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H. David Rosenbloom
New York University School of Law

Fadi Shaheen
Rutgers Law School

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TREATY OVERRIDE: THE FALSE CONFLICT BETWEEN *WHITNEY* AND *COOK*

by

H. David Rosenbloom and Fadi Shaheen***

ABSTRACT

This Article explores the conditions under which a U.S. statute overrides an earlier self-executing treaty. Focusing on the often blurred distinction between three types of statute-treaty relationships—reconcilable inconsistencies, textual repugnancies, and conflicts—the Article concludes that, contrary to a common view, there is no contradiction between the 1888 Supreme Court decision in Whitney v. Robertson*, stating that in the event of a conflict between a statute and a treaty the later-in-time provision always controls, and the Court's 1933 decision in* Cook v. United States*, holding that a later-in-time statute does not override an earlier treaty without a clear expression of congressional intent to override. The Article explains that* Cook *merely finds no conflict to which* Whitney*'s later-in-time rule might apply: Together, the two decisions harmoniously stand for the proposition that while typically a later-in-time treaty overrides an earlier repugnant statute, a later-in-time statute overrides an earlier repugnant*

* James S. Eustice Visiting Professor of Taxation, and Director of the International Tax Program, New York University School of Law. Member, Caplin & Drysdale Chartered, Washington D.C.

** Professor of Law and Professor Charles Davenport Scholar, Rutgers Law School, Newark.

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treaty only if Congress has clearly expressed its intent to override or if not overriding the treaty would render the statute a nullity. Though the Court did not say as much, Cook*'s approach is an application of the canon of construction favoring a specific provision over a general one. Reconceptualized this way,* Cook *cannot be said to give general primacy to treaties over statutes.*

I. Introduction

For well over a century, confusion regarding the relationship between U.S. statutes and U.S. treaties has reigned as a result of an apparent inconsistency between two immigration cases decided by the Supreme Court on the same day, December 8, 1884—*Chew Heong v. United States*[1] and *Edye v. Robertson* (*Head-Money Cases*).[2] There is no question that it is possible for a later-in-time treaty to override an earlier statute or for a later-in-time statute to override an earlier

1. 112 U.S. 536 (1884).

2. 112 U.S. 580 (1884). The confusion dates further back. *See* United States v. Forty-Three Gallons of Whisky, 108 U.S. 491, 497–98 (1883) (limiting Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870), discussed *infra* notes 60 and 164.)

treaty.[3] The confusion pertains to the conditions under which a statute is deemed to override a treaty. This question is often framed with reference to an apparent contradiction between the 1888 Supreme Court decision in *Whitney v. Robertson*[4] and the Court's 1933 decision in *Cook v. United States*,[5] with later decisions sometimes following one decision while ignoring the other. *Whitney* stated that in the event of a conflict between statute and treaty the later-in-time provision controls.[6] *Cook* held that a later-in-time statute does not override an earlier treaty without a clear expression of congressional intent to override.[7] *Cook* relied on *Chew Heong*; *Whitney* relied on the *Head-Money Cases*.

The confusion has taken various forms over the years. The House of Representatives and the Department of the Treasury took opposing positions while in the process of finalizing ostensibly relevant but ultimately meaningless tax legislation "dealing" with the question.[8] A Senate Report on that legislation went to heroic lengths in defending a preference for an invariable later-in-time rule while attempting to distinguish *Cook*.[9] Supreme Court and circuit court decisions standing for one proposition were considered, even by the same circuit court (though with different judges), as standing for the other.[10] The Restatement of

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3. U.S. Const. art. VI, cl. 2.
4. 124 U.S. 190 (1888).
5. 288 U.S. 102 (1933).
6. 124 U.S. at 194.
7. 288 U.S. at 120.
8. I.R.C. § 7852(d)(1); *see* Irwin Halpern, *United States Treaty Obligations, Revenue Laws, and New Section 7852(d) of the Internal Revenue Code*, 5 Fla. Int'l L.J. 1 (1989); Rebecca M. Kysar, *Will Tax Treaties and WTO Rules "Beat" the BEAT?*, 10 Colum. J. Tax. L. Tax Matters (Aug. 7, 2019), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/142 [https://perma.cc/FS5E-5MQ7]; Kathleen Matthews, *Treasury Encouraged by Finance Treaty Override Substitute*, 40 Tax Notes 662 (Aug. 15, 1988); H. David Rosenbloom & Fadi Shaheen, *The BEAT and the Treaties*, 92 Tax Notes Int'l 53, 58 (Oct. 1, 2018).
9. S. Rep. No. 100-445, at 325 (1988).
10. *E.g.*, Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 235–37 (D.C. Cir. 2013) (with respect to Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006); *id*. at 239–42 (Sentelle, J., dissenting; with respect to Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984), and *Fund for Animals*, 472 F.3d at 872).

the Foreign Relations Law described the issue as an open question and refrained from resolving it.[11] Tax scholars have disagreed on the issue.[12] And the Department of the Treasury is currently negotiating new U.S. tax treaties, and amendments to old treaties, apparently in reliance upon a facile and unnuanced reading of *Whitney*'s later-in-time rule.[13]

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11. The reporters' note to the Restatement stated:

> Courts presume that Congress does not ordinarily intend to violate U.S. treaty commitments. Their articulation of this presumption has varied, turning in part on evolving and sometimes contested approaches to statutory interpretation in general—a topic beyond the scope of this Restatement. Sometimes, the Supreme Court has suggested the need for clear evidence that Congress intended to override a treaty, in addition to an apparent conflict between the statute and treaty, before a later-in-time statute will be given this effect. . . . At other times, the Court has indicated that if there is a conflict between a clear statute and an earlier treaty, the statute will be applied as a matter of U.S. law, regardless of whether there is evidence that Congress specifically intended to override the treaty. . . . This Section does not seek to resolve this issue.

Restatement (Fourth) of the Foreign Relations Law of the United States § 309 reps.' note 1 (Am. L. Inst. 2018).

12. *See* Reuven S. Avi-Yonah & Bret Wells, *The BEAT and Treaty Overrides: A Brief Response to Rosenbloom and Shaheen*, 92 Tax Notes Int'l 383 (Oct. 22, 2018); David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 Minn. L. Rev. 1439, 1509 n.283 (2019); Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 Minn. L. Rev. 1755 (2020); Kysar, *supra* note 8; Rosenbloom & Shaheen, *supra* note 8; Symposium, Panel 1: Fadi Shaheen et al., *The Future of the New International Tax Regime*, 24 Fordham. J. Corp. & Fin. L. 242, 270–79 (2019).

13. Letter from U.S. Treas. Dep't to Senator Robert Menendez (June 12, 2019) (on file with the authors); *see* Joshua Rosenberg, *Senate GOP Leaders Vow to Bring Tax Treaties to Floor*, Law360 (June 14, 2019), https://www.law360.com/articles/1169321/senate-gop-leaders-vow-to-bring-tax-treaties-to-floor [https://perma.cc/88CT-ZB7P] (describing exchange of letters between Treasury and Senator Menendez).

Now would be an opportune time to take a fresh look at the statute-treaty relationship in light of the Constitution's Supremacy Clause.[14] To do so, it is necessary and worthwhile to revisit some hoary Supremacy Clause jurisprudence and to suggest a means of reconciling some old, but still very relevant, Supreme Court decisions. This could have been undertaken at many junctures in the past, but there was never the sort of pressing need that now exists. The relationship between U.S. statutes and treaties has emerged at various times in various substantive areas of the law and has produced a string of important Supreme Court decisions. It is, however, in the area of tax law, and specifically in recent tax legislation, that collisions between statutes and treaties are of immediate practical significance. The Internal Revenue Code has never been fully meshed with the thick network of bilateral and self-executing tax treaties that the United States has negotiated from the 1930s through the present. As the level of sophistication of both statutory and treaty law has increased, and as the business world and, therefore, the tax world have dramatically globalized, collisions have become more frequent and ever more demanding of attention.

The relationship between the Internal Revenue Code and U.S. treaties has come into particularly sharp focus with enactment of the Tax Cuts and Jobs Act in December 2017 (TCJA).[15] Congress has long exhibited a tendency to enact complex cross-border rules with little attention to their harmonization with treaty commitments, but in the TCJA this tendency was especially pronounced. The statute and its legislative history are virtually silent with respect to treaties, yet the new statutory rules adopted for international taxation raise obvious treaty issues with significant revenue and monetary implications for both the government and affected taxpayers. As a result, Supremacy Clause issues that have lain fairly dormant for years now cry out for attention and resolution.[16] Although we approach our topic as tax scholars, our proffered analysis is as valid outside the tax area as we believe it is within it.

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14. U.S. Const. art. VI, cl. 2.

15. H. David Rosenbloom & Fadi Shaheen, *The TCJA and the Treaties*, 95 Tax Notes Int'l 1057 (Sept. 9, 2019); Rosenbloom & Shaheen, *supra* note 8.

16. We have partially addressed some of those issues before. Rosenbloom & Shaheen, *supra* note 15; Rosenbloom & Shaheen, *supra* note 8.

After introducing the constitutional and interpretive frameworks in Part II, our path into the Supremacy Clause thicket starts in Part III with a description of three statute-treaty relationships—reconcilable inconsistencies, textual repugnancies, and conflicts. An inconsistency between statute and treaty is reconcilable when full effect can be given to both instruments without violating the language of either.[17] A textual repugnancy between two provisions means that one provision cannot be given full effect without violating the language of the other. A repugnancy results in a conflict except when there is an interpretive presumption to the contrary, which transforms the textual repugnancy into a reconcilable inconsistency.

Employing these concepts, Part IV develops the point that, contrary to a common view,[18] the apparent contradiction between *Whitney* and *Cook* is false. Our argument is simple. The *Whitney* line of cases never found a repugnancy between a later statute and an earlier treaty. Only after reconciling the statute and the treaty did the Supreme Court say—apparently in dicta—that if there had been a conflict between the two instruments, the one that was later in time would control. *Cook* accepted that proposition—in a holding—but found no conflict between an existing treaty and a repugnant later-in-time statute in the absence of a clear expression of congressional intent to override the treaty. *Cook*, therefore, harmonized the two instruments "in favor" of the earlier treaty.[19]

After establishing this proposition both textually and logically, we address three arguments that are often made to undermine *Cook*. We show that the argument that the *Cook* doctrine applies only to textually ambiguous statutes is an oxymoron. We then demonstrate the lack of textual and logical bases for the argument that because the statute in *Cook* represented a continuation of a pre-treaty statutory provision, it is the treaty, not the statute, that was later in time in *Cook*. Finally, we identify as a necessary corollary of *Cook* the proposition that a later-in-time statute overrides an earlier treaty—even without a clear expression of an intent to override—if not overriding the treaty would render the

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17. An example would be a treaty benefit that is met with statutory silence.

