible structural inferences. Structural inference is a legitimate and powerful tool of interpretation. The power of judicial review, for instance, is the product of inference about the scope and character of the "judicial Power" rather than direct textual expression.⁶⁰ Perhaps questions about the treaty power find their answers in the same sources.

V. TAKING STRUCTURE SERIOUSLY: THE TREATY POWER AS AN EXECUTIVE POWER

There are two textual features of the Treaty Clause that we omitted from the prior section. First, the Treaty Clause reads like a positive grant of power to the President and Senate, similar to the grants of legislative power in Article I. Second, the text of the Treaty Clause contains no evident internal limitations on the scope of its granted authority. An informed eighteenth-century audience, after weighing all relevant considerations, would have concluded that both of these features are in fact illusions: the Treaty Clause is not a grant of power to the President and the Senate, and it contains quite

⁶⁰ See John Harrison, The Constitutional Origins and Implications of Judicial Review, 84 *Va. L. Rev.* 333 (1998).

significant internal limitations. Later, we will explain why the apparent absence of internal textual limitations in the Treaty Clause is an illusion. First, we dispose of the myth that the Treaty Clause is a grant of power to the President.

If the Treaty Clause appeared in Article I of the Constitution, there is little doubt that it would constitute an affirmative grant of power to both the President and the Senate. The Treaty Clause, however, appears in Article II. *Enumerations of power in Article II do not serve the same constitutional function as do enumerations of power in Article I.* The President’s Article II powers stem from the Vesting Clause of Article II, which vests the “executive Power . . . in a President.” All other enumerations in Article II clarify, qualify, or explicate the basic power grant in the Article II Vesting Clause. This principle is the key to the meaning of the Treaty Clause, and it is controversial enough to require an extended discussion. That discussion must begin with an analysis of the constitutional provisions that surround Article II: the Article I and Article III provisions that empower the federal legislature and judiciary.

A. *Vested Power As Granted Power*

1. *A Tale of Two Articles: Legislative and Judicial Vesting*

Consider the structure of Article I of the Constitution. The first section of Article I states in full: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”⁶¹ Sections

⁶¹ U.S. Const, art I, § 1.

2 and 3 describe qualities and procedures of the House and Senate as individual bodies. Section 4 discusses election and assembly procedures for Congress and grants Congress power to “make or alter”⁶² state election rules for the federal legislature. Section 5 concerns powers and procedures of the respective houses of Congress, Section 6 describes prerogatives of and limitations on individual members of Congress, and Section 7 describes the process for making laws. Section 8 specifies that “[t]he Congress shall have Power” to engage in roughly two dozen activities spread through eighteen clauses. Section 9 identifies specific limitations on congressional power, and Section 10 describes limitations on states, some of which include provisions for congressional consent to or revision of state action. Other congressional powers can be found in various places in Articles II-V.

The language and structure of Article I, in conjunction with the rest of the Constitution, establish the role of the initial sentence in Article I. This provision, known as the “Article I Vesting Clause,” defines the institution of Congress, but it does not grant any powers to Congress, and in particular it does not grant to Congress all powers that would have been understood as “legislative” by an informed eighteenth-century audience. Instead, it specifies that Congress – defined as the House and Senate – is the sole institution vested with, and thus charged with exercising, whatever subset of the universe of “legislative” powers are “herein granted” elsewhere in the Constitution. In order to know precisely what are those “legislative Powers” that are vested in Congress, one must read the rest of the Constitution beyond the Vesting Clause.

⁶² *Id.* art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of chusing Senators”).

The specific enumerations of congressional power found in the Constitution, many of which take the form of “Congress shall have Power to . . . ,” are thus exactly what they appear to be on casual inspection: grants of power to the institution defined in the Article I Vesting Clause. That Vesting Clause designates the holder of certain powers conferred by the Constitution but it does not grant those powers. Article I thus has a recognizable structure: it begins with a Vesting Clause that defines but does not empower an institution of government and then uses specific power grants to define that institution’s jurisdiction.

Consider now the structure of Article III. As does Article I, Article III begins with a vesting clause: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁶³ After describing the characteristics of federal judicial officers,⁶⁴ Article III goes on to say that “[t]he judicial Power shall extend”⁶⁵ to nine categories of disputes. Other provisions in Article III limit the judicial power by prescribing trial by jury for criminal cases⁶⁶ and by defining the offense of, and methods of proof for, treason,⁶⁷ but nothing else in Article III even arguably grants any power to the federal courts⁶⁸ (though at least one provision in Article III grants power to Congress⁶⁹).

⁶³ **U.S. Const.** art. III § 1.

⁶⁴ See id. (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

⁶⁵ Id. art. III, § 2.

⁶⁶ Id. art. III, § 2, cl. 3.

⁶⁷ Id. art. III, § 3, cl. 1.

⁶⁸ The Appointments Clause in Article II authorizes federal courts to receive the power to appoint inferior federal officers if Congress chooses to grant that authority by statute, see id. Art. II, § 2, cl. 2, and the Chief

The Article III Vesting Clause, unlike the Article I Vesting Clause, functions as a grant of power to the federal courts. The considerations that lead to this conclusion have been developed in a series of now-classic articles by Professor Steven Calabresi, alone and in conjunction with Professor Saikrishna Prakash and Kevin Rhodes.⁷⁰ Those considerations turn out to be critical for understanding the structure of Article II, so they are worth fleshing out here.

First, the language of the Article III Vesting Clause – “[t]he judicial Power shall be vested” – strongly supports a power-grant reading. “It is very hard to read a clause that speaks of vesting power in a particular actor as doing anything other than vesting power in a particular actor.”⁷¹ If the Article I Vesting Clause said that “[a]ll legislative Powers shall be vested in a Congress,” it would be similarly difficult to avoid reading that clause as a grant of power to Congress. The Article I Vesting Clause, however, vests in Congress only those legislative powers “herein granted,” which specifically directs us

Justice is granted the power(and duty) to preside over presidential impeachment trials. See id. Art. I, § 3, cl. 6.

⁶⁹ See id. Art. III, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason”). Conventional wisdom holds that Congress is also granted power by the so-called Exceptions Clause, which states that in all cases in which the Supreme Court does not have constitutionally-prescribed original jurisdiction, “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.” Id. art. III, § 3, cl. 2. In fact, however, this provision simply *references* Congress’s power over the Supreme Court’s appellate jurisdiction. That power stems from the Sweeping Clause, not from the Exceptions Clause, which grants no power to Congress. For an exhaustive demonstration of this basic point, see David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 **B.Y.U. L. Rev.** 75.

⁷⁰ See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 **Harv. L. Rev.** 1153 (1992); Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 **Nw. U.L. Rev.** 1377 (1994); Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 **Yale L.J.** 541, 572-74 (1994). For additional elaboration, see Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 **Iowa L. Rev.** 1267, 1281-82 (1996); Saikrishna B. Prakash, The Essential Meaning of Executive Power, 2003 **U. Ill. L. Rev.** 70; Kevin H. Rhodes, A Structure without Foundation: A Reply to Professor Fromkin, 88 **Nw. U.L. Rev.** 1406 (1994).

⁷¹ Lawson & Moore, supra note XX, at 1281.

beyond the Vesting Clause for the definition of the granted powers. There is no comparable language in the Article III Vesting Clause that would lead one to look beyond the clause itself for the definition of the federal judiciary’s power.

Second, as Professor Calabresi has discussed at some length, the dictionary meanings of the verbs “vest” and “extend” – from the eighteenth century onward -- strongly indicate that the Article III Vesting Clause grants power while Section 2 of Article III describes the sphere of application of that power.⁷² As Professor Calabresi has noted, “the verb ‘vest’ (derived from the word vestment with its connotations of royal and ecclesiastical authority and clothing) seems to refer in this context to placing authority in the control of the supreme and inferior courts. Put another way, it ‘clothes’ them with the authority to act.”⁷³ Again, there is no “herein granted” language in the Article III Vesting Clause that might lead one to question this reading.

Third, the uses in the Constitution of the word “vest” in provisions other than the three vesting clauses strongly support the power-grant reading of the Article III Vesting Clause. The Sweeping Clause gives Congress power to pass laws “necessary and proper for carrying into Execution . . . all other Powers *vested* by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁷⁴ There is no way to read this provision as anything but a reference to powers actually granted to various federal actors or institutions.⁷⁵ Similarly, the Appointments Clause provides that

⁷² See Calabresi, *supra* note XX, at 1380-81.

⁷³ *Id.* at 1381.

⁷⁴ **U.S. Const.** art. I, § 8, cl. 18 (emphasis added).

⁷⁵ There is some ambiguity about exactly who those actors and institutions might be. It is clear enough in what circumstances the Constitution vests authority in an “Officer” of the United States: the Vice President is given power to preside over the Senate and to cast tie-breaking votes in that body, *see id.* art. I, § 3, cl. 4;

“Congress may by Law *vest* the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”⁷⁶

This clearly describes a circumstance in which Congress *grants* power to the named actors. It is conceivable, of course, that the Article III Vesting Clause uses the word “vest” in a manner entirely different from the usages in other constitutional provisions and from established dictionary meanings, but that seems far less likely than the contrary.

Fourth, and finally, if the Article III Vesting Clause does not grant power to the federal courts, it is hard to see what other clause in the Constitution does so. Professor Michael Froomkin has argued that the federal courts’ power to decide cases (and presumably whatever ancillary powers accompany that more basic power⁷⁷) can be derived from Section 2’s provision “extend[ing]” the judicial power to specific disputes.⁷⁸

the Chief Justice is given power to preside over presidential impeachments, *see id.* art. I, § 3, cl. 6; and department heads may receive authority from Congress to appoint inferior officers, *see id.* art. II, § 2, cl. 2. It is less clear what the Sweeping Clause means by a “Department.” Does that refer to congressionally-created executive departments, such as the Department of State or the Department of War? This seems unlikely, because the Constitution nowhere grants any power directly to a department so defined (though the Appointments Clause permits heads of such departments to appoint inferior officers if Congress so directs). The better view is that the word “Department” in this context means one of the three primary units of government in whom the Constitution itself vests considerable powers: the Congress, the President, and the federal judiciary. That is in fact the standard usage of the word “department” in the founding era, *see* Calabresi & Rhodes, *supra* note XX, at 1156 n.6, though certainly not the exclusive one (as the Appointments Clause demonstrates). The most problematic portion of the Sweeping Clause is the reference to powers vested in “the Government of the United States.” There are no powers vested by the Constitution in “the Government of the United States” as a unitary entity; all power grants are addressed to specific institutions or actors. The best reading of that phrase is thus something like “other principal institutions of the Government of the United States,” which would cover the individual Houses of Congress, which are neither “Department[s]” nor “Officer[s]” but which are granted significant powers that it makes sense for Congress to be able to effectuate by statute. *See* Gary Lawson, Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas under the Orders, Resolutions, and Votes Clause, 83 *Tex. L. Rev.* 1373, 1386 (2005).

⁷⁶ *U.S. Const.* Art. II, § 2, cl. 2.

⁷⁷ *See* Robert J. Pushaw, Jr., The Inherent Power of Federal Courts and the Structural Constitution, 86 *Iowa L. Rev.* 735 (2001).

⁷⁸ *See* A. Michael Froomkin, The Imperial Presidency’s New Vestments, 88 *Nw. U.L. Rev.* 1346 (1994); A. Michael Froomkin, Still Naked After All These Words, 88 *Nw. U.L. Rev.* 1420 (1994).

Thus, he says, even in the absence of the Article III Vesting Clause, one could still infer the existence of a “judicial Power” from the fact that such a power “extends” to various disputes. Perhaps one could make such an inference, but it seems more plausible to say that without the Article III Vesting Clause, the judicial power would have to stem from congressional statutes under the Sweeping Clause rather than from anything in the Constitution itself. It would be passing strange in a constitution of limited and enumerated powers to *infer* something as basic as a constitutionally-granted judicial power. In any event, given that the actual Constitution contains the Article III Vesting Clause, and given that the actual provision in Article III, Section 2 “extends” that power, it makes much more sense to read the Vesting Clause as the *grant* of power and Section 2 as a *demarcation of the boundaries of* -- *i.e.*, a *limitation* on or *clarification* of – that power.

Taking all of these arguments into consideration, the case for reading the Article III Vesting Clause as a grant of power to the federal courts is overwhelming. Indeed, because the Article III Vesting Clause refers generally to the “judicial Power” rather than to the “judicial Power herein granted,” the federal courts receive *everything* that would have fallen within an informed eighteenth-century understanding of judicial power. The jurisdictional provisions in Article III, section 2 then define the classes of disputes in which that “judicial Power” can be applied. Section 2 thus serves as a *limitation* on the judicial power rather than as a *grant* of judicial power: the judicial power extends, but extends *only*, to the matters described in section 2. Alternatively, if the jurisdictional grants in section 2 describe the *minimum* but not the *maximum* jurisdiction of the federal courts, the section 2 enumerations would serve as clarifications of the scope of the

judicial power (and perhaps as limitations on Congress’s authority to control that jurisdiction).⁷⁹

The contrast between Article I and Article III is striking. Article I begins with a vesting clause that refers to otherwise-granted powers but does not itself grant powers. The article then continues with a series of provisions specifying that “Congress shall have Power” to perform a variety of activities; those provisions (in conjunction with others scattered throughout Articles I-V) clearly define the scope of Congress’s power. The specific enumerations of congressional power are unambiguously grants of power. Article III, by contrast, begins with a grant of the “judicial Power,” which confers on the federal courts all powers that fall within that general classification. The article then continues with limitations and qualifications on that power. The specific “enumerations” in Article III – the heads of jurisdiction in Article III, section 2 – are not grants of power. Together, Articles I and III thus present two different models for giving effect to specific enumerations in the Constitution: the enumerations can serve as grants of power (Article I) or as limitations on grants of power (Article III).

Into which pattern does Article II best fit?

2. Of Cabbages and Kings: Vesting Executive Power

⁷⁹ It is something of an understatement to describe as “settled law” the proposition that section 2 enumerates the full scope of federal court jurisdiction. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). As a matter of pure textual exegesis, however, that conclusion is not inevitable. We do not opine here on *Marbury*’s correctness as a matter of original meaning. For our purposes, nothing turns on whether the enumerations in Article III, section 2 are exhaustive (and therefore limitations on the judicial power) or nonexhaustive (and therefore clarifications of the judicial power). In neither case does section 2 function as a grant of power.

On the one hand, Article II, as does Article III, begins with an unqualified vesting clause: “The executive Power shall be vested in a President of the United States of America.” The Article II Vesting Clause does not refer to executive powers “herein granted,” but seems to follow the Article III formula of granting a general power that includes, at least as a prima facie matter, whatever powers a fully-informed late eighteenth-century audience would have understood “executive Power” to include.