18. Restatement (Fourth) of the Foreign Relations Law of the United States § 309 reps.' note 1 (Am. L. Inst. 2018).

19. *Cf.* Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 234 (D.C. Cir. 2013).

statute a nullity. This explains why there is no inconsistency between *Cook* and statements in *Whitney* and its progeny that Congress can unintentionally override a treaty. A repugnancy cannot be unintentional when there is an expressed intention to override, but it might well be unintentional if Congress is silent on the question of override when not overriding the treaty would render the later-in-time statute a nullity.

Part V analyzes several D.C. Circuit cases and demonstrates that, contrary to the common view, they all are consistent with our reading of *Whitney* and *Cook*.

Part VI shows that although the Supreme Court did not say as much, *Cook*'s approach is a special application of the canon of construction favoring specific provisions over more general ones in the absence of a clear contrary intention.[20] Typically (though not invariably), a treaty is more specific than a statute because the treaty applies only with respect to the treaty partner whereas the statute applies generally. Reconceptualizing the *Cook* canon this way resolves much of the confusion about it.

Part VII explains why tax is not exceptional, and Part VIII concludes.

II. The Constitutional and Interpretive Frameworks

The Supremacy Clause provides that federal statutes and treaties are both the supreme law of the land and have the same constitutional status.[21] With no guidance in the Constitution on how to resolve inconsistencies between a statute and a treaty, the Supreme Court has developed rules of construction to deal with the question. At least on the surface, these rules appear to be in conflict, leaving the question not fully resolved.[22]

It is clear that an inconsistency between a self-executing treaty and a statute requires an effort to reconcile the two instruments to the

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20. For the specific-over-general canon of construction, see Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 & n.1 (2012) (referencing Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976), and Morton v. Mancari, 417 U.S. 535, 550–51 (1974)).

21. U.S. Const. art. VI, cl. 2.

22. Restatement (Fourth) of the Foreign Relations Law of the United States § 309 reps.' note 1 (Am. L. Inst. 2018).

extent possible without violating the language of either.[23] There is also no question that when an inconsistency rises to the level of a conflict, one instrument must yield to the other,[24] and that for an inconsistency to rise to the level of a conflict, there must be a textual repugnancy—often referred to, for emphasis, as a "positive repugnancy"—between statute and treaty.[25] It is also settled that when there is a textual

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23. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either. . . ."); *see also* United States v. Lee Yen Tai, 185 U.S. 213, 221–23 (1902); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–21 (1963); Weinberger v. Rossi, 456 U.S. 25, 31 (1982); Blanco v. United States, 775 F.2d 53, 61 (2d Cir. 1985); Kappus v. Comm'r, 337 F.3d 1053, 1056 (D.C. Cir. 2003); Rosenbloom & Shaheen, *supra* note 15.

24. *See* Cook v. United States, 288 U.S. 102, 118–19 (1933); Moser v. United States, 341 U.S. 41, 45 (1951) ("Not doubting that a treaty may be modified by a subsequent act of Congress, it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the Treaty.").

25. *Lee Yen Tai*, 185 U.S. at 221–22 ("In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that 'there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy;' and that 'if harmony is impossible, and only in that event, the former law is repealed, in part or wholly, as the case may be.' . . . The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a [treaty]." (citations omitted)); *see also Blanco*, 775 F.2d at 61; In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MDL-1775 (JG) (VVP), 2010 WL 10947344 (E.D.N.Y. Sept. 22, 2010); Rosenbloom & Shaheen, *supra* note 15.

repugnancy between a later-in-time self-executing treaty and an earlier statute, typically the treaty overrides the statute.[26]

There is no doubt that, as a matter of U.S. domestic constitutional law (though in violation of international law), a later-in-time statute can override an earlier self-executing treaty.[27] The open question regards the conditions under which a statute is considered to do that.[28] This question is often framed with reference to the Supreme Court decisions in *Whitney* and in *Cook*, with subsequent decisions sometimes following one while ignoring the other. The *Whitney* line of cases stands for the proposition that a later-in-time statute always overrides an earlier treaty to the extent of a conflict,[29] and *Cook* holds that for a later statute to override an earlier treaty, Congress must clearly express an intention to do so.[30]

These apparently different views can be traced back to two immigration cases decided by the Supreme Court on the same day, December 8, 1884—*Chew Heong v. United States* and the *Head-Money*

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26. *Cook*, 288 U.S. at 118–19; *see also* Johnson v. Browne, 205 U.S. 309, 321 (1907) ("[A] later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty.").

27. *See supra* notes 23–25.

28. *See supra* note 11.

29. Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing."); Alverez y Sanchez v. United States, 216 U.S. 167, 175–76 (1910) ("It is true that Congress did not, we assume, intend by the Foraker act to modify the treaty, but, if that act were deemed inconsistent with the treaty, the act would prevail; for an act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject.").

30. *Cook*, 288 U.S. at 120 ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.").

Cases (*Edye v. Robertson*).[31] *Whitney* relied on the *Head-Money Cases, Cook* on *Chew Heong.*

III. Inconsistencies, Repugnancies, Conflicts

The reconciliation or harmonization canon—providing that when a statute and a treaty "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either"[32]—is needed when treaty and statutory provisions are textually inconsistent but not repugnant. Such reconcilable inconsistencies include situations in which a treaty provides for a benefit while the statute is silent and thus provides no such benefit, and those in which the terms of a provision subject it to an inconsistent rule in the other instrument.[33] In the latter case, the provision in question must yield. If, on the other hand, a treaty benefit encounters statutory silence, the treaty benefit holds, even in the face of a post-treaty statutory amendment repealing a matching statutory benefit.[34] Obviously, a statutory rule when there is treaty silence holds as well.

Inconsistencies, however, can rise to the level of textual repugnancies when the language of a provision cannot be given full effect without violating the language of another provision. That can happen only if statutory and treaty texts are unambiguously contradictory—when neither provision "is reasonably susceptible to more than one meaning"[35] with at least one meaning not producing a repugnancy. If there is any such meaning, the harmonization canon would textually reconcile the two provisions by attaching that meaning to the ambiguous provision.

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31. Chew Heong v. United States, 112 U.S. 536 (1884); Edye v. Robertson (Head-Money Cases), 112 U.S. 580 (1884).

32. *Whitney*, 124 U.S. at 194; *see also supra* note 23.

33. *See infra* note 87.

34. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("[T]he Convention is a self-executing treaty. . . . [Therefore] no domestic legislation is required to give the Convention the force of law in the United States. The repeal of a purely domestic piece of legislation should accordingly not be read as an implicit abrogation of any part of it.").

35. McCreary v. Offner, 172 F.3d 76, 82 (D.C. Cir. 1999). *See generally* King v. Burwell, 576 U.S. 473 (2015).

A textual repugnancy results in a conflict unless an interpretive presumption to the contrary applies. That is, for example, how the specific-over-general canon of construction works.[36] Deeming a specific provision to be an exception to a more general and textually repugnant one, the canon transforms the textual repugnancy into a reconcilable inconsistency.

As will become clearer from the discussion below, the distinctions among reconcilable inconsistencies, textual repugnancies, and conflicts provide the key to interpretation even when all three situations are referred to, separately or collectively, as "inconsistencies" or, inaccurately, as "conflicts."

IV. *Whitney* and *Cook*

A. Whitney

In *Whitney*, the Supreme Court addressed the question whether a treaty with the Dominican Republic exempted the importation of Dominican goods from customs duties imposed by a later-in-time statute.[37] It was argued that the treaty barred discriminatory legislation against the importation of Dominican goods in favor of similar goods imported from any other country. Similar goods imported from Hawaii were at the time (1882) exempt from duties under a treaty.[38] The Court dismissed the argument on the ground that the nondiscrimination provision in the treaty did not cover concessions such as those made to Hawaii for valuable consideration.[39] It then went on to say:

> But, independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The act of congress under which the duties were collected, authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican republic, and, *if there be any conflict* between the stipulations of the treaty and the

36. *See supra* note 20 and accompanying text.
37. 124 U.S. at 191–92.
38. *Id.*
39. *Id.* at 192–93.

> requirements of the law, the latter must control. . . . By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.[40]

The Court's first rationale, that the treaty nondiscrimination provision did not cover the concessions made to Hawaii, meant that there was no repugnancy, and therefore no conflict, between the treaty and the statute. This holding was absolute. The Court's second rationale, regarding the later-in-time rule, was an alternative that was conditional on finding a conflict between treaty and statute. Although this second rationale appears to be dictum, *Cook* accepted it as a holding.[41] Thus, *Whitney*'s articulation of the later-in-time rule stands: If there is a conflict between a self-executing treaty and a statute, the later-in-time provision overrides to the extent of that conflict. The critical question, however, is what is meant by a "conflict." *Whitney* neither addressed nor answered this question—at least not fully.[42] As we shall see, *Cook* stands for the proposition that a repugnancy is a necessary but insufficient condition for a conflict to exist, thus partially filling that void.

After its general discussion of the relationship between statutes and treaties, the Court in *Whitney* concluded:

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40. *Id.* at 193–94 (emphasis added).

41. *See infra* note 51 and accompanying text.

42. The Court's statement in *Whitney* that its alternative rationale provided an independent answer to the plaintiffs' arguments (124 U.S. at 193–94) did not mean that the Court implicitly assumed that a repugnancy was equivalent to a conflict. The condition in *Whitney* was the existence of a conflict.

> It follows, therefore, that, when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head-Money Cases* . . . it was objected to an act of congress that it violated provisions contained in treaties with foreign nations, but the court replied that, so far as the provisions of the act *were in conflict* with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that, "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."[43]

To better understand this account, it helps to bear in mind that the Supreme Court's first reply to the treaty-based challenge to the statute in the *Head-Money Cases* was, without much elaboration, that the Court was "not satisfied that this act of congress violates any of these treaties, on any just construction of them."[44] Immediately thereafter, the court went on to say:

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43. *Id.* at 195 (emphasis added).

44. Edye v. Robertson (Head-Money Cases), 112 U.S. 580, 597 (1884). The *Head-Money Cases* involved suits brought to recover from the collector of New York amounts he collected in October 1882 from the consignees of non-U.S.-owned ships that brought immigrants to the port of New York. The amounts were collected at a rate of 50 cents per immigrant under an August 3, 1882, act of Congress titled "An act to regulate immigration." *Id.* at 586. The suits challenged the act on different grounds, and the treaty challenge was based on treaty provisions barring discriminatory taxation against ships of the treaty partner in favor of U.S. ships in similar cases. The treaty provisions were described only in the brief of counsel referenced in the decision. *Id.* at 597. It is clear, however, that the act did not violate those treaty provision because the head tax was imposed on each immigrant arrival, regardless of whether the ship was U.S.-owned or not.

> Though laws similar to this have long been enforced by the state of New York in the great metropolis of foreign trade, where four-fifths of these passengers have been landed, no complaint has been made by any foreign nation to ours of the violation of treaty obligations by the enforcement of those laws. But we do not place the defense of the act of congress against this objection upon that suggestion. We are of opinion that, so far as the provisions in that act *may be found to be in conflict* with any treaty with a foreign nation, they must prevail in all the judicial courts of this country.[45]

Even if the Court meant that it was not basing its defense of the statute against the treaty challenge on the "suggestion" that the statute did not violate the treaty (and not only that treaty partners never complained about New York laws), the Court's holding that the statute did not violate the treaty was unconditional and clear. This means that there was no repugnancy between the two instruments,[46] and therefore no conflict. Hence the Court's qualification that its rationale would apply "so far as the provisions in that act *may be found to be* in conflict with any treaty."[47] The Court did not explain, nor did it consider, what would have constituted a conflict. There simply was no need.

This is the pattern that the *Whitney* line of cases follows. All such cases state the later-in-time rule only to find no repugnancy, and therefore no conflict, between the treaty and the later-in-time statute at hand. None of these cases addressed the question of what, exactly, constituted a conflict.[48]

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45. *Id.* at 597 (emphasis added).

46. *See also supra* note 44.

47. 112 U.S. at 597 (emphasis added).

48. *See*, *e.g.*, *Botiller v. Dominguez*, 130 U.S. 238 (1889); *Breard v. Greene*, 523 U.S. 371 (1998); *Horner v. United States*, 143 U.S. 570 (1892). *Alverez y Sanchez v. United States*, 216 U.S. 167 (1910), and *Ribas y Hijo v. United States*, 194 U.S. 315 (1904), followed the same pattern, but *Alverez y Sanchez* involved special circumstances in which a repugnancy, were it to exist, would have resulted in a conflict (*see infra* note 84 and accompanying text), and in *Ribas y Hijo*, the treaty, not the statute, was later in time. In restating the later-in-time rule, some cases used the term "inconsistency," but it is clear that what they were referring to was a "conflict" and not a "reconcilable inconsistency."

B. Cook

Cook dealt with a repugnancy between a 1930 identical reenactment of a 1922 anti-bootlegger statutory provision and a 1924 treaty with Great Britain.[49] The statutory provision authorized the Coast Guard to board, search, and seize any vessel within four leagues (12 miles) of the coast of the United States, and the treaty provided for a shorter limit (the distance which "can be traversed in one hour by the vessel suspected of endeavoring to commit the offense").[50] Finding that boarding, searching, and seizing the vessel in question beyond the treaty limit but within the statutory limit was illegal, the Court first reasoned while relying on *Whitney* that "[t]he Treaty, being later in date than the act of 1922, superseded, so far as inconsistent with the terms of the act, the authority which had been conferred by section 581 [of the act] upon officers of the Coast Guard to board, search, and seize beyond our territorial waters."[51] Then, relying on *Chew Heong*[52] and the 1924 *Payne* decision,[53] the *Cook* Court continued:

> The Treaty was not abrogated by reenacting section 581 in the Tariff Act of 1930 in the identical terms of the act of 1922. *A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed*. . . . Here, the contrary appears. The committee reports and the debates upon the act of 1930, like the re-enacted section itself, make no reference to the Treaty of 1924.[54]

This is a rebuttable legal presumption. *Cook*, in effect, presumptively reads into the later-in-time statute an exception for the earlier repugnant treaty. This presumption would be rebutted if Congress clearly expressed its intent to override the treaty. As explained below,

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49. Cook v. United States, 288 U.S. 102, 107 (1933).
50. *Id.* at 110.
51. *Id.* at 118–19.
52. Chew Heong v. United States, 112 U.S. 536 (1884).
53. United States v. Payne, 264 U.S. 446, 448 (1924).
54. *Cook*, 288 U.S. at 119–20 (emphasis added; citations omitted).

the presumption would be rebutted also if not overriding the treaty would render the statute a nullity—not the case in *Cook*.

C. Reconciling Whitney *and* Cook

Cook is not inconsistent with *Whitney*. In fact, *Cook* relied on *Whitney* in holding that the 1924 treaty overrode the 1922 statutory provision because there was a conflict between the two. This means that the court found a textual repugnancy between the two instruments. Under *Whitney*, an override requires a conflict, and it is settled that a conflict requires a repugnancy.[55] If the treaty and the 1922 statutory provision were textually repugnant, then the treaty and the 1930 identical reenactment of the 1922 provision must have been textually repugnant as well. If *Cook* followed *Whitney* and still found that without a clear expression of congressional intent to override, a later-in-time statute did not override an earlier repugnant treaty, it must be that *Cook* found no conflict between the two instruments despite the textual repugnancy; it found merely a reconcilable inconsistency. This conclusion is supported by *Cook*'s reliance on *Chew Heong* and *Payne* in reaching the result that the treaty had not been overridden.[56] Both *Chew Heong* and *Payne* found later-in-time statutes not to override earlier treaties because the inconsistency between the two instruments was reconcilable and therefore not a conflict.[57] *Cook*'s reconciliation of the

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55. *See supra* notes 25 and 26.

56. *See supra* notes 52–54 and accompanying text.

57. *Chew Heong v. United States*, 112 U.S. 536 (1884), dealt with a Chinese citizen who resided in the United States when the United States and China entered into a treaty on November 17, 1880, securing his free return to the United States were he to leave, which he did on June 18, 1881. *Id.* at 538. When he attempted to return to the United States on September 15, 1884, he was denied entry based on the Chinese Restriction Act passed by Congress on May 6, 1882, and amended on July 5, 1884, requiring him to produce as proof of right of re-entry a certificate he could have obtained only if he were present in the United States around the time the act was passed or amended. *Id.* at 538–39. Despite an apparent repugnancy between the treaty and the act, the majority opinion construed the act as saving the plaintiff's right to re-entry in order to avoid both a conflict with the treaty and an absurd result. *Id.* at 539–59.

Payne addressed an inconsistency between an Indian treaty and a later-in-time act of Congress. Relying on *Chew Heong*, the Supreme Court held:

later-in-time statute with the earlier repugnant treaty was, however, presumptive, not textual. It could not be textual because of the repugnancy. It was presumptive because, as noted, *Cook*, in effect, presumptively read into the later-in-time statute an exception for the earlier repugnant treaty.

The general direction of the *Cook* holding, that a later-in-time statute does not override an earlier treaty without a clear expression of congressional intent, was alluded to in *Whitney*. After generally discussing the relationship between statutes and treaties and reformulating the later-in-time rule specifically when it is the statute that is later in time as "*if there be any conflict* between the stipulations of the treaty and the requirements of [a later-in-time] law, the latter must control,"[58] *Whitney* concluded: "It follows, therefore, that, *when a law is clear in its provisions*, its validity cannot be assailed before the courts for want of conformity to stipulations of a *previous* treaty. . . ."[59] That is, *Whitney* limited application of the later-in-time rule when a statute is later in time to situations in which the statute is "clear in its provisions."[60]

> The treaty makes no restriction in respect of the character of the land to be "assigned," and while the Allotment Act, being later, must control in case of conflict, it should be harmonized with the letter and spirit of the treaty, so far as that reasonably can be done, since an intention to alter, and pro tanto abrogate, the treaty, is not to be lightly attributed to Congress.

Payne, 264 U.S. at 448.

58. Whitney v. Robertson, 124 U.S. 190, 194 (1888) (emphasis added).

59. *Id*. at 195 (emphasis added).

60. *Id.* (emphasis added); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893) (intervening between *Whitney* and *Cook* and restating the later-in-time rule as: "In our jurisprudence it is well settled that the provisions of an act of congress . . . *if clear and explicit*, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty." (emphasis added)). This qualification appears to predate *Chew Heong* and the *Head-Money Cases*. In 1870, the Supreme Court held that a later-in-time statute overrode an earlier repugnant treaty without any qualifications (Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870)); but in 1883, the Court limited that holding to its facts and declined to follow it (United States v. Forty-Three Gallons of Whisky, 108 U.S. 491, 497–98 (1883)).

Whitney did not explain what such clarity entails. Since there was no repugnancy between the treaty and the later statute, there was no need to do so. When the question became material in *Cook*, the Court required a clear congressional expression of an intent to override. Quoting *Cook*, the Supreme Court made that very clear in *Trans World Airlines v. Franklin*:

> There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in *ambiguous congressional action*. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been *clearly expressed*." . . . Legislative silence is not sufficient to abrogate a treaty.[61]

The ambiguity in congressional action to which the Court was referring was legislative silence—that is, the lack of a clear expression of an intent to override.[62] The first sentence of the quoted excerpt from *Trans World Airlines* merely rephrases the second sentence (which is a quotation from *Cook*).

Therefore, it does not appear that the *Cook* requirement of a clear expression of intent to override a treaty is limited to textually ambiguous later-in-time statutes as it is sometimes argued.[63] To the

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61. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (emphasis added; quoting Cook v. United States, 288 U.S. 102, 120 (1933)).

62. Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 234–36 (D.C. Cir. 2013) (articulating the distinction between a (statutory) textual ambiguity and an ambiguity in congressional action, the court held: "[A]bsent some clear and overt indication from Congress, we will not construe a statute to abrogate existing international agreements even when the statute's text is not itself ambiguous.").

63. *See*, *e.g.*, Kysar, *supra* note 8 ("The best reading of the Cook doctrine, in my view, is that it is a canon of statutory interpretation requiring interpretive harmony between treaties and statutes but only where possible, i.e. where the statute is ambiguous."); *Owner-Operator*, 724 F.3d at 241 (Sentelle, J., dissenting); *cf.* Restatement (Fourth) of the Foreign Relations Law of the United States § 309 reps.' note 1 (Am. L. Inst. 2018). Consider also the discussion below (notes 89–125 and accompanying text) of *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006) ("The canon applies

contrary, the later-in-time statute must be unambiguously repugnant with the treaty to avoid *textual* harmonization: Under the harmonization canon, a textual ambiguity would require choosing the meaning that is harmonious with the treaty over the repugnant one, resulting in no repugnancy and obviating the need for the later-in-time rule and the *Cook* doctrine altogether.[64]

To be sure, there was no such textual ambiguity in the statutory provision discussed in *Cook*. The repugnancy with the treaty was clear. The statutory provision clearly authorized the Coast Guard to board, search, and seize vessels within four leagues of the U.S. coast, which was greater than the distance allowed under the 1924 treaty with respect to British vessels. The lack of a clear expression of an intent to override an earlier treaty was the statutory ambiguity the Court was referring to in *Trans World Airlines* ("ambiguous congressional action").[65] In fact, the Court said as much in *Cook*. Immediately after holding that a "treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed,"[66] the Court said:

> Here, the contrary appears. The committee reports and the debates upon the act of 1930, like the re-enacted section itself, make no reference to the Treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its re-enactment. . . . No change, in this respect, was made either by the Department of the Treasury or the Department of Justice after the Tariff Act of 1930.[67]

The Court was explaining that not only did the 1930 Tariff Act not meet the standard for abrogating the 1924 treaty, but the resulting

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only to ambiguous statutes. . . .") and of *Owner-Operator*, 724 F.3d, at 234 ("[A]bsent some clear and overt indication from Congress, we will not construe a statute to abrogate existing international agreements even when the statute's text is not itself ambiguous.").