On the other hand, sections 2 and 3 of Article II are full of provisions which state that the President “shall have Power” to perform certain acts. In that respect, sections 2 and 3 seem to resemble Article I, section 8, which grants various powers to Congress. The “shall have Power” provisions of Article II point towards the view that presidential power stems from specific enumerations rather than from a general vesting clause. If that is true, then the Article II Vesting Clause, as with the Article I Vesting Clause, might best be understood as a designation of office rather than as a grant of power. The Treaty Clause, as one of the enumerated powers in Article II, section 2, would then best be understood as a grant of power to both the President and the Senate.

Article II does not precisely follow the form of either Article I or Article III,⁸⁰ but on balance the evidence strongly supports the view that the President’s power stems from the Article II Vesting Clause, with sections 2 and 3 of Article II serving to limit, clarify, and qualify that basic power grant. This position does not reflect current law or the weight of scholarly opinion, but it does best reflect the Constitution’s original meaning.

⁸⁰ For an elegant and enlightening discussion of the distinctive features of each of the first three articles, see Douglas G. Smith, *Separation of Powers and the Constitutional Text*, 28 *N. Ky. L. Rev.* 595 (2001) (detailing the many ways in which the Constitution mixes powers in a way that pure theory would not).

Put simply: All of the considerations that support reading the Article III Vesting Clause as a grant of power⁸¹ also support a similar reading of the Article II Vesting Clause. The language of the clause reads as a grant of “executive Power”; dictionary understandings of the word “vest” reinforce this meaning; other uses of the word “vest” in the Constitution consistently support a power-granting understanding of the term; and the parallel formulation in the Article III Vesting Clause further supports the power-grant reading of the Article II Vesting Clause. There is no “herein granted” language in the Article II Vesting Clause that might direct one away from this reading. The prima facie case for construing the Article II Vesting Clause as a grant of power is quite compelling.

Large segments of the legal community disagree. Modern doctrine is in many crucial respects inconsistent with the view that the Article II Vesting Clause is a grant of power,⁸² and a wide range of scholars expressly reject the power-grant reading of the Article II Vesting Clause.⁸³ Those rejections, however, are often noticeably short on arguments that are relevant for reasonable-observer originalists.⁸⁴ We are aware of only

⁸¹ See supra XX.

⁸² For a compendium of inconsistencies between the power-grant reading of Article II (and Article III) and modern law, see Joseph P. Verdon, Note, The Vesting Clauses, The Nixon Test, and the Pharaoh’s Dreams, 78 **Va. L. Rev.** 1253 (1992).

⁸³ See, e.g., Flaherty, supra note XX, at 1778; Froomkin, The Imperial President’s New Vestments, supra note XX, at 1363; Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 **Am. U.L. Rev.** 443, 466 (1987); Morton Rosenberg, Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291, 23 **Ariz. L. Rev.** 1199, 1209 (1981).

⁸⁴ That is not surprising, as few academicians (or judges) are reasonable-observer originalists. But to the extent that such scholars are trying to tackle the power-grant reading of the Article II Vesting Clause on the terms of its proponents, who do tend to be reasonable-observer originalists, the form of the argument becomes very important.

Professor Froomkin, we suspect, will be surprised to find his extensive discussions of the Article II Vesting Clause relegated to a footnote. But Professor Froomkin concentrates almost all of his fire on the analogy between the Article II and Article III Vesting Clauses. We make less of that analogy than did Professor Calabresi and Kevin Rhodes, to whom Professor Froomkin was directly responding. Professor Froomkin has relatively little to say about the direct textual arguments that actually formed the foundation

two comprehensive critiques of the Vesting Clause thesis (as modern scholars generally call the view that the Article II and Article III Vesting Clauses grant power), and neither is persuasive.

a. *Defending Executive Vestments I (or The President, The Administration, And The Wardrobe)*

An important set of criticisms of the Vesting Clause thesis has come from Professors Larry Lessig and Cass Sunstein, who defend at some length the claim that the Article II Vesting Clause “says who has the executive power, not what that power is, just as the Vesting Clause of Article I says who has the legislative power (a Congress), while section 8 says what that power is, and the Vesting Clause of Article III says who has the judicial power (one Supreme Court at least) while section 2 specifies to what that power ‘extends.’”⁸⁵ Professors Lessig and Sunstein offer four distinct arguments against the Vesting Clause thesis. All four lead nowhere.

The first argument is best labelled “the argument from redundancy”: if the Vesting Clause grants power, “it would have the effect of rendering superfluous much of the balance of Article II, since much of the balance of Article II merely articulates what . . . [the Vesting Clause thesis] would say is implied in the Vesting Clause.”⁸⁶ The argument fails for three reasons.

First, as Professors Calabresi and Prakash point out, an interpretation of the

of the Calabresi/Rhodes, Calabresi, and Calabresi/Prakash positions and that form the foundation of our construction of the vesting clauses here.

⁸⁵ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 48 (1994).

⁸⁶ *Id.* at 49.

Article II Vesting Clause as a designation of office is even more flagrantly redundant than is the Vesting Clause thesis; provisions of the Constitution other than the Article II Vesting Clause consistently refer to a single Chief Executive known as the President, which renders the Lessig/Sunstein construction of Article II utterly purposeless.⁸⁷ Second, as Professors Calabresi and Prakash have also responded, it is easy to overstate the weight of arguments from redundancy in constitutional interpretation.⁸⁸ That is especially true when one is discussing redundancy among *clauses* rather than redundancy among *terms within a clause*; arguments from redundancy are much more plausible in the latter cases.⁸⁹ Third, Calabresi and Rhodes, echoed by Calabresi and Prakash, try to explain how at least some of the specific provisions in sections 2 and 3 of Article II do not simply replicate the “executive Power” granted by the Article II Vesting Clause but instead limit that executive power in various ways.⁹⁰ We take that argument one large step further: we maintain that *none* of the apparent enumerations of presidential power in sections 2 and 3 of Article II in fact grant *any* powers that the President does not otherwise possess. Instead, they serve to *limit, clarify, or qualify* the President’s “executive Power” in order to avoid misconstruction of that power, Congress’s constitutional powers, or both. Thus, although a number of those provisions are phrased as grants of power to the President, that is not in fact their constitutional function or meaning.

⁸⁷ See Calabresi & Prakash, *supra* note XX, at 576-77.

⁸⁸ See *id.* at 577; Calabresi & Rhodes, *supra* note XX, at 1196 n.216.

⁸⁹ See Lawson, *supra* note XX, at 1719-21 (discussing the differences between redundancy within clauses and redundancy among clauses).

⁹⁰ See *id.* at 577-79.

A prime example is the first sentence of Article II, section 2: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”⁹¹ If the Article II Vesting Clause grants something called “executive Power” to the President, it surely grants to the President power to command American military forces as an element of that “executive Power.” Commanding military forces goes to the very heart of what chief executives traditionally do. So why would the Constitution then additionally specify that power if, as we claim, it had already been granted by the Vesting Clause?

The answer is that the Article II (and Article III) strategy of granting a general power (the “executive Power” or the “judicial Power”) poses dangers of congressional encroachment on those powers. When powers are not precisely specified, one can expect the legislative department’s “impetuous vortex”⁹² to make overreaching efforts to claim them. This is an especially great danger with respect to the crucial power to direct troop movements. The Constitution vests considerable power over the military in Congress. Article I expressly gives to Congress the Power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,”⁹³ “[t]o raise and support Armies,”⁹⁴ “[t]o provide and maintain a Navy,”⁹⁵ “[t]o make Rules for the Government and Regulation of the land and naval Forces,”⁹⁶ “[t]o provide for calling

⁹¹ **U.S. Const.** art. II, § 2, cl. 1.

⁹² **The Federalist** No. 48, at 309 (Clinton Rossiter ed., 1961) (James Madison).

⁹³ **U.S. Const.** art. I, § 8, cl. 11.

⁹⁴ *Id.* art. I, § 8, cl. 12.

⁹⁵ *Id.* art. I, § 8, cl. 13.

⁹⁶ *Id.* art. I, § 8, cl. 14.

forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”⁹⁷ and “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”⁹⁸ Absent these specific provisions allocating power to Congress, at least some of these powers arguably might have belonged to the President pursuant to the grant of the “executive Power.”⁹⁹ The Constitution clearly takes great pains to make clear that Congress is an important player in the control of the military. The power to direct troop movements, of course, is not among the enumerated military powers of Congress. But it is not difficult to imagine Congress arguing that its impressive enumerated military powers somehow imply that it also has the power to control the actual operations of the armed forces. Alternatively, one can imagine Congress claiming that its power to “make all Laws which shall be necessary and proper for carrying into Execution” its otherwise-enumerated congressional powers over the military includes the power of troop direction. Neither argument is persuasive on its own terms, but it is entirely predictable that Congress would make such arguments if the Constitution did not prevent it. And if Congress made those arguments, in the absence of a Commander-in-Chief Clause to render them frivolous, the country could be plunged into a constitutional confrontation during times of national crisis. Thus, the Commander-in-Chief Clause functions as an *anti-inference* device: it makes absolutely clear that the President’s “executive Power,” not Congress’s enumerated military powers, contains the power to direct the American

⁹⁷ *Id.* art. I, § 8, cl. 15.

⁹⁸ *Id.* art. I, § 8, cl. 16.

⁹⁹ *See* Smith, *supra* note XX, at 601-02.

military. The Commander-in-Chief Clause thus *clarifies* presidential power in a crucial area and thereby avoids needless but otherwise likely constitutional conflict.

Similar considerations account for the Opinions Clause, which immediately follows the Commander-in-Chief Clause in Article II, section 2. That clause states that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” This clause has greatly puzzled constitutional scholars. Why give the President such a strange power? Doesn’t this clause prove that the President has no general power to direct the activities of subordinates? And more to the point, doesn’t it prove that the Article II Vesting Clause could not possibly be a grant of power, because any such grant of “executive Power” would surely include something as basic as the power to ask subordinates for written opinions?

Again, however, the Opinions Clause forecloses a predictable, and predictably damaging, inference that Congress might otherwise seek to draw. All executive offices except the presidency and the vice presidency are created by statute pursuant to the Sweeping Clause; the Constitution does not of its own force create any federal agencies or executive officers. Statutes determine the titles of executive offices, the powers of executive offices, the salaries of executive offices, and all other properties of executive offices.¹⁰⁰ It is easy to envision Congress specifying that certain executive officials – such as the Secretary of War or the Secretary of State – must report directly to Congress and may not report to the President. Perhaps such a statute would not be “necessary and

¹⁰⁰ Does that mean that Congress can also determine the *tenure* of executive offices and thus constrain the President’s ability to remove executive officials. Our answer -- somewhat heretically for advocates of a unitary executive – is “quite possibly yes.” See Gary Lawson, The Rise and Rise of the Administrative State, 107 **Harv. L. Rev.** 1231, 1243-45 (1994).

proper” under the Sweeping Clause in the absence of the Opinions Clause, but this would be a very large, and potentially explosive, question to leave to inference. It is entirely sensible for a constitution to foreclose that argument by making clear that the President cannot be cut off from communicating with subordinates. The Opinions Clause, as does the Commander-in-Chief-Clause, thus serves as an *anti-inference* provision that *clarifies* presidential power that is otherwise granted by the Article II Vesting Clause.¹⁰¹

The same can be said of the Pardons Clause, which states that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Surely the “executive Power” includes the pardon power; that was a traditional aspect of the power of chief executives. But because Congress defines all federal criminal offenses, there is value in preventing Congress from trying to use the Sweeping Clause to place certain offenses beyond the pardon power. That is a particular danger with respect to treason, because the Constitution specifically declares that “Congress shall have Power to declare the Punishment of Treason.”¹⁰² In the absence of the Pardons Clause, could Congress reason that in order to protect its power to define the punishment for treason, the President must not be allowed to interfere with the administration of that punishment through pardons? Any such statute would likely be unconstitutional even without the Pardons Clause, but again why leave to inference the resolution of a conflict that is likely to arise in the most heated of settings?

The Pardons Clause also specifies that the President’s pardon power does not extend to “Cases of Impeachment.” That provision was, strictly speaking, unnecessary,

¹⁰¹ See Prakash, *supra* note XX, at 729-30 (advancing this interpretation of the Opinions Clause – among several others – and attributing it to Professor Michael Rappaport).

¹⁰² U.S. Const. art. III, § 3, cl. 2.

because impeachment is not a criminal proceeding and therefore could never come within the pardon power encompassed by the grant of the “executive Power” in the Article II Vesting Clause. Nonetheless, just as one can readily imagine circumstances in which the risk of congressional overreaching is high, one can also readily imagine circumstances in which presidents might be inclined to stretch their powers beyond the breaking point. Wouldn’t it be tempting for presidents to try to argue that impeachments are analogous enough to criminal proceedings to come within the pardon power? Why not forestall that predictable inference, and thus avoid serious constitutional conflict at a time of crisis, by telling the President up front to back off? The “limitation” on the President’s pardon power contained in the Pardons Clause is thus not a “limitation” at all, in the sense that it does not alter the legal world; the President’s pardon power would not extend to impeachment even if the Pardons Clause contained no such express provision. Rather, the provision serves an *anti-inference* function by clarifying an already-existing limitation on the scope of presidential power.

All three provisions in Article II, section 2, clause 1 thus function as *anti-inference* provisions that clarify rather than grant (or limit) presidential powers. They do not expand (or contract) the President’s executive power, but rather warn Congress (or the President) against attempting to encroach (or enlarge) upon that power in predictable ways and thus avoid constitutional conflicts on matters of urgent national interest which are likely to present the highest political stakes.

Article II, section 2, clause 2 contains, in addition to the Treaty Clause, the Appointments Clause, which provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers

and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁰³ The appointment power certainly seems like an aspect of the “executive Power” that the President would gain from the Article II Vesting Clause if that clause is indeed a grant of power, at least in the absence of constitutional specification to the contrary.¹⁰⁴ The Appointments Clause, however, significantly *limits* and *qualifies* the President’s appointment power. The Congress is granted a crucial role in determining which inferior officers can be appointed by persons other than the President; the heads of executive departments and the federal courts are granted power to make certain appointments if Congress so specifies; and the Senate is granted a crucial role in the appointment process for principal officers and for all inferior officers whose mode of appointment does not specifically exclude the Senate. Thus, the Appointments Clause functions as a grant of power to Congress, the Senate, executive department heads, and the federal courts. It is a limitation on presidential power in the form of a grant of power to other actors.¹⁰⁵ It is not a grant of power to the President.

The Recess Appointment Clause, which says that the President “shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting

¹⁰³ **U.S. Const.** art. II, § 2, cl. 2.

¹⁰⁴ Founding-era state constitutions often specified to the contrary. See Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 **Mich. L. Rev.** 545, 578 (2004).

¹⁰⁵ See Smith, supra note XX, at 597.

Commissions which shall expire at the End of their next Session,”¹⁰⁶ is necessitated by the grant of appointment power to the Senate in the Appointments Clause. Some provision had to be made for appointments when the Senate was not available to complete them. The Recess Appointments Clause thus serves essentially as a *limitation* on presidential appointment power during periods of senatorial recess.