64. *See supra* note 35 and *infra* notes 120–154.

65. 466 U.S. at 252.

66. Cook v. United States, 288 U.S. 102, 120 (1933).

67. *Id.* (citations omitted).

ambiguity was bolstered by agency action—the continued application of the treaty after the 1930 Tariff Act. It is evident that the statutory ambiguity the Court identified ("any doubt as to the construction of the section") referred to legislative silence on the question of override, not a textual ambiguity in the statute.

To sum up: The lack of a clear congressional expression of intent to override an earlier treaty is itself the requisite ambiguity precluding override of the treaty by an otherwise textually unambiguous and clearly repugnant later-in-time statute. Under *Cook*, such a statute falls short of conflicting with the treaty, and the later-in-time rule does not apply.

Thus, *Cook* fully followed and applied the later-in-time rule articulated in *Whitney*. Since in *Cook* there was a textual repugnancy between the statute and the treaty, the Court did address the question that the *Whitney* line of cases left open: What constitutes a conflict that would trigger application of the later-in-time rule? Applying the later-in-time rule to resolve a textual repugnancy between a statute and a later-in-time treaty but not applying it to resolve a textual repugnancy between a treaty and a later-in-time statute when Congress did not clearly express intent to override the treaty must mean that a textual repugnancy invariably constitutes a conflict when the repugnancy is between a statute and a later-in-time treaty but not when the repugnancy is between a treaty and a later-in-time statute. Unless Congress clearly expresses its intent to override the treaty, the textual repugnancy between a statute and an earlier treaty amounts to a presumptive reconcilable inconsistency requiring harmonization of the two instruments in favor of the treaty, viewed as a continuing specific exception to the general rule of the later statute. The textual repugnancy is transformed into a reconcilable inconsistency by presumptively reading into the statute an exception for the earlier treaty. A clear expression of congressional intent to override the treaty would rebut this presumption. As we shall see, this approach is well ingrained in U.S. law not only as a clear-statement rule[68] but also more specifically in the form of the rule of construction favoring specific provisions over general ones. A few additional points are in order first.

68. *See Owner-Operator*, 724 F.3d at 236–38.

In the legislative history of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), a Senate Report attempted to distinguish *Cook*:

> The Court reached its conclusion on the stated ground that the treaty limit continued to apply under the 1930 Act, because section 581, "with its scope narrowed by the Treaty, remained in force after its reenactment in the act of 1930." Properly construed, therefore, the committee believes that *Cook* stands not for the proposition that Congress must specifically advert to treaties to have later statutes given effect, but that for purposes of interpreting a reenacted statute, it may be appropriate for some purposes to treat the statute as if its effect was continuous and unbroken from the date of its original enactment.[69]

The Report thus suggests that the 1930 reenactment of the 1922 statutory provision was not a repeal and reenactment but an uninterrupted continuation of the 1922 statutory provision that should be dated back to a time before the treaty. It takes the position there was no treaty override in *Cook* because the treaty, not the statute, was the provision that was later in time.

That, however, is not how *Cook* was decided,[70] nor is it the way the Supreme Court read *Cook* in *Trans World Airlines*, discussed above,[71] and other cases.[72] Moreover, the Senate Report's interpretation

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69. S. Rep. No. 100-445, at 325 (1988) (citation omitted; quoting *Cook*, 288 U.S. at 120). The report was with respect to the Technical Corrections Act of 1988, which was indefinitely postponed and replaced with an identical bill enacted on November 10, 1988, as the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. No. 100-647, 102 Stat. 3342.

70. Rosenbloom & Shaheen, *supra* note 8, at 57.

71. *See supra* note 61 and accompanying text.

72. *See, e.g.*, Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1934). Relying on *Cook*, the Court in *Pigeon River* held:

> We find no reason for regarding this action as intended to abrogate or modify the provision of the Webster-Ashburton

of *Cook* does not follow from viewing the 1930 reenactment of the 1922 statutory provision as a continuation of the earlier statutory provision. There is an established body of case law relating to the circumstances in which statutory reenactments are viewed as continuations of older provisions and not as repealing and reenacting them.[73] The later statutory provision does not lose later-in-time status to an earlier treaty

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> Treaty. So far as the act of Congress specifically authorized the charging of tolls for the use of the improvements on the Minnesota side of the boundary, it would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected. But the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.

Id. at 160 (citations omitted); *see also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968) (quoting *Pigeon River*, 291 U.S. at 160, which in turn relied on *Cook*, the Court said: "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress"); *Washington v. Wash. Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) (indirectly referring to *Cook* by relying on *Menominee Tribe*, the Court said: "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights").

73. *E.g.*, Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497 (1936):

> The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment . . .

that postdates the older statutory provision, even if the later provision is deemed to speak from the time of the first enactment. The 1930 reenactment in *Cook* may have been an uninterrupted continuation of the 1922 statutory provision, but it remained, relative to the 1924 treaty, "the latest expression of the sovereign will," which under *Whitney* should have controlled had there been a conflict.[74] Saying that the treaty, not the reenactment of the statutory provision, is "the latest expression of the sovereign will" would absurdly mean that reenactments can never override earlier treaties that postdate the first enactment, even with a clear expression of an intention to override. *Cook* referred to the 1930 reenactment as later in time, and its core rationale was that "a treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."[75] This must mean that under *Cook* there is no conflict between a treaty and a later-in-time repugnant statute that is not accompanied by a clear expression of congressional intention to override the treaty.

Since the 1924 treaty limited the scope of the 1922 statutory provision, it is doubtful that the 1930 reenactment in *Cook* should be viewed as an uninterrupted continuation of the 1922 provision.[76] *Cook*

> . . . . The question whether a statute is repealed by a later one containing no repealing clause, on the ground of repugnancy or substitution, is a question of legislative intent to be ascertained by the application of the accepted rules for ascertaining that intention. And, even in the face of a repealing clause, circumstances may justify the conclusion that a later act repeating provisions of an earlier one is a continuation, rather than an abrogation and reenactment, of the earlier act.

Id. at 503–05 (citations omitted).

74. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

75. Cook v. United States, 288 U.S. 102, 120 (1933); *see* note 54 and accompanying text.

76. Section 651 of the 1930 Tariff Act repealed the 1922 Act along with other specified and any inconsistent unspecified statutory provisions. Tariff of 1930 (Smoot-Hawley Tariff), Pub. L. No. 71-361, § 651, 46 Stat. 590, 762 (1930). The section also included a saving provision to the effect that pending proceedings were not affected by the repeal, modification, or

clearly held that because of the 1924 treaty, the law before the 1930 reenactment was as it stood in 1924, not 1922. That is, *Cook* held that the law prior to the 1930 reenactment, the law as modified by the 1924 treaty, continued to apply *because* the Court found that the 1930 reenactment did not override the 1924 treaty.

Based on its attempt to distinguish *Cook*, the Senate Report suggested that the question of treaty override by a later-in-time repugnant statute turns on congressional intent, not on whether congressional intent was clearly expressed.[77] This argument does not follow from *Whitney* and contradicts *Cook*, and therefore collapses together with the Report's attempt to distinguish *Cook*. Determining congressional intent is exactly what *Cook* sought to avoid when it imposed the legal presumption that without a clear expression of congressional intent there is no override. It is true that congressional intent is what matters. *Cook*, however, presumes no congressional intent to override unless such intent is clearly expressed.[78]

After holding the treaty was not abrogated by the 1930 Tariff Act, because "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed," the Court said:

> Searches and seizures in the enforcement of the laws prohibiting alcoholic liquors are governed, since the 1930 act, as they were before, by the provisions of the Treaty. Section 581, with its scope narrowed by the Treaty, remained in force after its reenactment in the act of 1930. The section continued to apply to the boarding, search, and seizure of all vessels of all countries

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reenactment under the 1930 Tariff Act of existing laws and that all liabilities under such laws continued and were to be enforced "in the same manner as if such repeal, modification, or enactments had not been made." *Id.* § 651(c). If Congress intended that repeals and reenactments of existing laws be viewed as continuations of such laws, there would have been no need to include "reenactments" in the saving provision.

77. S. Rep. No. 100–445, at 327 (1988).

78. Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 237 (D.C. Cir. 2013) ("[The] decision is directed by a legal presumption, not an 'inquiry into congressional and presidential motives.'" (quoting *id.* at 242 (Sentelle, J., dissenting)).

> with which we had no relevant treaties. It continued also, in the enforcement of our customs laws not related to the prohibition of alcoholic liquors, to govern the boarding of vessels of those [about 15] countries with which we had entered into treaties like that with Great Britain.[79]

The Court was explaining that the statute was at no time a nullity because it applied fully to vessels of nontreaty countries and to vessels of treaty countries to the extent not prohibited by treaty. As an interpretive principle, the *Cook* doctrine—that there can be no treaty override by statute in the absence of a clear expression of congressional intent—is not absolute and would, presumably, yield to the rule against a nullity, which is "as close to absolute as interpretive principles get."[80] This is a clear corollary of the *Cook* doctrine (and, as we shall see later, of the specific-over-general rule of construction). *Cook* looks to harmonize a treaty with a later-in-time repugnant statute that is not accompanied by a clear expression of intent to override. Harmonization means giving effect to both instruments to the extent possible without violating the language of either. If one instrument is rendered a nullity, it will have no effect and there would be no harmonization. Therefore, if not overriding an earlier repugnant treaty would nullify a later-in-time statute—*not* the case in *Cook*—an intent to override the treaty would be implied and a conflict would exist regardless of whether Congress expressed or even actually had such an intent.[81] Obviously, a nullity means an absolute nullity—that is, no effect whatsoever.[82]

This notion disposes of another possible apparent inconsistency between *Cook* and the *Whitney* line of cases. There is language

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79. *Cook*, 288 U.S. at 120.

80. King v. Burwell, 576 U.S. 473, 502 (2015) (Scalia, J., dissenting).

81. For cases meeting this standard, see Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Alverez y Sanchez v. United States, 216 U.S. 167 (1910); *see also infra* note 84.

82. King, 576 U.S. at 502; *see also* Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003) (*Roeder I*) (clarifying that a nullity means zero effect); *supra* note 81; *infra* note 141 and accompanying text.

in *Whitney*, and possibly in *Alverez y Sanchez v. United States*,[83] suggesting that an unintentional statutory departure from an earlier treaty can result in an override.[84] This is sometimes viewed as contradicting

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83. 216 U.S. at 175–76.

84. Confirming observations made by a Massachusetts circuit court in Taylor v. Morton, 2 Curt. C.C. 454, 23 F. Cas. 784, 787 (1855), the Court in *Whitney* said that "it is wholly immaterial to inquire whether by the act assailed [Congress] has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad." Whitney v. Robertson, 124 U.S. 190, 195 (1888). Under *Whitney*, it is critically material whether a statute conflicts with the treaty. If there is a conflict, the instrument that is later-in-time controls, and in the absence of a conflict, the two instruments must be reconciled. As the court in *Taylor v. Morton* explained, what it meant in saying that it is immaterial to inquire whether the statute there departed from the earlier treaty is that either way the statute would have effect: If there is a departure from the treaty, the statute controls; and if there is no departure, harmonization with the treaty would also give the statute an effect. 23 F. Cas. at 787. In any event, the "by accident or design" language stands, suggesting that an unintentional conflict may result in an override. That is not necessarily the case with respect to the *Alverez y Sanchez* language. Suggesting an inconsistency with *Cook,* the Restatement views *Alverez y Sanchez* as standing for the proposition that "if there is a conflict between a clear statute and an earlier treaty, the statute will be applied as a matter of U.S. law, regardless of whether there is evidence that Congress specifically intended to override the treaty." Restatement (Fourth) of the Foreign Relations Law of the United States § 309 reps.' note 1 (Am. L. Inst. 2018). We do not disagree with the proposition itself (other than its being inconsistent with *Cook*), but we doubt it follows from *Alverez y Sanchez*. *Alverez y Sanchez v. United States*, 216 U.S. 167 (1910), dealt with the claim that in the Foraker act of 1900, the United States illegally deprived a Puerto Rican citizen of an office of solicitor of the courts in Puerto Rico, which he had purchased and held in perpetuity before and during the war with Spain. The claim was based on the 1898 treaty of peace between Spain and the United States in which Spain ceded the island of Puerto Rico to the United States without impairing the property or rights of private individuals. *Id*. at 172–73. After holding that the claim was not covered by the treaty because the U.S. obligation not to impair property or rights did not apply to public or quasi-public stations (which means that there was no repugnancy between statute and treaty), the Supreme Court went on to say:

> It is true that Congress did not, we assume, intend by the Foraker act to modify the treaty, but, *if that act were* deemed

Cook because an unintentional override and a clear expression of an intent to override may not coexist.[85] Under *Whitney*, however, the later-in-time rule applies in case of a conflict between a statute and a treaty, and under *Cook*, a conflict between a treaty and a later-in-time repugnant statute may result either if Congress clearly expressed an intent to override the treaty or if not overriding the treaty would render the statute a nullity. The repugnancy cannot be unintentional when there is an expressed intention to override, but it might well be unintentional in the case of a nullity. Therefore, suggesting that a statute may

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> inconsistent with the treaty, the act would prevail; for an act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject.

Id. at 175–76 (emphasis added). The Restatement must have based its reading of *Alverez y Sanchez* on the first part of this quoted sentence. All the Court was saying, however, is that Congress could not have intended by the Foraker act to modify the treaty because, as the Court held, the two instruments were not repugnant. Following the pattern of the *Whitney* line of cases, the Court went on to say, citing to *Ribas y Hijo v. United States*, 194 U.S. 315, 324 (1904) (*supra* note 48), which in turn cited to *Whitney*, that had there been a conflict, the later-in-time rule would have applied. 216 U.S. at 176. It is therefore not clear that the Restatement's reading of *Alverez y Sanchez* would necessarily follow. In any event, were a repugnancy to exist between the Foraker act of 1900 and the 1898 treaty of peace, it would have resulted in a conflict regardless of whether Congress clearly expressed its intent to override the treaty. That is so because if a repugnancy were to exist, not overriding the treaty would have resulted in a nullity. Congress passed the Foraker act on April 12, 1900. 31 Stat. 77 (1900). The act applied only with respect to Puerto Rico and other islands ceded by Spain to the United States under the treaty of peace. The act provided that "the laws and ordinances of P[ue]rto Rico [then] in force shall continue in full force and effect," except, among other things, as altered or modified by military orders in force when the act was to take effect on May 1, 1900. 31 Stat. at 79; *see also* 216 U.S. at 174. On April 30, 1900, a military order had abolished the office of solicitor of the court in Puerto Rico. 216 U.S. at 173. Therefore, the act effectively ratified the military order. If this order was repugnant with the 1898 treaty of peace, not overriding the treaty would have rendered the order, and its ratification by the act, a nullity.

85. *See, e.g.*, Restatement (Fourth) of the Foreign Relations Law of the United States § 309 reps.' note 1 (Am. L. Inst. 2018); Kysar, *supra* note 8, at n.23.

unintentionally override a treaty does not appear to be inconsistent with *Cook*.

V. Lower Courts

Several D.C. Circuit and Tax Court cases are sometimes cited for the proposition that lower courts do not follow *Cook*. Those cases belong to two groups. One deals with a later-in-time statute accompanied by a clearly expressed congressional intent to override repugnant treaty provisions, thus meeting the *Cook* standard for applying the later-in-time rule.[86] The other group deals with later-in-time treaty provisions that by their terms subjected the treaty obligation to preexisting domestic law limitations, thus producing no repugnancies and allowing the courts to harmonize the two instruments by giving full effect to both without violating the language of either.[87] There is nothing in either group of cases that is inconsistent with *Cook*.

Five D.C. Circuit cases—*South African Airways v. Dole* (1987),[88] *Fund for Animals v. Kempthorne* (2006),[89] *Roeder v. Islamic Republic of Iran* (2003) (*Roeder I*),[90] *Roeder v. Islamic Republic of Iran* (2011) (*Roeder II*),[91] and *Owner-Operator Independent Drivers*

86. Lindsey v. Comm'r, 98 T.C. 672 (1992), *aff'd*, 15 F.3d 1160 (D.C. Cir. 1994); Jamieson v. Comm'r, T.C. Memo. 1995-550, 70 T.C.M. (CCH) 1372 (1995), *aff'd*, 132 F.3d 1481 (D.C. Cir. 1997) (unpublished); Pekar v. Comm'r, 113 T.C. 158 (1999) (one aspect of this case belongs to the second group of cases listed *infra* note 87); Kappus v. Comm'r, T.C. Memo. 2002-36, 83 T.C.M. (CCH) 1203 (2002), *aff'd*, 337 F.3d 1053 (D.C. Cir. 2003); Jamieson v. Comm'r, T.C. Memo. 2008-118, 95 T.C.M. (CCH) 1430 (2008), *aff'd*, 584 F.3d 1074 (2009).

87. Brooke v. Comm'r, T.C. Memo. 2000-194, 79 T.C.M. (CCH) 2206 (2000), *aff'd*, 13 Fed. Appx. 7 (D.C. Cir. 2001) (unpublished); Price v. Comm'r, T.C. Memo. 2002-215, 84 T.C.M. (CCH) 250 (2002); Vax v. Comm'r, T.C. Memo. 2005-134, 89 T.C.M. (CCH) 1411 (2005); Haver v. Comm'r, T.C. Memo. 2005-137, 89 T.C.M. (CCH) 1428 (2005), *aff'd*, 444 F.3d 656 (D.C. Cir. 2006).

88. 817 F.2d 119 (D.C. Cir. 1987).

89. 472 F.3d 872 (D.C. Cir. 2006).

90. 333 F.3d 228 (D.C. Cir. 2003) (*Roeder I*).

91. 646 F.3d 56 (D.C. Cir. 2011) (*Roeder II*).

Ass'n v. U.S. Department of Transportation (2013)[92]—deserve closer attention.

A. South African Airways

South African Airways[93] dealt with the relationship of the Comprehensive Anti-Apartheid Act of 1986[94] to the 1947 air service executive agreement between the United States and South Africa.[95] The 1986 act provided for terminating the agreement in accordance with the agreement's provisions—that is, with one year's notice—and required the President to direct the Secretary of Transportation ten days after enactment to revoke the rights of South African carriers to provide air service. Shortly after the United States delivered the one-year termination notice to South Africa, the Secretary of Transportation, following a Presidential order, issued an order for the immediate revocation of South African Airways' air service permit.

South African Airways argued that although the act required the President to direct the Secretary ten days after enactment to revoke the permit, the act was silent as to when the revocation was to take place and that the act must be construed in a manner consistent with the then not-yet-terminated 1947 executive agreement barring revocation of the permit to provide service prior to termination of the agreement. The Court of Appeals dismissed the significance of the statutory silence regarding timing of revocation. The court reasoned that other provisions of the act compelled the conclusion that Congress intended to revoke the permit without regard to the one-year notice required for terminating the agreement, and that suspending revocation of the permit pending termination of the agreement would have rendered the act's requirement to revoke the permit a nullity because the permit would have expired with the termination in any event.[96]

Finding "no indication in the legislative history to suggest that in adopting the [1986 act], Congress intended to abrogate any provision of the [1947 executive agreement]" prior to its termination, the court said that it did not need to decide whether the requirement to revoke the

92. 724 F.3d 230 (D.C. Cir. 2013).
93. 817 F.2d at 119.
94. Pub. L. No. 99-140, 100 Stat. 1086 (1986).
95. S*ee S. Afr. Airways*, 817 F.2d at 121 n.1.
96. *Id.* at 124.

permit violated the executive agreement.[97] Referring to the later-in-time rule as articulated in *Whitney*[98] and noting the Supreme Court's "extreme reluctance to find a conflict between an act of Congress and a pre-existing international agreement,"[99] the court explained that because the purpose of Congress in adopting the requirement was unambiguous, if there was in fact a repugnancy between the act and the agreement, the latter must yield.[100]

It appears there was no indication of a congressional intent to override the executive agreement because Congress was operating under the view that it was "working within the parameters of the agreement" since South Africa was in violation of the agreement.[101] Be that as it may, the act's requirement to revoke the permit satisfies the *Cook* standard for overriding the agreement for two independent reasons. First, yielding to the agreement would have rendered the act's requirement a nullity. Second, the act's relevant provision was all about revoking rights under the agreement prior to its final termination, regardless of whether that violated the agreement. That, by itself, is a clear expression of congressional intent to repeal treaty rights. This becomes clearer from the following discussion of *Fund for Animals*, which is very similar to *South African Airways*.

B. Fund for Animals

Like *South African Airways*, *Fund for Animals*[102] presents an account of the later-in-time rule and the *Cook* doctrine that is consistent with the reading of *Whitney* and *Cook* suggested in this Article. The Court of Appeals said:

> The combination of the last-in-time rule and the canon against abrogation has produced a straightforward practice: Courts apply a statute according to its terms

97. *Id.* at 125.
98. *Id.* at 126.
99. *Id.* at 125.
100. *Id.* at 126.
101. *Id.* at 125 (quoting Senator Sarbanes, 132 Cong. Rec. S11,713–14 (daily ed. Aug. 14, 1986)).
102. Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006).