Section 3 of Article II contains a series of provisions concerning presidential power, many of which are phrased as duties rather than powers. The President “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”¹⁰⁷ These are obligations imposed upon the President rather than powers granted to him and thus cannot even in principle implicate the status of the Article II Vesting Clause as a grant of power.

The next provision of section 3 is phrased as a grant of power: “he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper.”¹⁰⁸ This provision, however, functions as a *limitation* on presidential power. A bare grant of the “executive Power” would at least arguably grant the President broad power to adjourn the legislature¹⁰⁹; this clause confines that power to a narrowly defined scope.

¹⁰⁶ U.S. Const. art. II, § 2, cl. 3.

¹⁰⁷ *Id.* art. II, § 3.

¹⁰⁸ *Id.*

¹⁰⁹ See Smith, *supra* note XX, at 608-09.

The final three provisions of Article II, section 3 are formulated a bit more ambiguously than some of the others: “he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”¹¹⁰ Although the word “shall” can sometimes signify a grant of power, the context of at least the last two of these provisions suggests the imposition of duties more naturally than it does the grant of powers. That is clearest in the case of the Take Care Clause. English monarchs had occasionally claimed the power to suspend laws by refusing to enforce them. It thus makes very good sense for a presidential power of law execution granted by the Vesting Clause to be cabined by the Take Care Clause – the President does not have absolute discretion with respect to law execution but must exercise that power faithfully. The Take Care Clause thus neatly eliminates any possible presidential claim to a royal power of suspension.¹¹¹ The Commissions Clause similarly reads most naturally as a duty – as a certain Secretary of State and would-be Justice of the Peace once taught us.

The Receipt of Ambassadors Clause, however, simply does not make sense as a duty. To say that the President “shall receive Ambassadors and other public Ministers” leaves open a great many questions: Exactly who counts as a legitimate foreign emissary? On what terms will such emissaries be received? Which functionaries are appropriate stand-ins for the President? The clause makes sense only if it reads as though the President “shall [be the person who bears responsibility to] receive Ambassadors and other public Ministers.” As with the provisions in Article II, section 2, this clause thus

¹¹⁰ **U.S. Const.** art. II, § 3.

¹¹¹ See Lawson & Moore, *supra* note XX, at 1312-13; Prakash, *supra* note XX, at 722-26.

avoids potential conflict with Congress over who bears primary diplomatic responsibility. The “executive Power” is a natural home for both the ceremonial and substantive functions involved in receiving foreign emissaries, but one can imagine Congress claiming the right to, for example, determine who to recognize as a legitimate foreign emissary as an incident to its powers to regulate foreign commerce or declare war. Dispute about such matters could prove eminently embarrassing, so it is eminently sensible to foreclose the prospect of conflict.

It is thus possible to integrate all of the provisions of Article II into a unified theory of Article II that is anchored by the Vesting Clause thesis. To anticipate an obvious objection to the foregoing account: no, we do not maintain that the available historical records show clear expressions of intent on the part of the framers to construct Article II as we have presented it. There is nothing in the drafting history of the Constitution that points inexorably (or even feebly) towards all of the constructions that we have placed upon the various provisions concerning the President. We have instead produced an idealized reconstruction of Article II that harmonizes the provisions with certain fundamental principles derived from the Constitution’s overall text and structure, most notably the Vesting Clause thesis which is compelled, at least as a *prima facie* matter, by the textual, intratextual, and structural features of the Constitution’s use of the terms “vest” and “vested.” That is, we submit, exactly the right way to discern the meaning of Article II. After all, we are not arguing that the text and structure of sections 2 and 3 of Article II affirmatively mandate the Vesting Clause thesis; we are arguing merely that those provisions do not provide a compelling reason to *abandon* the Vesting Clause thesis that is derived from other considerations. Understood from the perspective

of an ideal observer who has already acknowledged the potent prima facie case for the Vesting Clause thesis, the provisions in sections 2 and 3 of Article II other than the Treaty Clause appear most plausibly as duties imposed on the President, clarifications of presidential power that forestall constitutional conflicts, or qualifications or limitations on presidential power. Some of these provisions grant power to non-presidential actors, but none grant power to the President. Nothing in sections 2 and 3 of Article II casts doubt on the status of the Article II Vesting Clause as a grant of the “executive Power” to the President.¹¹² Accordingly, even if one was inclined to question the Vesting Clause thesis if it generated extreme redundancy, the structure of Article II does not exhibit such redundancy.

The second argument against the Vesting Clause thesis advanced by Professors Lessig and Sunstein can be labelled “the argument from the Hamilton that didn’t bark in the night.” In a series of essays in *The Federalist*, Alexander Hamilton discussed the constitutional powers of the President.¹¹³ He never mentioned the Article II Vesting Clause among those powers. Thus, “not even Hamilton described the Vesting Clause as an independent source of substantive executive power, though he was in general quite eager to define a strong executive. In his catalog of the executive powers, contrasting the American executive with the British monarch, nowhere does he discuss a general executive power arising from the Vesting Clause.”¹¹⁴ If even someone as disposed

¹¹² The President does in fact draw power from constitutional provisions other than the Vesting Clause, but those provisions are not found in Article II. See U.S. Const. art. I, § 7, cls. 2-3 (describing the President’s role in the lawmaking process).

¹¹³ The Federalist Nos. 69, 73-77, supra note XX, at 417-23, 442-63.

¹¹⁴ Lessig & Sunstein, supra note XX, at 49. See also Bradley & Flaherty, supra note XX, at 602 (making a similar argument).

towards broad executive power as Alexander Hamilton did not recognize the Article II Vesting Clause as a power grant, how are we to do so?

Professors Calabresi and Prakash have responded that Hamilton, whatever his personal beliefs may have been, was unlikely to trumpet a broad presidential power in a document that was designed to defuse Antifederalist criticism of the Constitution.¹¹⁵ They are exactly right. *The Federalist* was campaign literature, and it needs to be viewed as such. Unlike modern campaign literature, it occasionally contains some very profound observations about human nature, governmental structure, and the workings of the Constitution, but one must tread carefully when using it as an interpretative guide.

Third, Professors Lessig and Sunstein make what we somewhat teasingly call “the argument from Illinois.” They claim that “while the federal constitution certainly constituted a more unitary executive than most state constitutions, the same language vesting executive power in state constitutions had been understood at the time of the framing not to mark an inherent power, but to describe an authority limited to that power enumerated. At least as a presumption, similar language in the federal constitution would suggest a similar understanding.”¹¹⁶ So phrased, this looks like a very sensible argument. If founding-era state constitutions actually used executive vesting clauses as designations of office rather than as grants of power, that would be relevant evidence concerning the meaning of the Article II Vesting Clause.

¹¹⁵ Calabresi & Prakash, *supra* note XX, at 612.

¹¹⁶ Lessig & Sunstein, *supra* note XX, at 49-50.

Unfortunately for Professors Lessig and Sunstein, the only example of such a constitution that they can muster comes from an 1839 Illinois Supreme Court decision¹¹⁷ construing the executive vesting clause of the 1818 Illinois constitution.¹¹⁸ That case did indeed hold that the Illinois constitution’s executive vesting clause did not grant any power to the Illinois governor, and in particular did not grant the power to remove at will the Illinois Secretary of State. But 1839 is, by our count, fifty-one years after the ratification of the federal Constitution.¹¹⁹ As evidence of the original meaning of the Federal Constitution of 1788, this leaves something to be desired.¹²⁰

More to the point, a broader study of state constitutions that *really were* from the founding era provides *support* for the Vesting Clause thesis. Such a study of state constitutions from 1776-77 has been conducted by Lance Miller,¹²¹ and it discloses that the text and structure of these constitutions, as well as the practices of state governments under them, tends to support the view that founding-era executive vesting clauses were, at least some of time, grants of executive power. For instance, some of those early constitutions, after describing specific powers of the chief executive, have vesting clauses that refer to “all other executive powers” or “all the other executive powers of

¹¹⁷ See Field v. People ex rel. McClelland, 3 Ill. (2 Scam.) 79 (1839).

¹¹⁸ See **Ill. Const. of 1818** art. 3, § 1 (“The executive power of the state shall be vested in a governor.”).

¹¹⁹ At least part of the Constitution became effective in 1788. Other parts did not become fully effective until 1789. See Gary Lawson & Guy Seidman, When Did the Constitution Become Law?, 77 **Notre Dame L. Rev.** 1 (2001).

¹²⁰ See Calabresi & Prakash, supra note XX, at 613.

¹²¹ See Lance E. Miller, Power of the Federal Presidency: Perspectives From Early State Constitutions (manuscript of March 29, 2004 on file with authors). In the interests of full disclosure: Mr. Miller wrote this paper under Professor Lawson’s supervision. Professor Lawson, however, merely suggested that it would an interesting inquiry to undertake. He emphatically did not suggest or prejudge the outcome – for the simple reason that he had not done enough research to form a judgment (pre- or otherwise) on the matter.

government.”¹²² As Mr. Miller ably concludes, “[b]y vesting ‘all *other*’ executive powers in the executive, the framers of these early constitutions indicated an understanding that the listed powers granted [to] the governors are *part of* a larger class of ‘executive powers.’”¹²³ These early constitutions are thus precedents for grants of general executive powers to chief magistrates. Moreover, various executives under these first constitutions “acted to seize property, change a state capital, and authorize payments, all under authority not specifically iterated under their respective constitutions.”¹²⁴ These actions, which were not challenged on constitutional grounds, make sense only if the relevant vesting clauses granted these governors a general executive power. The overall lesson to be drawn from Mr. Miller’s study is that “while the early framers were protective against executive tyranny, the safeguards they instituted in their constitutions did not come in the form of a refusal to vest executive powers.”¹²⁵ Instead, they employed plural executives and elaborately specified restrictions on the exercise of executive power. There is, of course, some distance between state constitutions of 1776-77 and the federal Constitution of 1788-89, but the distance is far less than the gap between the federal Constitution and an 1839 Illinois Supreme Court decision.

¹²² See **Del. Const. of 1776**, art. VII (stating that the President has power to grant pardons, lay embargoes, and withdraw money, and shall exercise “all other executive powers of government limited and restrained . . . according to the laws of the state”); **Md. Const. of 1776** art. XXXIII (providing that the state’s plural executive has various military powers “and may alone exercise all the other executive powers of government”); **N.C. Const. of 1776** art. XIX (providing that the state’s plural executive, in addition to enumerated powers, “may exercise all the other executive powers of government”).

¹²³ Miller, *supra* note XX, at 18.

¹²⁴ *Id.* at 34-35.

¹²⁵ *Id.* at 24-25.

Professors Lessig and Sunstein had the right idea, but they looked at the wrong evidence and reached the wrong conclusion.¹²⁶

The final argument from Professors Lessig and Sunstein can be called the “do-you-really-want-to-go-there? argument.” Drawing on the parallels often drawn by advocates of the Vesting Clause thesis between the Article II and Article III Vesting Clauses, Professors Lessig and Sunstein ask: “If the difference between Article II and Article I entails broad inherent power in the President, does it entail the same broad grant of inherent power in Article III? For just like Article II, and unlike Article I, Article III vests ‘[t]he judicial power’ (and not just the judicial power ‘herein granted’) in ‘the Supreme Court.’ But does this mean that the judicial branch has a wide range of inherent and (legislatively) unregulable judicial authority beyond that enumerated and granted by Congress, drawn from English practice?”¹²⁷ The subtext of this passage is fairly clear. Advocates of the Vesting Clause thesis tend, on the whole, to favor what one might loosely call “judicial restraint,” though that term is notoriously difficult to pin down.¹²⁸

¹²⁶ Professors Bradley and Flaherty appear to draw somewhat different conclusions than did Mr. Miller from these early state constitutions. *See* Bradley & Flaherty, *supra* note XX, at 571-85. But while they very successfully show that early state constitutions were generally distrustful of executive authority, they are much less successful in showing that executive vesting clauses in those constitutions were designations of office rather than grants of (perhaps minimal) executive authority. At times, they seem to assume that vesting clauses followed by specific identifications of power cannot be grants of power and thus defeat the Vesting Clause thesis, *see id.* at 579-80, but that is simply a strong form of an unpersuasive argument from redundancy. At other times, they appear to acknowledge that early vesting clauses indeed granted power, albeit power that was strictly limited and cabined. *See id.* at 579-80 (“to the extent these general executive power provisions conveyed anything, they conveyed no more than a general power of implementing and enforcing the laws.”); *id.* at 580 (“General language was used to delegate only the power to implement the laws”). If such clauses conveyed any power at all, they provide general support for the Vesting Clause thesis as we present it. This discussion exemplifies the tendency of Professors Bradley and Flaherty to equivocate between different meanings of the term “Vesting Clause thesis.” *See infra* XX. And at no time do Professors Bradley and Flaherty consider the actual exercises of power undertaken by early state governors.

¹²⁷ Lessig & Sunstein, *supra* note XX, at 50.

¹²⁸ For a brief overview of the confusion, see Gary Lawson, *Conservative or Constitutionalist?*, 1 *Geo. J.L. & Pub. Pol’y* 81 (2002).

But if the Article III Vesting Clause is, as proponents of the Vesting Clause thesis claim, an independent grant of power to the federal courts, what might those powers be? Couldn't they include many things that make advocates of the Vesting Clause thesis recoil in horror? Does the quest for the Unitary Executive lead instead to the Imperial Judiciary?

The answer is that the Vesting Clause thesis does indeed mean that the Constitution grants to the federal judiciary “a wide range of inherent and (legislatively) unregulable judicial authority beyond that enumerated and granted by Congress.” Put simply, the Constitution gives the federal courts power to decide cases in accordance with governing law. The courts do not get that power of decisionmaking from Congress. One of us has described at considerable length how far (at least he believes that) this unregulable judicial authority goes.¹²⁹ It includes (or so Professor Lawson believes), for example, power to fashion rules of evidence and other principles of decisionmaking free from legislative control. But that power is not unlimited. It extends only to those matters which concern the decisionmaking process of the federal judiciary. That is not a trivial set of concerns, but it does not make the federal courts all-powerful. The grant of power in Article III, after all, is a grant of “judicial Power,” not a grant of all possible power. The *general* nature of the grant does not make it an *unlimited* grant. In other words, if Professors Lessig and Sunstein want to try to discredit the Vesting Clause thesis with claims about its implications for the power of the federal courts, we say: “Bring it on!”

¹²⁹ See Lawson, *supra* note XX. And yes, many advocates of the Vesting Clause thesis will recoil in horror from these conclusions.

b. *Defending Executive Vestments II (or Executive Power Existentialism and Foreign Affairs)*

Professors Curtis Bradley and Martin Flaherty have recently entered the debate with a lengthy attack on the Vesting Clause thesis.¹³⁰ Their argument is difficult to summarize for two reasons. First, it spans 144 law review pages. Second, and more importantly, it is not clear precisely what version of the Vesting Clause thesis Professors Bradley and Flaherty mean to attack. Their argument was prompted by the argument of Professors Sai Prakash and Michael Ramsey that the Article II Vesting Clause grants to the President a specific package of powers over foreign affairs that includes such things as the power to recall ambassadors, to communicate with foreign governments, and to terminate treaties.¹³¹ The Prakash/Ramsey position entails two distinct claims: that the Article II Vesting Clause grants to the President a set of powers called the “executive Power,” and that such powers include certain specific foreign affairs powers. If the first claim is false, the second is false as well, but the first claim can be true even if the second is false. The *content* of the “executive Power” granted to the President by the Vesting Clause is an issue separate from *whether* the Article II Vesting Clause grants power. It is frequently unclear to which of these claims Professors Bradley and Flaherty are trying to respond, but it seems as though they are primarily concerned with the more specific claim that the Vesting Clause grants certain foreign affairs powers. Indeed, some of their most powerful arguments involve pointing out that evidenced mustered by Professors Prakash and Ramsey supports only the general proposition that the Article II Vesting Clause

¹³⁰ Bradley & Flaherty, *supra* note XX.

¹³¹ See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231 (2000).

grants *some* power, such as a power to execute the laws, but not more *precise* propositions about foreign affairs powers.¹³²

But while the vast bulk of their argument clearly targets something that is best labeled the “Foreign Affairs Vesting thesis” rather than the “Vesting Clause thesis,” Professors Bradley and Flaherty do put forward a case against the more general Vesting Clause thesis that we advance here. We are unmoved.

Many parts of the Bradley/Flaherty critique of the Vesting Clause thesis are familiar. They suggest, as have others before them, that the use of the “herein granted” language in the Article I Vesting Clause but not in the Article II or Article III Vesting Clauses may have been the product of a drafting accident rather than conscious design.¹³³ That may be true, but it does not affect the meaning of the Constitution from the perspective of reasonable-observer originalism, which is concerned with how the Constitution’s language would be publicly perceived by a reasonable observer rather than with the motivations behind that language. Moreover, it misunderstands the role of the “herein granted” language, which is hardly “the principal textual argument”¹³⁴ in support of the Vesting Clause thesis. The principal textual argument is the text of the Article II and Article III Vesting Clauses and the other constitutional provisions that use the words “vest” and “vested,” which seem on their faces to be grants of power. The “herein granted” language in Article I highlights the fact that the Article II and Article III Vesting Clauses do not expressly direct one outside those clauses for definitions of the powers of

¹³² See Bradley & Flaherty, *supra* note XX, at 553 n.26.

¹³³ See *id.* at 553-54 (citing David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 177 (1997)).

¹³⁴ See Bradley & Flaherty, *supra* note XX, at 553.

the President and the federal courts, but that language does not anchor the argument for the Vesting Clause thesis.

Professors Bradley and Flaherty also advance at some length the argument from redundancy, emphasizing that past defenders of the Vesting Clause thesis have not provided convincing explanations for all of the specific enumerations in sections 2 and 3 of Article II.¹³⁵ We have addressed that argument at length already.¹³⁶ They further suggest that general grants of executive (and, one presumes, judicial) authority, such as those claimed by the Vesting Clause thesis, are “at least in tension with the enumerated powers structure of the Constitution,”¹³⁷ but power-granting vesting clauses in fact enumerate powers. There may be a good case against construing those general powers *broadly*, but not against construing them as powers. And Professors Bradley and Flaherty also offer a (somewhat meandering) argument based on the comparison between Article II and Article III, which eventually culminates in a claim about the *scope* of the power granted by the Article II Vesting Clause rather than a claim about the Vesting Clause thesis in its most general form.¹³⁸

Overhanging the entire Bradley/Flaherty argument are two methodological puzzles. Professors Bradley and Flaherty do not claim decisively to have defeated the Vesting Clause thesis on the basis of text and structure. Rather, they advance their textual and structural arguments in order to show that the “textual arguments *in support*

¹³⁵ See *id.* at 555-57.

¹³⁶ See *supra* XX.

¹³⁷ Bradley & Flaherty, *supra* note XX, at 558-59.

¹³⁸ See *id.* at 557-58.

of the Vesting Clause Thesis are, at best, indeterminate,”¹³⁹ and that “the legitimacy of the Vesting Clause Thesis cannot be determined simply by looking at what the Constitution says.”¹⁴⁰ The first puzzle is figuring out what they mean by “indeterminate.” If they mean that the Vesting Clause thesis cannot be proved beyond a reasonable doubt, they have a point – albeit a point that renders “indeterminate” virtually every interesting question in constitutional law from the perspective of virtually every interpretative approach that one can imagine. If instead they mean that one cannot, using arguments from text and structure, evaluate the *relative plausibility* of the Vesting Clause thesis compared to other interpretations of the vesting clauses, they are just wrong.

This leads to the second methodological puzzle. Professors Bradley and Flaherty are very quick to give up on textual and structural arguments and pronounce them indeterminate. It sometimes seems as though they regard the *conceivability* of alternative interpretations as grounds for existentialist-like despair about the utility of textual and structural reasoning. This contrasts sharply with their sophisticated, detailed, and painstaking parsing of historical materials, which displays a keen sensitivity to sometimes subtle differences in interpretations of such materials. In our view, the expenditure of energy should be allocated in precisely the opposite fashion. One should direct primary attention to sophisticated, detailed, and painstaking scrutiny of textual and structural arguments and turn to history only as a last resort. With the expenditure of some energy, the textual and structural arguments in favor of the Vesting Clause thesis emerge as considerably stronger than Professors Bradley and Flaherty seem willing to credit – and

¹³⁹ *Id.* at 553 (emphasis added).

¹⁴⁰ *Id.* at 559.

certainly as stronger than any alternative construction of the Vesting Clauses. That is enough to let argument go forward.

c. Tailoring Executive Vestments

In the end, the case for a power-grant reading of the Article II Vesting Clause is very strong. The primary question raised by the Article II Vesting Clause is not *whether* it grants power to the President but rather *what kind* of power it grants. What is the scope of the “executive Power” that is vested in the President by Article II? That is an enormous question that we cannot pursue here in depth. For now, we must be content with several preliminary observations, some of which we have foreshadowed and some of which we will shortly elaborate.

First, a *general* power is not an *unlimited* power. Any power claimed by the President under the Article II Vesting Clause must fall within a late eighteenth-century understanding of “executive Power” in the aftermath of an anti-monarchical revolution. There are many imaginable assertions of presidential power that fail the laugh test under this standard, such as the power to take over steel mills,¹⁴¹ to halt pending judicial proceedings,¹⁴² and to make law under the guise of “interpretation.”¹⁴³ The “executive Power” granted by the Vesting Clause is not the royal prerogative. It is not necessarily a very large power at all.

¹⁴¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Constitution 1, President 0.

¹⁴² See *Dames & Moore v. Regan*, 453 U.S. 653 (1981). Constitution 1, President 1.

¹⁴³ See *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001). President 2, Constitution 1.

Second, the term “executive Power” clearly did not have a single, well-defined, universally understood meaning in the founding era; that much has been more than amply demonstrated by Professors Bradley and Flaherty.¹⁴⁴ That does not establish, however, that the term was empty or meaningless; “[a] term need not be precisely determinate in order to have meaningful content.”¹⁴⁵

Third, the core meaning of “executive Power” is the power to execute federal laws.¹⁴⁶ This power is not merely the power mechanistically to follow congressional commands, but also includes elements of discretion in enforcement policy, interpretation of ambiguous statutes (up to a point), and what can best be described as the setting of administrative policy.¹⁴⁷

Fourth, and more controversially, the “executive Power” also includes foreign affairs powers that are not otherwise allocated to specific institutions by the Constitution. According to Professors Prakash and Ramsey, these powers include such things as the power to direct troop movements, to communicate with foreign nations, to recall ambassadors, to enter into executive agreements, and probably to terminate treaties. Professors Bradley and Flaherty, of course, vigorously contest all of these claims. We are not prepared to say that Professors Prakash and Ramsey are right about every single power that they claim for the President under the Article II Vesting Clause.¹⁴⁸ But we do

¹⁴⁴ See Bradley & Flaherty, supra note XX; Flaherty, supra note XX.

¹⁴⁵ Lawson, supra note XX, at 338 n.43.

¹⁴⁶ See Prakash, supra note XX.

¹⁴⁷ A broad understanding of law execution could even extend to such matters as the power to pardon, to appoint, and perhaps to remove subordinates, though the point is incidental to the present argument.

¹⁴⁸ At least one of us is especially dubious about the validity of executive agreements.

believe that at least *some* powers that can loosely be labeled “foreign affairs powers” are encompassed by the Article II Vesting Clause. At the risk of engaging a 144-page discussion in a few sentences: It does not suffice to say, as Professors Bradley and Flaherty convincingly say, that “executive Power” was a messy, contested concept in the late eighteenth century. That does not foreclose a best reading of the concept in specific circumstances. Nor does it suffice to say, as Professors Bradley and Flaherty convincingly say, that available founding-era records do not yield extensive discussions that specifically mention the “executive Power” in Article II as a locus of foreign affairs powers. Originalist arguments that focus on public meaning, and particularly the reasonable-observer originalism that we employ, operate on a higher level of conceptual generality than Professors Bradley and Flaherty address. And that brings us to the principal point: For reasonable-observer originalists, the central insight of the Prakash/Ramsey argument is one which Professors Bradley and Flaherty do not really engage¹⁴⁹: Whatever some pure theory might or might not say about the allocation of foreign affairs powers, the federal Constitution, which adopts the strategy of enumerating the powers of federal institutions, specifically grants to Congress something less than the full range of traditional foreign affairs powers and then grants “executive Power” to the President. Either the grant of the “executive Power” includes some of these traditional foreign affairs powers that are not granted to Congress (with room for argument about exactly which ones are included) or the Constitution fails to grant those powers to any

¹⁴⁹ This is not a criticism of Professors Bradley and Flaherty; it is simply an observation. They are not reasonable-observer originalists. They were responding to an article that was not written from the perspective of reasonable-observer originalism (though at least some of that article is consistent with such an approach). Professors Prakash and Ramsey made some strong claims about historical materials, so it is only reasonable for Professors Bradley and Flaherty to respond in kind. Our concern is that their understandable focus on the historical claims has diverted attention from the more basic textual and structural claims to which historical argument is appropriately the handmaiden.

federal institution. Perhaps the Constitution is a major botch-job which left many of those powers ungranted. But while we are perhaps more willing than are Professors Prakash and Ramsey to indulge the possibility that some foreign affairs powers slipped through the constitutional cracks and therefore cannot be claimed by any federal institution, we suspect that a fully-informed reasonable observer would be loathe to reach that conclusion with respect to *all* otherwise expressly unallocated foreign affairs powers when a sensible alternative is at hand.

The Article II Vesting Clause grants “executive Power” to the President. That does not make the President the King. Nor does it make the President a cipher. The truth lies in between.

B. Location, Location, Location: The Article II Treaty Clause

In a portion of the Constitution, such as Article I, in which the Vesting Clause confers no power, the specific enumerations that follow that clause clearly represent grants of power that define the powers “herein granted” that belong to Congress.¹⁵⁰ Article I enumerations are grants of power. In portions of the Constitution such as Articles II and III, however, in which the first sentence confers a general power, subsequent enumerations serve very different functions. They do not grant power to the principal subjects of their respective Articles, but instead clarify, qualify, or limit the

¹⁵⁰ Several of the Article I enumerations grant powers to entities other than Congress. Some of the provisions in sections 2-5 of Article I grant powers to the individual legislative branches concerning such matters as appointment of legislative officers, the qualifications of Members of the legislature, and impeachment. *See U.S. Const.* art I, §2, cl 5; *id.* art I, § 3, cl 5-6; *id.* art. I, § 5, cl 1-3. Other provisions in those sections grant power to non-legislative actors, such as giving the Vice President power to preside over the Senate and cast tie-breaking votes, *id.* art I, § 3, cl 4, and the Chief Justice power to preside over presidential impeachment trials. *Id.* art I, § 3, cl 6.

basic power grants in the vesting clauses. They sometimes grant power to to other actors, but not to the actors that receive power from the vesting clauses.

The Treaty Clause appears in the middle of Article II, section 2. If it follows the general pattern of Article II enumerations, and there is no evident reason for an observer to suppose that it does not, then the Treaty Clause *is not a grant of power to the President*. It is a *limitation*, by way of requiring Senate consent, on a presidential power that is otherwise granted by the Article II Vesting Clause. It grants power to the *Senate* that that body would not otherwise have, but it does not create a federal treaty power that would not exist in the clause's absence. Without the Treaty Clause, the President would have the sole power of making treaties as an aspect of the "executive Power."

This conclusion, while firmly grounded in constitutional structure, is not as straightforward as we have made it out to be. The drafting history of the Treaty Clause does not reveal a conscious consensus to place the clause in the middle of Article II in order to cement its executive pedigree; the drafting process was considerably messier than that.¹⁵¹ Although the treaty power in the late eighteenth century, consistently with its Article II placement, "would historically have been understood as part of the executive power,"¹⁵² a number of prominent founding-era figures, including some prominent Framers, expressed the view that the treaty-making power was legislative, or at least was

¹⁵¹ The classic study of the drafting of the Treaty Clause, which emphasizes that the participants in the Constitutional Convention probably did not intend for the clause's placement in Article II to settle this issue, is Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause As a Case Study*, 1 *Persp. in Am. Hist.* 233 (1984). Such evidence of drafting intentions is relevant to an inquiry into original *understanding*, but is considerably less decisive to an inquiry into original *meaning* that focuses on the perceptions (whether actual or hypothetical) of the public to whom the Constitution was addressed.

¹⁵² Prakash & Ramsey, *supra* note XX, at 292. Indeed, virtually every important thinker who influenced the founding generation thought of treaty-making as an executive function. *See id.* 265-72; Yoo, *Globalism and the Constitution*, *supra* note XX, at 1990-97.

not clearly executive.¹⁵³ Third, as David Golove has forcefully argued,¹⁵⁴ the eighteenth-century historical conception of treaty making as an executive function may have rested on a view of executive sovereignty that does not necessarily fit the American Constitution very well. Accordingly, a hypothetical, fully-informed eighteenth-century audience may have been quite open to the possibility that the treaty-making power under the American system of government is best viewed as legislative rather than executive.

But while these considerations might be enough to establish that a treaty clause located among legislative powers in Article I should not be regarded as executive, it is very hard to see how they permit a treaty clause located in the middle of Article II to be viewed by an informed public as reflecting anything other than executive power. As Professor John Norton Moore has elegantly put it

It is possible to debate theoretically whether the power to make treaties is primarily executive or legislative, as did Hamilton and Madison in the famous "Pacifcus-Helvidius" exchange. Under the Constitution of the United States, however, there can be but one answer. For the treaty power is placed in Article II, under the Executive, with a check in the Senate. It was not placed in Article I, under the Legislative branch, with a check in the Executive. The starting point for

¹⁵³ See e.g., James Madison, Letters of Helvidius, Aug. 24, 1793, in 6 **The Writings of James Madison** 138-88 (Gaillard Hunt, ed. 1906):

If we consult, for a moment, the nature and operation of the two powers to declare war and to make treaties, it will be impossible not to see, that they can never fall within a proper definition of executive powers. The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed. A treaty is not an execution of laws; it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a *law*, and to be carried into *execution*, like all *other laws*, by the *executive magistrate*.