> even if the statute *conflicts* with a prior treaty (the last-in-time rule), but where fairly possible, courts tend to construe an ambiguous statute *not to conflict* with a prior treaty (the canon against abrogation).[103]

Still, *Fund for Animals* can be misunderstood as being inconsistent with *Cook* because of its statement that the "canon [against interpreting a statute to abrogate a treaty] applies only to ambiguous statutes."[104] *Fund for Animals* dealt with the question whether the Secretary of the Interior's decision to exclude mute swans from protection under the Migratory Bird Treaty Act of 1918,[105] which implemented non-self-executing U.S. treaties for the protection of migratory birds, was consistent with the 1918 act as amended by the Migratory Bird Treaty Reform Act of 2004.[106] The reform act was passed to exclude nonnative birds like mute swans from protection in response to a 2001 court decision[107] interpreting the treaties and the original act as covering these birds. The reform act also stated that it was the "sense of Congress" that the reform act was consistent with the treaties implemented by it.[108] The argument in *Fund for Animals* was that the 2001 court decision interpreting the treaties was correct and therefore the "sense of Congress" provision of the reform act was inconsistent with the act's language that clearly excludes mute swans from protection. That inconsistency, according to the argument, rendered the statute ambiguous and thus triggered "the canon of construction that ambiguous statutes should not be interpreted to abrogate a treaty."[109] The court dismissed the argument on two grounds. First, the court said that the sense of Congress provision does not result in any ambiguity because it merely clarified that the reform act was not an attempt to override the treaties but "rather was a correction of what Congress believed to be an

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103. *Id.* at 879 (emphasis added) (original emphasis omitted).

104. *Id.* at 878.

105. Pub. L. No. 65-186, 40 Stat. 755 (1918) (codified at 16 U.S.C § 703).

106. Pub. L. No. 108-447, div. e, tit.1, § 143, 118 Stat. 2809, 3071–72 (2004) (codified at 16 U.S.C. § 703).

107. Hill v. Norton, 275 F.3d 98 (D.C. Cir. 2001).

108. § 143(d), 118 Stat. at 3072; *see* 472 F.3d at 875.

109. 472 F.3d at 877.

erroneous judicial interpretation of a treaty."[110] Second, the court said that accepting the argument would have rendered the reform act meaningless. The court then said: "[The] argument lacks merit. The canon applies only to ambiguous statutes (and as we have just explained, this statute is not ambiguous),"[111] and then summarized:

> The Migratory Bird Treaty Act implements the migratory bird conventions. The Migratory Bird Treaty Reform Act amends that earlier statute and makes clear that mute swans are not protected by the Act. The canon against interpreting a statute to abrogate a treaty does not apply because the amended statute is plain.[112]

A concurring opinion added that "even assuming the statute is ambiguous, the canon should not apply in cases involving non-self-executing treaties such as the migratory bird conventions."[113]

There is nothing in *Fund for Animals* that is inconsistent with *Cook* or *Trans World Airlines*. It is important to bear in mind that because the treaties involved were not self-executing, the question in *Fund for Animals* was not whether the reform act was consistent with the treaties but whether the Secretary's decision was consistent with the original act as amended by the reform act.[114] Non-self-executing treaties and inconsistencies with them are of no direct moment for domestic law purposes. As the Supreme Court explained in *Whitney*: "When the stipulations [of a treaty] are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject."[115] For the same reason, not only the

110. *Id*.
111. *Id*. at 878.
112. *Id*. at 879.
113. *Id*. (Kavanaugh, J., concurring).
114. *Id*. at 876 ("We review de novo the legal question whether the Secretary's decision to exclude mute swans from protection was consistent with the Migratory Bird Treaty Act.").
115. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

Cook canon, but—as *Whitney* made clear—also the later-in-time rule itself does not apply when non-self-executing treaties are involved.[116]

That said, the reform act would have met the *Cook* standard for overriding the treaty were the later-in-time rule to apply. As the court explained, yielding to the treaties if they were interpreted as covering nonnative birds would have rendered the reform act a nullity.[117] That alone would allow overriding the treaty under *Cook*. Moreover, the reform act's amendment of the original act in implementing the treaties was itself a clear expression of congressional intent to repeal the treaties' prior practice. Finally, the reform act's title—the Migratory Bird Treaty Reform Act—spoke for itself. Therefore, the reform act was unambiguous about its relationship to the treaties, and that would have constituted a clear expression of congressional intent to override the treaties if, contrary to the sense of Congress, the treaties were interpreted to be repugnant to the reform act.[118]

This is the context in which to place the *Fund for Animals* statement that the canon against interpreting a statute to abrogate a

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116. *Id.* at 194 ("When [a statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: *provided, always, the stipulation of the treaty on the subject is self-executing*." (emphasis added)).

117. 472 F.3d at 877–78.

118. Consider *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 724 F.3d 230 (D.C. Cir. 2013), where, referring to *Fund for Animals*, the court said:

> Though the provision asserted that the new statute offered the true interpretation of the treaty rather than a repudiation of it, it nonetheless showed Congress's express desire to abrogate the treaty's prior *application*. And finally, even without the "sense of Congress" provision, the Reform Act was obviously remedial—even its title is a dead giveaway. . . . Though *Fund for Animals* may have suggested a more permissive standard, the Reform Act offered precisely the express indication of congressional intent a clear statement rule requires.

Id. at 237.

treaty "applies only to ambiguous statutes."[119] It is true that the reform act was textually unambiguous in excluding nonnative birds, but the critical unambiguity the court was referring to was the clarity with which Congress expressed its intent to abrogate the prior application of the treaties. Like *Trans World Airlines*,[120] *Fund for Animals* was merely rephrasing the canon. *Cook* had stated the canon as: "A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."[121] *Fund for Animals*, on the other hand, rephrased this proposition as "the canon of construction that ambiguous statutes should not be construed to abrogate treaties."[122] The *Fund for Animals* court then stressed by repetition that the "canon applies only to ambiguous statutes";[123] and it later reiterated with respect to the reform act that the "canon against interpreting a statute to abrogate a treaty does not apply because the amended statute is plain."[124] The account of the canon in *Fund for Animals* can be rearranged as: A statute does not abrogate a treaty unless the statute is unambiguous. Thus, *Fund for Animals* simply substituted "unless the statute is unambiguous" for the *Cook* formulation of "unless such purpose on the part of Congress has been clearly expressed."[125]

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119. 472 F.3d at 878.

120. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984); *see supra* text accompanying notes 61–63.

121. Cook v. United States, 288 U.S. 102, 120 (1933).

122. 472 F.3d at 878.

123. *Id.*

124. *Id.* at 879.

125. 288 U.S. at 120. When the court rephrased the *Cook* canon to "an ambiguous statute should be construed where fairly possible not to abrogate a treaty," it referenced *Trans World Airlines*, *Roeder I*, and *South African Airways* as authorities. *Fund for Animals,* 472 F.3d at 878–79. The reference to *Roeder I* leaves no room for any doubt as to the meaning of "ambiguous statute," were such doubt to remain after the above discussion of *Trans World Airlines* and *South African Airways*. The only mention of the canon on the referenced page of the court of appeals' decision in *Roeder I* was about the need to express a clear intent to override treaties or executive agreements. Roeder v. Islamic Republic of Iran, 333 F.3d 228, 237 (D.C. Cir. 2003).

C. The Roeder *Cases*

The only judicial statements we are aware of that may have suggested a more permissive standard for abrogating treaties by statutes were those of the district court in *Roeder I* and *Roeder II*, apparently in dicta.[126] The district court in *Roeder I* said:

> When a court is presented with a statute and a previously-enacted international agreement that potentially cover the same legal ground, there are three possible relationships between the two: first, the statute can unambiguously fail to conflict with the agreement; second, the statutory language can be ambiguous, and one of its possible interpretations can conflict with the agreement; and third, the statute can unambiguously conflict with the agreement. With respect to the first situation, when a statute is unambiguous in its language and effect and does not conflict with an earlier international agreement, both the statute and agreement co-exist as valid law.
>
> If a court is presented with the second situation, a conflict between one possible reading of an ambiguous statute and an earlier international agreement, that court must inquire into Congress' intent with respect to the abrogation of the international agreement prior to giving force to the statute. . . . Without a clear expression of Congressional intent to abrogate an agreement, a court must not read an ambiguous statute to so abrogate, and must interpret the statute so as to avoid the conflict. If and only if Congress' intent to abrogate is clear, may the court interpret the statute so as to conflict with and supercede the earlier agreement.
>
> If, however, a court is presented with the third situation, when the unambiguous statutory text conflicts

126. Roeder v. Islamic Republic of Iran, 195 F.Supp.2d 140 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003) (*Roeder I*); Roeder v. Islamic Republic of Iran, 742 F. Supp.2d 1 (D.D.C. 2010), *aff'd*, 646 F.3d 56 (D.C. Cir. 2011) (*Roeder II*).

> with an earlier treaty or international executive agreement, precedent of equally long-standing requires the later statutory provision to prevail.[127]

In *Roeder II*, the district court restated its approach:

> [A] statute must satisfy one of two criteria to overturn a previously-enacted international agreement. . . . First, if a later statute unambiguously conflicts with the international agreement on its face, the unambiguous later statute will prevail. If the statute is ambiguous, however, a Court will not interpret it to modify or abrogate a treaty or executive agreement "unless such purpose of Congress has been clearly expressed."[128]

The problem with this approach is that conflicts cannot be ambiguous, and the *Cook* canon cannot meaningfully apply to ambiguous statutes. Saying that a statute is textually ambiguous means that it "is reasonably susceptible to more than one meaning."[129] That is also what the district court meant. If one reasonable meaning of the statute is repugnant to a treaty and the other is not, the harmonization canon would always require choosing the harmonious meaning over the repugnant one. As noted, the Supreme Court has been clear about that.[130] For example, it said in *Whitney* that when a statute and a treaty "relate to the same subject, the courts will *always* endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."[131] That is, a textual ambiguity in a statute must always result in harmony with the treaty. Such harmony, by definition, cannot encompass abrogating the treaty. Therefore, saying that the *Cook* canon applies only in textually ambiguous situations is an oxymoron that would render the canon meaningless.

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127. *Roeder I*, 195 F. Supp.2d at 169–70 (citations omitted).

128. *Roeder II*, 742 F.Supp.2d at 3–4 (citations omitted) (quoting Bennett v. Islamic Republic of Iran, 618 F.3d 19, 23–24 (D.C. Cir. 1987)).

129. *Supra* note 35 and accompanying text.

130. *Supra* notes 32–35 and 63–66 and accompanying texts.

131. Whitney v. Robertson, 124 U.S. 190, 194 (1888) (emphasis added); *see also supra* note 23 and accompanying text.

In any event, as we shall see, the court of appeals in *Roeder I* and *II* did not accept the district court's approach and expressly rejected it in *Owner-Operator*. Also, none of what the district court in *Roeder I* and *II* said regarding the *Cook* canon was necessary in the first place because, in both cases, the basis for the Court of Appeals' affirmation of the district court's conclusions against abrogating the international agreement was that there were no textual repugnancies between the later-in-time statutes and the agreement.