Other members of the founding generation expressed similar views at various times. See Golove, *supra* note XX, at 1873-75 (noting that James Madison, George Mason, and James Wilson at the Constitutional Convention viewed the treaty power as legislative in character and that Alexander Hamilton took conflicting positions at different times). Of course, under reasonable observer originalism, even a strong historical consensus in favor of an executive classification of the treaty power would not be conclusive.

¹⁵⁴ See Golove, *supra* note XX, at 1873-74.

analysis under the United States Constitution, then, is that the treaty power is primarily executive in its nature.¹⁵⁵

As a result of the location of the Treaty Clause, one of the “obvious” insights that emerges from a cursory examination of the constitutional text--that the Treaty Clause is a grant of power to the President and Senate--is false, at least as applied to the President.¹⁵⁶ Clauses that speak of granted power do not have the same meaning in Article II that they have in Article I. Article II enumerations of “power” are not grants of power to the President that otherwise would not exist, but instead are clarifications or qualifications of powers that are otherwise part of the “executive Power.” The treaty power, as befitting its location in the middle of Article II of the Constitution, is an aspect of the “executive Power,” distinguished from other aspects of the executive power by the requirement of consent by two thirds of the Senate.

Accordingly, the Treaty Clause, although phrased as an enumeration of power, is in reality a constraint on the President’s executive power. Alexander Hamilton thus aptly described the Treaty Clause when he remarked in his defense of the Neutrality Proclamation that “the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general ‘Executive Power’ vested in the President”¹⁵⁷ To be sure, Hamilton in *The Federalist*, while he was trying to

¹⁵⁵ John Norton Moore, Treaty Interpretation, the Constitution, and the Rule of Law, 42 **Va. J. Int’l L.** 163, 192 (2001).

¹⁵⁶ The Senate does gain power from the Treaty Clause via the requirement of its “Advice and Consent” and two-thirds approval for the making of treaties. Whether this power is purely a negative power of disapproval or a stronger power to participate in the shaping of treaties is an interesting question that we do not address. For illuminating explorations, see Bradley & Flaherty, supra note XX, at 626-31; Rakove, supra note XX. For whatever this may be worth to the debate: as a textual matter, it seems very difficult to read a provision calling for “Advice and Consent” as requiring only consent without advice.

¹⁵⁷ *Pacificus No. 1*, June 29, 1793, in **The Papers of Alexander Hamilton** 42 (Harold C. Syrett ed. 1969).

sell the Constitution to New Yorkers skeptical of broad presidential power, expressly disclaimed the executive character of the treaty power.¹⁵⁸ As has been frequently observed, consistency was not always the Framers' hallmark--which is yet another reason to focus on what the Constitution says rather than on what people said that it says.

C. The Limits of Executive Power: Implementation and Reasonableness

The identification of the treaty power as an aspect of the "executive Power" has important substantive consequences. The "executive Power" granted to the President is not boundless. Nor does the dearth of express textual limitations on that power suggest a broad scope for presidential power. Quite to the contrary, Article II did not need to enumerate the range of cases to which the "executive Power" extends in order to limit that power because *the very nature of the executive power defines its limits*.

1. Execution as Implementation

The essence of the executive power is to execute, or carry into effect, national laws.¹⁵⁹ These laws include the Constitution, statutes, treaties, judicial judgments, and the common law of the United States to the extent that such a body of law exists, subject to the President's paramount obligation to the Constitution. But the "executive Power,"

¹⁵⁸ See **The Federalist** No. 75, at 418 (Hamilton) ("Though several writers on the subject of government place that [treaty-making] power in the class of executive authorities, yet this is evidently an arbitrary disposition. For if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them.").

¹⁵⁹ Prakash, *supra* note XX.

in the course of carrying out its essential function, can only execute laws that *already exist independently of the exercise of federal executive power*. That execution, of course, can include interpretation of the laws and hence is not a purely ministerial function. It also includes a strong element of discretion in the selection of the means, forms, and priorities for execution--which collectively we might call the setting of administrative policy. But all of this discretion must be exercised within the confines of ends established by pre-existing law. If the laws in question leave too much to the imagination, their “interpretation” would in fact be the *creation* rather than the *execution* of the law and would therefore exceed the President’s executive power.¹⁶⁰ Accordingly, the grant to the President of the “executive Power” is self-limiting. It is a grant of power to carry into effect other law.

We can now understand, intratextually, why the Article II Vesting Clause, unlike the Article I Sweeping Clause, does not expressly say, “The executive Power to take all Actions which shall be necessary and proper for carrying into Execution the Laws of the United States shall be vested in a President.” The “for carrying into Execution” proviso did not need to be textually specified in the Article II Vesting Clause because it is inherent in the very concept of “executive Power” as the Constitution uses that term. (We will later demonstrate that the “necessary and proper” requirement is also implicit in the grant of the executive power.) It is the nature of the President’s “executive Power” to implement existing law, not to create new law. The “executive Power,” despite its textually unqualified nature, is an *implementational* power.

¹⁶⁰ This proposition, and its implications for the nondelegation doctrine, is explored in Gary Lawson, Delegation and Original Meaning, 88 **Va. L. Rev.** 327, 337-40 (2002).

That also explains how the federal treaty power can be implementational even though the Treaty Clause does not contain the kind of language found in the Sweeping Clause. The grant to the President of the “executive Power,” at least in its fundamental function of executing the laws, carries with it, by its very nature, a requirement that it be used only for carrying into execution federal law. No textual limitation to that effect was necessary. Executive power and legislative power are different enough in character to require different forms of limitation; one would not expect grants of legislative power to be textually limited in precisely the same manner as grants of executive power. To the extent that the treaty power is part of the “executive Power” granted by the Vesting Clause, one similarly would not expect the same kinds of textual limitations that one finds on legislative power.

At least, that is true of the “executive Power” in its “essential meaning” of executing the laws of the United States. There is more to the executive power than that. How much more is a matter of considerable controversy, which we cannot hope to address here. It suffices to say that the Constitution’s vesting of “all legislative Powers herein granted” in Congress, and its creation of a judiciary department separate from the executive, counsels in favor of a relatively narrow understanding of the scope of the executive power.¹⁶¹ It is hard to dispute, however, that the Article II Vesting Clause confers, in addition to the power to execute the laws of the United States, a certain degree of federative, or foreign affairs, powers not otherwise allocated to any federal institution

¹⁶¹ For an excellent overview of the historical debate and a defense of a minimalist conception of the executive power, see Henry P. Monaghan, The Protective Power of the Presidency, 93 **Colum. L. Rev.** 1 (1993).

that involve a significant degree of policymaking.¹⁶² These powers do not simply carry into effect the ends set by other governmental actors; they constitute an independent head of jurisdiction vested in the President. But they only grant jurisdiction of a limited kind. Most importantly, these general foreign affairs powers typically are not lawmaking powers; they do not permit the President unilaterally to impose rights and obligations on citizens.¹⁶³ Rather, these powers concern such matters as communication with foreign nations and the recall of ambassadors.

Some presidential foreign affairs powers, however, do have the potential to affect private rights. If Professors Prakash and Ramsey are right that the President has the “executive Power” to terminate treaties (and we are officially agnostic on that point), private rights relating to the terminated treaties can be at stake. And to the extent that the President has the power to employ military force, that action has quite significant consequences for the forces under his command, if not for the country at large. Most significantly for our purposes, as we have discussed at length in a previous article, the President may act as a lawmaker with respect to occupied foreign territory during wartime.¹⁶⁴ As “legisecutive” powers go, this one is about as “legis” as one can get. It is limited, however, to occupied foreign territory during wartime and provides no basis for exercising jurisdiction over American citizens in American territory. But it is

¹⁶² See Prakash & Ramsey, *supra* note XX. Of course, to say that it is hard to dispute is not to say that no one has ever disputed it. James Madison disputed it with considerable fervor in his exchange with Alexander Hamilton concerning the President’s power to issue the Neutrality Proclamation of 1793. Professors Curtis Bradley and Martin Flaherty, as we have seen, vociferously say nay. See Bradley & Flaherty, *supra* note XX. But the proposition that an ideal eighteenth-century observer would have had an understanding of “executive Power” that includes a foreign affairs component of *some* dimension can withstand scrutiny.

¹⁶³ See Prakash & Ramsey, *supra* note XX, at 263-64.

¹⁶⁴ See Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 *Nw. U.L. Rev.* 581 (2001).

unquestionably a significant grant of power to the President. Thus, while the bulk of the powers granted to the President by the Article II Vesting Clause are limited to the implementation of ends set by other legal actors, some of those powers are best understood as independent heads of jurisdiction.

Given the dual aspect of the Article II Vesting Clause, which contains both implementational and jurisdiction-granting elements, how would one determine the proper scope of the treaty power? Does the Treaty Clause partake solely of the implementational aspect of the executive power or does it also constitute a unique kind of jurisdiction-extending lawmaking instrument?

Before we finalize our answer to that question, we need to flesh out more fully what it would mean for the treaty power to be implementational. In particular, we need to understand precisely what limitations the implementational view reads into the Treaty Clause by virtue of its Article II location. And that requires a 500-year detour.

2. The Principle of Reasonableness

We are contending that the Treaty Clause is analogous to the Sweeping Clause: it exists in order to effectuate other enumerated powers of federal institutions. The Sweeping Clause specifically limits its grant of power to laws “for carrying into Execution” federal powers. We have already explained why the absence of such language in the Article II Treaty Clause can be consistent with an implementational view of that clause: if the treaty power is an aspect of the more general Article II “executive Power,” its implementational character follows as a matter of course. The Sweeping

Clause, however, contains a substantive textual limitation in addition to the requirement that it be used only “for carrying into Execution” constitutionally granted powers. Laws enacted pursuant to the Sweeping Clause must be “necessary and proper” for their implementational purpose. One of us has spent a fair portion of his professional life plumbing the meaning of the word “proper” and has concluded that it requires executory legislation to conform to constitutional principles of federalism, separation of powers, and individual rights.¹⁶⁵ Of course, the better-known term, because of its prominence in *McCulloch v Maryland*, is “necessary,” which denotes a causal, or telic,¹⁶⁶ relationship between the means employed and the ends served. The Sweeping Clause requires a certain degree of “fit” between means and ends.¹⁶⁷ Can one similarly derive some kind of “necessary and proper” requirement for the treaty power from inference?

In order to answer this question, one needs to examine at length some eighteenth-century background principles about delegated power. All of the powers in the Constitution are delegations from the ultimate source of law. Many of these grants of power unavoidably involve the exercise of discretion by public officials. It was well understood in eighteenth-century English law that grants from Parliament of discretionary governmental authority carried the implied provision that exercises of discretion had to

¹⁶⁵ See Lawson & Granger, *supra* note XX; Lawson, *supra* note XX.

¹⁶⁶ See David E. Engdahl, *Constitutional Federalism in a Nutshell* 20 (2d ed., West, 1987).

¹⁶⁷ The debate in *McCulloch* concerned how tightly the means and ends must be linked, with opponents of the bank arguing for a standard of strict necessity and its defenders opting for a standard of helpfulness. For the argument of the Bank’s opponents, see 17 U.S. (4 Wheat.), 367 (argument of Mr. Jones). For the argument of the Bank’s proponents, see *id.*, 324-25 (argument of Mr. Webster); *id.*, 356-57 (argument of Attorney General); *id.*, 386-88 (argument of Mr. Pinckney). We need not resolve that debate here. For discussions of the original meaning of the word “necessary” in the Sweeping Clause, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 *U. Penn. J. Const. L.* 183 (2003); Lawson, *supra* note XX, at 1709-16; Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, 2003-04 *Cato Sup. Ct. Rev.* 119, 142-53.

be reasonable.¹⁶⁸ The principle is often traced back to *Rooke's Case* in 1598.¹⁶⁹ A statute from the reign of Henry VIII in 1531 gave to sewer commissioners the power to determine needed repairs to water-control measures “as case shall require, after your wisdoms and discretions” and the power to assess landowners for the costs of maintenance and repairs as the commissioners “shall deem most convenient to be ordained.”¹⁷⁰ The Commissioners of Sewers under this statute¹⁷¹ had assessed on one landowner the full costs of a repair to a bank of the Thames, even though “divers other persons had lands to the quantity of 800 acres within the same level, and subject to drowning, if the said bank is not repaired”¹⁷² The court, through Sir Edward Coke, upheld the landowner’s challenge to the assessment. An adequate ground for the decision was probably language in the 1427 predecessor to the statute making clear that “no tenants of land or tenements . . . shall in any way be spared in this,”¹⁷³ but Lord Coke nonetheless added in dictum:

Notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and

¹⁶⁸ Grants of authority can, of course, be ministerial rather than discretionary. In that circumstance, there is no need for a principle of reasonableness, for the agent has no discretion that can be unreasonably exercised.

¹⁶⁹ 5 Co Rep 99b (1598).

¹⁷⁰ 23 H 8 c V, § 3, cl 2-3, 4 Stat at Large 223, 224 (1531).

¹⁷¹ Technically, the statute of 1531 expired by its own terms after 20 years, but it was continued indefinitely in 1549. See 3 & 4 Ed 6 c 8, 5 Stat at Large 341 (1549).

¹⁷² 5 Co Rep 99b-100a.

¹⁷³ 6 H 6 c V 3 Stat at Large 108, 110 (1427). The vitality of this statute was specifically confirmed in the 1531 enactment. See 23 H 8, c V, § 6, 4 Stat at Large 227.

pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit*.¹⁷⁴

This dictum was very influential in the seventeenth and eighteenth centuries. A similar sentiment was often repeated in seventeenth-century cases,¹⁷⁵ and in 1773 it was restated by the court in *Leader v Moxon*.¹⁷⁶ A statute gave paving commissioners power to pave and repair streets “ ‘in such a manner as the commissioners shall think fit.’ ” The court (one of whose judges was William Blackstone) nonetheless awarded damages when the commissioners ordered part of a street raised so high that it obstructed the plaintiff’s doors and windows, because “the commissioners had grossly exceeded their powers, which must have a reasonable construction. Their discretion is not arbitrary, but must be limited by reason and law.”¹⁷⁷ As the court explained, “the act could never intend that any of the householders should pay a rate of 1s. 6d. in the pound in order to have their houses buried under ground, and their windows and doors obstructed [H]ad Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, and given an equivalent for the loss that individuals might have sustained thereby.”¹⁷⁸

¹⁷⁴ 5 Co Rep 99b-100a.

¹⁷⁵ See **Stanley de Smith, Harry Woolf & Jeffrey Jowell, *Judicial Review of Administrative Action*** 297-98 (5th ed., Sweet & Maxwell, 1995); **H.W.R. Wade & C.F. Forsyth, *Administrative Law*** 353 (8th ed., Oxford University Press, 2000).

¹⁷⁶ 2 W Bl 924 (1828) (reporting cases from Westminster Hall from 1746-1779).

¹⁷⁷ *Id.*, 924-25.

¹⁷⁸ *Id.*, 925.

In England, the statement from *Rooke's Case* “has lost nothing of its accuracy in over 400 years”¹⁷⁹; the principle of reasonableness remains one of the bedrocks of English administrative law.

The principle of reasonableness in the exercise of delegated discretionary power is a common law principle that the eighteenth-century colonists would have found very congenial given its rights-protective and anti-monarchical character. But what could this principle mean operationally in the context of the powers delegated under the American Constitution?

In England before the founding, delegated power effectively meant executive power (which included what we now think of as judicial power). The quintessential case of discretion pertained to the choice of means for carrying out ends established by Parliament. In that context, discretion can be limited from at least three important directions. First, one can say that the delegatee’s choice of means must be measured, in the sense of reasonably proportionate to the end sought. One does not burn down a village to kill a fox--or, perhaps more to the point, one does not ordinarily fix a road by destroying a house when less destructive alternatives are available. Continental lawyers have raised this notion of proportionality to the level of high principle, refining it and using it to require a relatively precise fit between means and ends that approximates the “least restrictive alternative” analysis familiar to First Amendment lawyers.¹⁸⁰ English law has never recognized this “principle of proportionality” as a distinct legal

¹⁷⁹ **Wade & Forsyth**, *supra* note XX, at 353.

¹⁸⁰ *See de Smith, Woolf & Jowell*, *supra* note XX, at 596. For general discussions of the continental principle of proportionality, see **Jurgen Schwarze**, *European Administrative Law* 677-88 (1992); **Robert Thomas**, *Legitimate Expectations and Proportionality in Administrative Law* 77-85 (2000).

requirement.¹⁸¹ It certainly was not a part of English law in the eighteenth century, if only because the principle was developed in Germany in the nineteenth century.¹⁸² Nonetheless, it is not difficult to see elements of proportionality (though not the fully refined continental principle) in the traditional common law concept of reasonableness; “the principles of reasonableness and proportionality cover a great deal of common ground.”¹⁸³ It is very natural to describe a decision as “unreasonable” if the means are grossly disproportionate to the ends, and many English decisions, including *Leader v Moxon*, are consistent with this observation.¹⁸⁴

A second dimension of unreasonableness is efficacy: a discretionary implementational decision could be thought of as unreasonable if the chosen means are ill-suited to achieve the desired ends. Considerations of cause and effect are a basic facet of rational thinking. And a third element of unreasonableness might be substantive: a discretionary decision could be seen as unreasonable, however measured and efficacious it might be, if it trenches on substantive rights or represents an inappropriate consideration of manifestly relevant factors.

The most important question, of course, is how far a decision must stray from perfection in order to be “unreasonable.” There is a large difference, for example, between requiring an implementational decision to be the least restrictive alternative and requiring it to be plausibly related to the desired end. For now, however, let us leave that

¹⁸¹ Its adoption has, however, often been urged in modern times, *see Thomas*, *supra* note XX, at 86-110, and the principle “may well infiltrate British law” through decisions of the European Court of Human Rights, which engages in proportionality review. *Wade & Forsyth*, *supra* note XX, at 368.

¹⁸² *See de Smith, Woolf & Jowell*, *supra* note XX, at 593.

¹⁸³ *Wade & Forsyth*, *supra* note XX, at 368.

¹⁸⁴ *See de Smith, Woolf & Jowell*, *supra* note XX, at 603-05.

critical question aside. It is enough for present purposes to recognize that the abstract principle of reasonableness was a foundational principle of delegated implementational power in eighteenth century English common law.

One of the great innovations of American constitutionalism is the idea that all governmental power stems from a delegation. All powers of federal actors are delegated powers. Accordingly, when the Constitution delegated discretionary implementational powers to federal actors in 1788, it is eminently sensible to suppose that those delegations carried with them the common law principle of reasonableness. Consider, for instance, the President's "executive Power" to execute the laws. Could the President, exercising discretion in the selection of forms and means of law enforcement, apprehend a suspect holed up in Concord by leveling the entire town? Could the President, exercising discretion in the forms and means of legal interpretation, interpret laws by channeling the spirit of Elvis? Could the President in 1790, prior to ratification of the Fourth Amendment, exercise discretionary investigative powers by indiscriminately searching an entire region? We think that all of these measures would be, not merely ill-advised, but unconstitutional.¹⁸⁵ The Article II Vesting Clause grants the President discretion in law execution, but that discretion is bounded. Not everything done by the President, even in the guise of executing the laws, is an exercise of the "executive Power" delegated through the Constitution.

The same is true of the "judicial Power" granted by the Article III Vesting Clause. Suppose that a federal judge exercises the "judicial Power" to decide a case by flipping a

¹⁸⁵ The difference between "ill-advised" and "unconstitutional" is relevant if the President's actions give rise to a private-law cause of action that is not barred by immunity. If the act is unconstitutional, then the actors could not claim actual legal authorization for their conduct.

coin. The judge’s decision could certainly be reversed on appeal. The judge could certainly be impeached and removed by Congress. But has the judge violated the Constitution? We say yes.¹⁸⁶ The case-deciding power granted by the Constitution’s Article III Vesting Clause is not entirely unbounded. There is substantial room within that grant of power for different methodologies, and even substantial room for error, but at some point a judgment falls so far off the map that it simply ceases to be an exercise of the judicial power. Not everything done by a judge, even in the guise of deciding a case, is an exercise of the “judicial Power” within the meaning of Article III. The limits may be broad, but there are limits.

The delegated powers to execute the laws and to decide cases are both implementational, rather than ends-setting, powers. Accordingly, they necessarily carry with them the principle of reasonableness in the exercise of discretionary delegated powers. That principle did not need to be expressly stated in the Constitution because it is part of the very nature of delegations of implementational powers such as the “executive Power” and the “judicial Power” as understood in eighteenth-century common law.

The common law principle of reasonableness was never applied to Parliament (or, more precisely, to the King or Queen in Parliament). It was a principle that applied only to discretionary authority delegated from Parliament, not to supreme legislative authority. Indeed, the law imposed no limits, of reasonableness or otherwise, on the legislative

¹⁸⁶ Again, the answer could be legally relevant if there is not an absolute judicial immunity from civil lawsuits. The Supreme Court has said that there is absolute immunity even for actions taken in bad faith without jurisdiction. *See* *Bradley v Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). We plan to explore the correctness of this determination, as well as larger questions of executive and sovereign immunity, in a subsequent work.

supremacy of Parliament,¹⁸⁷ which stood above the other two governmental departments in the legal hierarchy.

The Congress under the American Constitution, of course, is not Parliament. Congress is not hierarchically superior to the executive or judicial departments. Congress, as does the President and the federal courts, exercises only delegated power, and that power is far from limitless. If the principle of reasonableness derives solely from the existence of delegated discretionary power, then it would follow that the delegated authority of Congress is subject to constraints of proportionality, efficacy, and substantive reasonableness. But would a cautious eighteenth-century lawyer be satisfied with that inference? Could someone plausibly argue that the principle of reasonableness does not apply to Parliament simply because Parliament (at least in its legislative guise) exercises legislative rather than implementational executive or judicial power? If that is the correct basis for refusing to extend the principle of reasonableness to Parliament, it would apply as well to Congress, in which case grants of enumerated power to Congress would not necessarily carry with them a requirement of reasonableness in the exercise of discretion. Accordingly, it makes sense to specify a constitutional constraint on Congress's discretionary powers if such a constraint is desired.

The language of the Sweeping Clause elegantly subjects Congress's implementational legislative powers to the principle of reasonableness. The phrase "necessary and proper for carrying into Execution" is an excellent way to describe requirements of proportionality, efficacy, and substantive reasonableness. A measure is "necessary" if it is proportionate, and it is "proper" if it is well suited to its task

¹⁸⁷ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 3-11 (8th ed., 1982).

(efficacious) and substantively reasonable. It is no accident that when the modern European Court of Justice described the principle of proportionality, it said that the principle, *inter alia*, requires measures to be “appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question.”¹⁸⁸

In sum, there are very good reasons why the federal Constitution would textually specify in the Sweeping Clause that executory laws must be “necessary and proper” but would not use equivalent language in Article II or Article III. Discretionary executive and judicial powers, by their nature, carry with them the principle of reasonableness. Perhaps that is true as well of delegated legislative power (or perhaps at least of delegated implementational legislative power), so that a requirement of reasonableness would exist even in the absence of the “necessary and proper” language in the Sweeping Clause, but the matter is open enough to question to make it prudent to specify the desired limitation on Congress.

The treaty power, we contend, is an implementational, executive power delegated in Article II. Accordingly, it carries the principle of reasonableness by its nature, without need for textual specification. The absence of “necessary and proper” language in the Treaty Clause does not point away from a requirement of a means-ends “fit” for treaties--no more than it does for other delegated Article II and Article III powers. Just as exercises of the law-execution and case-deciding powers must be proportionate, efficacious, and substantively reasonable, the same is true of exercises of the treaty-making power. It remains to be determined, of course, whether the degree of proportionality, efficaciousness, and reasonableness required of treaties is greater,

¹⁸⁸ **Thomas**, *supra* note XX, at 79 (quoting *R. Ministry of Agriculture, Fisheries and Food, ex parte Fedesa*, ECR (1990)).

smaller, or the same as the degree required of executory legislation under the Sweeping Clause, exercises of law-enforcement discretion, or exercises of judicial power, but the basic principle of reasonableness applies to treaties.

3. Jeffersonian Treaties

The implementational view of treaties thus reads the Treaty Clause as an executive power that is, by its nature, subject to a requirement that exercises of the treaty power be “necessary and proper for carrying into Execution” other federal powers. The baseline constitutional presumption is that executive powers are implementational; the elements of the constitutionally-granted “executive Power” that are not purely implementational are quite limited, both in number and in sphere of application. There is especially good reason to apply this presumption in the case of the treaty power, because tearing it loose from its implementational moorings, and the implicit “necessary and proper for carrying into Execution” requirement that goes with that designation, would leave it without obvious limits. This would be, to say the least, anomalous for an executive power. The Treaty Clause thus seems much more like the usual run of purely implementational executive powers than like the few odd executive powers that make the President a lawmaker. An implementational treaty power makes sense in the context of Article II. It also makes sense in the context of the Constitution as a whole, to which we next turn.

VI. TAKING CONSEQUENCES SERIOUSLY: THE STRUCTURAL ROLE OF THE TREATY CLAUSE

Constitutional clauses do not exist in a vacuum. The actual clauses of the actual Constitution were presented to the public in 1787 as an integrated package. We know, for instance, that the Article II Vesting Clause grants the President the executive power of the United States rather than, say, the executive power of Connecticut because we can read the Article II Vesting Clause (which, unlike the Article III Vesting Clause, contains no specific mention of the United States) in pari materia with the provisions that surround it. A conversation about constitutional meaning, whether in 1787 or today, would only be sensible if it considered how interpretations of various clauses would interact with other clauses.

A. The Treaty Clause in Constitutional Context

Consider a treaty in which the President and the Senate agree to make non-citizens eligible for the presidency, in apparent violation of the clause providing that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President”¹⁸⁹ Is that treaty provision domestically enforceable as the supreme law of the land? If the Treaty Clause is read as a jurisdictional grant, there is nothing in the Treaty Clause to suggest any limitation on the content of treaties. Nonetheless, the treaty provision is clearly inoperative on any plausible understanding of the Treaty Clause. As a matter of domestic law, the Constitution is hierarchically superior to all other forms of law,

¹⁸⁹ U.S. Const. art II, § 1, cl 5.

including statutes and treaties. The same reasoning by inference that led John Marshall correctly to place the Constitution above federal statutes also leads to the conclusion that the Constitution is supreme over treaties. The Eligibility Clause, unlike some provisions such as the First Amendment or the Slave Trade Clause, is framed in sufficiently general terms to apply to *all* federal actions, regardless of their form. It accordingly forbids the treaty provision in question.

Once it is acknowledged that treaties cannot violate the Constitution, the trick becomes to determine what counts as a constitutional violation. Surely treaties cannot do what the Constitution expressly forbids to all actors, including the President and Senate, such as granting titles of nobility or withdrawing money from the Treasury without an appropriation. Thus, provisions of the Constitution framed as “thou shalt nots” apply to the treaty power whenever their terms encompass the treaty-making authority and not simply a more specific constitutional actor such as Congress.

Another kind of constitutional violation would be an attempt to accomplish actions through forms other than those prescribed by the Constitution. A treaty could not, for instance, permit a revenue measure to originate in the Senate, dispense with the presentment requirement, or permit the delegation of legislative power. And if France took objection to the location of Vermont’s capital in the French-sounding city of Montpelier, and accordingly demanded as a condition of a commercial treaty that Vermont be deprived of its voice in the Senate, the federal treaty-makers could not agree to that condition.

These propositions about the inability of treaties to alter constitutional form and structure, of course, are not compelled by any specific textual provision. Nor does the

Constitution have specific textual provisions stating that the House, Senate, and President under Article I, section 7, the President under the non-treaty powers in Article II, or the federal judiciary in Article III cannot alter basic structural arrangements. No such express provision is necessary because, as Chief Justice Marshall recognized in *Marbury*, it is structurally clear that the Constitution is supreme law. Moreover, the Constitution prescribes a specific amendment process, which by inference creates a very strong presumption against alteration of the Constitution through other means. As a general interpretative principle, power grants to federal actors do not include the power to alter the Constitution unless that power is clearly given.¹⁹⁰

Hence, the seemingly unqualified power to “make Treaties,” whatever its scope or nature, is really a power to “make Treaties that are consistent with provisions of the Constitution allocating federal governmental power and that do not violate prohibitory provisions of the Constitution framed broadly enough to apply to the treaty-making authority.”

But what about prohibitory provisions that are *not* framed broadly enough to apply to the treaty-making authority? Suppose that in order to secure certain trade concessions with France, a treaty includes a provision demanded by the French that perpetually forbids all Americans from publishing any criticisms of France or the French government. The First Amendment, recall, does not apply to treaties because they are not acts of Congress. Of course, to the extent that the treaty requires congressional implementation, the First Amendment would pose a problem, but that could be avoided

¹⁹⁰ The Article V amending authorities, of course, are expressly granted the power to alter the Constitution’s structural arrangements. And accordingly, their authority is expressly limited by the proviso that no state may be deprived of its equal suffrage in the Senate without its consent.

by making the treaty provision self-executing, perhaps by giving the French government power to enforce the prohibition through civil actions for libel. Does the Constitution permit the American treaty-makers to refashion state libel law in this manner? And what if the French--in accordance with fears actually voiced at the North Carolina ratifying convention--further added a provision mandating that Catholicism be declared the official religion of the United States?¹⁹¹ Is that concession within the power of the President and Senate? If the answer is “no,” it is not by virtue of anything contained in the First Amendment or any other express provision of the Constitution; it must be by virtue of something internal to the treaty power. Finally, suppose that the French, once again upset by the location of Vermont’s capital in the French-sounding city of Montpelier, demand as a condition of a trade agreement that the capital be moved to an Anglo-sounding city such as Burlington. Congress clearly has no enumerated power to alter state capitals, but does anything prevent the treaty-making authorities from agreeing to the deal, which then becomes “the supreme Law of the Land”?