The *Roeder* cases dealt with failed attempts to sue Iran for damages over the taking of American hostages in 1979 despite the Algiers Accords—an executive agreement the United States entered into with Iran providing for freeing the hostages in exchange for U.S. promises, including a promise to bar any legal action against Iran arising out of the hostage taking.[132] Apart from the Algiers Accords, foreign states generally are statutorily immune from the jurisdiction of U.S. courts unless one of several statutory exceptions applies.[133] When the first lawsuit was filed, none of the statutory exceptions applied with respect to Iran. Congress, however, intervened while the lawsuit was pending and amended the statute twice, first by creating, for this specific case, an exception to Iran's statutory sovereign immunity,[134] followed by a correction of a typographical error in the original amendment.[135] The question in *Roeder I* was whether those later-in-time statutory amendments abrogated the Algiers Accords. Finding no repugnancy between the statutory amendments and the executive agreement, the Court of Appeals held that the agreement barred the suit. The court reasoned that the amendments merely removed Iran's statutory immunity and said nothing about the executive agreement; there was nothing in the legislative history of the original amendment to indicate otherwise; Congress did not vote on, nor did the President sign, a bill embodying a statement in the legislative history of the technical correction that might have met the standard for abrogating an executive agreement; and when the President signed the two amendments, he stated that the executive branch

132. *See Roeder II*, 742 F.Supp.2d at 3.

133. 28 U.S.C. §§ 1604–1607.

134. Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001); *see* Roeder v. Islamic Republic of Iran, 195 F.Supp.2d 140, 145 (D.D.C. 2002).

135. Pub. L. No. 107-117, § 208, 115 Stat. 2230 (2002); *see Roeder I*, 195 F.Supp.2d at 145.

would, and the courts were encouraged to, act in a manner consistent with the executive agreement.[136]

The court then examined the legislative history of the typographical error correction and said, quoting *Trans World Airlines*' quotation of *Cook*: "There is thus no clear expression in anything Congress enacted abrogating the [executive agreement]. Yet neither a treaty nor an executive agreement will be considered 'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'"[137] The *Roeder I* court did not, however, base its decision on that,[138] as it immediately thereafter said: "The way Congress expresses itself is through legislation. While legislative history may be useful in determining intent, [it goes here] well beyond the legislative text . . . which did nothing more than correct a typographical error. . . . Such legislative history *alone* cannot be sufficient to abrogate a treaty or an executive agreement."[139] The court was explaining that there can be no override without a textual repugnancy between the statute and the agreement, even if the legislative history indicates intent to override the executive agreement. The court then explained that the *Cook* canon is a clear statement rule but went on to reiterate that there was no repugnancy between the statutory amendments and the executive agreement: "The kind of legislative history offered here cannot repeal an executive agreement *when the legislation itself is silent*."[140]

Finally, the Court of Appeals explained that its interpretation of the amendments not to override the executive agreement did not render them nullities: Removing Iran's statutory sovereign immunity, the amendments created the opportunity for the plaintiffs to make the argument that the Algiers Accords were not a valid executive

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136. Roeder v. Islamic Republic of Iran, 333 F.3d 228, 236–37 (D.C. Cir. 2003).

137. *Id.* at 237 (quoting Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984)).

138. *But see* Roeder v. Islamic Republic of Iran, 646 F.3d 56, 58 (D.C. Cir. 2011) ("[In *Roeder I* we held that the] 2001 and 2002 amendments . . . did not provide the 'clear expression' of congressional intent necessary to abrogate an executive agreement.").

139. *Roeder I*, 333 F.3d at 238 (emphasis added).

140. *Id.* at 238 (emphasis added).

agreement. That this argument was eventually rejected was of no moment, the court said.[141]

Although the account of *Cook* by the *Roeder I* Court of Appeals was apparently dictum, both this dictum and the court's holding that a treaty cannot be abrogated by a non-repugnant later-in-time statute are consistent with this Article's suggested reading of *Whitney* and *Cook* and a clear rejection of the district court's approach.

The Court of Appeals did the same in *Roeder II*, which was a second attempt to sue Iran over the hostage taking. This attempt was based on yet another statutory amendment,[142] after the decision in *Roeder I*. The amendment was in response to the Court of Appeals decision in another case, which held that the same statute did not create a right of action against foreign states.[143] The amendment created a private right of action against foreign states for state sponsorship of terrorism and reenacted the provision granting the district court jurisdiction over claims related to the *Roeder* case.[144] The Court of Appeals held that the Algiers Accords remained a bar to an action against Iran because the statutory amendments could be reasonably read in harmony with the executive agreement and therefore could not abrogate it. The court said:

> Because of [the textual] ambiguity regarding whether Roeder . . . may file under the new . . . cause of action, we are required again to conclude that Congress has not abrogated the Algiers Accords. We also reject Roeder's alternative argument that the reenacted and partially revised jurisdictional provisions . . . abrogate the Accords. These provisions are not meaningfully different than they were when presented to us in *Roeder I*.[145]

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141. *Id*.

142. *Roeder II*, 646 F.3d at 59–60.

143. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C.Cir. 2004); *see Roeder II*, 646 F.3d at 59.

144. *Roeder II*, 646 F.3d at 59.

145. *Id.* at 62.

The court described the *Cook* canon as a clear statement rule. Quoting its decision in *Roeder I* and the Supreme Court's decision in *Gregory v. Ashcroft*,[146] the court said:

> Legislation abrogating international agreements "must be clear to ensure that Congress—and the President—have considered the consequences." An ambiguous statute cannot supercede an international agreement if an alternative reading is fairly possible. This clear statement requirement—common in other areas of federal law—"assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[147]

That, however, was not the rationale for the decision, which relied on the lack of a textual repugnancy between the statute and the executive agreement.

D. Owner-Operator

The Court of Appeals viewed the *Cook* canon as a clear statement rule also in *Owner-Operator*.[148] A trade association challenged a federal agency's decision to exempt commercial drivers licensed in Canada or Mexico from a statutory medical certification prerequisite to operating commercial vehicles in the United States.[149] The decision was based on reciprocal international agreements with Canada and Mexico. The challenge relied on a provision in the authorizing statute that changed the requirements for issuing the medical certificates without mentioning the two preexisting international agreements.[150] The question

146. 501 U.S. 452, 461 (1991).

147. *Roeder II*, 646 F.3d at 188 (citations omitted) (quoting Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003), and *Gregory*, 501 U.S. at 461). The second statement in the quoted excerpt excludes situations in which yielding to the treaty would render the later-in-time statute a nullity.

148. Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 724 F.3d 230, 234–35 (D.C. Cir. 2013).

149. *Id.* at 232.

150. *Id.* at 233.

was whether this later-in-time statutory provision overrode the earlier international agreements or, as more generally put by the court, "whether a facially unambiguous statute of general application is enough to abrogate an existing international agreement without some further indication Congress intended such a repudiation."[151] Reiterating the distinction between a statutory textual ambiguity and an ambiguity in congressional action,[152] the court held that "absent some clear and overt indication from Congress, [it] will not construe a statute to abrogate existing international agreements even when the statute's text is not itself ambiguous."[153] The court's main reasoning was that both its "precedents and the Supreme Court's routinely characterize the presumption against implicit abrogation of international agreements as a clear statement rule."[154] The court continued to say:

> It stands to reason that if Congress or the President understood the Act to be a repudiation of the federal government's obligations to Mexico and Canada, someone would have said something. . . . [O]ur decision is directed by a legal presumption, not an "inquiry into congressional and presidential motives." We remain, as ever, guided by the text. In circumstances like this one that demand a clear statement, part of the textual analysis involves drawing insight from what Congress chose *not* to say along with what it did. . . . After all, any clear statement rule involves an unwillingness to give full effect to a statute's unambiguous text. That is how [clear statement rules] work.
>
> Our invocation of the presumption against implicit abrogation of international agreements is born of common sense. Our dissenting colleague laments how much "harder" today's opinion makes it for Congress to override existing agreements. But inserting a phrase like "notwithstanding any existing international agreement" into a bill does not threaten to exhaust

151. *Id.* at 232.

152. *Id.* at 235–36; *see supra* text accompanying notes 62–66 and 120–124.

153. *Owner-Operator*, 724 F.3d at 234.

154. *Id.*

> legislative resources. Like all clear statement rules, the one we acknowledge today injects clarity into the policymaking process. It permits Congress, the President, the courts, and the public alike to better comprehend the actual implications of legislation.[155]

VI. *Cook* as a Special Application of the Specific-over-General Canon of Construction

The *Cook* canon is not only a clear statement rule but also, and more specifically, a special application of the specific-over-general canon of construction.[156] The rationale behind the *Cook* holding, that a later-in-time statute will override an earlier treaty only if Congress has clearly expressed its intent to do so, was to ensure that Congress considered and comprehended the consequences of its actions,[157] or as the Supreme Court articulated it in *Chew Heong*:

> Aside from the duty imposed by the constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.[158]

This rationale might leave opponents of the *Cook* canon with the (in our view, unjustified) concern that, contrary to the Supremacy

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155. *Id.* at 237–38 (citations omitted) (quoting *id.* at 241–42, Sentelle, J., dissenting).

156. *Cf.* Halpern, *supra* note 8, at 6.

157. *See, e.g.*, Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003) (*Roeder I*); *Owner-Operator*, 724 F.3d at 238.

158. Chew Heong v. United States, 112 U.S. 536, 540 (1884).

Clause, treaties are given primacy over statutes. This concern might grow stronger if the view that the canon is a clear statement rule—which, as *Roeder I* explained, is a common rule in other areas of federal law that do not involve treaties[159]—was partially based on the notion that "requiring a clear statement rule with respect to implicit abrogation of international agreements 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'"[160] Such a justification might be considered more appropriate as a matter of international law and not when treaties are merely considered as part of domestic law.

An answer to these concerns can be found in viewing the *Cook* canon as an application of the specific-over-general canon of construction. In a purely statutory context, the specific-over-general canon provides that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."[161] A specific provision is treated as an exception to (and therefore not being in conflict with) a more general (and textually repugnant) provision.[162] Like most canons, the specific-over-general canon "applies only to provisions that are of the same legal hierarchy."[163] As noted, treaties and statutes are of the same legal (and constitutional) hierarchy, and there is no reason to think the canon inapplicable to the interaction between them.[164]

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159. *Roeder I*, 333 F.3d at 238.

160. *Owner-Operator*, 724 F.3d at 236 (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013)).

161. Morton v. Mancari, 417 U.S. 535, 550–51 (1974).

162. *See supra* note 20 and authorities cited there.

163. Scalia & Garner, *supra* note 20, at 187.

164. S. Rep. No. 100-445, at 321 (1988) ("[P]resent law . . . [is] that canons of construction applied by the courts to the interaction of two statutes enacted at different times apply also in construing the interactions of revenue statutes and treaties enacted and entered into at different times"). The *dissenting* opinion in *Cherokee Tobacco* was based on the same rationale:

> An express law creating certain special rights and privileges is held never to be repealed by implication by any subsequent law couched in general terms, nor by any express repeal of all laws inconsistent with such general law, unless the language be such as clearly to indicate the intention of the legislature to effect such repeal.