Most significantly, consider the effect of the Slave Trade Clause, which as we noted earlier does not, by its terms, apply to the treaty power. This clause protected regulation of the slave trade for the Nation’s first twenty years against ordinary legislation, even by unanimous majorities in both Houses. Article V, without any special provision for the Slave Trade Clause, would have entrenched that firewall against combined majorities (and even some supermajorities) in the House, Senate, and the state

¹⁹¹ At that convention, Henry Abbott observed that “[i]t is feared by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States” **Jonathan Elliot, 1 Debates on the Adoption of the Federal Constitution**, 191-92 (1859) (statement of Henry Abbott). James Iredell’s tepid response was simply that “[t]he power to make treaties can never be supposed to include a right to establish a foreign religion among ourselves, though it might authorize a toleration of others.” *Id.*, 194 (statement of James Iredell).

legislatures: it would have taken a two-thirds majority in each House or a two-thirds majority of the state legislatures to propose an amendment repealing the Slave Trade Clause, and it would then have taken a three-fourths majority of the states to ratify the amendment. Article V, with its special proviso that exempted the Slave Trade Clause from the amendment process, protected the slave trade against even that unlikely supermajoritarian combination. Thus, until 1808, no possible combination – not even a unanimous combination -- of the President, the Congress, and the state legislatures could have prohibited the slave trade. But if the treaty power is an independent grant of jurisdiction that is not limited to implementing other enumerated powers, then the President plus two-thirds of a quorum of the Senate nonetheless could have abolished the slave trade by treaty if only the thought had occurred to them. Such a treaty would not have violated any specific prohibition in the Constitution or altered any structural form of action specified in the Constitution. It simply would have done what no other possible combination of constitutional actors, including the amending authorities, had the enumerated power to do. A Constitution that permitted pre-1808 abolition of the slave trade would, of course, have been a *good* Constitution. The question for interpreters, however, is whether it is a *plausible* Constitution.¹⁹²

If the Treaty Clause does give the President and the Senate power to alter state capitals, disestablish state religions, or end the slave trade before 1808, then the entire federal structure, apart from a few fortuitously worded prohibitions on federal action in Article I, section 9, is a President and two-thirds of a quorum of senators (and perhaps a bona fide demand from a foreign government) away from destruction. That is, of course,

¹⁹² See William E. Mikell, The Extent of the Treaty Making Power of the President and Senate of the United States, 7 U. Pa. L. Rev. 435, 443 (1909).

not an impossible circumstance. Some Anti-federalists desperately feared it, even if they did not articulate their concerns in precisely the manner that we have done.¹⁹³ But in light of the overarching structure and themes of the Constitution, that is a conclusion that one ought to reach only with some hesitation. The potential existence of a “back door” that would permit federal treaty makers to declare a national religion, dictate the location of state capitals, and abolish the slave trade in 1789 is intriguing enough to warrant a bit more interpretative energy with respect to the treaty power.

One could, of course, suggest that the Treaty Clause’s requirement of two-thirds consent by the Senate, the body initially selected by the states themselves and in which each state has equal representation, is the only safeguard provided against misuse of the treaty power.¹⁹⁴ Structurally, however, the provision for supermajority Senate approval does not support any strong inferences about the scope of the treaty power. As John McGinnis and Michael Rappaport have pointed out in a powerful article, most of the Constitution is supermajoritarian.¹⁹⁵ Ordinary legislation must pass through two different

¹⁹³ Patrick Henry was particularly vocal on this score. See 3 **Elliot’s Debates**, *supra* note XX, at 315 (statement of Patrick Henry) (“The important right of making treaties is upon the most dangerous foundation. The President, and a few senators, possess it in the most unlimited manner”). Other prominent Antifederalists shared his concerns. See *id.*, 509 (statement of George Mason) (“The President and Senate can make any treaty whatsoever”); Letter IV from the Federal Farmer, Oct. 12, 1787, *reprinted in* 14 **The Documentary History of the Ratification of the Constitution** 43-44 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (“[i]t is not said that these treaties shall be made in pursuance of the constitution, nor are there any constitutional bounds set to those who shall make them This power in the president and senate is absolute”); Brutus II, Nov 1, 1787, *reprinted in* 13 **The Documentary History of the Ratification of the Constitution** 529 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (“I do not find any limitation, or restriction, to the exercise of this [treaty] power”). James Madison’s response to these concerns at the Virginia ratifying convention was vague and general: “I conceive that, as far as the bills of rights in the states do not express any thing foreign to the nature of such things, and express fundamental principles essential to liberty, and those privileges which are declared necessary to all free people, these rights are not encroached on by this government.” 3 **Elliot’s Debates**, *supra* note XX, at 516 (statement of James Madison).

¹⁹⁴ See Flaherty, *supra* note XX, at 1308-09.

¹⁹⁵ See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 **Tex. L. Rev.** 703 (2002).

branches of the legislature that are (at least under the original constitutional design) selected by different majorities.¹⁹⁶ It must then be presented to the President, who represents yet a different majority. Passage through all three legislative units thus requires approval by three separate majorities, which is a pretty fair description of a supermajority requirement. And if the President vetoes a bill, it can become law only with a two-thirds majority of both the House and the Senate. Article V requires either two-thirds majorities in both Houses of Congress or a convention called by two-thirds of the state legislatures for the proposal of constitutional amendments and ratification by three-quarters of the states for the adoption of such amendments. In light of the Constitution's pervasive supermajoritarian theme, a requirement of approval by the President and by two-thirds of the Senate for treaties is not a small matter by any means, but it is not so extraordinary that it short-circuits an inquiry into substantive limits on the treaty power.

In the end, the power to make *implementational* law by carrying other enumerated powers into effect in the international arena makes sense across all fronts. It fulfills the purpose of treaties to permit the United States to enter into and acquire binding commitments from foreign nations. It acknowledges the lawmaking character of the treaty power while still grounding it in the larger structure of Article II. And, most importantly, it prevents the Treaty Clause from unraveling the rest of the constitutional scheme. If the Treaty Clause is read as jurisdiction-extending, one must either figure out some way to limit it, the difficulty of which is demonstrated by two centuries of debates,

¹⁹⁶ Even in a post-Seventeenth Amendment world, there can be a real difference between the majorities required to elect a senator and a representative in any state that conducts House elections by district and that has more than one district.

or maintain that the middle of Article II contains a constitutional joker. To put it bluntly, an authorization to implement other grants of jurisdiction makes sense in the overall context of the Constitution, while a grant of jurisdiction to pursue independent ends does not.

There is no a priori requirement that the Constitution make sense, but if one is trying to project how a fully informed eighteenth-century audience, knowing all that there is to know about the Constitution and the surrounding world, would have understood the power to “make Treaties,” the implementational view looks pretty good. To read the Treaty Clause as an end-setting provision, with no direct connection to the otherwise careful enumerations of federal powers, simply does too much damage to the rest of the Constitution to be a plausible reading of a brief clause in Article II, section 2. Once again, Jefferson was right.

We must still determine in precisely what fashion Jefferson was right. There is an ambiguity in the notion of an “implementational” treaty power. On the strictest understanding, treaties can only be used to carry into effect powers *already exercised* by other governmental actors. Thus, if Congress tries to regulate foreign commerce in a way that requires the agreement of a foreign sovereign, a treaty could validly implement that prior exercise of the lawmaking power. But on this understanding, a treaty could not regulate foreign commerce without first having an exercise of congressional power to implement. This would directly assimilate the treaty power into the executive power, which carries into effect laws that already exist.

That is not, however, the only sense in which a power can be “implementational.” Consider the Sweeping Clause. The Clause is an implementational power in that it only

grants Congress power to pass laws “for carrying into Execution” other granted powers. But Congress does not need to wait for those other powers actually to be exercised in order to use its authority under the Sweeping Clause. For instance, Congress could appropriate funds and authorize the appointment of officers for the negotiation of a particular treaty, even if the President ultimately chooses not to negotiate the treaty at all. Indeed, because all appropriations come from acts of Congress pursuant to the Sweeping Clause, such legislation often must be enacted *before* the power that Congress seeks to implement is exercised. On this understanding of an “implementational” power, the power can “pave the way” for the exercise of powers elsewhere granted to institutions of the national government without awaiting the actual exercise of those powers.

There is yet a third possibility to consider. In his September 7, 1803 letter to Wilson Cary Nicholas expressing his view of the treaty power, Jefferson said that the Constitution “specifies & delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President & Senate may enter into the treaty” If one emphasizes the phrase “enumerated objects,” one can come up with a “hybrid” conception of the treaty power that permits it, on some occasions, to function as a stand-alone power. The Constitution’s power-granting provisions can be viewed as the specification of ends or goals that the national government may permissibly pursue. Thus, the Commerce Clause specifies the permissible end or goal of regulating foreign commerce. A treaty, on this hybrid understanding, can be used to pursue this otherwise-specified end, but it need not be tied in any way to an exercise of congressional power.

That is, the President and the Senate would have an independent jurisdiction to enter into treaties regulating foreign commerce, even if Congress has not acted,¹⁹⁷ but they could only exercise this independent power in connection with ends specified in some provision of the Constitution other than the Treaty Clause.

This was not, of course, Jefferson's own position. Jefferson, we should recall, believed that treaties cannot concern matters that could "otherwise be regulated" or matters in which the Constitution "gave a participation to the House of Representatives." In other words, where the Constitution specified a particular form for action, Jefferson regarded that form as exclusive. The person to whom Jefferson wrote on September 7, 1803, however, articulated a position fairly close to this hybrid view. In a letter to Jefferson of September 3, 1803, Wilson Cary Nicholas, then a Virginia senator, tried to dissuade Jefferson from expressing doubts about the constitutionality of the Louisiana Purchase or from articulating an unduly narrow conception of the treaty power. He explained that he did not "see anything in the constitution that limits the treaty power, except the general limitation of the power given to the government, and the evident object for which the government was instituted."¹⁹⁸ By "the general limitation of the power given to the government," one can easily mean "the ends and objects that institutions of the federal government may permissibly pursue under their enumerated powers." This understanding is consistent with the views expressed by George Nicholas at the Virginia ratifying convention, in which he said that no treaty could be made "which

¹⁹⁷ What happens under this theory if Congress has already acted depends on the hierarchical status of treaties and laws. See Kesavan, *supra* note XX.

¹⁹⁸ Letter from Wilson Cary Nicholas to Thomas Jefferson, Sept. 3, 1803, *quoted in* **Everett S. Brown, The Constitutional History of the Louisiana Purchase** 27 (1920).

shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers.”¹⁹⁹

This hybrid position has the typical virtues and vices of a compromise. Its primary virtue is that it gives wide effect to the arguably “legis” aspect of the treaty power while providing clearly marked boundaries for the exercise of the power. Its primary, and fatal, vice is that it misunderstands the Constitution. The Constitution does not specify permissible ends for the national government to pursue. Rather, it grants specific powers to specific institutions of the national government. In that sense, it specifies permissible ends, as well as permissible means, but they are not ends and means for “the national government” as a unitary entity. The hybrid view amounts to saying that every power granted to any institution of the national government is also independently granted to the President and the Senate: Congress (and the President) can regulate foreign commerce by statute, so the President and Senate can regulate foreign commerce by treaty. But changing the example shows the deep flaw in this approach: Congress and the state legislatures can amend the Constitution, so can the President and Senate amend the Constitution by treaty? No, no, one immediately objects. When Article V confers the amendment power, it confers it on specific institutions to be exercised in a specific form. It does not simply specify an abstract end of amending the Constitution; it also designates the proper institution and form for pursuing that end. That is true, but it is as true of the foreign commerce power as it is of Article V

This means that compromise is not possible. Either the Treaty Clause is an independent grant of subject-matter jurisdiction to the President and Senate or it is a

¹⁹⁹ 3 *Elliot’s Debates*, *supra* note XX, at 507 (statement of George Nicholas).

power to carry into effect (whether prospectively or after-the-fact) valid exercises of power by other federal governmental actors. For the reasons that we have already given, the latter view makes the most sense in light of the Constitution’s architecture. The remaining question is whether the treaty power is “triggered” only by prior exercises of constitutional authority or may also be used, a la the Sweeping Clause, to facilitate anticipated exercises of authority. For our purposes, nothing of consequence turns on this question, though the latter view makes more sense in view of the general character of implementational authority. All things considered, the best way to integrate the treaty power into the constitutional structure is to treat it as an implementing mechanism for all federal powers.

It is, of course, always dangerous to reason from conclusions to interpretations. Unless one fully equates the meaning of a provision with its intended results, which we do not, one must acknowledge the possibility that the Constitution might fail to achieve at least some of the ends that were expected of it. We therefore are not claiming that odd results can overcome a clear contextual meaning. But as we have endeavored to show, the case for reading the Treaty Clause as an independent head of jurisdiction is far from contextually clear. The stark language of the Treaty Clause does not, as some have claimed, settle that question. Rather, it requires us to determine how a fully informed eighteenth-century observer would have understood the Constitution’s power to “make Treaties.” Paradigm cases, particularly paradigm cases as extreme as the ones that we have invoked, are relevant to that inquiry. If an interpretation of the Treaty Clause is available that avoids the kinds of major sinkholes into which other interpretations get sucked, that is a point, albeit not a conclusive one, in its favor.

B. *Treaties' Domains*

Once we make that move, however, we must identify the breadth and depth of the sinkholes to which our own interpretation is vulnerable. What kinds of treaty provisions that an eighteenth-century observer would have regarded as unproblematic would the Jeffersonian implementational interpretation call into question?

Treaties of peace are no problem for the Jeffersonian view. Although Congress cannot terminate a war, and the Treaty Clause therefore cannot be used to implement any such congressional power, the President can terminate a war.²⁰⁰ Peace treaties can then formalize and set the terms of--in other words, can implement--the state of peace created by the President, which is precisely what the implementational theory of the Treaty Clause contemplates. Because the treaty power is implementational, the treaty could not end the war without concomitant presidential action, but because the treaty itself cannot exist without presidential action to put it before the Senate, that is a matter of no moment.

The more interesting question is what kinds of concessions can be made in peace treaties. To say that the President and Senate can execute a peace treaty is not to say that they can do so any terms whatsoever. On the implementational view, any provision in a peace treaty, as in any other treaty, must carry into effect some constitutional power of some federal actor. Recognition of a state of peace effectuates the President's peacemaking powers, but peace treaties often do much more than declare peace. In particular, peace treaties, and other treaties as well, are often occasions for the exchange

²⁰⁰ For a detailed demonstration of this basic point, see Pace, supra note XX, at 562-67.

of territory. Vasan Kesavan has recently demonstrated, at great length, that the general understanding at the time of the framing was that treaties permitted the cession of American territory, including territory that was part of a state, without the consent of the state in which the territory was located. We accept the proposition that a fully-informed eighteenth-century audience would have been startled to discover that the federal government had no power to cede territory, even as part of a peace settlement. The implementational view of the Treaty Clause is consistent with this expectation--up to a point.

There is no problem at all with treaties ceding territory that belongs exclusively to the United States. Congress can cede that property by ordinary legislation through its power under the Property Clause to “dispose of . . . Territory or other Property belonging to the United States,”²⁰¹ and there is accordingly no issue about implementing that power through treaty. The Property Clause, however, does not authorize Congress to dispose of territory belonging to a state. What if the requested price for peace, or even for a particularly attractive commercial treaty, is Maine, Vermont, and New Hampshire?

Our answer is that state territory can be ceded away as part of a peace settlement but not otherwise. Once the treaty power is seen as wholly implementational, there is no arguable power in any federal actor to alienate state territory during peacetime and therefore nothing for the treaty power to implement. During wartime, however, the President has the power to “cede” state territory by refusing to defend it (or by defending it and losing). Once territory is occupied by an invading foreign sovereign, the invader, pursuant to international law, gets to govern the territory in accordance with its own

²⁰¹ U.S. Const. art. IV, § 3, cl. 2.

political institutions. A treaty of peace that formally cedes the conquered territory thereby implements the presidential decision to sacrifice part of the country during wartime in order to save the rest.

The joker in the deck, of course, is the Guarantee Clause, which provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against Invasion . . .*”²⁰² Does this Clause forbid the President, either as commander-in-chief or as treaty-maker, from making a tactical decision to sacrifice one state to save another by imposing a duty to protect “each” of the states against invasion?

There are two ways to understand this clause. First, it might impose on the President a duty to defend in good faith every part of the country with equal vigor. This understanding would satisfy the concern that the President might neglect invasions in disfavored areas or play geographical favorites in the event of a large-scale invasion.²⁰³ It would also permit the President to surrender state territory in a good-faith exercise of tactical judgment, and accordingly would permit the formal transfer of such territory in peace treaties. Alternatively, the Guarantee Clause might be read as an absolute prohibition on the surrender of any state territory under any circumstances. This would mean that if any part of the Union fell to foreign invasion, the entire Union must fight to the death until the invader is repelled or the Union ceases to exist as a viable political entity. This understanding would, of course, forbid treaties of cession--but it would do so

²⁰² U.S. Const. art IV, § 4.

²⁰³ See St. George Tucker, 1 *Blackstone's Commentaries App.* 366 (1803) (“The possibility of undue partiality in the federal government in affording it’s protection to one part of the union in preference to another, which may be invaded at the same time, seems to be provided against, by that part of this clause which guarantees such protection to each of them.”).

even on a much broader understanding of the scope of the Treaty Clause. The Guarantee Clause, after all, is phrased as a duty imposed on “[t]he United States” and accordingly extends to the treaty-making authority. Even if the Treaty Clause was an independent head of jurisdiction for the national government, it would be limited by the duties imposed by the Guarantee Clause, including any putative duty to refuse to surrender state territory. Thus, if the federal government is forbidden from surrendering state territory, it is not because of anything peculiar to the implementational view of the treaty power, but because of the supervening force of the Guarantee Clause.

The implementational view does, however, limit the circumstances under which state territory can be ceded. State territory can be ceded as part of a peace settlement, but not as part of ordinary commercial relations. Northern New England could not be traded away for fishing rights in the Gulf of Mexico or favorable tariff status for cotton. We do not believe that a fully-informed eighteenth-century audience would have been scandalized by this outcome.

Treaties of acquisition pose some complicated problems, which we have explored at considerable length elsewhere.²⁰⁴ The short answer is that the United States may acquire territory by treaty whenever it is reasonable to do so in order to implement an enumerated power, such as the power to admit new states²⁰⁵ or the power to provide and maintain a navy.²⁰⁶ Most of America’s acquisitions by treaty easily satisfy this test. The

²⁰⁴ See Lawson & Seidman, supra note * at 72-85, 92-94, 105-08, 111-15.

²⁰⁵ **U.S. Const.** art. IV, § 3, cl. 1.

²⁰⁶ Id. art. I, § 8, cl. 13.

acquisition of the Philippines probably did not,²⁰⁷ and the acquisition of Alaska was a close call.²⁰⁸

Treaties of commerce are among the most common types of treaties. Such treaties can fix the terms of trade, set tariff levels, or grant navigational rights. A treaty power that did not include the ability to enter into such agreements would be as peculiar as a treaty power that did not authorize treaties of peace.

Such treaties are permissible as vehicles for implementing the congressional powers to “lay and collect Taxes, Duties, Imposts and Excises”²⁰⁹ and to “regulate Commerce with foreign Nations.”²¹⁰ The implementational character of the treaty power does mean, however, that treaties cannot unilaterally set tariff rates or trade rules without congressional action. They can carry into effect statutes that already exist. They can establish frameworks that are triggered by subsequent statutes. But they cannot create free-standing regulatory regimes.

This understanding is contrary to established practice, but not so contrary to eighteenth-century expectations that it threatens to take the implementational view of treaties off the table. Under conventional understandings of the treaty power, in which treaties can fix tariff levels or terms of trade, those treaties “bind” the United States as a matter of international law, but not as a matter of domestic law. Subsequent congressional statutes that violate the terms of the treaty are perfectly valid as a matter of domestic law. They may embroil the United States in international problems, but they

²⁰⁷ See Lawson & Seidman, supra note * at 111-15.

²⁰⁸ See id. at 105-08.

²⁰⁹ **U.S. Const.** art. I, § 8, cl. 1.

²¹⁰ Id. art. I, § 8, cl. 3.

are not, in any meaningful sense, “unconstitutional.” Full effectiveness of a treaty always requires the collaboration of Congress, if only through inaction, even if one views treaties as self-executing (that is, as taking effect without legislative implementation). Our view is not all that different in substance. Under an implementational theory of treaties, treaties of commerce always require the collaboration of Congress through affirmative action: Congress must either enact a statute for the treaty to implement or, if no such statute yet exists, the treaty can at most establish a contingent legal framework that is triggered by congressional action. Put in the language of modern debates, treaties are not self-executing with respect to Congress, though they are self-executing with respect to the states by virtue of the Supremacy Clause.

Of course, in the process of “implementing” an exercise of power embodied in a specific statute, a treaty “dis-implements” subsequent exercises of the same power by attaching international legal consequences to the enactment of statutes that are inconsistent with the terms of the treaty. But that is always a possibility with implementational powers. The Property Clause, for instance, is both substantive and implementational: the power to dispose of and regulate federal property is a self-contained authorization of both means and ends. Suppose that Congress exercises the power to “dispose of . . . Property belonging to the United States” by vesting a land title in a private person. That statute “dis-implements” future acts that seek to, for instance, make the property part of a post road. Congress can, in fact, make the land part of a post road even after it has been vested in a private party, but there are legal consequences that attach to that action--namely, an obligation to provide just compensation for the taking of property. More directly, if the executive “implements” a statutory scheme by entering

into contracts, those contracts create legal obligations that “dis-implement” future actions, in the sense of attaching legal consequences to future actions that are inconsistent with the original implementing act. Treaties have the same status and effect. The treaty-making authority can bind the United States as a matter of international law in the course of implementing enumerated powers, in the sense of making future legislative action bear legal consequences. That is a significant result, of course, which is why the treaty power is a significant power.

A more vexing problem concerns treaty provisions that address subjects typically within the exclusive jurisdiction of the states, such as private-law rights of tort, contract, property, and descent. It is commonplace to give foreign emissaries broad immunity from local laws and broad powers that states might not otherwise give to aliens. It was also commonplace in the founding era. On July 29, 1789, the Senate ratified a treaty with France that had been negotiated by the Confederation government involving reciprocal privileges of consuls and vice-consuls,²¹¹ which “trenched more deeply on state prerogatives than any of the other previous treaties negotiated under the Confederation” by, inter alia, granting “consular officials and employees and consular premises extensive immunities from the operation of state laws (though not compelled to do so by the law of nations)”²¹² What power, if any, do treaty provisions of this kind implement?

²¹¹ See Convention Between His Most Christian Majesty and the United States of America, for the Purpose of defining and establishing the Functions and Privileges of their respective Consuls and Vice-Consuls, 8 Stat 106 (1859) (providing the text of the convention); **Journal of the Executive Proceedings of the Senate of the United States** 8-9 (1828) (providing the text of the Senate’s approval).

²¹² Golove, supra note XX, at 1150.

The only possible power is the President’s power under Article II to “receive Ambassadors and other public Ministers.”²¹³ Blackstone understood the English King’s power to receive foreign emissaries to include, as a necessary incident, the power to receive them free of the normal constraints of municipal law: “[t]he rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitution.”²¹⁴ If the President’s constitutional power to “receive Ambassadors and other public Ministers” includes the right to receive them under similar conditions of immunity,²¹⁵ then a treaty could implement that power. Of course, in order to know whether the 1789 Consular Convention was constitutional, one would need to explore whether the power (and perhaps duty) to grant immunity to foreign emissaries extended to consuls²¹⁶ and whether it included all of the provisions contained in that treaty. We are less interested in the answer to that question than in the general principle that determines the scope of the treaty power to grant rights and immunities to foreign emissaries.

Foreign *citizens*, as opposed to official foreign *emissaries*, are a different story. One of the most contentious foreign relations issues in early American history was the extent to which treaties, either under the authority of the Articles of Confederation or of the Constitution, could give alien citizens rights to own and dispose of real property

²¹³ **U.S. Const.** art II, § 3.

²¹⁴ **Blackstone**, supra note XX, at 246.

²¹⁵ See Joseph Story, 3 **Commentaries on the Constitution** § 1562 (1833) (“as public functionaries, they [ambassadors] are entitled to all of the immunities and rights, which the law of nations has provided at once for their dignity, their independence, and their inviolability.”).

²¹⁶ See id. § 1559 (suggesting that a presidential power to receive consuls can be inferred, even though consuls “are not diplomatic functionaries, or political representatives of a foreign nation; but are treated in the character of mere commercial agents”).

contrary to state law, presumably in exchange for similar rights for American citizens in foreign countries. The best-known example is Article 9 of the Jay Treaty of 1795, which declared that “British Subjects who now hold Lands in the Territories of the United States . . . shall continue to hold them according to the nature and Tenures of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives.”²¹⁷ Just where did federal treaty negotiators get the power to dictate state rules of property ownership and descent?

They didn’t. An implementational view of the Treaty Clause would not permit provisions of this nature. If that limitation unduly burdened federal treaty-makers, they would need a constitutional amendment to authorize reciprocal property-ownership provisions and other provisions that involve powers not otherwise allocated to some federal institution. As the founding-era controversies over such provisions demonstrates, a significant portion of the actual eighteenth-century public would have found this conclusion wholly congenial. If the hypothetical, fully informed eighteenth-century audience that is the target of our inquiry would have been at all distressed by that conclusion, we suspect that it would be far more surprised by a conclusion that the slave trade could have been ended in 1789 if only the President could have mustered a two-thirds majority of a quorum of the Senate.

C. The Epistemology of the Treaty Clause

²¹⁷ Treaty of Amity, Commerce and Navigation, Nov 19, 1794, United States-Great Britain, art 9, 8 Stat 116, 122.

Suppose, however, that the reader is not convinced. After all, even if we are right that the textual and structural case for a treaty power that extends to any subject is not, as Professor Golove would have it, “compelling, even overwhelming,”²¹⁸ that does not establish that the Jeffersonian interpretation is correct either. If both conceptions of the treaty power--the jurisdiction-extending view and the implementational view--can be advanced plausibly in terms of text and structure, where does one go from there?

As we have elsewhere argued at some length,²¹⁹ the default rule for federal power is, “when in doubt, don’t.” In other words, the burden of proof always rests with the proponent of federal governmental power. If someone wants to claim that the federal treaty power includes the power to make treaties on matters that are not within the enumerated powers of any federal institution, that person must overcome a presumption against any such power. That anti-power presumption is not grounded in normative or political concerns. It is grounded in the basic epistemological principle that he who asserts the affirmative existence of something must prove it. Because the federal Constitution creates the national government as a government of enumerated powers, the existence of a specific federal power is always a matter for proof. Once that power is established, the existence of an external limitation on that power is a matter for proof, so the epistemological presumption does not always work against governmental power. Quite to the contrary, it works in favor of governmental power when one is discussing constitutional restraints on either the federal or state governments in the form of “thou

²¹⁸ Golove, *supra* note XX, at 1099.

²¹⁹ See Lawson & Seidman, *supra* note XX, at 1106-07. For a more detailed defense of this position, see Lawson, *Legal Indeterminacy: Its Cause and Cure*, *supra* note XX.

shalt nots.” But for the threshold question of determining the scope of enumerated federal powers, the balance always tilts away from the power.

How strongly the balance tilts depends on the strength of the presumption against grants of federal power. That, in turn, depends on the proper standard of proof for claims of constitutional meaning generally and for claims of federal power in particular. That is a project for another day. For now, it is enough simply to note that doubts about the scope of the treaty power should, all else being equal, be resolved against an expansive view of the power. On that point as well, Jefferson was right.

VII. TAKING DOUBTS SERIOUSLY: A JEFFERSONIAN CONCLUSION

To be sure, the Jeffersonian view of the treaty power has significant flaws, not the least of which is its relative dearth of direct historical support. But every other view of the treaty power has its own problems with which to contend. In other words, we view Jefferson’s interpretation of the Treaty Clause through the same epistemological lens as did Jefferson himself. Jefferson’s notes of Washington Administration Cabinet conferences from 1793 describe a discussion among some of the nation’s then-brightest luminaries about the form and effect of President Washington’s forthcoming Neutrality Proclamation. Alexander Hamilton evidently initiated a discussion of the treaty power by declaring that, although the President could not unilaterally foreclose a congressional declaration of war by issuing a proclamation, “the constn having given power to the President and Senate to make treaties, they might make a treaty of neutrality which should take from Congress the right to declare war in that particular case, and that under

the form of a treaty they might exercise any powers whatever, even those exclusively given by the constn to the H. of representatives.”²²⁰ Edmund Randolph countered “that where they undertook to do acts by treaty (as to settle a tariff of duties,) which were exclusively given to the legislature, that an act of the legislature would be necessary to confirm them”²²¹ Jefferson, for his part, insisted, as he would later do in his parliamentary manual, “that in givg to the Prest & Senate a power to make treaties, the constn meant only to authorize them to carry into effect by way of treaty any powers they might constitutionally exercise.”²²² Jefferson noted that he “was sensible of the weak points in this position, but there were still weaker in the other hypothesis”²²³ We could not have put it better, and we will not try.

²²⁰ **Thomas Jefferson**, 1 *The Writings of Thomas Jefferson* 329 (Paul L. Ford ed., 1904).

²²¹ Id.

²²² Id.

²²³ Id.