The rationale behind the specific-over-general canon is that "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."[165] This rationale gains force when the interaction between a statute and a treaty is concerned. A typical self-executing bilateral treaty is more specific than the statute it interacts with, given that the statute is usually of general applicability while the treaty applies only in relation to a particular jurisdiction.[166] In addition, self-executing treaties exist to establish differences from statutory domestic law with respect to the treaty partners while statutes are not typically enacted to establish differences from treaty law. Finally, treaties are usually the product of years of detailed negotiations in which treaty partners closely consider the implications of each treaty provision taking into account the provision's advantages and disadvantages, both individually and as part of the whole.[167] In short, self-executing treaties, unlike statutes, are bilateral instruments, which are developed and become U.S. law under special procedures and which are typically meant to establish special treatment with respect to the treaty partner.[168]

Applying the later-in-time rule together with the specific-over-general canon of construction, while viewing the treaty as the specific

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Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 622 (1870) (Bradley, J., dissenting). As noted, the Supreme Court limited the reach of the *majority* view in that case to its facts and declined to follow it. United States v. Forty-Three Gallons of Whisky, 108 U.S. 491, 497–98 (1883).

165. Scalia & Garner, *supra* note 20, at 183, also quoting Jeremy Bentham, *A Complete Code of Laws*, *in* 3 The Works of Jeremy Bentham 155, 210 (John Bowring ed., 1843) ("[T]he particular provision is established upon nearer and more exact view of the subject than the general, of which it may be regarded as a correction."); *see also* Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).

166. *See* Halpern, *supra* note 8, at 6; H. David Rosenbloom, *Current Developments in Regard to Tax Treaties*, 40 N.Y.U. Inst. on Fed. Tax'n 31-1, 31-12 (1982); *see also Morton*, 417 U.S. at 550 (viewing a statute preferencing Indians for employment with the Bureau of Indian Affairs as more specific than a later-in-time statute of general application providing for nondiscrimination in federal employment).

167. *See, e.g.*, Rocca v. Thompson, 223 U.S. 317, 332 (1912) ("[T]reaties are the subject of careful consideration before they are entered").

168. *See* United States v. Stuart, 489 U.S. 353, 371–77 (1989) (Scalia, J., concurring).

provision and the statute as the more general one, produces the same result as the *Cook* canon: A later-in-time treaty always overrides an earlier repugnant statute, but a later-in-time statute overrides an earlier repugnant treaty only if Congress has clearly expressed its intent to do so. A later-in-time statute may, however, override an earlier repugnant treaty without a clear expression of intent to override if not overriding the treaty would render the statute a nullity. Not overriding a treaty would render a repugnant statute a nullity only if the statute and treaty are at the same level of specificity or generality, in which case the specific-over-general canon does not apply. That was, for example, the case in *South African Airways* and *Fund for Animals*. In *South African Airways* both the statute and the treaty applied only with respect to South Africa; and the treaty in *Fund for Animals* protected covered birds in rem and not only with respect to the treaty partner.[169]

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169. Section 6139 of TAMRA, enacted on November 10, 1988, raises interesting questions in this context. Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. No. 100-647, § 6139, 102 Stat. 3342, 3724. The United States taxes a foreign person's insurance income either on a net basis if the income is effectively connected with the conduct of a U.S. trade or business, or on a gross basis if the income is with respect to insuring U.S. risk and is not so connected. The gross basis tax is not the normal gross tax of I.R.C. §§ 871(a)(1) and 881(a) but an excise tax imposed under I.R.C. § 4371, which dates back to the Revenue Act of 1918. The U.S.-Barbados income tax treaty of 1984, which has been in force since 1986, applied to, and exempted, the insurance excise tax. Convention Between Barbados and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Barb.-U.S., Dec. 31, 1984, Tax Analysts Doc. 93-31298-I. Since insurance income is invariably business profits, the United States has a treaty right to tax such income of a Barbadian insurer only if the income is attributable to a U.S. permanent establishment through which the insurer carries on a U.S. business (articles 5 and 7 of the treaty), which is not the case if the excise tax applies. The U.S.-Bermuda insurance income tax treaty of 1986 as originally signed would do the same for Bermudian insurers (article 4 of the treaty). Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (on Behalf of the Government of Bermuda) Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters, U.S.-Berm., July 11, 1986, Tax Analysts Doc. 93-31796. When TAMRA was enacted, the U.S.-Bermuda treaty was pending ratification by the President after the Senate had given its advice and consent subject to a reservation that was accepted by Bermuda.

Reconceptualized as a special application of the specific-over-general canon of construction, *Cook* cannot be said to give general supremacy to treaties over statutes. Without a clear expression of contrary intent, a later-in-time statute yields to a repugnant and more specific treaty not because the treaty is a treaty but because it is the more specific instrument. Similarly, without a clear expression of contrary intent, a later-in-time statutory provision yields to an earlier, repugnant, but more specific statutory provision. The *Cook* canon simply views an earlier treaty as a continuing exception to the general rule of a later-in-time statute when Congress has not clearly expressed an intention to override the treaty.

The reservation limited the excise tax exemption to premiums received between 1985 and 1990. The reservation was intended to conform the Bermuda treaty exemption to section 6139 of TAMRA, which limited excise tax exemptions under the Barbados and Bermuda treaties to premiums received before 1990 and provided that the limitation would apply even if one of the treaties entered into force after the date of enactment, unless the treaty by specific reference to the section expressed an intent to override it. The President ratified the treaty with Bermuda subject to the reservation 18 days after TAMRA was enacted, and the treaty has not been modified since. Tax Analysts Doc. 93-31184 (Nov. 28, 1998). Therefore, the Bermuda treaty is consistent with section 6139 and the question whether the section's language about overriding future treaties is of any moment—most likely not—remains a theoretical one. Section 6139, however, overrode the treaty with Barbados because a repugnancy existed, and section 6139 was a later-in-time statutory provision that clearly expressed an intent to override article 7 of the treaty with respect to the excise tax. But in a 1991 amendment to the Barbados treaty, articles 5 and 7 were completely replaced with new articles that again provided for an exemption, and the question is whether, as later-in-time provisions (*cf.* Kappus v. Comm'r, 337 F.3d 1053, 1057–60 (D.C. Cir. 2003)), new articles 5 and 7 overrode TAMRA section 6139. (The 2004 amendment to the treaty did not affect articles 5 and 7 and therefore is irrelevant here. *See Kappus*, 337 F.3d at 1057–60.) The answer should turn on whether section 6139 is more specific than articles 5 and 7. If it is, the specific-over-general canon would treat section 6139 as a continuing exception to the more general rule of articles 5 and 7. The argument that section 6139 is the more specific provision would be that the section specifically applies with respect to the excise tax on Bermudian insurers while article 7 applies also to the federal income tax.

VII. The Myth of Tax Exceptionalism

The addition of section 7852(d)(1) to the Internal Revenue Code by TAMRA and the act's legislative history are often cited as setting tax apart from other fields regarding the statute-treaty relationship.[170] There does not appear to be any basis for this view. Section 7852(d)(1) provides that "[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law." This language merely rephrases an obvious point that flows directly from the Supremacy Clause: As between statute and treaty, neither has preferential status. If anything, I.R.C. section 7852(d)(1) confirms that tax is not exceptional, and that is all it can do, as Congress has no power to alter the constitutional rule. Given that a statute and a treaty have the same constitutional status, neither type of instrument could enhance its own status vis-à-vis the other.[171]

In the legislative history, the Senate Committee on Finance seemed to read more into the statutory language of I.R.C. section 7852(d)(1):

> In adopting this rule, the committee intends to permanently codify (with respect to tax-related provisions) present law to the effect that canons of construction applied by the courts to the interaction of two statutes enacted at different times apply also in construing the interactions of revenue statutes and treaties enacted and entered into at different times.[172]

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170. Kysar, *supra* note 8; *cf.* Halpern, *supra* note 8.

171. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); Rosenbloom & Shaheen, *supra* note 8, at 58 ("In addition to the lack of value in restating the constitutional rule, it is unclear whether Congress has the power to embroider on it. The later-in-time rule is a judicial interpretation of the supremacy clause, which Congress certainly cannot alter. All it can do is play by the constitutional rule: When it enacts a statute that is later in time than a treaty, it can express an intent to override, express an intent not to override, or remain silent. But Congress cannot enhance the status of a statute vis-à-vis a treaty for the same reason that a treaty cannot do so vis-à-vis a statute. All section 7852(d)(1) can do is reiterate that neither the statute nor the treaty enjoys preferential status." (footnotes omitted)).

172. S. Rep. No. 100–445, at 321 (1988); *see supra* note 69.

Although we do not see how this "intent" is reflected in the language of section 7852(d)(1) and doubt that Congress has any say in the matter,[173] we agree with the Senate Report's restatement of present law that canons of construction applied to the interaction between two statutes apply also to the interaction between statutes and treaties. That is what the Supreme Court said in *United States v. Lee Yen Tai* in 1902 with respect to any interaction between statute and treaty.[174] Both the harmonization canon and the later-in-time rule apply to the interaction between statutory and treaty provisions the same way they apply to the interaction between two statutory provisions: When two provisions relate to the same subject, effect should be given to both if that can be done without violating the language of either; if there is a conflict between the two provisions, the one that is later in time controls; and for there to be a conflict, a repugnancy between the two provisions must exist.[175] If a repugnancy exists between two statutory provisions, clear statement rules and the specific-over-general canon of construction apply to resolve the question whether the repugnancy rises to the level of a conflict or is mitigated into a reconcilable inconsistency by an interpretive presumption.[176] That is precisely what the *Cook* canon does with respect to the interaction between repugnant statutory and treaty provisions.[177]

VIII. Conclusion

The issues discussed in this Article deal with old—even ancient—Supreme Court decisions and range over a variety of legal areas. The concepts are abstract and not always articulated clearly by courts and commentators. However, both the issues and the concepts are of immediate practical importance, especially for the federal tax laws, because

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173. *See supra* note 171 and accompanying text.

174. 185 U.S. 213, 221–23 (1902); *see supra* quotation in note 25.

175. *See supra* notes 23–25.

176. *See supra* notes 146–155 and 161–165 and accompanying text.

177. *See supra* notes 161–170 and accompanying text. Even without our reconceptualization of *Cook* as an application of the specific-over-general canon of construction, saying that canons of construction applied to interactions between statutory provisions apply also to interactions between statutory and treaty provisions does not mean that canons of construction applicable only to the interaction between statutes and treaties no longer apply. One does not exclude the other, and both can apply harmoniously.

few other areas of the law exhibit such close and frequent encounters between the supreme law of the land as enacted by Congress and the equally supreme law created by some 65 treaties. The question of how to mesh the statutory law of the Internal Revenue Code with the legal obligations undertaken by the United States in its tax treaties has never been squarely addressed, and the relationship is an uneasy one. Recent enactment of the Tax Cuts and Jobs Act has forced that question to the foreground where it will, most likely, be litigated. The objective of this Article is to suggest a framework in which the question can be understood and, perhaps, resolved.